These notes refer to the Companies Act 2006 (c.46)
which received Royal Assent on 8 November 2006

COMPANIES ACT 2006

EXPLANATORY NOTES

TERRITORIAL EXTENT AND DEVOLUTION

Northern Ireland

12. Company law is a transferred matter. Currently, the provisions of GB company law are generally replicated, some time later, in separate Northern Ireland legislation. The Act provides for a single company law regime applying to the whole of the UK, so that companies will be UK companies rather than GB companies or Northern Ireland companies as at present. This does not affect the legislative competence of Northern Ireland: company law remains a transferred matter, and the Act could be separately amended or repealed in Northern Ireland if that were so desired.

13. Where a note describes a particular section as restating or replacing a provision in the 1985 Act, the 1989 Act or the C(AICE)Act 2004, this should be read as applying equally to the corresponding provision of the Companies (Northern Ireland) Order 1986, the Companies (Northern Ireland) Order 1990 or the Companies (Audit, Investigations and Community Enterprise) Order 2005.

Scotland

14. Company law is a reserved matter and Companies Acts extend to the whole of Great Britain. However, there are several areas where, in legislating about companies, the Act deals with matters that are devolved:

- changes (in Part 41) to the regulation of business names (a devolved matter) – these correspond to changes (in Part 5) to the regulation of company names (a reserved matter);
- statutory guidance to prosecutors and other enforcement authorities in relation to a new offence of knowingly or recklessly causing an audit report to be misleading, false or deceptive – although the offence itself is a reserved matter, guidance is to be issued by the Lord Advocate in Scotland (see section 509);
- changes relating to exemptions from audit requirements for companies that are charities (see section 1175);
- conferral of a power on the Auditor General for Scotland to specify public bodies for his audit (see section 483).

These were the subject of a legislative consent motion agreed to by the Scottish Parliament on 16 March 2006.

Wales

15. Company law is not transferred to the Welsh Assembly. There are no provisions that impact on devolved competences**.**

Crown Dependencies

16. Part 28 of the Act (takeovers) contains provision enabling it to be extended by Order in Council to the Isle of Man or any of the Channel Islands. This reflects the existing jurisdiction of the Takeover Panel (as the takeover regulator) and has been agreed by the relevant Island authorities. If the power were to be exercised, there would be further consultation with the Island authorities beforehand.

Part 1: General Introductory Provisions

Section 1: Companies

17. This section restates section 735(1)(a) and (b) of the 1985 Act. It defines "company" and provides signposts to provisions in the Act which relate to companies that are registered but not formed under the Act or former Companies Acts, to unregistered companies and to overseas companies.

Section 2: The Companies Acts

18. This section replaces section 744 of the 1985 Act. The Act does not restate or replace all existing companies legislation and section 2 makes it clear that any reference to "Companies Acts" in the Act includes those provisions of the Acts listed in *subsection (1)(c)* that remain in force as well as the company law provisions of the Act and Part 2 of the C(AICE) Act 2004.

19. The CLR recommended that the law should provide for the formation of new companies of each of the types that are currently available (Final Report, paragraph 9.2). This recommendation is taken forward in the following group of sections, which retains all of the current forms of companies.

Section 3: Limited and unlimited companies

20. This section restates section 1(2) of the 1985 Act. It updates the Companies Acts definitions of "limited company" and "unlimited company" to reflect changes to what is to be included in a company's memorandum of association (see section 8). As now, a company may be limited by shares or by guarantee. Where there is no limit on the liability of the company's members, a company is an "unlimited company."

Section 4: Private and public companies

21. This section restates section 1(3) of the 1985 Act. It provides definitions of "private company" and "public company."

22. A "private company" is any company that is not a public company.

23. A "public company" is a company whose certificate of incorporation states that it is a public company. To obtain this certificate the company will need to comply with the provisions of the Act (or former Companies Acts) as regards registration or re-registration as a public company. There is a minimum share capital requirement (the "authorised minimum"), which is currently set at £50,000, and remains unchanged under the Act. In future the authorised minimum will however be capable of being satisfied in sterling or the euro equivalent to the prescribed sterling amount (see Chapter 2 of Part 20).

24. Section 4 also provides a signpost to Part 20 of the Act, which sets out key differences between public and private companies, for example, a private company may not offer shares to the public.

Section 5: Companies limited by guarantee and having share capital

25. This section restates section 1(4) and section 15(2) of the 1985 Act. It makes it clear that a company can no longer be formed (or re-register) as a company limited by guarantee and with a share capital. This provision has been in force in Great Britain since 22nd December 1980 and in Northern Ireland since 1st July 1983.

Section 6: Community interest companies

26. The C(AICE) Act 2004 came fully into force on 1 July 2005. Part 2 of that Act created a new company vehicle, the "community interest company" or "c.i.c.", which is designed for use by social enterprises.

27. This section provides a signpost to the provisions in the C(AICE) Act, which enable a company to be formed as or become a community interest company. Such companies are registered under the same legislation as other registered companies, but have to complete certain additional formalities and are subject to certain additional elements of regulation. *Subsection (2)* of this section highlights the fact that in some respects the requirements imposed on community interest companies are different from the requirements imposed on other registered companies.

Part 2: Company Formation

28. This Part of the Act is about how companies are formed. It replaces or, as the case may be, restates equivalent provisions in the 1985 Act.

Section 7: Method of forming company

29. This section replaces sections 1(1) of the 1985 Act. It retains the current requirement that individuals who wish to form a company must subscribe their names to the memorandum of association ("memorandum"). *Subsection (1)* introduces the new provisions about forming a company. In line with the recommendations of the CLR, it is provided that a single person is able to form any sort of company (not just a private company) (Final Report, paragraph 9.2).

30. *Subsection (2)* reproduces the existing requirement that a company may not be formed for an unlawful purpose.

Section 8: Memorandum of association

31. This section replaces section 3(1) of the 1985 Act.

32. Under the Act, the memorandum serves a more limited, but nonetheless important, purpose: it evidences the intention of the subscribers to the memorandum to form a company and become members of that company on formation. In the case of a company that is to be limited by shares, the memorandum will also provide evidence of the members' agreement to take at least one share each in the company.

33. The memorandum of a company formed under the Act will, therefore, look very different from that of a company registered under the 1985 Act. In addition it will not be possible to amend or update the memorandum of a company formed under the Act.

34. These changes to the memorandum are based on the CLR's recommendation that there should be a single constitution (Final Report, paragraph 9.4). In line with the principles behind this recommendation, in future key information regarding the internal allocation of powers between the directors and members of a company will be set out in one place: the articles of association ("articles").

35. By virtue of section 28, provisions in the memoranda of existing companies will be treated as provisions in the articles if they are of a type that will not in be in the memoranda of companies formed under the Act. Existing companies will, therefore,

not be required to amend their articles to reflect these changes, but they can do so if they wish. They will however be able to alter or update provisions in their constitution which are now set out in their memoranda by amending their articles, for example to reflect changes to the law made by the Act.

Section 9: Registration documents

36. This section replaces various provisions in sections 2 and 10 of the 1985 Act. It prescribes the types of information or "documents" that must be delivered to the registrar when an application for registration is made and the registrar to whom the information must be delivered.

37. The changes to the way in which certain information is delivered to the registrar are required as a result of the changes that have been made to the memorandum. In future, information which is currently set out in the memorandum will be provided to the registrar in accordance with the provisions of this section, which prescribes, amongst other things, the contents of the application for registration. In all cases this application must state:

- the company's proposed name;
- whether the company's registered office is to be situated in England and Wales (or Wales), in Scotland or in Northern Ireland;
- whether the liability of the company's members is to be limited and if so whether it is to be limited by shares or by guarantee;
- whether the company is to be a private or a public company.

38. In the case of a company that is to have a share capital, the application must also contain a statement of capital and initial shareholdings (see section 10). In the case of a company that is to be limited by guarantee the application must also contain a statement of guarantee (see section 11).

39. In all cases the application must also contain a statement of the company's proposed officers (see section 12) and a statement of the intended address of the company's registered office (that is, the postal address of the company's registered office as opposed to a statement confirming the jurisdiction in which the company's registered office is to be situated – which is also required).

40. The application for registration must also contain a copy of any proposed articles (to the extent that the company does not intend to use the model articles (see sections 19 and 20) and must be accompanied by the memorandum (see*subsection (1)*) of this section and a statement of compliance (see section 13).

41. In future it will be possible to form a company on-line and the various types of information referred to in the section are, therefore, capable of being delivered as a series of data entries as well as in paper or such other form as the registrar may permit or prescribe. The registrar has power under section 1068 to prescribe the form and manner in which documents are to be delivered to her.

Section 10: Statement of capital and initial shareholdings

42. This section is a new provision. It sets out the contents of the statement of capital and initial shareholdings.

43. Currently, in the case of a limited company with a share capital the memorandum is required to state the amount of the share capital with which the company proposes to be registered and the nominal amount of each of its shares. This is known as the "authorised share capital" and acts as a ceiling on the amount of capital which can be issued (although this limit can be increased by ordinary resolution). The CLR recommended

that the requirement for a company to have an authorised share capital should be abolished (Final Report, paragraph 10.6).

44. The Act gives effect to this recommendation and in future, information about the shares subscribed for by the subscribers to the memorandum, which is currently set out in the memorandum itself, will be provided to the registrar in the statement of capital and initial shareholdings.

45. Like the statement of guarantee (see section 11), the statement of capital and initial shareholdings must contain such information as may be prescribed by the Secretary of State, in regulations made under the Act, for the purpose of identifying the subscribers to the memorandum (i.e. the founder members of the company).

46. The statement of capital and initial shareholdings is essentially a "snapshot" of a company's share capital at the point of registration. For public companies, this requirement is linked to the abolition of authorised share capital (see above). It implements (as far as public companies are concerned) Article 2 of the Second Company Law Directive (77/91/EC) (the "Second Directive") which states:

""the statutes or instruments of incorporation of the company shall always give at least the following information…(c) when the company has no authorized capital, the amount of the subscribed capital….".

47. The statement of capital and initial shareholdings must contain the following information:

- the total number of shares of the company to be taken on formation by the subscribers to the memorandum;
- the aggregate nominal value of those shares;
- for each class of shares: prescribed particulars of the rights attached to those shares, the total number of shares of that class and the aggregate nominal value of shares of that class; and
- the amount to be paid up and the amount (if any) to be unpaid on each share (whether on account of the nominal value of the shares or by way of premium).

48. The reference to "*prescribed particulars of the rights attached to the shares*" in this section (and elsewhere in the Act where a statement of capital is called for), refers to such particulars as may be prescribed by the Secretary of State by statutory instrument (see section 1167).

49. Whilst the Second Directive only applies to public companies it is important that the information on the public register is up-to-date for both public and private companies. A statement of capital will, therefore, be required where it is proposed that a company formed under the Act will have a share capital on formation and, with limited exceptions (in particular, where there has been a variation of class rights which does not affect the company's aggregate subscribed capital) whenever a limited company having a share capital makes an alteration to its share capital (and in certain cases where an unlimited company makes a return to the registrar).

Section 11: Statement of guarantee

50. This section replaces section 2(4) of the 1985 Act. It sets out the contents of the statement of guarantee that must accompany the application for registration where it is proposed that a company will be limited by guarantee on formation.

51. The statement of guarantee is essentially an undertaking, given by the founder members of the company, to contribute to the assets of the company up to a specified amount in the event of it being wound up. New members must also agree to make the same contribution.

52. A member of a company limited by guarantee is only liable to contribute to the assets of a company if it is wound up during the time that he is a member or within one year of him ceasing to be a member.

53. Like the statement of capital and initial shareholdings the statement of guarantee must contain such information as may be prescribed by the Secretary of State, in regulations made under the Act, for the purposes of identifying the subscribers to the memorandum (i.e. the founder members of the company).

Section 12: Statement of proposed officers

54. This section replaces section 10(2) and (3) of the 1985 Act and contains a new provision. Under section 10, details of the first director(s) and the secretary or joint secretaries must be given to the registrar at the time of application for registration. That requirement is carried forward but there are two changes:

- firstly, to the required particulars. These are specified in relation to directors in sections 163 to 166. The main change is that a service address must be provided for each director who is a natural person. This is in addition to the requirement for the usual residential address;
- secondly, as recommended by the CLR (Final Report, paragraph 4.7), there is no requirement for a private company to have a company secretary but it may do so if it wishes (see section 270(1)). As now, a company which proposes to be registered as a public company must have a company secretary (see section 271).

Section 13: Statement of compliance

55. This section replaces section 12(3) and (3A) of the 1985 Act. At present, where an application for registration of a company is made in paper form, the application must be accompanied by a statutory declaration (made before a solicitor or commissioner of oaths) confirming that the requirements of the 1985 Act in respect of registration, and of matters precedent and incidental to it, have been complied with (see section 12(1) of that Act). This statutory declaration must be made by one of the persons whom it is proposed will be a founder director or secretary of the company (that is, on registration) or a solicitor engaged in the formation of the company.

56. Where the application for registration is made in electronic form, in place of the statutory declaration required under section 12(3) of the 1985 Act, the same persons may, alternatively, deliver an "electronic statement" to the registrar. This statement must confirm that the requirements referred to in section 12(1) have been met.

57. Based on the recommendations of the CLR (Final Report, paragraph 9.5), the current requirement for a statutory declaration or electronic statement, here and elsewhere in the Act, is replaced by a requirement to make a statement of compliance. This statement does not need to be witnessed and may be made in paper or electronic form. It will be for the registrar's rules under section 1068 to specify who may make this statement (and the form of it). As with all documents delivered to, or statements made to, the registrar, it is an offence to make a false statement of compliance – see section 1112.

Section 14: Registration

58. This section restates section 12(1) and (2) of the 1985 Act. As now, where the registrar is satisfied that all of the requirements of the Act as to registration have been met she will register the documents delivered to her and issue a certificate of incorporation under section 15.

Section 15: Issue of certificate of incorporation

59. This section restates section 13(1)(2) and (7)(a) of the 1985 Act and contains a new provision in *subsection (2)*, which prescribes the contents of the certificate of

incorporation issued by the registrar on registration of a company. The certificate of incorporation is conclusive evidence that the requirements of the Act as to registration have been met, that the company has been registered, and (where relevant) that the company has been registered as a limited company or a public company.

60. There is one change to what the certificate of incorporation is required to state: in future this will include details of whether the company's registered office is situated in England and Wales (or in Wales), in Scotland or in Northern Ireland. The certificate will also state, where the company is limited, whether it is limited by shares or by guarantee.

Section 16: Effect of registration

61. This section replaces section 13(3) to (5) of the 1985 Act. It provides, amongst other things, that the subscribers to the memorandum, together with such other persons as may from time to time become members of a company, are a body corporate by the name stated in the certificate of incorporation and, in the case of a company having a share capital, that the subscribers to the memorandum become holders of the shares specified in the statement of capital and initial shareholdings. This means that on registration a company becomes a legal person in its own right, which is distinct from the people who own it (the members) and the people who manage it (the directors).

Part 3: a Company's Constitution

62. This Part deals with various matters relating to a company's constitution. It replaces similar provisions in the 1985 Act. It starts by defining (non-exhaustively) "*a company's constitution*" and then makes provision about the main constituent parts of a company's constitution (the articles of association and certain classes of members' resolutions and agreements), including their legal effects, how they are to be notified to the registrar and made available to members, and how changes to them are to be dealt with.

Chapter 1: Introductory

Section 17: A company's constitution

63. This section is a new provision. It sets out a definition of "*a company's constitution*" which will apply throughout the Act, and the other "Companies Acts" (defined in section 2), unless the context requires a wider or more restricted meaning (see for example section 257, which expands the definition of a company's constitution for the purposes of Part 10). The concepts of a company's constitution and the rights and obligations arising under it are used both in this Part and elsewhere in the Act.

64. The definition is expressed to be non-exhaustive. In addition to the provisions of companies' articles and the resolutions and agreements to which Chapter 3 of this Part applies (described in section 29), the contents of certain other documents are clearly of constitutional relevance for certain purposes. For example the certificate of incorporation summarises key information pertaining to the company such as whether it is public or private limited – see section 15.

Chapter 2: Articles of Association

65. A company's articles are rules, chosen by the company's members, which govern a company's internal affairs. They form a statutory contract between the company and its members, and between each of the members in their capacity as members, and are an integral part of a company's constitution. At present, companies may divide their constitutional rules between their memoranda and their articles, with the terms of their memoranda being capable of being altered after formation in some respects but not in others. In future, the memorandum will be a very simple document of purely historic significance, evidencing an intention to form a company, and all the company's key

internal rules on matters such as the allocation of powers between the members of a company and its directors will be set out in the articles – see notes on sections 8 and 28.

Section 18: Articles of association

66. This section replaces section 7(1) and (3) and section 744 of the 1985 Act. It carries forward the requirement that all registered companies must have articles. The provisions of this section have been updated to reflect the changes made by section 19, which gives the Secretary of State the power to prescribe "default" model articles for different descriptions of companies. As a result of this change, some types of company that are currently required to register articles with the relevant registrar of companies (for example, private companies limited by guarantee) will have the option of not registering articles but relying on the "relevant model articles" for that description of company.

67. As now, the articles must be contained in a single document and must be divided into consecutively numbered paragraphs.

68. Generally speaking, companies formed under the 1985 Act have freedom to make such rules about their internal affairs as they see fit, subject to the qualification that if a company's articles contain anything that is contrary to the provisions of that Act, or against the general law, then it will have no effect. This principle will also apply to the articles of companies which are formed and registered under the Act.

Section 19: Power of Secretary of State to prescribe model articles

Section 20: Default application of model articles

69. Section 8 of the 1985 Act enables the Secretary of State to prescribe model forms of articles for companies registered under that Act (see the Companies (Tables A to F) Regulations 1985 (SI 1985/805)). Articles for certain special types of companies used in particular sectors, for example, commonhold associations, right to manage ("RTM") companies, and right to enfranchise ("RTE") companies are prescribed by regulations made under the Acts of Parliament that created these types of company.

70. Although sections 8 and 8A of the 1985 Act allow the Secretary of State to prescribe forms of articles (and memoranda) for a number of different types of company under section 8, he is only able to prescribe "default" model articles for companies limited by shares. "Default" model articles are model articles which apply to companies of a particular description where they have not registered any articles of their own, or have not made provision for a particular matter for which there is a corresponding model article. "Default" model articles apply to a company of the description for which they are prescribed only to the extent that it has not modified the default provision in question in its own registered articles or excluded it, or the model articles in their entirety, from the registered articles.

71. The rationale behind this is that the model articles should operate as a "safety net" which enables the members and directors of such companies to take decisions in circumstances where a company has failed to provide the appropriate authority in its registered articles (or failed to register articles at all).

72. These two sections replace section 8 of the 1985 Act. In line with the CLR's recommendations (Company Formation and Capital Maintenance, paragraph 2.22), the Secretary of State will have the power to prescribe model articles, including "default" model articles, for different descriptions of companies formed under the Act.

73. For existing companies, there will be no change. The principle is maintained that the version of the model articles that was in force at the time that a particular company was originally registered will continue to apply to that company. For the majority of companies limited by shares on the register at the date that the Act comes into force, the

"default" model articles will continue to be the Companies Act 1985 Table A ("Table A").

74. Existing companies will be free to adopt, wholly or in part, the model articles prescribed for companies of a particular description formed under the Act (see *subsection (3)* of section 19). For example, an existing private company limited by shares may prefer to adopt the new model articles for private companies limited by shares, or indeed the new model articles for public companies formed under the Act (with or without modification) in place of the current Table A articles, or previous articles of its own devising.

75. As with Table A, the adoption of model articles by companies formed under the Act will be entirely a matter for individual companies. They will be able to incorporate (with or without amendment) provisions from the model articles, and/or add to those provisions, and/or exclude such provisions as they think fit.

76. They will also be able to adopt the provisions of model articles by reference. This is a common practice, which enables a company that wishes to incorporate specific provisions of the model articles into its own registered articles to do this without having to copy out the provision in question. To take an example, a company's registered articles may say something to the following effect: "*the model articles apply except for articles x, y and z*", or "*the company's articles are A, B and C, plus model articles g, p and q. Model article n applies but is amended as follows*: …". Companies have found such techniques useful in the past and they will continue to be permitted.

Section 21: Amendment of articles

77. *Subsection (1)* provides that, as now, a company's articles can in general be amended by special resolution. This restates section 9(1) of the 1985 Act.

78. *Subsections (2) and (3)* make it clear that this general principle is subject to certain rules in charities legislation about the ability of companies which are charities to change their constitutions and the effects which such changes have. There are separate but broadly similar rules for English and Welsh, Scottish and Northern Irish charities.

Section 22: Entrenched provisions of the articles

79. Section 22 is a new provision. It replaces the current practice (provided for in section 17(2)(b) of the 1985 Act), whereby companies are able to entrench certain elements of their constitution by putting them in their memoranda and providing that they cannot be altered.

80. This section permits companies to provide in their articles that specified provisions may be amended or repealed only if conditions are met that are more restrictive than would apply in the case of a special resolution. Such a provision is referred to as a "provision for entrenchment". As a result of this section companies formed under the Act will not be permitted to provide in their articles that an entrenched provision can never be repealed or amended.

Section 23: Notice to registrar of existence of restriction on amendment of articles

81. This is a new provision that requires a company to give notice to the registrar when an entrenching provision is included in its articles (whether on formation or subsequently) or where the company's articles are altered by order of a court or other authority so as to restrict or exclude the power of the company to amend its articles. There is a corresponding requirement as to notice where the company amends its articles so as to remove a provision for entrenchment or where the articles are altered by order of a court or other authority so as to remove a provision for entrenchment or any other restriction on, or any exclusion of, the power of the company to amend its articles.

Section 24: Statement of compliance where amendment of articles restricted

82. This is a new provision. Where a company's articles contain provision for entrenchment or where the articles are subject to an order of a court or other authority restricting or excluding the company's power to amend its articles and the company subsequently amends its articles, it is required to send to the registrar the document making or evidencing the amendment. This document must be accompanied by a "statement of compliance" (see note on section 13).

83. The statement of compliance must certify that the amendment to the articles has been made in accordance with the company's articles (including any provision for entrenchment) or, where relevant, in accordance with any order of the court or other authority that is in force at the time of the amendment.

84. The purpose of the provisions in sections 23 and 24 is to ensure that the registrar, and any person searching the public register, is on notice that the articles contain entrenching provisions and that special rules therefore apply to the company's articles.

Section 25: Effect of alteration of articles on company's members

85. This section restates section 16 of the 1985 Act. The only difference is that section 16 also applied to alterations of a company's memorandum. A company formed under the Act will not be able to (or need to) alter its memorandum.

86. This section retains the principle that a member of a company is not bound by any alteration made to the articles subsequent to his becoming a member if the alteration has the effect of increasing his liability to the company or requires him to take more shares in the company. A member may however give his written consent to such an alteration and, where he does, he will be bound by it.

Section 26: Registrar to be sent copy of amended articles

87. The First Company Law Directive (68/151/EEC) requires Member States to take such measures as are required to ensure that companies disclose certain constitutional information which will then be made available to the public in a central register. In particular, companies are to be required to disclose (i) their "*instrument of constitution, and the statutes if they are contained in a separate instrument*"; (ii) *any amendments to these instruments*; and (iii) "*after every [such] amendment…the complete text of the instrument or statutes as amended to date*". For UK companies, the "instrument of constitution" equates to the memorandum and the "statutes" equate to the articles. The central registers are those kept by the registrars of companies for England and Wales, Scotland and Northern Ireland.

88. This section replaces equivalent provisions in section 18(2) and (3) of the 1985 Act and Schedule 24 to that Act.

89. Where a company fails to comply with the provisions of this section, the company and every officer of the company who is in default commits an offence. The penalty for this offence is set out in *subsection (4)*.

Section 27: Registrar's notice to comply in case of failure with respect to amended articles

90. This section is a new provision. It gives the registrar a means of ensuring that companies comply with the obligation set out in section 26 without having to resort to criminal proceedings. (However, the offence of failing to file amended articles is retained: see of section 26(3)).

91. Where the registrar becomes aware of any default in complying with section 26 (or any similar provision of another enactment that was in force at the time of the default, for example, section 18(2) of the 1985 Act), she may give notice to the company requiring

it to rectify the breach within 28 days. Where the company complies with the notice, the company will avoid prosecution for its initial failure to comply. If the company does not comply, it will be liable to a civil penalty of £200, recoverable by the registrar as a debt, in addition to any criminal penalty that may be imposed (see, for example, section 26(4)).

Section 28: Existing companies: provisions of memorandum treated as provisions of articles

92. For companies formed under the Act, the memorandum will contain limited information evidencing the intention of the founder members to form a company. The memoranda of existing companies, on the other hand, will contain key constitutional information of a type which will in future be set out in the articles or provided to the registrar in another format (see Part 2). *Subsection (1)* of this section provides that such material is to be treated for the future as part of the company's articles.

93. *Subsection (2)* of this section makes it clear that where the memorandum of an existing company contains a provision for entrenchment (see note on section 22) at the date that this part of the Act comes into force, this will be deemed, with effect from that date, to be a provision for entrenchment in the company's articles.

Chapter 3: Resolutions and Agreements Affecting a Company's Constitution

94. This Chapter replaces equivalent provisions in the 1985 Act on the registration of resolutions and agreements and on making these available to members.

Section 29: Resolutions and agreements affecting a company's constitution

95. This section replaces section 380(4) and (4A) of the 1985 Act. It lists the resolutions and agreements that must be forwarded to the registrar for registration (see section 30) and made available to members on request (see section 32).

Section 30: Copies of resolutions or agreements to be forwarded to registrar

96. This section restates section 380 (1), (5) and (7) of the 1985 Act and Schedule 24 to that Act. Where a company passes a resolution or enters into an agreement of the type listed in section 29, it must forward a copy of the resolution or agreement to the registrar for registration within 15 days of the date on which the resolution was passed. If a company fails to do this, the company, and every officer of it who is in default, commits an offence. For the penalty, see *subsection (3)*.

97. Where a resolution or agreement which affects a company's constitution is not in writing, the company is required to provide the registrar with a written memorandum setting out the terms of the resolution or agreement in question.

Chapter 4: Miscellaneous and Supplementary Provisions

Section 31: Statement of company's objects

98. This section provides for a new approach to the question of a company's objects. Under the 1985 Act all companies are required to have objects and these objects are required to be specified in the memorandum. The 1985 Act also makes specific provision for where a company states its objects to be to carry on business as a general commercial company (see section 3A of the 1985 Act).

99. Based on a recommendation of the CLR (Final Report, paragraph 9.10), under the Act a different approach is taken. Instead of companies being required to specify their objects, companies will have unrestricted objects unless the objects are specifically restricted by the articles (see *subsection (1)*). This will mean that unless a company makes a deliberate choice to restrict its objects, the objects will have no bearing on what it can do.

Some companies will continue to restrict their objects. Companies that are charities will need to restrict their objects (under charities legislation) and some community interest companies may also choose to do so.

100. *Subsection (2)* provides that where a company changes its articles to add, remove or alter a statement of the company's objects, it must give notice to the registrar. The registrar is to register that notice, and the alteration does not take effect until it has been so registered.

101. *Subsection (3)* ensures that such an amendment to the company's articles will not affect any rights or obligations of the company or render defective any legal proceedings by or against it.

102. For companies which are charities, the effect of this section is subject to section 64 of the Charities Act 1993 in England and Wales and in Northern Ireland subject to the Charities (Northern Ireland) Order 1987 (SI 1987/2048 (NI 19)) (*subsection (4)*).

103. *Subsection (5)* makes equivalent provision for Scotland. These provisions impose additional requirements in the case of companies which are charities when changing certain aspects of their constitutions, including their objects.

104. The directors of a company are under a duty to observe the company's constitution (see section 171) although restrictions in objects will, as now, have little effect outside of the internal workings of the company because of the effect of sections 39 and 40 (except in the case of charities where modified rules again apply – see section 42).

Section 32: Constitutional documents to be provided to members

105. This section replaces section 19 of the 1985 Act and Schedule 24 to that Act. It gives members the right to obtain from the company copies of the company's articles and certain other documents of constitutional importance (see *subsection (1)*).

106. The provision in the 1985 Act which enables a company to charge its members 5p for a copy of its articles and/or memorandum has been removed. This information must in future be provided to the members (on request) free of charge.

107. Where a company fails to comply with the provisions of this section, every officer of the company who is in default commits an offence. For the penalty for this offence, see *subsection (4)*.

Section 33: Effect of company's constitution

108. *Subsection (1)* of this section replaces section 14(1) of the 1985 Act. Its effect is that the provisions of a company's constitution constitute a special kind of contract, whose terms bind the company and its members from time to time. Like section 14(1), the provisions of this section are excepted from the general principle set out in section 1 of the Contracts (Rights of Third Parties) Act 1999, so that provisions of a company's constitution will not confer any rights on persons other than the company and its members. Unlike section 14(1), section 34 refers to "*a company's constitution*", rather than its "*memorandum and articles*". This reflects the new division of formation and constitutional information between the memorandum, articles and other constitutional documents noted above.

109. The language in *subsection (1)* has been updated but there is no change to the law (the provision continues to reflect what the law has always been: in particular a company's constitution binds both the company and its members).

110. *Subsection (2)* replaces section 14(2) of the 1985 Act. It provides that amounts which a member of a company is obliged to pay to it under its constitution are debts due to the company. In England and Wales and Northern Ireland, such debts are ordinary contract debts.

Section 34: Notice to registrar where company's constitution altered by enactment

111. This section replaces section 18 of the 1985 Act and Schedule 24 to that Act.

112. The provisions of a company's constitution may be altered by legislation, rather than by a resolution or agreement of the company's members. Such legislation will either be of general relevance to all companies (for example, a new Companies Act provision that provisions of a certain type in any company's articles are void), or to all companies of a particular type (for example, new commonhold legislation changing the provisions prescribed for inclusion in the articles of all commonhold associations) or it will be relevant only to a particular company (for example, a private Act of Parliament amending the articles of a specific company established by an earlier Act).

113. In keeping with the principles underlying section 26, it is important that those searching the register of companies should be able to be made aware of the changes to companies' articles which legislation may effect. However, there is a balance to be struck between maintaining transparency on the one hand and inundating the registrar and searchers with mountains of paper which will be of little practical use to persons searching the public register (and whose contents are generally available in any event). The section therefore does not require companies to send copies of most public general Acts which alter their articles (such as Companies Acts or new commonhold legislation) to the registrar. It does however require "special enactments" (as defined in *subsection (4)*) to be sent to the registrar by companies whose articles are altered by the enactment in question.

114. Where an enactment to which this section applies alters a company's articles, or where such an enactment alters a resolution or agreement affecting the company's constitution, the company is obliged to send a copy of the articles, or the resolution or agreement in question, as altered, to the registrar.

115. The procedural rules for sending such legislation to the registrar, and the penalties for non-compliance with them, are as for section 26.

Section 35: Notice to registrar where company's constitution altered by order

116. This is a new provision which provides a mechanism for registering alterations which are made to a company's constitution by an order of the court or other authority (for example, the Charity Commission). It obliges companies to give notice of such alterations to the registrar, and to supply a copy of the articles, or the resolution or agreement in question, as altered to the registrar.

Section 36: Documents to be incorporated in or accompany copies of articles issued by company

117. This section replaces section 380(2), (6) and (7) of the 1985 Act and Schedule 24 to that Act. It provides that every copy of a company's articles which it issues must be accompanied by various documents: in particular resolutions, agreements, enactments or orders which affect or evidence alterations to the company's constitution (see *subsection (1)*) unless the effect of the resolution, agreement, enactment or order has been incorporated into the company's articles or is no longer in force.

118. The intention behind this provision is that information provided on a request for a copy of the company's articles should be up-to-date but the company should not be obliged to provide the same information twice (i.e. in different forms).

Section 37: Right to participate in profits otherwise than as member void

119. This section restates section 15(1) of the 1985 Act. It provides that a company limited by guarantee without a share capital cannot, by means of a provision in its articles or a resolution of its members, confer on any person a right to participate in its divisible profits otherwise than as a member. As under the 1985 Act, there is no statutory

restriction on the members of such companies participating in their profits, unless they have sought exemption from the use of the word "limited" in their names.

Section 38: Application to single member companies of enactments and rules of law

120. Under section 7 it will be possible for a single person to form any type of company. This section provides that in future any enactment or rule of law that is applicable to companies formed by two or more persons (or having two or more members) applies (with any necessary modifications) to companies formed with one member (or having only one person as a member). This is already the case in respect of private limited companies: see the Companies (Single Member Private Limited Companies) Regulations 1992 (SI 1992/1699).

Part 4: a Company's Capacity and Related Matters

121. This Part replaces various provisions in the 1985 Act about a company's capacity and related matters, including in particular those in Chapter 3 of Part 1 of that Act.

Section 39: A company's capacity

122. This section provides that the validity of a company's acts is not to be questioned on the ground of lack of capacity because of anything in a company's constitution. It replaces the present section 35(1) and (4) of the 1985 Act, which made similar provision for restrictions of capacity contained in the memorandum.

123. The section does not contain provision corresponding to section 35(2) and (3) of the 1985 Act. It is considered that the combination of the fact that under the Act a company may have unrestricted objects (and where it has restricted objects the directors' powers are correspondingly restricted), and the fact that a specific duty on directors to abide by the company's constitution is provided for in section 171, makes these provisions unnecessary.

124. *Subsection (2)* indicates that the section, like section 35 of the 1985 Act, is modified in its application to charities.

Section 40: Power of directors to bind the company

125. This section provides safeguards for a person dealing with a company in good faith and restates section 35A and 35B of the 1985 Act. The power of the directors to bind the company, or authorise others to do so, is deemed not to be constrained by the company's constitution. This means that a third party dealing with a company in good faith need not concern itself about whether a company is acting within its constitution.

126. *Subsection (2)(b)(i)* of the section replaces part of section 35B of the 1985 Act: an external party is not bound to enquire whether there are any limitations on the power of the directors. The first limb of section 35B (which refers to the memorandum) has not been carried forward. This is concerned with restrictions in a company's constitution that limit a company's ability to act and consequently the powers of the directors to bind the company (the so called "ultra vires rule"). Under the Act, the objects no longer affect the company's capacity to act and so this limb is not necessary.

Section 41: Constitutional limitations: transactions involving directors or their associates

127. This section restates section 322A of the 1985 Act. It applies to a transaction if, or to the extent that, its validity depends on section 40 and provides that where the party to a transaction with a company is an "insider" (for example, a director of the company or person connected to such a director – see *subsection (2)(b)(i) and (ii)*), then the protection afforded by that section will not apply. Instead, the transaction will be voidable at the instance of the company.

128. Irrespective of whether the transaction is avoided, the "insider" and any director who authorised the transaction is liable to account to the company for any gain he has made as a result of the transaction and to indemnify the company for any loss or damage that the company has incurred (see*subsection (3)*). However, where the "insider" is not a director of the company, it may be possible for him to avoid liability if he can show that at the time he entered into the transaction with the company he was unaware that the directors were exceeding their powers (see *subsection (5)*).

129. As now, under *subsection (4)*, a transaction will cease to be voidable in certain circumstances, for example, if restitution is no longer possible.

Section 42: Constitutional limitations: companies that are charities

130. This section restates section 65 of the Charities Act 1993. It is a qualification of the rules in sections 39 and 40.

131. It provides that the protection afforded to an external party by sections 39 and 40 will not apply where the company in question is a charity, unless:

- the external party was unaware (at the time that the act was done) that the company was a charity; or
- the company has received full consideration in respect of the act done, and the external party was unaware that the act in question was beyond the company's capacity or beyond the powers of the directors.

132. Corresponding provisions for charities that are registered in Scotland can be found in section 112 of the Companies Act 1989 (see *subsection (5)).*

Section 43: Company contracts

133. This section restates the provisions of section 36 of the 1985 Act.

Section 44: Execution of documents

134. This section largely restates section 36A of the 1985 Act. It provides that a company may execute a document under the law of England and Wales or Northern Ireland by affixing the company seal or by signature by two directors or by one director and a secretary (or joint-secretary) or (for the first time) by a single director if that signature is witnessed and attested.

Section 45: Common seal

135. This section replaces the provisions of sections 36A(3) and 350 of the 1985 Act. It permits but does not require a company to have a common seal. If a company has a common seal, it requires the seal to include the company's name: failure to do so is an offence.

Section 46: Execution of deeds

136. This section restates section 36AA, inserted into the 1985 Act by the Regulatory Reform (Execution of Deeds and Documents) Order 2005 (SI 2005/1906). The only change is to extend the application for the purposes of the law of Northern Ireland.

Section 47: Execution of deeds and other documents by attorney

137. This section replaces section 38 of the 1985 Act. The 1985 Act does not require the appointment of the attorney to be by deed nor does it say anything about deeds executed on behalf of the company in the United Kingdom. This section provides that a company may appoint, under the law of England and Wales or Northern Ireland, attorneys to execute deeds or other documents on its behalf, and that documents executed in this

manner, whether in the UK or abroad, have effect as if executed by the company. It also makes clear that the method for a company appointing an attorney is by instrument executed as a deed, which is the same method by which an individual appoints an attorney.

Section 48: Execution of documents by companies

138. This section restates section 36B of the 1985 Act. It makes clear that no seal is required regardless of any other statutory provision. The only change is the addition of *subsection (1)* which makes clear that this section forms part of the law of Scotland only.

Section 49: Official seal for use abroad

139. This section replaces section 39 of the 1985 Act. It sets out the circumstances and manner in which a company may use its common seal outside the UK.

Section 50: Official seal for share certificates etc

140. This section restates section 40(1) of the 1985 Act. It enables a company that has a common seal to have an official seal for sealing securities issued by the company and for sealing documents creating or evidencing securities so issued.

Section 51: Pre-incorporation contracts, deeds and obligations

141. This section restates section 36C of the 1985 Act. A company is not bound by a contract purportedly made on its behalf before it came into existence unless the obligations are novated, i.e. a new contract must come into existence after incorporation on the same terms as the old one. Novation may be express or implied.

Section 52: Bills of exchange and promissory notes

142. This section restates section 37 of the 1985 Act. A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to its bearer. A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to its bearer. Where someone acting under a company's authority makes, accepts, or endorses such an instrument in the name of the company, or on its behalf, this section treats this as if these actions had been done by the company.

Part 5: a Company's Name

143. This Part applies to the name under which a company is registered, sometimes called the "corporate name". This Part regulates the choice of name. The rules are primarily intended to ensure that third parties are not misled. There are no property rights in companies' registered names as such. While there is no requirement for a company to use its registered name in the course of business, this Part also requires a company to disclose its name in specified circumstances.

144. Sections 70 to 74 provide for the appointment of adjudicators in cases where there is dispute over the registering of a company name. Section 71 safeguards the independence of the adjudicators and section 74 provides a right of appeal to the court.

Chapter 1: General Requirements

Section 53: Prohibited names

145. This section replaces section 26(1)(d) and (e) of the 1985 Act. It retains the existing prohibition of companies registering names that cannot be used without commission of an offence and of those that are offensive.

Section 54: Names suggesting connection with government or public authority

146. This section replaces section 26(2)(a) of the 1985 Act. It prevents a name being registered without the Secretary of State's approval if it suggests a connection with Her Majesty's Government, a local authority or – which represents a change from the 1985 Act – any part of the Scottish administration, or Her Majesty's Government in Northern Ireland. A new power allows similar protection to be extended to other public authorities.

Section 55: Other sensitive words or expressions

147. This section replaces sections 26(2)(b), 29(1)(a) and 29(6) of the 1985 Act.

148. *Subsection (1)* requires prior approval for the adoption of a name that includes words or expressions specified in regulations. *Subsection (2)* provides for the procedure to be used for making the regulations. The words and expressions protected by the current Regulations (the Company and Business Names Regulations 1981, SI 1981/1685) include British, English, Scottish and Welsh; chamber of commerce, charity, Her Majesty, midwife, police, and university.

Section 56: Duty to seek comment of government department or other specified body

149. This section replaces section 29(1)(b) and (2) and (3) of the 1985 Act. It provides power for the Secretary of State to specify whose view must be sought when seeking approval for a name. For example, under the present Regulations, the approval of the General Dental Council is required for the use of either "dental" or "dentistry". Regulations under the new power would be able to replicate this. They could also require the approval of, say, the House Authorities for names suggesting a connection with Parliament.

150. When a request is made under section 56 in connection with the registration or the change of name of a company, the registrar must be sent a statement that a request has been made, and a copy of the response (see *subsections (3) and (4)*). But the registrar must no make the response available for public inspections (see section 1087(1)(a)).

Section 57: Permitted characters etc

151. This section is a new provision. It provides power for regulations to specify what letters, symbols, etc may be used in a company's registered name; the regulations may also specify a permitted format for a name (for example, to prevent the use of superscript or subscript).

Chapter 2: Indications of Company Type Or Legal Form

Section 58: Public limited companies

152. This section replaces section 25(1) of the 1985 Act (and also section 27(4)(b) and (d) in its application to public limited companies). It brings together in a single provision all the alternative statutory indicators of legal status that must be used by a public company as part of its registered name, i.e. "public limited company" or the Welsh

equivalent or the specified abbreviations. This section does not apply to community interest companies.

Section 59: Private limited companies

153. This section replaces section 25(2) of the 1985 Act (and also section 27(4)(a) and (c) in its application to private limited companies). It brings together in a single provision all the alternative statutory indicators of legal status that must be used by a private company as part of its registered name, i.e. "limited" or the Welsh equivalent or the specified abbreviations. Certain companies are exempt (see section 61). This section does not apply to community interest companies.

Sections 60 to 62: Exemption from requirement as to use of "limited"

154. These sections replace section 30 of the 1985 Act. Section 30 exempts certain companies from the requirement for their names to conclude with "limited". Exempt companies are also exempt under the 1985 Act from some of the requirements regarding publication of their name but they still have to disclose their limited status in correspondence. Those currently exempt are those with a licence granted under section 19 of the Companies Act 1948 which have delivered a statutory declaration to the Registrar that the company complies with the requirements for the exemption. These requirements are, in effect, that the company is non-profit-making and its objects are the promotion of commerce, art, science, education, religion, charity or any profession.

155. Section 60 continues the exemption for companies already exempt so long as they continue to meet the conditions and until they change their registered name. It also provides an exemption for charities and allows the Secretary of State to make regulations exempting other companies. Only private companies may be exempt

156. Sections 61 and 62, which replace section 30(2) and (3), specify the conditions that must be met for a company currently exempt to continue to qualify for the exemption: its objects must continue to satisfy the criteria for their exemption and its articles must both preclude distributions of dividends to its members and also, in the event of it being wound up, require its assets to be passed to a body with similar objects. For companies limited by shares benefiting from an exemption under the 1948 Act (or its Northern Irish equivalent), there is a new requirement that the articles prevent a distribution of capital. This is linked to the change in section 63(4) (see below).

Section 63: Exempt company: restriction on alteration of articles

157. This section replaces section 31(1) and (5). It prohibits a company benefiting from an exemption under the 1985 Act or the 1948 Act (or their Northern Irish equivalents) from changing its articles in such a way that it no longer meets the requirements for the exemption. It is an offence to change the company's articles in such a way. Many companies with an exemption under the 1948 Act (or its Northern Irish equivalent) were made to include a provision in their memoranda preventing an amendment to their memoranda or articles without the consent of the Board of Trade (there were a number of variations on this theme). *Subsections (4) and (5)* make provision to remove this administrative burden.

Section 64: Power to direct change of name in case of company ceasing to be entitled to exemption

158. This section replaces section 31(2) to (6). It gives the Secretary of State power to withdraw a private company's exemption from the requirement for its name to conclude with "limited" and to direct it to change its name if it no longer meets the criteria that applied when it was granted the exemption.

Section 65: Inappropriate use of indications of company type or legal form

159. This section replaces section 26(1)(a), (b), (bb) and (bbb) of the 1985 Act. These paragraphs restrict the use of various words, expressions and abbreviations that are indicators of legal status for various types of commercial entity, e.g. p.l.c., community interest company, open-ended investment company, etc. Some of the restrictions apply to the use of the particular indicator at the end of a company's name; some anywhere other than the end of the name; and some anywhere in a company's name.

160. This section provides power to make regulations prohibiting the inclusion in a company's name of specified words, expressions and abbreviations. The only words etc that can be specified in the regulations are those associated with a particular type of company or form or organisation or those confusingly similar to such words and expressions. This section also provides power to require or prohibit the statutory indicators of legal status being used in conjunction with specified other words.

Chapter 3: Similarity to Other Names

Section 66: Name not to be the same as another in the index

161. This section replaces section 26(1)(c) and (3) of the 1985 Act.

162. *Subsection (1)* retains the present prohibition, in section 26(1)(c), on a company adopting a name that is already on the registrar's index of company names – which includes not only the names of Companies Act companies but various other business entities (see section 1099). *Subsections (2) and (3)* provide power for the Secretary of State to make regulations to replace the detailed rules presently contained in section 26(3) of the 1985 Act as to:

- what is to be disregarded; and
- what words, letters and symbols are to be taken as the same, or as not the same,

when comparing a proposed and an existing name. At present only "and" and "&" are taken as the same.

163. The section provides power also to treat as the same:

- currency symbols (e.g. £, $) and their respective English word equivalents;
- "%" and "per cent";
- "1", "2", "3" etc and "one", "two" "three".

164. The prohibition of names that, under these rules, are the same as an existing name will not be discretionary. But in future, it will be possible for there to be exceptions: *subsection (4)* provides that the regulations may provide that names which would otherwise be prohibited as being the same may be permitted in specified circumstances, or with specified consent, and that a subsequent change of circumstances or withdrawal of consent will not affect the company's registration.

Section 67: Power to direct change of name in case of similarity to existing name

165. This section replaces section 28(2) of the 1985 Act which provides power for the Secretary of State to direct a company to change its name if the name is the same as or too like a name already on the registrar's index of company names (or one which should have been there). The objective is to prevent the public being confused by the simultaneous appearance on the register of two very similar names when the similarity is such that the later name was not caught by the non-discretionary prohibition of adopting a name effectively the "same as" an existing name (see section 66).

166. The section is intended to cover two circumstances. First, any delay in the entry on the index of company names of new names of entities that are not UK companies.

Companies House enter all names immediately but there may be delays outside their control. If the name had already been taken by the other entity before the company adopted it, then the Secretary of State will direct the company to change its name. Second, the visual difference between the new name and an existing name being so small that third parties are likely to be confused by the simultaneous appearance of both names on the index of company names.

167. *Subsections (2) and (3)* provide power to make regulations, corresponding to that provided by section 66, to replace the detailed rules presently contained in section 26(3) of the 1985 Act as to:

- what is to be disregarded; and
- what words, letters and symbols are to be taken as the same

when comparing a proposed and an existing name. As in section 67, *subsection (4)* provides for a power to make regulations permitting names that would otherwise be regarded as "too like" in certain circumstances or where consent is given.

Section 68: Direction to change name: supplementary provisions

168. This section replaces section 28(4) and (5) of the 1985 Act as they apply to section 28(2). It provides a deadline of 12 months for the Secretary of State to direct a change of name under section 67, and for the Secretary of State to specify a period for the company's compliance. It makes failure by the company to comply an offence.

Similarity to other name in which person has goodwill

169. Sections 69 to 74 are new provisions. They respond to the CLR recommendation (Final Report, paragraph 11.50) that there be provision so that a person can apply for a company to be directed to change its name if the applicant can show that the name was chosen with the principal intention of seeking money from him or preventing him registering the name where it is one in which he has previously acquired reputation or goodwill.

Section 69: Objection to company's registered name

170. This section provides for any person, not just a company, to object to a company names adjudicator if a company's name is similar to a name in which the objector has goodwill. There is list of circumstances raising a presumption that a name was adopted legitimately. The respondent must show that one of these applies, or otherwise that he acted in good faith or that the interests of the applicant are not significantly affected (for example, where the applicant has hardly used the name at all). The objection will be upheld if the respondent cannot do so, or if the objector can show that the name was registered either to obtain money from him or to prevent him using the name.

Section 70: Company names adjudicators

171. This section provides power for the Secretary of State to appoint company names adjudicators and their staff and to finance their activities. One of the adjudicators is to be appointed Chief Adjudicator.

Section 71: Procedural rules

172. This section provides the Secretary of State with power to make rules for the proceedings before a company names adjudicator. The list of matters which the rules may cover is not exhaustive. It also enables the rule to confer on the Chief Adjudicator power to determine any matter that could be the subject of the rules made under this power.

Section 72: Decision of adjudicator to be made available to public

173. This section requires the adjudicator to publish his decision and his reasons for it, possibly through a website. The publication must be within 90 days of the decision.

Section 73: Order requiring name to be changed

174. This section is a new provision. If an objection made under section 69 is upheld, then the adjudicator is to direct the company with the offending name to change its name to one that does not similarly offend. A deadline must be set for the change. If the offending name is not changed, then the adjudicator will determine a new name for the company.

Section 74: Appeal from adjudicator's decision

175. This section enables appeal to a court against the decision of the company names adjudicator. The court will either uphold or reverse the adjudicator's decision, and may make any order that the adjudicator might have made.

Chapter 4: Other Powers of the Secretary of State

Section 75: Provision of misleading information etc

176. This section replaces section 28(3) of the 1985 Act and, insofar as they support that subsection, section 28(4) and (5). It provides power for the Secretary of State to direct a company to change its name within a specified period in two circumstances. First, if misleading information was given to enable the adoption of the name. Second, if an undertaking or assurance given to enable the adoption of the name has not been fulfilled. The direction can only be made up to five years after the adoption of the name. It is an offence not to comply with the direction.

Section 76: Misleading indication of activities

177. This section replaces section 32 of the 1985 Act. It provides power for the Secretary of State to direct a company to change its name, regardless of how long the company has had the name, in the specified circumstances. The circumstances are that, in his opinion, not only does the name give a misleading indication of the nature of the company's activities but also that the public are likely to suffer harm as a result. The company may appeal to the court, who may either confirm the direction or set it aside. It is an offence not to comply with the direction.

178. The section also sets time limits for compliance with the direction (6 weeks) and the application to the court (3 weeks). If the court confirms the direction, it specifies the deadline for compliance.

Chapter 5: Change of Name

Section 77: Change of name

179. This section replaces section 28(1) of the 1985 Act. Under the existing provision, companies can only change their names:

- by special resolution; or
- following a direction by the Secretary of State in the restricted circumstances provided by section 31 of the 1985 Act, which apply only to companies exempt from their name concluding in "limited."

180. This section also provides for the following means:

- whatever means are provided in the company's articles (this means that the company will be able to determine the procedures for changing its own name);

- by an order of the company names adjudicator if an objection under section 73 is upheld, or by a court following an appeal against the adjudicator's decision under section 74; and
- under section 1033 on the company's restoration to the register.

Section 78: Change of name by special resolution

181. This section is a new provision. It requires the company to notify the registrar of a change of name when it has been agreed by special resolution. This requirement is in addition to the obligation under Chapter 3 of Part 3 to forward a copy of the special resolution to the registrar. *Subsections (2)* and *(3)* address the particular situation where a company has passed a special resolution to change its name but the change is not to take place until some other event has occurred (e.g. a merger). The notice of change of name must say that the change is conditional and whether the event has occurred. If the event has not yet occurred, the registrar will not act on the notice to change the name until she has received a second notice stating that the specified event has occurred. The registrar may rely on that statement without further evidence.

Section 79: Change of name by means provided for in company's articles

182. This section is a new provision, supplementing the new provision (section 77(1)(b)) whereby a company may change its name by any means provided for in its articles. *Subsection (1)* requires the company to provide the registrar with both a notice of the name change and a statement that the change has been made in accordance with the company's articles. *Subsection (2)* ensures the registrar may rely on that statement without further evidence.

Section 80: Change of name: registration and issue of new certificate of incorporation

183. This section, which partly replaces sections 28(6) and 32(5) of the 1985 Act, provides for the procedures that the registrar must perform before a company's proposed new name is effective. *Subsection (2)* provides for the checks both that the name meets all the requirements for a company's name in this Part of the Act and that the necessary documents have been provided. *Subsection (3)* provides for the company to be issued with a certificate of incorporation with the new name.

Section 81: Change of name: effect

184. This section, which replaces sections 28(6) and 32(5) in part and, in total, section 28(7) of the 1985 Act, provides that the new name is effective as soon as the altered certificate of incorporation is issued. It also provides that the change of name does not affect the company's rights or obligations or legal proceedings by or against it in its previous name.

Chapter 6: Trading Disclosures

Section 82: Requirement to disclose company name etc

185. This section replaces sections 348(1), 349(1), and 351(1) and (2) of the 1985 Act and, insofar as it applies to companies, section 4(1) of the Business Names Act 1985. It provides power for the Secretary of State to make regulations requiring every company:

- to display a sign with its name and specified other information at specified locations;
- to include its name and specified other information in specified documents and communications;

- to provide its name and specified other information to those who request it in the course of business (this is a new provision insofar as it applies to companies doing business under their registered names).

Section 83: Civil consequences of failure to make required disclosure

186. This section replaces section 5 of the Business Names Act 1985, so far as it applies to companies. As recommended by the CLR (Final Report, paragraph 11.57), it follows the precedent of the Business Names Act as regards the civil consequences of failure to comply with the information requirements made in regulations under section 82: the provision for personal civil liability of officers in default in section 349(4) of the Companies Act 1985 is not included.

Section 84: Criminal consequences of failure to make required disclosures

187. This section replaces sections 348(2), 349(2) and (3) and 351(5) of the 1985 Act and, insofar as it applies to companies, part of section 7 of the Business Names Act 1985. It makes it an offence not to comply with the requirements, to be specified in regulations under section 82, for every company to disclose its name and specified other information.

Section 85: Minor variations in form of name to be left out of account

188. This section is a new provision. It means that the company's name as used to comply with the disclosure requirements need not be exactly the same as the registered name. The permitted differences are the case of the letters, the use of punctuation, accents, etc and formatting. However the differences must not result in there being a risk of confusion.

Part 6: a Company's Registered Office

Section 86: A company's registered office

189. This section restates section 287(1) of the 1985 Act. It requires every company to have a registered office and provides for that office to be an address to which communications and notices may be sent. Section 1139 provides that the service of a document on a company is effective if it is sent to its registered office.

Section 87: Change of address of registered office

190. This section restates section 287(3) to (6) of the provisions of the 1985 Act. It provides the means by which a company may change the address of its registered office.

Section 88: Welsh companies

191. This section provides a definition of a Welsh company. A company can be set up as a Welsh company by delivering to the registrar a statement on formation that its registered office is to be situated in Wales (see section 9(2)(b)). *Subsection (2)* restates section 2(2) of the 1985 Act whereby a company may become a Welsh company by passing a special resolution (so that the register states that its registered office is to be situated "in Wales"). As recommended by the CLR, *subsection (3)* provides a mechanism whereby a company can cease to be a Welsh company (i.e. so that the register states that its registered office is to be situated in "England and Wales"). This is new. At present, while a company may choose to restrict the address of its registered office to Wales on formation or subsequently by special resolution, it is not possible under the 1985 Act for a Welsh company to drop the restriction so that its registered office address can be changed to anywhere in England and Wales.

192. Welsh companies may deliver documents to the registrar in Welsh (see section 1104). Welsh companies may also end their company name with Welsh versions of the statutory indicators of legal status. For example, "cyfyngedig" in place of "limited" or "c.c.c." in place of "p.l.c." (see sections 58 and 59). When a company ceases to be a Welsh company using the procedure under this section, it may no longer take advantage of these provisions.

193. Where a company passes a special resolution under subsection (2) or (3) (and so becomes or ceases to be Welsh company) *subsection (4)* provides that the registrar will amend the register and issue the company with a new certificate of incorporation.

Part 7: Re-Registration as a Means of Altering a Company's Status

194. This Part of the Act is about the re-registration of companies. It replaces equivalent provisions in Part 2 of the 1985 Act. There are some substantive changes as well as amendments reflecting the new provisions of the Act about registration which are carried through to the re-registration provisions.

Introductory

Section 89: Alteration of status by re-registration

195. This section provides for various ways under the Act by which a company may alter its status. As recommended by the CLR (Final Report, paragraph 11.6) it retains the current possibilities for re-registration, but there is one significant change to the 1985 Act regime: in line with the recommendations of the CLR (Final Report, paragraph 11.11), in future a public company will be able to re-register as an unlimited private company without first having to re-register as private limited – see section 109.

Private company becoming public

Section 90: Re-registration of private company as public

196. This section restates section 43(1) and (2), and section 48 of the 1985 Act. It enables a private company (whether limited or unlimited) to re-register as a public company providing that certain conditions are met. These conditions are set out in *subsections (2) to (4)*. They include a requirement for the company to make such alterations to its name and articles of association ("articles") as are necessary to reflect the fact that the company will be a public company. This will be particularly important for private companies formed under the Act who are using the model articles: in particular, the new model articles for private companies limited by shares formed under the Act will be written with such companies in mind and are unlikely to be suitable for use by a newly re-registered public company – see notes on sections 19 and 20.

197. As now (see section 48 of the 1985 Act), an unlimited private company with a share capital will be able to re-register as a public company and this is reflected in *subsection (4)* of this section.

198. *Subsection (2)(e)* retains the requirement that a private company may not re-register as a public company if it has previously re-registered as an unlimited company. The intention behind this provision is that a company should not be able to enjoy the benefits of limited liability or avoid the obligations that are attached to this, for example, the increased reporting requirements, by continually swapping from limited to unlimited status.

Section 91: Requirements as to share capital

199. This section restates sections 45, 47(3) and 48(5) to (7) of the 1985 Act. It sets out the requirements as to share capital of a company that it is proposing to re-register as a public company. These requirements carry forward the provisions of current

companies legislation, for example, the company's share capital must not be less than the authorised minimum (defined in section 763) and each of the company's allotted shares must be paid up at least as to a quarter of the nominal value of that share and the whole of any premium on in.

200. *Subsection (5)* of this section replaces section 47(3) of the 1985 Act. It provides that the registrar must not issue a new certificate of incorporation on re-registration if the court has made an order confirming a reduction of capital which has the effect of bringing the company's allotted share capital below the authorised minimum (which remains at £50,000 but may be satisfied in sterling or euros – see section 763) or if the company has reduced its capital via the new solvency statement procedure for capital reductions (see section 642) or in connection with a redenomination of share capital (see section 626).

Section 92: Requirements as to net assets

201. This section restates section 43(3)(b), (c) and (e), and (4), and section 46 of the 1985 Act. The requirements as to net assets for a public company remain unchanged (as now, these are determined by reference to the company's most recent balance sheet).

Section 93: Recent allotment of shares for non-cash consideration

202. This section restates section 44 of the 1985 Act. As now, where there has been an allotment of shares for non-cash consideration between the date of the balance sheet required under section 92 and the date that the company passed the resolution to re-register as a public company, the registrar will not entertain an application for re-registration unless the consideration for the allotment has been valued in accordance with section 596.

Section 94: Application and accompanying documents

203. This section restates sections 43(3)(a) to (e) and 47(2) of the 1985 Act. It prescribes the contents of the application for re-registration where a private company is proposing to re-register as public. There is one important change, which is required as a result of the abolition of the current requirement for private companies to have a company secretary – see section 270. In future, where a private company is proposing to re-register as a public company the application for re-registration must include a statement of the company's proposed secretary where the company does not already have a secretary. The contents of this statement are prescribed in section 95.

204. The application for re-registration must be accompanied by a statement of compliance – see section 90(1)(c)(ii) – which replaces the present requirement for a statutory declaration (or its electronic equivalent), contained in subsections 43(3)(e) and (3A) of the 1985 Act, with a requirement to make this statement (see note on section 13).

Section 95: Statement of proposed secretary

205. This section is a new provision, which is required as a result of the abolition of the requirement for private companies to have a company secretary – see section 270. Where a private company is proposing to re-register as a public company and the company does not already have a company secretary, the application for re-registration must include details of the person or persons who will act as company secretary or joint secretaries on re-registration. The statement of proposed secretary must also contain a consent, given by the person or each of the persons named in the statement, to act as company secretary or joint secretaries. If all the partners in a firm are to be joint secretaries, one partner in the firm may give consent to act on behalf of all of the partners.

Section 96: Issue of certificate of incorporation on re-registration

206. This section replaces section 47 of the 1985 Act. As now, where the registrar is satisfied that a company is entitled to be re-registered as a public company, she will issue a new certificate of incorporation (which must state that it is being issued on the re-registration of the company). On the issue of a new certificate of incorporation under this section: the company becomes a public company; the change to its name and any amendments that were made to the company's articles take effect; and the person (or persons) named as secretary (or joint secretaries) in the statement of proposed secretary (see section 95) is deemed to have been appointed as such.

207. As now, the certificate of incorporation on re-registration is conclusive evidence that the company is now a public company and that the requirements of the Act as regards re-registration have been met.

Public company becoming private

Section 97: Re-registration of public company as private limited company

208. This section replaces section 53 of the 1985 Act. It enables a public company to re-register as a private limited company if the conditions specified in *subsection (2)* are met. The conditions are the same as those which are presently set out in section 53 but there are two important changes:

- Consistent with the approach taken elsewhere in the Act, for example the sections on the re-registration of a private company as public, *subsection (1)(c)(ii)* of this section introduces a new requirement for a statement of compliance (see note on section 13).
- *Subsection (2)* introduces new provisions which enable the registrar to process an application for the re-registration of a company from public to private limited within the 28-day period during which dissenting members may apply to the court, under section 98, for an order cancelling the resolution for re-registration, providing that she is satisfied that such an application cannot be made. This change reflects the registrar's current practice.

209. As now, the company must make such changes to its name and articles as are necessary in connection with it becoming a private company limited by shares or, as the case may be, a private company limited by guarantee.

Section 98: Application to court to cancel resolution

210. This section restates section 54(1) to (3) and (5) to (6) of the 1985 Act. As now, where a public company has passed a special resolution to re-register as a private limited company, the requisite majority of the company's members (see *subsection (1)*) may apply to the court for the cancellation of this resolution. Such an application to the court must be made within 28 days of the resolution to re-register being passed and on hearing the application the court may confirm or cancel the resolution or make such other order as it thinks fit.

Section 99: Notice to registrar of court application or order

211. This section replaces section 54(4) (7) and (10) of the 1985 Act. It makes it clear that, as now, where an application is made to the court under section 98 (that is, to cancel a resolution for re-registration as a private limited company), the company must immediately give notice to the registrar. Similarly, where the court has made an order in connection with such an application, the company must deliver a copy of that order to the registrar within 15 days of the order being made (or such longer time as the court may direct).

212. *Subsection (1)* of this section is a new provision which requires the dissenting members, on making an application to court seeking to cancel the resolution for re-registration from public to private, to give notice direct to the registrar. This ensures that the registrar is aware of any applications which have been made under section 98 and therefore will enable the registrar to process the application for re-registration without further delay where she is satisfied that no application to court may be made – see note on section 97.

213. *Subsection (4)* carries forward the offence in section 54(10) of the 1985 Act. Where the company fails to give notice to the registrar or fails to deliver a copy of the order made by the court under section 98 within the prescribed time limits (see *subsections (2) and (3)*), the company and every officer of the company who is in default commits an offence. The penalty for this offence is set out in *subsection (5)*.

Section 100: Application and accompanying documents

214. This section replaces section 53(1)(b) of the 1985 Act and contains new provisions. It prescribes the documents/information that must accompany the application for re-registration where a company is proposing to re-register from public to private limited. Consistent with the approach taken in the Act with other forms of re-registration, in future the application for re-registration as a private limited company must be accompanied by a statement of compliance – see note on section 13. (There is currently no requirement for a statutory declaration (or electronic equivalent) where a public company re-registers as a private limited company).

Section 101: Issue of certificate of incorporation on re-registration

215. This section restates section 55 of the 1985 Act. As now, where the registrar is satisfied that a company is entitled to be re-registered as a private limited company, she will issue a new certificate of incorporation (which must state that it is being issued on the re-registration of the company). On the issue of a new certificate of incorporation under this section, the company becomes a private limited company and the change to its name and any amendments that were required to be made to the articles take effect.

216. As now, the certificate of incorporation on re-registration issued under this section is conclusive evidence that the company is now a private limited company and that the requirements of the Act as regards re-registration have been met.

Private limited company becoming unlimited

Section 102: Re-registration of private limited company as unlimited

217. This section replaces section 49, of the 1985 Act. As now, this section permits a private company that is limited by shares or, as the case may be, by guarantee, to re-register as an unlimited private company, providing that certain conditions are met (see *subsection (2)*) and all of the members have given their assent to the company being so re-registered. In the case of a deceased member, assent may be given by the personal representative of the deceased member's estate. Where a member is bankrupt, assent may be given by his trustee in bankruptcy (to the exclusion of the member in question).

218. An "unlimited company" is a company not having any limit on the liability of its members.

219. As now, a company may not re-register as an unlimited company, if it has previously been re-registered as limited (having previously been unlimited) or as unlimited (having previously been limited).

220. The application for re-registration as an unlimited company must be accompanied by a statement of compliance (see note on section 13).

Section 103: Application and accompanying documents

221. This section replaces section 49(8) and (8A) of the 1985 Act. It prescribes the contents of the application for re-registration where a company is proposing to re-register from private limited to unlimited and the documents/information that must accompany this application. The current requirement for a statutory declaration made by the directors on application for re-registration as an unlimited company is replaced by a requirement for a statement of compliance. Unlike other statements of compliance made under the Act (see, for example, section 13) the statement of compliance made on application for re-registration as an unlimited company must contain a statement made by the directors confirming that:

- the persons by whom or on whose behalf the form of assent is authenticated constitute the whole membership of the company; and
- if any of the members have not authenticated that form themselves, that the directors have taken all reasonable steps to satisfy themselves that each person who authenticated it on behalf of a member was lawfully empowered to do so.

222. The contents of the directors' statement carry forward the provisions of section 49(8) of the 1985 Act.

Section 104: Issue of certificate of incorporation on re-registration

223. This section restates section 50 of the 1985 Act. As now, where the registrar is satisfied that a company is entitled to be re-registered as an unlimited company, she will issue a new certificate of incorporation (which must state that it is being issued on the re-registration of the company). On the issue of a new certificate of incorporation under this section, the company becomes an unlimited company and the change to its name and any amendments that were required to be made to the articles take effect.

224. As now, the certificate of incorporation on re-registration is conclusive evidence that the company is now an unlimited company and that the requirements of the Act as regards re-registration have been met.

Unlimited private company becoming limited

Section 105: Re-registration of unlimited company as limited

225. This section replaces section 51(1) to (3) of the 1985 Act. As now, this section permits an unlimited company to re-register as a private limited company if certain conditions are met (see *subsection (2)*). As now, a re-registration from unlimited to limited requires a special resolution of the company's members, (which must specify whether the company is to be limited by shares or limited by guarantee). The company must also make such changes to its name and articles as are required to reflect the change in the company's status. As is the case under section 51(6) of the 1985 Act, this section does not permit the re-registration of an unlimited company as a public company (this section provides for the re-registration of an unlimited company as a *private* limited company). There is a new requirement for a statement of compliance (see note on section 13).

Section 106: Application and accompanying documents

226. This section replaces section 51(5) of the 1985 Act and contains new provisions. It prescribes the contents of the application for re-registration where an unlimited private company is proposing to re-register as private limited and the documents/information that must accompany this application. Where the company is to be limited by guarantee, *subsection (2)(b)* requires the application for re-registration to be accompanied by a "statement of guarantee" (see note on section 11). It should be noted that there is no requirement for a statement of capital and initial shareholdings where the company is to be limited by shares. This is unnecessary because the company will be required to

make a return of allotments to the registrar, under section 555 as soon as it allots shares subsequent to its registration and the return must be accompanied by a statement of capital.

Section 107: Issue of certificate of incorporation on re-registration

227. This section restates section 52 of the 1985 Act. As now, it provides that, where the registrar is satisfied that a company is entitled to be re-registered as a private company, she will issue a new certificate of incorporation (which must state that it is being issued on the re-registration of the company). On the issue of a new certificate of incorporation under this section, the company becomes a private limited company and the change to its name and any amendments that were required to be made to the articles take effect.

228. As now, the certificate of incorporation on re-registration issued under this section is conclusive evidence that the company is now a private limited company and that the requirements of the Act as regards re-registration have been met.

Section 108: Statement of capital required where company already has share capital

229. This section is a new provision which requires a company that has re-registered from unlimited having a share capital to private limited by shares to file a statement of capital with the registrar in certain circumstances. The statement must be delivered to the registrar within 15 days of the company's re-registration and, where the company fails to observe this requirement, the company and every officer of the company who is in default, commits an offence (see*subsection (4)*).

230. The provision is necessary because unlimited companies are required to provide a statement of capital to the registrar in a limited number of circumstances only: in particular, where the company has a share capital on formation (see section 10) or where an unlimited company having a share capital makes an annual return to the registrar under section 854. Consequently, where an unlimited company having a share capital re-registers as private limited by shares under section 107, in contrast to other companies that are limited by shares, the information on the public register pertaining to the company's subscribed capital may be out of date (in particular if the company has allotted further shares subsequent to its formation or, as the case may be, its last annual return).

231. The requirement for a statement of capital in this section puts companies which have re-registered as private limited by shares under section 107 on the same footing as other companies limited by shares on the register and ensures that the information on the public register is up-to-date. The company will, however, be exempted from the requirement to provide a statement of capital on re-registration where there has been no change to the company's total subscribed capital since it was first formed and registered or, as the case may be, since the company filed its most recent annual return (see *subsection (2)*).

Public company becoming private and unlimited

Section 109: Re-registration of public company as private and unlimited

232. This section is a new provision, which, as recommended by the CLR (Final Report, paragraph 11.11), enables a public company to re-register as a private unlimited company with a share capital without first having to re-register as a private limited company. The conditions specified in *subsection (2)* must be met and all of the members must give their assent to the company being so re-registered. In the case of a deceased member, assent may be given by the personal representative of the deceased member's estate. Where a member is bankrupt, assent may be given by his trustee in bankruptcy (to the exclusion of the member in question).

233. A public company may not re-register as an unlimited private company under this section if it has previously been re-registered as limited or as unlimited (see *subsection (2)*). The intention behind this subsection (which is based on the provision in *subsection (2)(e)* of section 90) is that a company should not be able to enjoy the benefits of limited liability or avoid the obligations that are attached to this, for example, the increased reporting requirements, by continually swapping from limited to unlimited status.

Section 110: Application and accompanying documents

234. This section is a new provision. It prescribes the contents of the application for re-registration where a company is proposing to re-register from public to unlimited private and the documents/information that must accompany this application. There is a requirement for a statement of compliance (see note on section 13) and, in contrast to the statements of compliance that are required elsewhere in the Act, the statement of compliance that is required here must contain a statement made by the directors confirming that:

- the persons by whom or on whose behalf the form of assent is authenticated constitute the whole membership of the company; and
- if any of the members have not authenticated that form themselves, that the directors have taken all reasonable steps to satisfy themselves that each person who authenticated it on behalf of a member was lawfully empowered to do so.

235. This mirrors the requirements of the directors' statement in section 103(4).

Section 111: Issue of certificate of incorporation on re-registration

236. This section is a new provision which requires the registrar to issue a new certificate of incorporation is she is satisfied that a public company is entitled to register as private and unlimited. On the issue of a new certificate of incorporation (which must state that it is being issued on the re-registration of the company), the company becomes a private unlimited company and the change to its name and any amendments that were made to the articles take effect.

237. The certificate of incorporation on re-registration is conclusive evidence that the company is now a private unlimited company and that the requirements of the Act as regards re-registration have been met.

Part 8: a Company's Members

238. This Part of the Act defines who are a company's members, provides rules relating to a company's register of members and overseas branch registers and, subject to certain exceptions, prohibits a company from being a member of its holding company.

Chapter 1: the Members of a Company

Section 112: The members of a company

239. This section restates section 22 of the 1985 Act. There are additional words to make it clear that the subscribers to the memorandum become members on registration of the company, even if the company fails to enter their names in the register of members.

Chapter 2: Register of Members

Section 113: Register of members

240. This section restates section 352(1) to (5) of the 1985 Act. The only new provision is *subsection (5)*which makes it clear that, for the purposes of this Chapter, joint holders

of a share fall to be treated as a single member, so the register need only show a single address although all their names must be stated in the register.

Section 114: Register to be kept available for inspection

241. This section replaces section 353 of the 1985 Act. Currently, the register of members is required to be kept at the registered office of the company, except that if the company has appointed a third party to maintain or update the register, it may be kept at the office where that work is done, subject to that office being in the jurisdiction where the company is registered. Under the Act, it is immaterial where the work of compiling or updating the register is carried out. *Subsection (1)* provides that the register must be kept available for inspection either at the company's registered office or at a place permitted under regulations made under section 1136.

Section 115: Index of members

242. This section replaces section 354 of the 1985 Act. There is no change in the obligation of a company with more than 50 members to maintain an index of the names of the members (which the company is obliged to do unless the register itself is kept in such a form as to constitute an index).

Section 116: Rights to inspect and require copies

243. This section replaces section 356 of the 1985 Act. Under section 356, the obligation to make the register available for inspection is subject to an exception when the register is closed under section 358 of the 1985 Act. The power to close the register has not been carried forward in the Act and so the obligation in *subsection (1)* is absolute. The CLR recommended that information in a company's register of members should be made available only for certain specified purposes (Final Report, paragraph 11.44). This section follows this recommendation. It modifies the rights of inspection and to be provided with copies of the register of members and its index. (Section 1137 provides power for the Secretary of State to make regulations about the inspection of records and provision of copies and to set fees.) *Subsections (3) and (4)*, which are new, require those seeking to inspect or to be provided with a copy of the register of members to provide their names and addresses, the purpose for which the information will be used, and, if the access is sought on behalf of others, similar information for them.

Section 117: Register of members: response to request for inspection or copy

244. This is a new provision. This section provides a procedure by which the company can refer the matter to the court if it thinks that the request may not be for a proper purpose. It replaces the 10-day deadline for compliance with a request with a 5-day period within which the company must either comply with the request or apply to the court for relief from the obligation. If the company opts for the latter, then *subsections (3), (4) and (5)* apply. Under subsection (3), if the court is satisfied that the access to the register of members is not sought for a proper purpose, it will require the company of the obligation not to comply with the request and may require that the person who made the request pay the company's costs. Under subsection (4), the court may also require the company not to comply with other requests made requests for similar purposes. If the court does not make an order under subsection (3), or the proceedings are discontinued, then, under subsection (5), the company must immediately comply with the request.

Section 118: Register of members: refusal of inspection or default in providing copy

245. This section replaces section 356(5) and (6) of and Schedule 24 to the 1985 Act. It retains the existing sanctions for the company's failure to comply with a request. They do not apply if the court has directed that the company need not comply with the request.

Section 119: Register of members: offences in connection with request for or disclosure of information.

246. This is a new provision. It creates two offences. First, in relation to the new requirement in section 116 to provide information in a request for access, it is an offence knowingly or recklessly to make a statement that is misleading, false or deceptive in a material particular. Second, it is an offence for a person to disclose to another person information from a company's register of members obtained under section 116 knowing or having reason to suspect that the other person may use the information for a purpose that is not a proper purpose.

Section 120: Information as to state of register and index

247. This is a new provision. It implements the CLR recommendation that companies be required to advise anyone exercising their right of inspection or right to demand a copy of the register or index whether the information is up-to-date and, if not, the date to which it has been made up (Final Report, paragraph 11.43). Failure to provide this information renders the company and any officer in default liable to a fine.

Section 121: Removal of entries relating to former members

248. This section replaces section 352(6) of the 1985 Act. Based on a recommendation by the CLR (Final Report, paragraph 11.40), it reduces the period for which the entry of a past member must be kept on the register from 20 years to 10 years.

Section 122: Share warrants

249. This section replaces section 355 of the 1985 Act and implements the CLR recommendation (Completing the Structure, paragraph 5.41) in making clear that shares need not first be issued in registered form, but can be issued directly in warrant to bearer form.

Section 123: Single member companies

250. This section replaces section 352A of the 1985 Act, which implements the Twelfth Company Law Directive (89/667/EEC) on single member private limited liability companies. This section requires a statement to be entered in a company's register of members that it has only one member if that is the case on incorporation or at a later date – if the latter, the date on which it so became must also be entered. It also requires a statement that the company has ceased to have only one member together with the date of the increase. Section 352A of the 1985 Act applies to private companies alone, but this section applies to both private and public companies.

Section 124: Company holding its own shares as treasury shares

251. This section replaces section 352(3A) as regards the entries required to be made in the register of members where a company holds treasury shares. The effect of that provision is unchanged.

Section 125: Power of court to rectify register

Section 126: Trusts not to be entered on register

Section 127: Register to be evidence

252. These sections restate sections 359, 360 and 361 of the 1985 Act.

Section 128: Time limit for claims arising from entry in register

253. This section replaces section 352(7) of the 1985 Act. Based on a recommendation by the CLR (Final Report, paragraph 11.40), it reduces the time limit for claims relating to entries in the register from 20 years to 10 years.

Chapter 3: Overseas Branch Registers

254. This Chapter restates the 1985 Act's provisions (section 362 and Parts I and II of Schedule 14) regarding overseas branch registers. It enables companies in specified circumstances to keep in a specified country or territory a register of those members resident in that country or territory. An overseas branch register is deemed to be part of the company's register of members. It differs from the provisions of the 1985 Act in two respects.

- First, rather than providing for an Order in Council, section 129(3) provides the Secretary of State with power to make regulations as to the circumstances in which a company is to be regarded as keeping an overseas branch register.
- Second, section 131 provides power to modify the provisions of Chapter 2 of this Part (relating to the company's register of members) in their application to overseas branch registers.

Chapter 4: Prohibition on Subsidiary Being Member of Its Holding Company

255. This Chapter is a restatement of the provisions of section 23 of the 1985 Act and Schedule 2 to that Act as it applies for the purposes of that section. Unless in circumstances covered by an exception, a company cannot be a member of its own holding company. There is no change of substance to the provision in the 1985 Act.

Part 9: Exercise of Members' Rights

256. The CLR considered the rights of persons other than the registered shareholders, presenting their recommendations in Chapter 7 of the 'Final Report'. The new provisions in Part 9 have been developed with these recommendations in mind and are designed to make it easier for investors to exercise their governance rights fully and responsibly. Nowadays when investors, whether major institutional investors or retail investors, buy shares in a listed company they are increasingly likely to hold their shares through an intermediary or a chain of intermediaries. This means that it is an intermediary's name that appears on the company's register of members. As a result investors typically have to rely on contractual arrangements with the intermediaries both to obtain information from the company and also to give any instructions they wish about how shares should be voted.

257. This Part of the Act introduces new provisions dealing with the ability of indirect investors to exercise governance rights. The first section in the Part removes any doubts as to the ability of companies to make provision in their articles for others to enjoy and exercise membership rights and enables indirect investors to enjoy information rights via the registered member. The next group of sections provides that indirect investors in traded companies can be nominated by the registered member to receive company documents and information. It is up to the registered member, typically a broker, to decide whether to nominate or not. The last two sections in the Part make it easier for registered members to exercise rights in different ways to reflect the underlying holdings and allow indirect investors to participate in, for example, requests for resolutions at the AGM. The provisions of this Part should be looked at together with sections 324 to 331 on proxies in Part 13, which enable the registered member to appoint indirect investors as proxies to exercise voting rights.

258. An important principle to note is that the information rights and exercise of other rights where shares are held on behalf of others can be initiated and enforced with the company

only by the registered member. This Part does not compel the registered member to confer such rights on third parties. It will be for indirect investors, such as shareholders holding through a nominee, to choose a nominee operator who offers such rights as part of their service.

Effect of provisions in company's articles

259. Section 145 protects arrangements through company articles to enfranchise indirect investors and provides that where a company makes provision, through its articles, to extend rights to those holding shares through intermediaries, the provision is legally effective in relation to various statutory requirements.

Section 145: Effect of provisions of articles as to enjoyment of exercise of members' rights

260. This section (*subsection (1)*) allows a company's articles to enable a member to identify another person or persons as entitled to enjoy or exercise all or any specified rights of a member. The articles may specify that this entitlement can apply only to certain rights or to all rights, except the right to transfer the shares. As *subsection (4)(b)* makes clear, the right to transfer shares must remain, as under the 1985 Act, with the member whose name is on the register.

261. *Subsection (2)* provides that where a company makes relevant provision in its articles, all the relevant references in the Companies Acts to 'member' should be read as if the reference to member was a reference to the person or persons nominated by the member. *Subsection (3)* provides a non-exhaustive list of the provisions in question.

262. *Subsection (4)(a)* makes clear that non-members do not have direct enforceable rights against the company. They should enforce their rights through the member whose name is on the register and who has the right to enforce the articles.

Information rights

263. Sections 146 to 150 introduce new provisions enabling indirect investors to be appointed by the registered member to receive information that is sent to members by the company. These provisions apply only to companies traded on a regulated market. The Secretary of State may extend or limit the classes of companies to which these provisions apply through the power provided under section 151.

Section 146: Traded companies: nomination of persons to enjoy information rights

264. *Subsections (1) and (2)* provide new rights for members of companies whose shares are traded on regulated markets to nominate those on whose behalf they hold shares to receive information that is sent to members direct from the company and to exercise certain rights.

265. *Subsection (3)* sets out what is meant by 'information rights', namely the right to receive all communications that the company sends to members, the right to require copies of accounts and reports (as in section 431 or 432), and the right to require hard copy versions of documents (section 1145).

266. *Subsection (4)* refers to section 426, which allows under certain circumstances for summary financial statements rather than full accounts to be sent out as part of the general information. These must also be sent to nominated persons.

267. *Subsection (5)* provides that the company does not need to respond to a nomination that specifies only certain information rights.

Section 147: Information rights: form in which copies to be provided

268. This section deals with the way in which information is to be provided to a nominated person. *Subsection (2)* explains that if a nominated person wants communications to be in hard copy, they must ask the member, providing a postal address, before the nomination is made. If the member then passes this on to the company, under *subsection (3)* the nominated person will have the right to receive hard copy communications.

Section 148: Termination or suspension of nomination

269. This section provides that a nomination will stop having effect on the request of the nominated person or the member (*subsection (2)*), or on the death, bankruptcy or winding up of the nominated person or the member (*subsection (3)*).

270. *Subsection (5)* explains that all nominations made by member will be suspended if there are more nominations that the total number of shares, and *subsection (6)* makes similar provision where there are different classes of shares.

Section 149: Information as to possible rights in relation to voting

271. This section requires the company, when sending a meeting notice to nominated persons, to include a statement that the nominated person may have voting rights that he can exercise through the person who nominated him.

Section 150: Information rights: status of rights

272. This section deals with the rights arising from a nomination under section 146, and in particular provides that it is the member, rather than the nominated person, who can enforce the rights against the company.

Section 151: Information rights: power to amend

273. This section gives a power for the Secretary of State to amend the provisions of sections 146 to 150. The power allows for changes in the companies covered, the circumstances in which nominations can be made and the rights conferred by nomination.

Effect of rights where shares held on behalf of others

274. Sections 152 and 153 enable indirect investors, via the registered member, to exercise voting and requisition rights by making it easier for registered members to exercise rights in different ways to reflect underlying holdings and by allowing those on whose behalf they hold shares to participate in requisitions. These two sections apply to all companies.

Section 152: Exercise of rights where shares held on behalf of others: exercise in different ways

275. This section provides that a member can choose to split his holding and exercise rights attached to shares in different ways. This is to accommodate members who hold shares on behalf of more than one person, each of whom may want to exercise rights attaching to their shares in different ways. So, for example, it enables votes to be cast in different ways. *Subsection (4)* provides that if the member does not make it clear to the company in what way he is exercising his rights the company can assume that all rights are being dealt with in the same way.

Section 153: Exercise of rights where shares held on behalf of others: members' requests

276. This section deals with four situations where the shareholder threshold required to trigger a right is 100 shareholders holding £100 each on average of paid-up capital.

Indirect investors are able to count towards the total subject to certain conditions, intended to ensure that only genuine indirect investors are allowed to count towards the total, that the same shares cannot be used twice and that the indirect investor's contractual arrangements with the member allow the former to give voting instructions.

Part 10: Company Directors

277. This Part replaces Part 10 of the 1985 Act (enforcement of fair dealing by directors), the provisions relating to directors in Part 9 of that Act and the provisions relating to confidentiality orders in Part 25 of that Act. It also introduces a statutory statement of directors' general duties to the company.

Who is a director?

278. Section 250 defines a director as including any person occupying the position of director, by whatever name called. This is the same as the definition contained in section 741(1) of the 1985 Act. The Act does not attempt a more detailed definition of a director because it is important to ensure that the term is applied to anybody who exercises real power within the company, particularly in relation to decision taking. The term "director" therefore includes:

- an executive director who has been properly appointed by the company;
- a non-executive director who has been properly appointed by the company;
- a de facto director (that is, a person who has assumed the status and functions of a company director even though he has not been properly appointed).

279. A "shadow director" is defined by section 251 as "a person in accordance with whose directions or instructions the directors of the company are accustomed to act". The section provides that a person is not to be regarded as a shadow director by reason only that the directors act on advice given by him in a professional capacity. This definition is the same as the definition contained in section 741(2) of the 1985 Act.

Powers of directors

280. This Part of the Act does not generally directly give powers to the directors, but, under the draft model articles of association for private companies limited by shares, the directors' functions are:

- to manage the company's business; and
- to exercise all the powers of the company.

Chapter 1: Appointment and Removal of Directors

Section 154: Companies required to have directors

281. This section replaces section 282 of the 1985 Act. It distinguishes between private and public companies. It retains the requirement for a private company to have at least one director and requires all public companies to have at least two. There will no longer be an exception for public companies registered before 1st November 1929 (or before 1st January 1933 in Northern Ireland).

Section 155: Companies required to have at least one director who is a natural person

282. This section is a new provision. It introduces a requirement that every company have at least one director who is a natural person, ie an individual. Subject to this requirement being satisfied, any legal person, including one that is a company or a firm, can be a director but one company cannot be the sole director of another company. *Subsection (2)*

provides that the requirement that the director be a natural person is met if the director is a corporation sole (for example, the Archbishop of Canterbury) or someone appointed on the basis of some other appointment that they hold.

Section 156: Direction requiring company to make appointment

283. This section is a new provision, enabling enforcement of the existing requirement for a private company to have at least one director and a public company to have at least two directors and of the new requirement for every company to have at least one director who is an individual. Where it appears to the Secretary of State that any of these requirements is not met, the Secretary of State will be able to direct the company to comply by issuing a notice. It will be an offence not to comply.

Section 157: Minimum age for appointment as director

284. This section is a new provision. It introduces a minimum age of 16 for a natural person to be a director. *Subsection (2)* provides that prohibition will not prevent the appointment of a younger person provided it is not to take effect until that person is 16. *Subsection (3)* provides that the age limit applies even if the director's appointment is a consequence of some other appointment. *Subsection (5)* provides that this prohibition on under-age directors does not provide protection from criminal prosecution or civil liability if he or she were to act as director, i.e. as a de facto director, or if the company's directors usually act on that young person's instructions.

Section 158: Power to provide for exceptions from minimum age requirement

285. This section is a new provision. It provides for an exception from the prohibition in section 157 on anyone under 16 being appointed a director of a company. It provides a power for the Secretary of State to make regulations specifying circumstances in which a younger person may be a director. The regulations may differ for different parts of the UK.

Section 159: Existing under-age directors

286. This section is a new transitional provision. *Subsections (1) and (2)* provide that where a person under 16 has been appointed as director (or holds the office of director by virtue of another office or is a corporation sole) prior to the prohibition on under age directors coming into force, that person will cease to be a director when the prohibition in section 157 comes into force. *Subsection (3)* makes it the company's responsibility to amend its register of directors accordingly but the company is not required to notify the registrar of the change. *Subsection (4)* gives the registrar power to amend the register without a notification by the company of the director's removal but rather on the basis of information already held (i.e. the date of birth as provided when the appointment was notified).

Section 160: Appointment of directors of public company to be voted on individually.

287. This restates section 292 of the 1985 Act: the appointment of each proposed director of a public company must be voted on individually unless there is unanimous agreement to a block resolution. Without such consent, any appointment of a director that is not voted on individually is void. This ensures that members can express their disapproval of any particular director without having to reject the entire board.

Section 161: Validity of acts of directors

288. This section, which replaces section 285 of the 1985 Act, provides that a director's actions are valid even if his or her appointment is subsequently found to have been defective or void.

Section 162: Register of directors

289. This section replaces part of section 288 of the 1985 Act. It imposes on every company a requirement to keep a register of its directors (secretaries are dealt with in Part 12). This register need not contain particulars of shadow directors.

290. This section requires the register to be kept available for inspection either at the company's registered office or at a place specified in regulations made under section 1136. It must be available for inspection by members (without charge) or the public (for a prescribed fee, set under powers provided under section 1137). Refusal to permit inspection is an offence for which every officer in default (including a shadow director) can be liable. In addition, the court may compel immediate inspection of the register if the company has refused.

Section 163: Particulars of directors to be registered: individuals

291. This section replaces section 289 of the 1985 Act so far as it applies to individuals. It specifies the particulars that must be entered in the register of directors for each director who is an individual (as opposed to a company or similar entity). The most significant change is the requirement for companies to provide a service address for a director rather than, as now, the director's usual residential address. A director may give the company's registered office as his or her service address; the service address may also be the same as the director's residential address – but this will not be apparent from the public record. In addition, in fulfilment of a Government commitment given in March 1998, the particulars no longer include details of other directorships held. There are also changes to the requirement to provide the director's name. The requirement is now to include any name by which the individual was formerly known for business purposes. As recommended by the CLR (Final Report, paragraph 11.38), there is no longer an exception for a married woman's former name. However the section retains a protective provision relating to the former names of peers.

Section 164: Particulars of directors to be registered: corporate directors and firms

292. This section replaces section 289(1)(b) of the 1985 Act. It retains the requirement for the corporate or firm name and the registered or principal office to be recorded where the director is either a body corporate or a firm that is a legal person under the law by which it is governed. In addition, as recommended by the CLR (Final Report, paragraph 11.38), it requires for EEA companies the register where the company is registered and its registration number; for all others, particulars of the legal form of the company or firm, the law by which it is governed, and, if applicable, where it is registered and its registration number.

Section 165: Register of directors' residential addresses

293. This section is a new provision. It requires companies to keep a register of the usual residential addresses of directors who are individuals. Provided that a director's service address is not the company's registered office, if his/her residential address is the same as his/her service address, then the register need only contain an entry making that clear. This register is not to be open to public inspection, but can be used in accordance with Chapter 8 of this Part.

Section 166: Particulars of directors to be registered: power to make regulations

294. This section is a new provision. It provides power for the Secretary of State to make regulations that add or remove items from the particulars that have to be entered in a company's register of directors and register of directors' residential addresses.

Section 167: Duty to notify registrar of changes

295. This section replaces section 288(2) of the 1985 Act insofar as it applies to directors. It retains the requirement that the appointment of a director, or a director's ceasing to hold office, and any change in an existing director's particulars, be notified to the registrar within 14 days. This requirement does not extend to shadow directors. Default is an offence. This section also requires a notice of appointment to be accompanied by the appointee's consent. This provision ensures that the public record is kept up to date. There is also a requirement to notify the registrar of changes to information in the register of directors' residential addresses (but this information is not to be open to public inspection at Companies House).

Section 168: Resolution to remove director

296. This section replaces section 303 of the 1985 Act. *Subsection (1)* provides that an ordinary resolution is sufficient to remove a director, but requires that it be at a meeting so as to ensure the director's right to be heard.

Section 169: Director's right to protest removal

297. This section replaces section 304 of the 1985 Act. The only change is to be found in *subsection (5)*; the court need no longer be satisfied that the rights conferred by the section are being abused to secure needless publicity for defamatory matter, so long as it is satisfied that they are being abused

Chapter 2: General Duties of Directors

Sections 170 to 181: General comments

298. The general duties form a code of conduct, which sets out how directors are expected to behave; it does not tell them in terms what to do. More particularly, the duties address:

- the possibility that a director may put his own or other interests ahead of those of the company;
- the possibility that he may be negligent.

299. The duties are derived from equitable and common law rules, and are not at the moment written down in statute.

300. The Law Commission and the Scottish Law Commission recommended that there should be a statutory statement of a director's main fiduciary duties and his duty of care and skill in their joint report *Company Directors: Regulating Conflicts of Interests and Formulating a Statement of Duties*. The CLR's main recommendations in respect of directors' general duties are summarised in chapter 3 of the Final Report.

301. The CLR recommended that there should be a statutory statement of directors' general duties, and that this should, with two exceptions, described in the next paragraph, be a codification of the current law. In particular they wanted:

- to provide greater clarity on what is expected of directors and make the law more accessible. In particular, they sought to address the key question "in whose interests should companies be run?" in a way which reflects modern business needs and wider expectations of responsible business behaviour;
- to make development of the law in this area more predictable (but without hindering development of the law by the courts);
- to correct what the CLR saw as defects in the present duties relating to conflicts of interest.

The Government has accepted these recommendations.

302. There are two areas, both relating to the regulation of conflicts of interest, where the statutory statement departs from the current law:

- under section 175, transactions or arrangements with the company do not have to be authorised by either the members or by the board; instead interests in transactions or arrangements with the company must be declared under section 177 (in the case of proposed transactions) or under section 182 (in the case of existing transactions) unless an exception applies under those sections;
- section 175 also permits board authorisation of most conflicts of interest arising from third party dealings by the director (e.g. personal exploitation of corporate resources and opportunities). Such authorisation is effective only if the conflicted directors have not participated in the taking of the decision or if the decision would have been valid even without the participation of the conflicted directors. Board authorisation of conflicts of interest will be the default position for private companies, but public companies will need to make provision in their constitutions to permit this. Board authorisation is not permitted in respect of the acceptance of benefits from third parties (section 176).

303. Both reforms implement recommendations of the CLR, which noted that the basic principles in the current law relating to directors' conflicts of interest are very strict:

- they noted that in practice most companies permit a director to have an interest in a proposed transaction or arrangement with the company, provided that the interest is disclosed to his fellow directors. The statutory statement therefore reflects the current position in most companies;
- they also took the view that the current strict rule relating to conflicts of interest in respect of personal exploitation of corporate opportunities fettered entrepreneurial and business start-up activity by existing company directors. The statutory statement therefore provides for board authorisation of such conflicts.

304. These reforms are modified for charitable companies in England and Wales and Northern Ireland by section 181.

Codification of common law rules and equitable principles

305. Codification is not a matter of transposing wording taken from judgments into legislative propositions. Judgments are, of necessity, directed at particular cases. Even when they appear to state general principles, they will rarely be exhaustive. They will be the application of (perhaps unstated) general principles to particular facts. In the company law field, the principles being applied will frequently be taken from other areas, in particular trusts and agency. It is important that these connections are not lost and that company law may continue to reflect developments elsewhere. Frequently the courts may formulate the same idea in different ways. In contrast legislation is formal. It is not easy to reconcile these two approaches but the draft sections seek to balance precision against the need for continued flexibility and development. In particular:

- *subsection (3)* of section 170 provides that the statutory duties are based on, and have effect in place of, certain common law rules and equitable principles;
- *subsection (4)* of section 170 provides that the general duties should be interpreted and applied in the same way as common law rules and equitable principles. The courts should interpret and develop the general duties in a way that reflects the nature of the rules and principles they replace;
- *subsection (4)* of section 170 also provides when interpreting and applying the statutory duties, regard should be had to the common law rules and equitable principles which the general duties replace; thus developments in the law of trusts and agency should be reflected in the interpretation and application of the duties;

- section 178 provides that the civil consequences of breach (or threatened breach) of the statutory duties are the same as would apply if the corresponding common law rule or equitable principle applied. It also makes clear that the statutory duties are to be regarded as fiduciary, with the exception of the duty to exercise reasonable care skill and diligence which is not under the present law regarded as a fiduciary duty.

306. The statutory duties do not cover all the duties that a director may owe to the company. Many duties are imposed elsewhere in legislation, such as the duty to file accounts and reports with the registrar of companies (section 441). Other duties remain uncodified, such as any duty to consider the interests of creditors in times of threatened insolvency.

Duties owed to the company

307. Section 170(1) makes it clear that, as in the existing law, the general duties are owed by a director to the company. It follows that, as now, only the company can enforce them. Part 11 (derivative claims and actions by members) describes the mechanism whereby members may be able to enforce the duties on behalf of the company.

Who are the duties owed by?

308. The duties are owed by every person who is a director of a company (as defined in section 250). They are therefore owed by a de facto director in the same way and to the same extent that they are owed by a properly appointed director.

309. Certain aspects of the duty to avoid conflicts of interest and the duty not to accept benefits from third parties continue to apply even when a person ceases to be a director; this is necessary to ensure that a director cannot, for example, exploit an opportunity of which he became aware while managing the company's business without the necessary consent simply by resigning his position as director. The closing words of section 170(2) provide that these duties apply to a former director subject to any necessary adaptations. This is to reflect the fact that a former director is not in the same legal position as an actual director.

310. The statutory duties apply to shadow directors where, and to the extent that, the common law rules or equitable principles which they replace so apply (section 170(5)). This means that where a common law rule or equitable principle applies to a shadow director, the statutory duty replacing that common law rule or equitable principle will apply to the shadow director (in place of that rule or principle). Where the rule or principle does not apply to a shadow director, the statutory duty replacing that rule or principle will not apply either.

The relationship between the duties

311. Many of the general duties will frequently overlap. Taking a bribe from a third party would, for example, clearly fall within the duty not to accept benefits from third parties (section 176) but could also, depending on the facts, be characterised as a failure to promote the success of the company for the benefit of its members (section 172) or as an aspect of failing to exercise independent judgment (section 173).

312. The effect of the duties is cumulative, so that it is necessary to comply with every duty that applies in any given case. This principle is stated in section 179. One exception relates to the duty to avoid conflicts of interest (section 175). This particular duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company. In such cases the duty to declare interests in proposed transactions or arrangements (section 177) or the requirement to declare interests in existing transactions or arrangements (section 182) will apply instead. Section 181 modifies these provisions for charitable companies in England and Wales and Northern Ireland.

313. The cumulative effect of the duties means that where more than one duty applies, the director must comply with each applicable duty, and the duties must be read in this context. So, for example, the duty to promote the success of the company will not authorise the director to breach his duty to act within his powers, even if he considers that it would be most likely to promote the success of the company.

314. As well as complying with all the duties, the directors must continue to comply with all other applicable laws. The duties do not require or authorise a director to breach any other prohibition or requirement imposed on him by law.

Relationship between the duties and the company's constitution

315. Under section 171 a director must act in accordance with the company's constitution.

316. Companies may, through their articles, go further than the statutory duties by placing more onerous requirements on their directors (e.g. by requiring shareholder authorisation of the remuneration of the directors). The articles may not dilute the duties except to the extent that this is permitted by the following sections:

- section 173 provides that a director will not be in breach of the duty to exercise independent judgment if he has acted in a way that is authorised by the constitution;
- section 175 permits authorisation of some conflicts of interest by independent directors, subject to the constitution;
- *subsection (4)(a)* of section 180 preserves any rule of law enabling the company to give authority for anything that would otherwise be a breach of duty;
- *subsection (4)(b)* of section 180 provides that a director will not be in breach of duty if he acts in accordance with any provisions in the company's articles for dealing with conflicts of interest;
- section 232 places restrictions on the provisions that may be included in the company's articles. But nothing in that section prevents companies from including in their articles any such provisions as are currently lawful for dealing with conflicts of interest.

317. The company's constitution may also set out the purposes of the company, especially in the case of an altruistic company which has purposes other than the benefit of the company's members. It is very important that directors understand the purposes of the company, so that they are able to comply with their duty to promote the success of the company in section 172.

Relationship between the duties and the detailed rules requiring member approval of conflicts of interest

318. Under the provisions in Chapter 4 of this Part, the directors must sometimes obtain prior shareholder approval for the following types of transaction involving a director (or, in some cases, a person connected to a director): long-term service contracts; substantial property transactions; loans, quasi-loans and credit transactions; and payments for loss of office.

319. Section 180 provides that:

- compliance with the general duties does not remove the need for member approval of such transactions (*subsection (3)*);
- (subject to the exception set out in the bullet point below) the general duties apply even if the transaction also falls within Chapter 4 (because it is a long-term service contract, substantial property transaction, loan, quasi-loan, credit transaction or payment for loss of office). So, for example, the directors should only approve a loan to a director if they consider that it would promote the success of the company.

This is so, even if the loan does not require the approval of members under Chapter 4 because it falls within a relevant exception, such as the exception for expenditure on company business in section 204;

- if the transaction falls within Chapter 4 (because it is a long-term service contract, substantial property transaction, loan, quasi-loan, credit transaction or payment for loss of office) and approval of the members is obtained to the transaction in accordance with that Chapter, or an exception applies, so that approval is not necessary under that Chapter, then the director does not need to comply with the duty to avoid conflicts of interest (section 175) or the duty not to accept benefits from third parties (section 176) in respect of that transaction. All other applicable duties will still apply. For example, a director would not be acting in breach of the duty to avoid conflicts of interests if he failed to obtain authorisation from the directors or the members for a loan from the company in respect of legal defence costs. Section 181 modifies this provision for charitable companies in England and Wales and Northern Ireland.

Relationship between the duties and the general law

320. Section 180(5) provides that the general duties have effect notwithstanding any enactment or rule of law except where there is an express or implied exception to this rule. For example, section 247 provides that directors may make provision for employees on the cessation or transfer of a company's business even if this would otherwise constitute a breach of the general duty to promote the success of the company.

Consequences of breach

321. Section 178 preserves the existing civil consequences of breach (or threatened breach) of any of the general duties. The remedies for breach of the general duties will be exactly the same as those that are currently available following a breach of the equitable principles and common law rules that the general duties replace.

322. *Subsection (2)* of that section makes it clear that the duties are enforceable in the same way as any other fiduciary duty owed to a company by its directors (except for the duty to exercise reasonable care, skill and diligence, which is not considered to be a fiduciary duty). In the case of fiduciary duties the consequences of breach may include:

- damages or compensation where the company has suffered loss;
- restoration of the company's property;
- an account of profits made by the director; and
- rescission of a contract where the director failed to disclose an interest.