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## PART I

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### INTRODUCTION

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## THE CURRENT LEGAL FRAMEWORK RELATING TO DIRECTORS

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### A. Introduction

The focus of this book is on the office of directors and the general and specific duties and liabilities of directors, both civil and criminal. The legal framework affecting these matters is largely made up of provisions in the company's constitution and in the Companies Acts, but common law rules and equitable principles have always had an important part to play. Some statutory provisions codify, with or without modification, common law rules and equitable principles (eg directors' duties and the prohibition on making distributions out of capital). In other cases statute has left the common law rules and equitable principles unaffected (eg rules requiring directors to take account of the interests of creditors or which prevent the company from ratifying acts or omissions of directors which prejudice creditors and the rule recognizing that members may bind the company by their unanimous but informal assent). **1.01**

The Companies Act 2006 begins with two definition sections. Section 1 explains the meaning of 'company' in the Companies Acts and s 2 explains the meaning of the 'Companies Acts'. These expressions are discussed in Sections B and C of this chapter. Section D discusses the reforms made by the Companies Act 2006, its implementation, and approaches to its interpretation. **1.02**

- 1.03** This work attempts to state the law of England and Wales relating to directors of companies as at 1 October 2008.<sup>1</sup> At that date most of the provisions of the 2006 Act, particularly those of most immediate concern to directors, were in force, but many other provisions, including those relating to the fundamental features of a company and its capital, do not come into force until 1 October 2009. Where the provisions of the 2006 Act are not in force, the corresponding provisions of the Companies Act 1985 remain in effect. The provisions of the Companies Act 2006 extend to the whole of the United Kingdom, including Northern Ireland, unless the context otherwise requires.<sup>2</sup> In contrast the Companies Act 1985, to the extent that it is still in force, does not extend to Northern Ireland or apply to companies registered or incorporated in Northern Ireland or outside Great Britain, except where expressly provided.<sup>3</sup>

## B. Definitions: Company, Body Corporate, and Corporation

- 1.04** Immediately preceding this chapter is a Glossary of expressions used in this work, which includes definitions in the 2006 Act, s 1174 and Schedule 8.<sup>4</sup>
- 1.05** In a book about directors of companies it is essential to understand the meanings of ‘company’ and ‘director’. Whereas the word ‘company’ has a precise meaning, as discussed in the following paragraphs, ‘director’ does not. In the Companies Acts ‘director’ is given an inclusive meaning: a director is any person occupying the position of director, by whatever name called.<sup>5</sup> Chapter 3 discusses the meaning of ‘director’ and the different types of director.

### *Company*

- 1.06** Under the Companies Acts 1985 and 2006, ‘company’ means a company formed and registered under those Acts or an existing company which was formed and

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<sup>1</sup> It does not consider limited liability partnerships, open-ended investment companies, industrial and provident societies, friendly societies, European Economic Interest Groupings, or European Public Limited Liability Companies.

<sup>2</sup> 2006 Act, ss 1284–1287, 1299.

<sup>3</sup> 1985 Act, s 745. Express provision is made for overseas companies by Part XXIII, ss 690A–703R, which will be replaced by 2006 Act, Part 34, ss 1044–1059 on 1 October 2009. Under the regime preceding the 2006 Act special provision is made for Northern Ireland by the Companies (Northern Ireland) Order 1986 (SI 1986/1032 (NI 6)), the Companies Consolidation (Consequential Provisions) (Northern Ireland) Order 1986 (SI 1986/1035 (NI 9)), and Part 3 of the Companies (Audit, Investigations and Community Enterprise) Order 2005 (SI 2005/1967 (NI 17)).

<sup>4</sup> Definitions used in the 1985 Act are contained in Part XXVI, ss 735–744 and s 744A is an index of defined expressions used in the 1985 Act.

<sup>5</sup> 2006 Act, s 250.

registered under the former Companies Acts.<sup>6</sup> The types of companies that may be formed under the 2006 Act are:

- (1) limited or unlimited companies; limited companies being limited by shares or by guarantee, but a company cannot be limited by guarantee with a share capital;<sup>7</sup>
- (2) private and public companies;<sup>8</sup> the two main differences being that a private company is prohibited from making a public offer, and a public company must have a minimum share capital of £50,000 or the euro equivalent.<sup>9</sup>

For certain provisions of the 2006 Act it is necessary to identify particular types of company. **1.07**

- (1) Sometimes the reason is to identify the relationship between companies: holding company, subsidiary company, and wholly-owned subsidiary.<sup>10</sup> A company is a subsidiary of another company, its holding company, if the latter company (a) holds a majority of voting rights in it, or (b) is a member of it and has the right to appoint or remove a majority of its board of directors, or (c) is a member of it and controls alone, pursuant to an agreement with other members, a majority of the voting rights in it. A company is also a subsidiary of another company, its holding company, if it is a subsidiary of a company which is a subsidiary of another company.
- (2) Accounting and reporting requirements vary, depending on whether the company is a small company, so as to qualify for the small companies regime,<sup>11</sup> a quoted or unquoted company,<sup>12</sup> or an unquoted company.<sup>13</sup> A quoted company is one whose equity share capital (a) has been included in the official list in accordance with FSMA, Part 5, (b) is officially listed in an EEA State, or (c) is admitted to dealing on the New York Stock Exchange or the Nasdaq exchange.

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<sup>6</sup> On 1 October 2009 the 2006 Act, s 1 replaces the 1985 Act, s 735(1)(a)(b) and (4) without material change. By subs 1(2) and Parts 33 and 34, ss 1040–1059 certain provisions of that Act may also extend to companies authorized to register under the 2006 Act, unregistered companies incorporated in and having a principal place of business in the United Kingdom, and overseas companies.

<sup>7</sup> 2006 Act, ss 3, and 5 which replaces 1985 Act, ss 1(2)(a)–(c), without change on 1 October 2009.

<sup>8</sup> 2006 Act, s 4, which replaces 1985 Act, s 1(3) without change on 1 October 2009.

<sup>9</sup> 2006 Act, Part 20, ss 755(1) and (2), 756, and 760 (which replace 1985 Act ss 58(3), 81(1) and (3), and s 742A, ss 755(3)(4)) and 2006 Act, ss 757–759 are new. 2006 Act, ss 761–764 and 767 replace 1985 Act, ss 117 and 118 with changes and new provisions on 1 October 2009. 2006 Act, ss 765 and 766 are new.

<sup>10</sup> 2006 Act, s 1159 and Schedule 6, which replace 1985 Act, ss 736 and 736A without change. This definition may be amended by regulations: s 1160.

<sup>11</sup> 2006 Act, ss 381–384. For eligibility for the small companies regime, see Chapter 23, paragraphs 23.03–23.06.

<sup>12</sup> 2006 Act, ss 361, 385(2), and 531, which definition may be amended or replaced by regulations (s 385(4)–(6)).

<sup>13</sup> 2006 Act, s 385, which contains new provisions, but the core definition of ‘quoted company’ is taken from 1985 Act, s 262.



Also in relation to accounts and reports, which derive from the Seventh Company Law Directive 83/349/EEC, it is necessary to identify 'parent company', 'parent undertaking', and 'subsidiary undertaking'.<sup>14</sup>

- (3) The definition of 'quoted company' also applies to Part 13 (resolutions and meetings), where there are special rules for polls of meetings of quoted companies.<sup>15</sup> However, the new provisions in the 2006 Act, Part 9, as to the enjoyment of information rights by persons nominated by the registered member, apply to companies whose shares are admitted to trading on a regulated market.<sup>16</sup>
- (4) There are special rules for distributions by investment companies, by which they may make distributions out of accumulated revenue profits.<sup>17</sup> For this purpose an investment company is one which had notified the Registrar of its intention to carry on business as an investment company and which (a) invests its funds mainly in securities, with the aim of spreading risk and giving members of the company the benefit of the results of the management of its funds, (b) complies with the 2006 Act, s 834 in that none of its holdings in companies (other than other investment companies) represents more than 15% by value of the company's investments, (c) is prohibited by its articles from distributing capital profits, and (d) does not retain more than 15% of the income it derives from securities.
- (5) Finally, the reason for the distinction may be geographical. There are special provisions for overseas companies, being companies incorporated outside the United Kingdom.<sup>18</sup> There are also distinctions depending on where the company was incorporated within the United Kingdom.<sup>19</sup>

**1.08** The activity of a company may determine whether particular provisions of the Companies Acts apply to it and whether it is subject to other forms of regulation:

- (1) banks and banking companies,<sup>20</sup> insurance companies,<sup>21</sup> and open-ended investment companies,<sup>22</sup> which are regulated by the FSA;

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<sup>14</sup> 2006 Act, ss 1162, 1173(1), and Schedule 7, which replace 1985 Act, ss 258, 742(1), and Schedule 10A without change.

<sup>15</sup> 2006 Act, ss 341–351 and 361. By s 531, the definition applies for the purpose of identifying quoted companies in respect of which members may raise voting concerns at accounts meetings under Part 16, Chapter 5, ss 527–531.

<sup>16</sup> 2006 Act, s 146(1). By s 1173(1) 'regulated market' has the same meaning as in Directive 2004/39/EC, Art 4.1(14), unless the relevant State has not implemented that Directive; in which case 'regulated market' has the same meaning as in Council Directive 93/22/EEC.

<sup>17</sup> 2006 Act, ss 832–835, which replaced 1985 Act, ss 265–267 on 6 April 2008: 2006 Commencement Order No 5, art 3(1)(k).

<sup>18</sup> 2006 Act, s 1044.

<sup>19</sup> 2006 Act, s 88 (Welsh company), ss 861(5) and 879(6) in relation to registration of company charges, and s 1158 (UK-registered company).

<sup>20</sup> 2006 Act, s 1164, which replaces 1985 Act, s 742B, and FSMA, Schedule 4.

<sup>21</sup> 2006 Act, s 1165, which replaces 1985 Act, s 742C, and FSMA, Schedule 4.

<sup>22</sup> FSMA, Part XVII (collective investment schemes) and in particular ss 236, 262, and 263; the Open-Ended Investment Companies Regulations 2001 (SI 2001/1228); the Open-Ended

- (2) charitable companies, for which there are modifications to the Companies Act, including modifications in relation to constitutional limitations, directors' duties, and transactions with directors,<sup>23</sup> and which are subject to oversight by the Charity Commissioners;
- (3) community interest companies, which are subject to the Companies (Audit, Investigations and Community Enterprise) Act 2004 (CAICE) Act 2004, Part 2.<sup>24</sup>

Some organizations have similarities to companies, but are not companies unless they exercise statutory powers to convert into companies. **1.09**

- (1) Building societies are regulated by the Building Societies Acts 1986 and 1997 and supervised by the FSA.<sup>25</sup> They are not companies, but are managed by directors and can convert into public companies.<sup>26</sup>
- (2) Cooperatives (such as consumer, agricultural, or housing cooperatives) and credit unions may be organized as companies, subject to the Companies Acts, but are more frequently organized as industrial and provident societies and registered under the Industrial and Provident Societies Acts 1965–2002. They are regulated by the FSA. An industrial and provident society may convert to a company.<sup>27</sup>
- (3) Friendly Societies (such as workmen's clubs) could not be companies until the Friendly Societies Act 1992 enabled them to establish as, or convert to, companies.

*'Body corporate' and 'corporation'*

By the new provisions of the 2006 Act, s 1173(1), the expressions 'body corporate' and 'corporation' include 'a body incorporated outside the United Kingdom, but do not include (a) a corporation sole,<sup>28</sup> or (b) a partnership that, whether or not

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Investment Companies (Amendment) Regulations 2005 (SI 2005/923). Open-ended investment companies can buy back their shares free of the restrictions that apply to ordinary companies. The FSA refers to them as 'investment companies with variable capital'.

<sup>23</sup> 2006 Act, s 42 (which derives from Charities Act 1993, s 65, and replaces it on 1 October 2009) and s 181; Charities Act 1993, s 66 as substituted by 2006 Act, s 226.

<sup>24</sup> By 2006 Act, s 6, a company may be formed as a community interest company. Also see the Community Interest Company Regulations 2005 (SI 2005/1788).

<sup>25</sup> As to supervision by the FSA, which includes the Building Societies Commission, see Building Societies Act 1986, Part VI (as amended).

<sup>26</sup> See in particular Building Societies Act 1986, Part VII, and Building Societies Act 1997, Part III.

<sup>27</sup> Industrial and Provident Societies Act 1965, ss 52, 53, as amended by the Industrial and Provident Societies Act 2002. Unless it converts into a company, it is not a company for the purposes of the Insolvency Act (in the absence of a contrary statutory intention): *Re Devon and Somerset Farmers Ltd* [1994] Ch 57.

<sup>28</sup> An individual constitutes a corporation sole by virtue of holding a particular office (the Sovereign, an Archbishop, or the Public Trustee), so the property of the office passes to the successive holders of the office by virtue of appointment or succession without the need for conveyance: Law Commission, *The Execution of Deeds and Documents by or on Behalf of Bodies* (1998, No 253) at para 4.23; *Halsbury's Laws of England* (4th edn reissue, 2006) Vol 9(2), para 1111.

a legal person, is not regarded as a body corporate under the law by which it is governed'. A 'body corporate' in the 2006 Act is a corporation aggregate; ie 'a body of persons which is recognised by the law as having personality which is distinct from the separate personalities of the members of the body or the personality of the individual holder of the office in question for the time being'.<sup>29</sup>

**1.11** The expressions 'body corporate' and 'corporation' may include:

- (1) a company incorporated under the Companies Acts 1985 and 2006 and former Companies Acts;<sup>30</sup>
- (2) a company incorporated in the United Kingdom otherwise than under those Acts (ie by royal charter,<sup>31</sup> private or local Act of Parliament,<sup>32</sup> or special public Act of Parliament<sup>33</sup>) to which the 1985 and 2006 Acts apply either because it is entitled to and does register under those Acts,<sup>34</sup> or because their provisions apply to it as an unregistered company;<sup>35</sup>
- (3) limited liability partnerships under the Limited Liability Partnerships Act 2000, since such partnerships are bodies corporate with unlimited capacity;<sup>36</sup>
- (4) companies incorporated outside the United Kingdom, to which the 2006 Act, Part 34 may apply;<sup>37</sup>

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<sup>29</sup> Law Commission, *The Execution of Deeds and Documents by or on Behalf of Bodies* (1998, No 253) at para 4.1; *Halsbury's Laws of England* (4th edn reissue, 2006) Vol 9(2), para 1109.

<sup>30</sup> This is made explicit by 2006 Act, s 15(2) and (3).

<sup>31</sup> At common law these companies, unlike others incorporated by Act of Parliament, have unlimited capacity: *Sutton's Hospital Case* (1612) 10 Co Re 1a, 23a, 30b; *Baroness Wenlock v River Dee Co* (1883) 36 Ch D 675, 685, per Bowen LJ (upheld on appeal at (1885) 10 AC 354). Examples of companies incorporated by Royal Charter are the Institute of Chartered Accountants and the Institute of Chartered Secretaries and Administrators, incorporated in 1880 and 1902 respectively.

<sup>32</sup> These were usually incorporated to undertake public utilities and few remain in existence.

<sup>33</sup> These were usually formed for public sector activity, but few of them remain after the Government's privatization programme, beginning with the Telecommunications Act 1984.

<sup>34</sup> 1985 Act, ss 680–683, which are replaced without change by 2006 Act, ss 1040–1042 on 1 October 2009. The Non-Companies Acts Companies Authorised to Register Regulations (SI 2008/) (draft) were intended to come into effect on 1 October 2008.

<sup>35</sup> 2006 Act, s 1043 which came into effect on 6 April 2007 and replaced 1985 Act, s 718 with changes. The Companies Acts (Unregistered Companies) Regulations (SI 2007/318) and the Companies (Unregistered Companies) Regulations 2008 (SI 2008/) (draft) apply most of the provisions of the 2006 Act that have been brought into force to unregistered companies (including those relating to directors). CLR recommended that most provisions of the main companies legislation should apply to unregistered companies CLR: *Final Report* at paras 11.34–11.38.

<sup>36</sup> Limited Partnerships Act 2000, s 1. The Limited Liability Partnerships Regulations 2001 (SI 2001/1090), as amended by the Limited Liability Partnerships (Amendment) Regulations 2007 (SI 2007/2073) and the Markets in Financial Instruments Directive (Consequential Amendments) Regulations 2007 (SI 2007/2932), apply many of the provisions of the 1985 Act to LLPs. The Limited Liability Partnerships (Accounts and Audit) (Application of the Companies Act 2006) Regulations 2008 (SI 2008/1911), apply provisions in 2006 Act, Parts 15 and 16 (accounts, reports, and audit) to limited liability partnerships with effect from 1 October 2008. Other provisions of the 2006 Act will be applied to limited liability partnerships with effect from 1 October 2009.

<sup>37</sup> Part 34, ss 1044–1059 come into force on 1 October 2009 and provide a new regime for overseas companies replacing 1985 Act, ss 690A–703R, as discussed in Chapter 31 of this work.

- (5) European Economic Interest Groupings (EEIG), which if registered in Great Britain are bodies corporate;<sup>38</sup>
- (6) European companies or Societas Europaea (SE), intended to facilitate cross-border mergers, which may be set up within the Community in the form of a European public limited-liability company with legal personality;<sup>39</sup>
- (7) European Co-operative Societies (SCE) which have separate legal personality and may be formed to further members' economic and social activities.<sup>40</sup>

Whereas 'corporation' is only used in connection with the representation of a corporation at a company meeting,<sup>41</sup> the expression 'body corporate' is used in many varied instances. It is used to enable provisions of the Companies Acts to reach corporations other than companies as defined above; eg corporate bodies that may be subject to a petition by the Secretary of State on the ground of unfair prejudice to members,<sup>42</sup> overseas companies carrying on business in Great Britain which may be subject to investigation by the Secretary of State or inspectors appointed by him,<sup>43</sup> companies which may commit offences,<sup>44</sup> and companies subject to the company communications provisions.<sup>45</sup> It is also used to identify the bodies corporate in respect of which members do not have to approve transactions with directors.<sup>46</sup> More often it is used so that the provision may apply to a corporate entity with dealings or connections with a company as:

- (1) a member,<sup>47</sup> holding company,<sup>48</sup> associated body corporate,<sup>49</sup> subsidiary undertaking or company,<sup>50</sup> or a person interested in shares in a company;<sup>51</sup>

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<sup>38</sup> Council Regulation (EEC) No 2137/85, European Economic Interest Grouping Regulations 1989 (SI 1989/638); the European Economic Interest Grouping (Fees) Regulations 2004 (SI 2004/2407). An EEIG may be formed with legal personality (Art 1(3) and reg 3) by existing firms or undertakings in Member States to provide cross-border non-profit-making ancillary services for its members on the basis of unlimited liability (Art 24). An EEIG may be wound up under the Insolvency Act as an unregistered company (regs 7 and 8) and, if wound up, the CDDA applies (reg 20).

<sup>39</sup> Council Regulation 2157/2001; Directive 2001/86; the European Public Limited Company Regulations 2004 (SI 2004/2326); the European Public Limited Company (Fees) Regulations 2004 (SI 2004/2407). These came into force in 2004. An SE may be wound up under the Insolvency Act if its registered office is in Great Britain (Art 63).

<sup>40</sup> Council Regulation 1435/2003; Directive 2003/72. These came into force on 18 August 2006. An SCE may be wound up under the Insolvency Act if it is registered.

<sup>41</sup> 2006 Act, ss 318 and 323.

<sup>42</sup> 2006 Act, s 55.

<sup>43</sup> 1985 Act, Parts XIV and XV, as amended by 2006 Act, ss 1035–1039, in particular 1985 Act, s 453.

<sup>44</sup> 2006 Act, ss 949(3), 1123, and 1127.

<sup>45</sup> 2006 Act, s 1148, applying to ss 1144–1148 and Schedules 4 and 5.

<sup>46</sup> 2006 Act, ss 188(6), s 190(4), 198(6), 200(6), 201(6), 203(5), 217(4), 218(4), s 226 (substituting the Charities Act 1993, s 66A).

<sup>47</sup> 2006 Act, ss 136(1)(a), 137(1), 148(3)(b), 384(2)(b), 467(2)(b).

<sup>48</sup> 2006 Act, ss 251(3) (shadow director), 1159.

<sup>49</sup> 2006 Act, ss 176(2), 203(1), 208(1) and (2), 220(2), 256.

<sup>50</sup> 2006 Act, ss 499(2)(a), 500(1), 532(4), 1159, 1161.

<sup>51</sup> 2006 Act, ss 823(1) and (2).

- (2) a director, secretary, or person authorized to certificate share transfers on behalf of the company;<sup>52</sup>
- (3) an entity in which a director is interested,<sup>53</sup> with which a director is connected,<sup>54</sup> or which is controlled by a director;<sup>55</sup>
- (4) a person associated for the purposes of independence requirements;<sup>56</sup>
- (5) an organization in relation to the provisions about political donations and expenditure;<sup>57</sup>
- (6) an entity with whom the company is proposing to merge or enter into an arrangement to allot shares.<sup>58</sup>

### **C. The Companies Acts and Other Statutes Affecting Directors**

**1.13** The Companies Act 2006 consists of 47 Parts and 1,300 sections. It also has 16 Schedules and is supplemented by a number of statutory instruments, which are identified in Appendix 1 to this work (some of the intended statutory instruments are still in draft). Subsection 2(1) defines the Companies Acts as:<sup>59</sup>

- (1) the company law provisions of the 2006 Act, being Parts 1–39, ss 1–1181, and the provisions of Parts 45–47, ss 1284–1300, as they apply for the purposes of those parts, with Schedules 1–2 and 16;<sup>60</sup>
- (2) the Companies (Audit, Investigations and Community Enterprise) Act 2004, Part 2, ss 26–67, concerning community interest companies;<sup>61</sup>
- (3) the provisions of the Companies Act 1985, which remain in force, namely Parts XIV and XV, ss 431–457 (investigation of companies and their affairs;

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<sup>52</sup> 2006 Act, ss 164, 165(6), 278(1), 775(4)(b).

<sup>53</sup> 2006 Act, s 183(2), (3).

<sup>54</sup> 2006 Act, ss 252(2), 254, 255.

<sup>55</sup> 2006 Act, ss 255, 412(b).

<sup>56</sup> 2006 Act, ss 345(2)(b), 937(2), (3) and (4), 1150, 1152.

<sup>57</sup> 2006 Act, s 379(1).

<sup>58</sup> 2006 Act, ss 93(6), 594(6), 595, 616.

<sup>59</sup> Section 2 came into force on 6 April 2007. Under 1985 Act, s 744 ‘the Companies Acts’ meant the 1985 Act, Criminal Justice Act 1993, Part V (insider dealing), and the Companies Consolidation (Consequential Provisions) Act 1985.

<sup>60</sup> The Parts of the 2006 Act that are not company law provisions are: Part 40, ss 1182–1191 (Company Directors: Foreign Disqualification etc); Part 41, ss 1192–1208 (Business Names); Part 42, ss 1209–1264 (Statutory Auditors); Part 43, ss 1265–1273 (Transparency Obligations and Related Matters); Part 44, ss 1274–1283 (Miscellaneous Provisions); the related Schedules 10–15. Parts 45–47 (ss 1284–1300) contain extensions of the Companies Acts and other enactments to Northern Ireland, general supplementary and final provisions.

<sup>61</sup> The provisions about community interest companies in the C(AICE) Act 2004 form a complete code, which is additional to company law. 2006 Act, s 1295 and Schedule 16 repeals C(AICE) Act 2004, Part 1, ss 1–10, 11(1), 12, 13, 19, and 20.

- requisition of documents; and orders imposing restrictions on shares under the 1985 Act, s 445<sup>62</sup>), as amended by the 2006 Act, Part 32, ss 1035–1039;<sup>63</sup> and
- (4) the provisions of the Companies Consolidation (Consequential Provisions) Act 1985, which remain in force, concerning old public companies, as defined by s 1, and miscellaneous savings and amendments relating to the 1985 Act.

Those provisions are considered to be core provisions of company law in that they are concerned with the way companies are formed and run. As described below, the 2006 Act is not yet fully in force and certain provisions of the 1985 Act, in addition to the provisions in paragraph (3) above, have not yet been repealed and remain in force (these as yet unrepealed provisions mainly concern constitutional matters and capital).

Other statutes of direct relevance to directors are considered to be on the fringe of core company law. These are statutory provisions, including those formerly included in the 1985 Act, about: **1.14**

- (1) the issue of securities (the Financial Services and Markets Act 2000, Part VI, including amendments made by the 2006 Act, Part 43<sup>64</sup>), which are considered in Chapter 27 of this work in so far as they expose directors to the risk of liability to third parties;
- (2) disqualification of directors (the Company Directors Disqualification Act 1986 and the 2006 Act, Part 40 concerning foreign disqualification orders<sup>65</sup>), which are considered in Chapter 28 of this work;
- (3) insolvency (the Insolvency Act 1986), the provisions of which of particular concern to directors are considered in Chapter 29 of this work.

## **D. The Companies Act 2006**

### **(1) The reforms**

Apart from changes in style and structure to make the 2006 Act more accessible (eg by clearly differentiating the provisions that apply to private and public companies), the Act makes a number of changes of substance which are of particular importance to directors. **1.15**

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<sup>62</sup> These provisions were not included in the 2006 Act, because they can go beyond companies and apply to other types of organization.

<sup>63</sup> The other provisions of the 1985 Act are repealed by 2006 Act, s 1295 and Schedule 16.

<sup>64</sup> These came into force on the Royal Assent, 8 November 2006 (s 1300(1)(a)).

<sup>65</sup> The provisions about foreign disqualification orders are to come into force on 1 October 2009.

*Parts 1–7: The fundamentals of a company*

- 1.16** These provisions concern types of company (paragraph 1.06 above), company formation, a company's constitution, its capacity to act, its name, its registered office, and change of status.<sup>66</sup>
- 1.17** The new provisions, which simplify the procedure for forming a company and its constitution (Parts 2 and 3), do not come into force until 1 October 2009. Until then a company will be formed under the 1985 Act, but amendments have been made to Tables A–F to reflect changes made by the 2006 Act and already in force.<sup>67</sup>
- 1.18** When the 2006 Act, Part 2, s 7 comes into force a single person may form a private or public company.<sup>68</sup> By s 9,<sup>69</sup> to form a company there must be delivered to the Registrar (a) the memorandum of association, stating that the subscribers wish to form a company under the Act and agree to become members and, in the case of a company that is to have a share capital, to take at least one share each,<sup>70</sup> (b) an application for registration containing prescribed information about the company, including particulars of its proposed share capital (if any) and its first directors and secretaries, with consents to act,<sup>71</sup> (c) a copy of the proposed articles unless the applicable Model Article is to apply,<sup>72</sup> and (d) a statement of compliance in accordance with s 13.
- 1.19** The main change from the procedure under the 1985 Act is that under the 2006 Act the memorandum is a simple document which provides a historical record evidencing the intention of the founder members to form the company and become members. It therefore underpins the statutory contract between members and

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<sup>66</sup> As Sir John Vinelott put it in 'Individual Insolvency—The Insolvency Acts 1985 and 1986' (1987) 40 *Current Legal Problems* 1, 11: 'A company, like a good soldier has a name, a number and a place.'

<sup>67</sup> The Companies (Tables A to F) (Amendment) (No 2) Regulations 2007 (SI 2007/2541) and the Companies (Tables A to F) (Amendment) (No 2) Regulations 2007 (SI 2007/2826), which apply to companies incorporated between 1 October 2007 and 1 October 2009. The Companies (Tables A to F) (Amendment) Regulations 2008 (SI 2008/739) made amendments to Tables C and E with effect from 6 April 2008.

<sup>68</sup> Under 1985 Act, s 1(3A), inserted by the Companies (Single Member Private Limited Companies) Regulations 1992 (SI 1992/1699) with effect from 15 July 1992, a single person may form a private company. The reforms in relation to formation largely adopt the recommendations of the CLR *Final Report* at paras 9.2 and 9.4.

<sup>69</sup> See also the Companies (Registration) Regulations 2008 (SI 2008/3014), made pursuant to ss 8(2), 10(3), and 11(2), and the Companies (Shares, Share Capital and Authorised Minimum) Regulations 2008 (draft), to be made pursuant to ss 10(2) and 32(2).

<sup>70</sup> 2006 Act, s 8.

<sup>71</sup> 2006 Act, ss 9–12. For public companies the statement about the company's share capital is linked to Article 2 of the Second Company Law Directive (77/91/EC).

<sup>72</sup> Pursuant to 2006 Act, s 19, the Companies (Model Articles) Regulations 2008 (SI 2008/3229) prescribe default model articles for private companies limited by shares pcls, private companies limited by guarantee pcls, and public companies plc.



the company.<sup>73</sup> It cannot be changed or updated, but there is no need to do so. The memorandum does not state the company's objects and much of the information that used to be contained in it is now contained in the application for registration.

There are also changes to a company's constitution. The 1985 Act does not refer to a company's constitution as such, but it included the memorandum, which states the company's objects, and the articles of association, which prescribe its regulations, both of which could be altered by special resolution.<sup>74</sup> Under the 2006 Act, s 17 a company's constitution includes its articles, which may be the Model Articles<sup>75</sup> and also any resolutions or agreements, described in s 29,<sup>76</sup> which affect its constitution. The constitution may now include entrenched provisions, which can only be amended or repealed by procedures more restrictive than a special resolution.<sup>77</sup> Another change is that a company's objects are unrestricted, giving it the same plenary capacity as an individual, unless specifically restricted by its articles.<sup>78</sup> The provisions of the constitution 'bind the company and its members to the same extent as if there were covenants on the part of the company and each member to observe those provisions'.<sup>79</sup> **1.20**

There are new rules about choice of name and trading disclosures, most of which do not come into force until 1 October 2009 (Part 5). These provisions should be considered with the supporting regulations<sup>80</sup> and Part 41, which contains new provisions about business names and provisions derived from the Business Names Act 1985, with changes. One matter of particular significance to directors is that they are no longer personally liable if the company's name is not correctly stated **1.21**

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<sup>73</sup> 2006 Act, s 33(1), replacing 1985 Act, s 14(1).

<sup>74</sup> 1985 Act, ss 4–9, 378, 380. For further discussion about resolutions, see Chapter 2, paragraphs 2.28–2.30, and Chapter 22. Note that 1985 Act, s 35A, inserted by the 1989 Act, s 108, refers to limitations under the company's constitution in an inclusive way.

<sup>75</sup> 2006 Act, ss 18–20.

<sup>76</sup> An informal agreement of the type considered in *Cane v Jones* [1980] 1 WLR 1451 would be part of the constitution and subject to the rules about forwarding to the Registrar (s 30) and being provided to members (s 32).

<sup>77</sup> 2006 Act, s 22 and for alteration of articles: ss 21–27.

<sup>78</sup> 2006 Act, ss 31 and 39. For charitable companies, see s 42.

<sup>79</sup> 2006 Act, s 33(1), replacing 1985 Act, s 14(1). Unlike its predecessor, s 33 expressly refers to the company. For cases on former provisions, see *Welton v Saffery* [1897] AC 299, 315 and *Hickman v Romney Marsh Sheep-Breeders Association* [1915] 1 Ch 881. Section 33 (like 1985 Act, s 14) is excepted from the general principle set out in Contracts (Rights of Third Parties) Act 1999, s 1 and so the provisions of a company's constitution will not confer any rights on persons other than the company and its members.

<sup>80</sup> The supporting regulations are or will be The Non-Companies Acts Companies Authorised to Register Regulations 2008 (draft), the Company Names Adjudicator Rules 2008 (SI 2008/1738), the Companies (Trading Disclosures) Regulations 2008 (SI 2008/495), the Companies (Unregistered Companies) Regs 2008 (draft), the Company and Business Names (Miscellaneous Provisions) Regulations 2008 (draft), and the Companies (Trading Disclosures) (Amendment) Regulations 2008 (laid in draft before Parliament).



on its contracts and bills, because the 1985 Act, s 349, was repealed with effect from 1 October 2008.<sup>81</sup>

*Part 9: Exercise of members' rights*

- 1.22** In recognition of the fact that shares are often held through nominees, there are new provisions, which came into force on 1 October 2007, enabling the registered member to nominate another person to exercise members' rights where the company's articles so provide,<sup>82</sup> or to nominate another person to enjoy information rights where the company is a traded company.<sup>83</sup>

*Part 10: A company's directors*

- 1.23** Part 10, concerning directors, contains a number of significant reforms, all of which are in force, except for provisions about the register of directors, disclosure of directors' residential addresses, and the power to make provision for employees on cessation of business.<sup>84</sup> Every company must have one natural director, who cannot be under the age of 16, but there are no upper age limits.<sup>85</sup> These matters are discussed in Chapter 6 of this work.
- 1.24** There is a statutory statement of directors' general duties and independent directors are given power to authorize a director to have a conflict of interest or take the benefit of a corporate opportunity.<sup>86</sup> These provisions are discussed in Chapters 9–16 of this work.
- 1.25** There are changes to the rules about directors declaring their interests in existing transactions and about transactions with directors requiring approval of members.<sup>87</sup> These matters are discussed in Chapters 17 and 18 of this work. Certain restrictions on transactions with directors, formerly contained in the 1985 Act, Part X (enforcement of fair dealing by directors), have been repealed and not replaced by provisions in the 2006 Act.<sup>88</sup>

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<sup>81</sup> 2006 Act Commencement Order No 5, Art 8(b) and Schedule 3.

<sup>82</sup> 2006 Act, s 145.

<sup>83</sup> 2006 Act, ss 146–153. The reforms in Part 9 were recommended by the CLR in its *Final Report* at Chapter 7. These matters are referred to in Chapter 22 at paragraph 22.92.

<sup>84</sup> 2006 Act, ss 162–167, 240–247, supported by the Companies (Fees for Inspection of Company Records) Regulations 2008 (SI 2008/3007), made pursuant to s 162(5)(b), and the Companies (Disclosure of Address) Regulations 2008 (laid before Parliament), made pursuant to s 243(3)–(6), which also come into force on 1 October 2009. In the meantime the corresponding provisions of the 1985 Act remain in force: ss 288, 289, 719, 723B–723E, and Schedule 24.

<sup>85</sup> 2006 Act, Part 10, Chapter 1, ss 154–169.

<sup>86</sup> 2006 Act, Part 10, Chapter 2, ss 170–181.

<sup>87</sup> 2006 Act, Part 10, Chapters 3–6, ss 182–231.

<sup>88</sup> The provisions of 1985 Act, Part 10, concerning transactions with directors, that have been repealed and not replaced are s 311 (prohibition on tax-free payments to directors), ss 323 and 327 (prohibition on directors dealing in share options), ss 324–326, 328, 329, and Schedule 13, Parts 2–4 (register of directors' interests), s 342 (criminal liability for loans to directors), and ss 343 and

There are new provisions about qualifying pension scheme indemnity provision in respect of directors' liabilities and ratification of a director's wrongful conduct by independent members,<sup>89</sup> which are discussed in Chapter 19 of this work. **1.26**

Finally, there are new restrictions on the disclosure of directors' residential addresses, which are not yet in force (discussed in Chapter 6 of this work).<sup>90</sup> **1.27**

*Part 11: Derivative claims*

There is a new statutory procedure for derivative claims by members arising from a breach of duty by directors,<sup>91</sup> which came into force on 1 October 2007 (discussed in Chapter 21 of this work). **1.28**

*Part 12: Company secretaries*

There is no need for private companies to have a secretary. The provisions of Part 12 are in force except for ss 275–279 concerning the register of secretaries.<sup>92</sup> **1.29**

*Part 13: Resolutions and meetings*

The way in which companies pass resolutions is simplified. The reforms, which are in force, include the following: (a) there are now only ordinary and special resolutions (extraordinary resolutions have been abolished),<sup>93</sup> (b) written resolutions are the normal procedure for private companies,<sup>94</sup> (c) all company meetings are convened on 14 days' notice, except public company AGMs which require 21 days,<sup>95</sup> (d) communications in relation to company meetings may be sent electronically,<sup>96</sup> (e) private companies are no longer obliged to hold AGMs,<sup>97</sup> and (f) there are new provisions for polls for quoted companies.<sup>98</sup> **1.30**

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344 (special procedure for disclosure by banks). These repeals reflected the recommendations of the Law Commission. The Government repealed the provisions about the register of directors' interests because the FSA require disclosure by companies whose shares are traded on a regulated market to comply with the EU Market Abuse Directive and the Government did not wish to extend those requirements to other companies. Since 2006 Act, s 413 makes special provision for disclosure requirements by banking companies, the provisions of 1985 Act, ss 343 and 344 were no longer required.

<sup>89</sup> 2006 Act, Part 10, Chapter 7, ss 232–239.

<sup>90</sup> 2006 Act, Part 10, Chapter 8, ss 240–246. In the meantime the provisions of 1985 Act, ss 723B–723E remain in force.

<sup>91</sup> 2006 Act, Part 11, ss 260–264 (claims in England and Wales or Northern Ireland).

<sup>92</sup> 2006 Act, Part 12, ss 270–280. The Companies (Fees for Inspection of Company Records) Regulations 2008 (SI 2008/3007) are made pursuant to s 275(5)(b) and come into force on 1 October 2009. Company secretaries are discussed in Chapter 3, Section E of this work.

<sup>93</sup> 2006 Act, ss 281–283.

<sup>94</sup> 2006 Act, ss 288–300.

<sup>95</sup> 2006 Act, s 307.

<sup>96</sup> 2006 Act, s 333.

<sup>97</sup> The provisions about AGMs for public companies are in 2006 Act, ss 336–340.

<sup>98</sup> 2006 Act, ss 341–354 (written resolutions).

*Parts 15 and 16: Accounts, reports, and audit*

- 1.31** The provisions of the 2006 Act concerning accounts, reports, and audit are all in force.<sup>99</sup> Chapter 23 of this work discusses directors' functions and duties in respect of these matters.
- 1.32** In relation to accounts and reports (Part 15), directors are under a new duty not to approve accounts unless they give a true and fair view.<sup>100</sup> There are new requirements for a company's annual accounts to disclose information about directors' benefits and for a business review in the directors' report for all companies other than those subject to the small companies regime.<sup>101</sup> The annual accounts of quoted companies must be published on their website.<sup>102</sup> The time for filing accounts and reports with the Registrar is reduced from ten months after the end of the relevant accounting reference period to nine months for private companies and six months for public companies.<sup>103</sup> There is a new provision making a director liable to compensate the company for any loss suffered by it as a result of an untrue or misleading statement in, or omission from the directors' report, the directors' remuneration report, or any summary financial statement derived from them.<sup>104</sup>
- 1.33** Part 16, concerning audit, contains new provisions to improve the accountability of auditors, including (a) new provisions relating to the appointment of auditors of private companies and the disclosure of the terms of an auditor's appointment;<sup>105</sup> (b) a requirement that an auditor's report given by a firm must be signed by an individual as senior statutory auditor;<sup>106</sup> (c) new provisions about offences relating to the audit report;<sup>107</sup> (d) obligations of the auditor and the company to notify the appropriate audit authority if the auditor ceases to hold office;<sup>108</sup> (e) a new right of shareholders in a quoted company to raise audit concerns at an accounts meeting of a quoted company;<sup>109</sup> and (f) new provisions relating to indemnity and limitation of auditors' liability.<sup>110</sup>

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<sup>99</sup> These parts are supported by regulations noted in nn 128 and 129 to paragraph 1.45 below and in the Table in Appendix 1 under Parts 15 and 16.

<sup>100</sup> 2006 Act, s 393.

<sup>101</sup> 2006 Act, ss 412, 413, 417.

<sup>102</sup> 2006 Act, s 430.

<sup>103</sup> 2006 Act, s 442.

<sup>104</sup> 2006 Act, s 463.

<sup>105</sup> 2006 Act, ss 485(2)–(5), 487, 488, 493, and 514.

<sup>106</sup> 2006 Act, ss 503, 504, and 506.

<sup>107</sup> 2006 Act, ss 507 and 508.

<sup>108</sup> 2006 Act, ss 522–525.

<sup>109</sup> 2006 Act, ss 527–531.

<sup>110</sup> 2006 Act, ss 532–538.

*Parts 17 and 18: A company's share capital and acquisition by a limited company of its own shares*

Most of the provisions in the 2006 Act concerning a company's capital replace provisions in the 1985 Act without change and come into force on 1 October 2009 (Chapter 24 of this work discusses directors' functions and duties in respect of capital). There are two relaxations in the capital maintenance rules for private companies which came into force on 1 October 2008. First, a private company may reduce its capital without a court order, provided that the directors make a solvency statement.<sup>111</sup> Secondly, the prohibition on giving financial assistance in the purchase of its own shares no longer applies to a private company (and the 'whitewash' provisions no longer apply to them).<sup>112</sup> **1.34**

Other new provisions, which come into force on 1 October 2009, provide that (a) companies no longer have an authorized capital, but shares must have a nominal value and cannot be in the form of stock,<sup>113</sup> (b) directors of a private company with only one class of shares may allot shares without prior approval of members (as required by the 1985 Act, s 80) unless prohibited by the company's articles,<sup>114</sup> and (c) a company may redenominate the currency of its share capital.<sup>115</sup> **1.35**

*Part 21: Certification and transfer of securities*

These provisions are in force. They include a new provision, s 771 (to be read with s 851), which makes clear the directors' duties when a transfer of shares in or debentures of a company is lodged.<sup>116</sup> As soon as reasonably practicable and in any event within two months after the date of lodgement the company must either **1.36**

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<sup>111</sup> 2006 Act, ss 641(1)(a) and (2)–(5), 642–644, 652(1) and (3), and 654, which were brought into force by 2006 Act Commencement Order No 7, Arts 2(a)–(c). See also the Companies (Reduction of Share Capital) Order 2008 (SI 2008/1915), which prescribes the form of solvency statement and provides for the treatment of reserves as distributable profits, unless, where the court confirms the reduction, it orders that it is not distributable. This reform was recommended by the CLR: *Completing the Structure* at paras 7.9 and 7.10 and CLR: *Final Report* at para 10.6.

<sup>112</sup> 2006 Act CLR: Commencement Order No 5, arts 5(2) and 8(b) and Schedule 3 repeal 1985 Act, ss 151–153 and 155–158 as regards private companies. The CLR recommended the dis-application of these provisions in CLR: *Completing the Structure* at para 7.12 and CLR: *Final Report* at para 10.6. Paragraph 52 of Schedule 4 to that Commencement Order makes it clear that the repeal could not have the effect that a case of financial assistance given by a private company might be impugned under the rule of law derived from *Trevor v Whitworth* (1887) 12 App Cas 409, HL (see commentary in para 7 of the Explanatory Memorandum to Commencement Order No 5). The provisions of the 2006 Act concerning financial assistance, ss 677–683 expressly apply only to public companies.

<sup>113</sup> 2006 Act, ss 540(2) and (3), 542, 545, and 546. The abolition of authorized capital was recommended by the CLR: *Completing the Structure* at para 7.7 and CLR: *Final Report* at para 10.6.

<sup>114</sup> 2006 Act, s 550. This reform was recommended by the CLR: *Final Report* para 4.5. The directors' power of allotment is of course subject to any pre-emption rights of existing shareholders, which in the case of a private company may be excluded by the articles or disapplied by the articles or special resolution (ss 567 and 569).

<sup>115</sup> 2006 Act, ss 622–628.

<sup>116</sup> 2006 Act, s 771 replaces 1985 Act, s 183(5), as recommended by the CLR: *Final Report* at paras 7.44 and 7.45. See further Chapter 24, paragraph 24.215 of this work.

register the transfer or give the transferee notice of refusal with reasons. The requirement for reasons is new. If the section is not complied with the company and every officer in default commits an offence.

*Part 23: Distributions*

- 1.37** The 2006 Act, s 845, which is in force, provides a solution to a problem in making an inter-group transfer of a non-cash asset at book value, which was thought to be caused by the decision in *Aveling Barford Ltd v Perion Ltd*.<sup>117</sup> The new section enables a company, which has distributable profits, to sell or transfer a non-cash asset to a member of its group at book value without being treated as having made a distribution.

*Part 31: Dissolution and restoration to the register*

- 1.38** There are new provisions, which come into effect on 1 October 2009, for restoring a dissolved company to the register, either administratively by the Registrar on the application of a former director or member if certain conditions are met, or by the court on the application of a former director and others, provided that the application is made within six years of dissolution (unless the application is for the purpose of bringing a claim against the company for damages for personal injury).<sup>118</sup> Under the 1985 Act a former director does not have standing to apply to restore a dissolved company to the register. The powers of directors in relation to dissolution and restoration to the register are discussed in Chapter 4, Section A(4) of this work.

**(2) Implementation**

- 1.39** When the Companies Act obtained the Royal Assent on 8 November 2006 Parts 46 and 47 (general supplementary and final provisions, except repeals in s 1295) came into force, including the continuity of law provision in s 1297, as did the non-company law provisions of Parts 43 and 44. Part 43, concerned with transparency obligations, makes amendments to FSMA, Part 6, which are discussed in Chapter 27 of this work.
- 1.40** Since then the 2006 Act has been implemented in stages; so far by seven Commencement Orders, each of which contains relevant repeals and transitional provisions. In its approach to implementing the Act the Government has had

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<sup>117</sup> [1989] BCLC 626. In that case a transfer of property by an insolvent company to its parent at book value, which was known to be below market value was set aside as a disguised and unlawful distribution. The CLR recommended that there should be provision enabling solvent companies to make inter-group transfers at book value: CLR: *Capital Maintenance: Other Issues* (URN 00/880) at paras 24–43 and CLR: *Completing the Structure* at para 7.21. Directors' functions and duties in relation to distributions are discussed in Chapter 24 of this work.

<sup>118</sup> 2006 Act, ss 1024–1032. The CLR recommended administrative restoration to the register in *Final Report* at paras 11.17–11.20.

three main objectives: (i) the new law should apply in the same way to existing companies and companies formed under the 2006 Act; (ii) existing bargains should not be overridden; and (iii) it should be as easy as possible for existing companies to take advantage of the new freedoms in the 2006 Act.<sup>119</sup>

As at 1 October 2008 more than half the company law provisions<sup>120</sup> are in force, and the corresponding provisions of the 1985 Act are repealed. The provisions of Parts 36–38, ss 1121–1174 (offences, supplementary provisions, and interpretation) come into force with the provisions to which they relate.<sup>121</sup> Appendix 1 to this work contains a Table showing the progress of implementation of the 2006 Act and the making of supporting regulations and orders. The Table identifies when and how the provisions of the 2006 Act in force on 1 October 2008 came into force and the remaining provisions which will come into force on 1 October 2009. **1.41**

The reasons for the delay in implementation have been the need for time to put in place the necessary secondary legislation (eg the statutory instrument prescribing the Model Articles), to enable companies and their advisers to familiarize themselves with the new legislation, and to enable Companies House to change its regulatory systems and processes. In fact, the time needed to implement changes at Companies House meant that final implementation of all provisions had to be postponed from 1 October 2008 to 1 October 2009.<sup>122</sup> **1.42**

*Commencement Orders Nos 1 and 2: effective 1 January, 20 January, and 6 April 2007*

The first two Commencement Orders were concerned in the main to give effect to EC Directives. **1.43**

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<sup>119</sup> *Implementation of the Companies Act 2006*, a DTI Consultative Document (February 2007) at para 4.6. The Government's approach is supported by the leading authorities: *Yew Bon Tew v Kenderaan Bas Mara* [1933] 1 AC 553, 562, 563, PC, per Lord Brightman; *Secretary of State for Social Security v Tunncliffe* [1991] 2 All ER 712, 724, CA, per Staughton LJ; *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486, 524, 525, HL, per Lord Mustill; *R v Field* [2003] 1 WLR 882, CA at paras 60, 61; *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, HL at paras 18 and 19, per Lord Nicholls; para 98, per Lord Hope; paras 153 and 154, per Lord Scott; and paras 186–202, per Lord Rodger.

<sup>120</sup> Those in Parts 1–39, 45–47.

<sup>121</sup> The Companies (Company Records) Regulations 2008 (SI 2008/3006), made pursuant to ss 1136, 1137, and 1292(1)(a), and the Companies (Fees for Inspection of Company Records) Regulations 2008 (SI 2008/3007), made pursuant to ss 162(5)(b), 275(5)(b), 877(4)(b), 892(4)(b), 1137, 1167, and 1292(1)(c), come into force on 1 October 2009.

<sup>122</sup> The original final implementation date was 1 October 2008 (written statements of the Minister of State for Industry and the Regions (Margaret Hodge) on 2 November 2006 and 28 February 2007), but on 7 November 2007 the Minister for Competitiveness (Stephen Timms) announced in the House of Commons (confirmed in a written statement dated 13 December 2007) that final implementation would be postponed to 1 October 2009, because Companies House could not confirm that it would be able to implement the necessary changes to its systems and processes by 1 October 2008.

- (1) On 1 January 2007: Part 35 relating to changes to the First Company Law Directive, designed to ensure increased facilities for e-communications with the Registrar;<sup>123</sup>
- (2) On 20 January 2007: the company communication provisions in Parts 13 and 37, providing for communications between a company and its shareholders and others, including provisions facilitating electronic communication, and Part 22 concerning a public company's right to investigate who has an interest in shares (both linked to implementation of the Transparency Obligations Directive<sup>124</sup>); also s 463, which sets out a statutory basis of directors' liability to the company in relation to the directors' report (including business review) and the directors' remuneration report;
- (3) On 6 April 2007: Part 28 about takeovers, giving effect to the Directive on Takeover Bids;<sup>125</sup> also repeal of the 1985 Act, s 41 (authentication of documents), ss 293, 294 (provisions relating to directors aged 70 and over in public companies or private companies which are subsidiaries of public companies), certain sections in Part 10,<sup>126</sup> and s 438, which gave power to the Secretary of State to bring civil proceedings on behalf of a company.

*Commencement Orders Nos 3 and 4: effective 1 October 2007*

- 1.44** On 1 October 2007 there came into force a number of important provisions concerning directors and the management of companies, including the new provisions in Part 9 about the exercise of members' rights, most of the provisions in Part 10 about directors, the new provisions in Part 11 about derivative claims, and new provisions in Part 13 about resolutions and meetings.<sup>127</sup>

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<sup>123</sup> Directive 2003/58/EC of the European Parliament and of the Council amended the First Company Law Directive, Council Directive 68/151/EEC.

<sup>124</sup> Directive 2004/109/EC of the European Parliament and of the Council 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.

<sup>125</sup> In order to give effect to Directive 2004/25/EC of the European Parliament and Council on Takeover Bids, which had been due to be implemented into national law by 20 May 2006. Because of the delay in passing the 2006 Act, as a temporary measure the Takeovers Directive was implemented by the Takeovers Directive (Interim Implementation) Regulations 2006 (SI 2006/1183) made under European Communities Act 1972, s 2(2). The Companies Acts (Unregistered Companies) Regulations 2007 (SI 2007/318) apply Part 28 (Takeovers etc) and certain ancillary provisions to unregistered companies.

<sup>126</sup> The repealed sections in Part 10 were s 311 (prohibitions on tax-free payments to directors), ss 323 and 327 (prohibition on directors dealing in share options), ss 324–326, 328, 329, and Schedule 13, Parts 2–4 (register of directors' interests) and ss 343 and 344 (special procedure for disclosure by banks).

<sup>127</sup> Most of these provisions were brought into force by the 2006 Act Commencement Order No 3, but the 2006 Act Commencement Order No 4 brought into effect regulations about fees for inspecting company records and corrected an error in the previous Commencement Order.



*Commencement Orders Nos 5–7: effective 6 April and 1 October 2008*

The provisions brought into effect on 6 April 2008 included new provisions in Part 12 about company secretaries, all the remaining provisions in Parts 15 (accounts and reports<sup>128</sup>), 16 (audit<sup>129</sup>), 19 (debentures), 20 (private and public companies), 21 (certification of transfers of securities), 23 (distributions), 26 (arrangements and reconstructions), and 27 (mergers and divisions of public companies). **1.45**

On 1 October 2008 provisions in Part 5 about a company's name and trading disclosures came into force,<sup>130</sup> as did the remaining provisions in Part 10 about directors, apart from those about disclosure of directors' residential addresses. In relation to a company's share capital the new provisions enabling a private company to reduce its share capital without the need for a court order came into force,<sup>131</sup> as did the repeal of the restrictions under the 1985 Act, ss 151–153, and 155–158 on the giving by a private company of financial assistance for acquisition of its own shares, including the 'whitewash' procedure.<sup>132</sup> **1.46**

*Commencement Order No 8: effective 1 October 2009*

The provisions of the 2006 Act that will come into force on 1 October 2009 mainly concern the new provisions about incorporation, a company's constitution (including the Model Articles), records kept by the Registrar, and share capital.<sup>133</sup> These are all provisions supported by secondary legislation, some of which have been published in draft as indicated in the Table in Appendix 1. **1.47**

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<sup>128</sup> These provisions are supported by the following regulations, which came into force on 6 April 2008: The Companies (Revision of Defective Accounts and Reports) Regulations 2008 (SI 2008/373); The Companies (Summary Financial Statement) Regulations 2008 (SI 2008/374); The Companies Act 2006 (Amendment) (Accounts and Reports) Regulations 2008 (SI 2008/393); The Small Companies and Groups (Accounts and Directors' Report) Regulations 2008 (SI 2008/409); The Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008 (SI 2008/410).

<sup>129</sup> These provisions are supported by the Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008 (SI 2008/489).

<sup>130</sup> The provisions of ss 69–74 are supplemented by the Company Names Adjudicator Rules 2008 (SI 2008/1738), made pursuant to s 71, which came into force on 1 October 2008. Section 82 is supplemented by the Companies (Trading Disclosures) Regulations 2008 (SI 2008/495), which came into force on 1 October 2008 and the Companies (Trading Disclosures) (Amendment) Regulations 2008 (laid in draft before Parliament) which come into force on 1 October 2009.

<sup>131</sup> 2006 Act Commencement Order No 7, arts 2(a)–(c); the Companies (Reduction of Share Capital) Order 2008 (SI 2008/1915).

<sup>132</sup> 2006 Act Commencement Order No 5, arts 5(2) and 8(b) and Schedule 3.

<sup>133</sup> 2006 Act Commencement Order No 8. 2006 Act, Part 13 (resolutions and meetings), ss 327(2)(c) and 330(6)(c) concerning polls are not being commenced for the time being.



### (3) Interpretation of the Companies Act 2006

**1.48** The Government's intention was that the Companies Act 2006 should be drafted 'in clear, concise and unambiguous language which can be readily understood by those involved in business enterprise'.<sup>134</sup> The 2006 Act not only includes the new reforming provisions, described in paragraphs 1.15–1.38 above, but also restates some of the provisions of the 1985 and 1989 Acts, rewriting them to make them simpler and easier to understand.<sup>135</sup> In February 2007 the Government published Explanatory Notes on the Act and tables of derivations and destinations. Three words are used in the table of derivations to identify provisions in the 2006 Act that do not re-enact the previous provisions without change:

- 'drafting' This indicates a new provision of a mechanical or editorial nature (such as a definition used to avoid repetition).
- 'changed' This means that the provision has been re-enacted with one or more primary, and not just consequential, changes.
- 'new' This indicates a provision which has no predecessor in the repealed legislation or which is fundamentally different from its predecessor.

The table of destinations uses the word 'repealed' to identify provisions in the 1985 Act, the Business Names Act 1985, and the 1989 Act, in force on 8 November 2006, which are repealed by the 2006 Act and not re-enacted, even in amended form.

**1.49** Despite the Government's intentions and the assistance in understanding the 2006 Act it has provided, it is to be expected that unusual factual situations will expose difficulties of construction. In order to understand the background to, and objective of, particular provisions, reference may be made to the reports of the Law Commission, the reports of the CLR and the White Papers, which are described in Chapter 2, Section E, and also to the Explanatory Notes on the Act, published by the Government after it received the Royal Assent.<sup>136</sup>

**1.50** To give guidance on the new statutory statement of duties of company directors, in June 2007 the Government published extracts of statements made by Ministers in Parliament during the passage of the Bill. Whether or not any of these statements may be admissible in court proceedings under the rule established by *Pepper v Hart*<sup>137</sup> the statements are likely to be a useful guide to understanding the 2006 Act and so many of them are quoted in this work.

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<sup>134</sup> *Modern Company Law for a Competitive Economy* (March 1998) at para 5.2(c).

<sup>135</sup> Explanatory memorandum to the 2006 Act Commencement Order No 1 at para 4.1.

<sup>136</sup> The court may refer to this material in order to interpret the Act: *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, HL, per Lord Nicholls at para 56; and for explanatory notes *R (Westminster County Court) v National Asylum Service* [2002] 1 WLR 2956, HL, per Lord Steyn at paras 4–6.

<sup>137</sup> [1993] AC 593, HL.

It is clear that the 2006 Act is intended to mark a new chapter in company law, freed from many of the restrictions and complications of the previous law. Since the 2006 Act combines old and new provisions, difficulties of interpretation or of application of the provisions to particular circumstances may arise. If there are any ambiguities, the court will no doubt prefer the interpretation which furthers rather than hinders the Government's stated aim of providing a framework which 'facilitates enterprise and promotes transparency and fair dealing'.<sup>138</sup> **1.51**

The 2006 Act may be compared with the Insolvency Act 1986, since the latter Act includes not only reforms made by the Insolvency Act 1985 in the light of the report of the Cork Committee (1982, Cmnd 6659), but also provisions about insolvency which derived from the Companies Act 1985 and some provisions about personal bankruptcy which derived from the Bankruptcy Act 1914. The approach of the court to issues of interpretation of the Insolvency Act may be instructive in relation to the 2006 Act. **1.52**

In *Smith v Braintree District Council*<sup>139</sup> Lord Jauncey of Tullichettle (with whom the other Lords agreed) construed a section of the Insolvency Act as a piece of new legislation without regard to 19<sup>th</sup> century authorities or similar provisions of repealed Bankruptcy Acts', having regard to changes in policy shown by the new Act in relation to that provision. **1.53**

In *Re a Debtor (No 784 of 1991)*<sup>140</sup> Hoffmann J, having referred to Lord Jauncey's speech in *Smith* and other authorities, said: 'Those authorities show that, in approaching the language of the Act of 1986, one must pay particular attention to the purposes and policies of its own provisions and be wary of simply carrying over uncritically meanings which had been given to similar words in the earlier Act. It does not, however, mean that the language of the new Act comes to one entirely free of any of the intellectual freight which was carried by words and phrases in earlier bankruptcy or other legislation.' Where there is nothing in the policy of the new Act to indicate that words taken from the old Act should bear a different meaning, they should be interpreted in the same way as in the old Act. **1.54**

In *Bishopsgate Investment Ltd v Maxwell*,<sup>141</sup> a case concerning an application for a private examination under s 236, Dillon LJ said: '... there can be no doubt that the primary task of the court is to construe the Insolvency Act 1986 as it stands, without regard to the legislative histories of its various components ... Even so, **1.55**

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<sup>138</sup> Foreword of the President of the Board of Trade (Margaret Beckett) to *Modern Company Law for a Competitive Economy* (March 1998); also paras 3.1, 3.8, 5.1, and 5.2.

<sup>139</sup> [1990] 2 AC 215, 238, HL.

<sup>140</sup> [1992] Ch 554, 558, 559; cited with approval by Ferris J in *Woodland-Ferrari v UCL Group Retirement Scheme* [2003] Ch 115 at para 41.

<sup>141</sup> [1993] Ch 1, 21, CA.

I have found it essential in the present case to consider the legislative antecedents of the Act of 1986, and the cases decided under them, partly to see how certain provisions of the Act of 1986 can, in the light of previous decisions under the earlier statutes, be expected to fit together, but even more to see what the mischief was in the old law which the Act of 1986 was intended to cure.’

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