



Company

It is Company Law – But not as we know it

The laws regarding the administration and governance of companies in England have at least one thing in common with the railways, the sewers and the water mains. They are essentially early Victorian in origin. This has long been recognised as less than ideal. There was a substantive attempt to revise company law following the Jenkins Report in 1962. This had to be abandoned, as have a number of later more limited proposals.

The Companies Act 2006

Recognising the need for the business community to compete in an environment dominated by the internet and other manifestations of information technology, the Government commissioned a wide ranging review of company law in 1998. Thousands of pages of reviews analysed the legal systems adopted in almost every one of the common law systems, including component parts of the United States, Australia and New Zealand and compared and contrasted these with the codified systems of continental Europe. The Law Commission then reviewed the results. This analysis runs to thousands of pages of closely analysed argument.

The result was that in November 2005 a Company Law Reform Bill was introduced into the House of Lords. During its passage through Parliament due to end in November, it was decided to consolidate this Bill with provisions of the Companies Acts 1985 - 89. The Companies Act 2006 ("the Act") has now received the Royal Assent. The intention is that all its major provisions be implemented by October 2008 and significant provisions regarding directors' duties in 2007. However, some EU-derived provisions came into effect immediately. The proposed timetable for implementation was announced at the end of February 2007.

The effect of the Act cannot be over estimated. It is proposed that almost every aspect of corporate administration, liability and obligation will be changed. Any pre-conception held by any person as to the structure, function or administration of a company will or could be rendered obsolete by the prospective implementation of the Act.

It represents the biggest overall change to company law since the Joint Stock Companies Act 1856. However, the Act is not intended to be an end in itself, but part of an evolving process.

Directors and Secretaries

- Directors' duties and obligations will be statutorily defined. These will relate to both form and substance, conduct towards employees, treatment of the environment and various unstated other obligations. These duties will be owed to the company in question alone but that is not the full story as there will be new provisions in relation to derivative actions by shareholders on behalf of companies, referred to below. Sadly the opportunity has not been taken to provide for a differentiation between the duties of executive and non-executive directors. This does not help with the operation of the corporate codes produced by the United Kingdom Listing Authority and institutional investors' representatives.
- In relation to the new statutory duties (the bulk of the provisions of which are intended to come into force in October 2007), any director must act in what he considers good faith to promote the success of the company in question. He must have regard, among other things (unspecified) to:-
 - the long term consequences
 - the company's employees
 - relations with suppliers, customers "and others" (again unspecified)
 - the impact on the community and the environment

- the desirability of the company maintaining a reputation for high standards of business conduct
- the need to act fairly between members.

The need for being seen to be doing all this is one issue. The others include what a disgruntled shareholder might try to make of it.

- There is to be a minimum age of 16 for directors.
- Regulations will provide that in certain circumstances directors will not have to disclose their home addresses.
- Service contracts more than two years in length will require shareholders' approval.
- Loans to directors will now be permitted but will require shareholders' approval. In practice many directors have been unaware of the general prohibition on loans to directors set out in the Companies Act 1985.
- Listed company directors will incur personal responsibility for information required to be disclosed under the EU Transparency Directive (including accounting information).
- Private companies will no longer need a secretary. Quite why one should be advised to dispense with a company secretary is uncertain. Someone has to do the job and, so far as we are aware, there has never been any particular band-wagon about the nefarious role of company secretaries.

Shareholders

Shareholders will acquire:-

- Rights covering derivative actions. The shareholder in question will need to persuade a Court that they have a prima facie case but can, of course, invite the Court to consider the obligations the directors owe under the statutory duty provisions. The Government has announced its intention to implement these provisions in October 2007.
- Powers to require that information is sent to nominees in relation to quoted companies.
- Obligations – for example, institutions will have to disclose their voting decisions (although detailed rules have yet to be made).

The Company

- Memoranda of Association are to be changed. They will now relate only to the status of the company when originally incorporated. New companies will be presumed to have corporate capacity to do any legal actions.
- Articles of Association will be allowed to contain entrenched rights which cannot be changed.
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Pro forma Articles of Association will be re-written in short form (although you have to change them first).

- There are to be new rules on issues and authority to allot shares.
- The general prohibition on financial assistance in relation to the acquisition of shares is to be relaxed. Private companies will be able to do this provided the directors swear a declaration of solvency.
- The Law Commissions' Report on company charges made suggestions which have not been included in the Act. This may be enacted when the electronic filing of charges with the Land Registry has been implemented. These are intended to be based on a notice priority based system. Instead, the current law has been restated.

Public Companies

- The EU Take-Over Directive will be implemented in full in April 2007. Currently only listed companies are affected by the Interim Regulations. The new statutory rules (including fines for misleading documents) will be applied by the Act.
- The Transparency Directive in relation to a disclosure of information regarding listed companies is to be implemented. This will include personal liabilities for directors.
- Revised "squeeze out" and "sell out" provisions are to be adopted.

Conclusions

- Companies incorporated under the new legislation will have a different structure and (unless they choose to limit this) unlimited corporate capacity. There will no longer be an authorised share capital.
- Existing companies will need to consider whether and how they can take advantage of some or all of the changes to be introduced by the Act.
- For directors of companies, life just got harder, how much so will depend upon regulations yet to be made, and what the judges make of it.

This bulletin contains a summary of prospective legal changes, which will involve extensive public discussion. Some provisions set out in statutes (for example, company charges in the 1989 Act, unlisted securities in the Financial Services Act 1986) have even been abandoned. Specific advice in relation to individual companies' circumstances is required. For further information and advice in connection with the Act, please be in touch with your usual contact in the Company and Commercial Department, or otherwise Max Hudson on 0207 465 4319 or mhudson@phb.co.uk