

# MODERN COMPANY LAW

*For a Competitive Economy*

## *Final Report*

VOLUME I

**The Company Law Review Steering Group**



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## Letter to the Secretary of State

Dear Secretary of State

We are delighted to present to you the Final Report of the Company Law Review.

We believe that our recommendations represent a major re-working of the whole framework of company law which meets the aim of making it fit for the new century. We have kept in mind throughout the aims which were established when the Review was launched by Margaret Beckett: that the framework should promote enterprise and competitiveness; that it should represent a modern view of the balance of interests between participants; and that it should be as simple and accessible as possible.

We have developed our proposals through an extended process of consultation. This gives us a high degree of confidence both that our proposals are effective and that they enjoy very wide support – in business, amongst the professionals, and more widely in the community at large.

We would wish warmly to acknowledge the participation of a very wide range of contributors. Through working groups and through wider consultation, many hundreds of participants have been involved. We have been very pleased at the range of expertise and expert knowledge which has been brought to bear – from business interests, the legal and accountancy professions, the financial and investment communities, trades unions, NGOs and charities. A project of this length and detail entails considerable commitment of time and resources from all involved, and we are very grateful to all who have contributed.

We commend our proposals to you. All of us – both on the Steering Group and all who have participated – are keen to see the process taken through to implementation. We are therefore delighted to see the commitment in your manifesto to reforming company law.

The Company Law Review Steering Group

June 2001



1 Company law can help business or it can hinder it. Company law can encourage entrepreneurship, promote growth, enhance international competitiveness and create the conditions for investment and commitment of resources, whether of savings or employment. Or it can frustrate entrepreneurs, inhibit growth, restrict competitiveness and undermine the conditions for investment.

2 Too much of British company law frustrates, inhibits, restricts and undermines. It is over-cautious, placing too high a premium on regulation and avoidance of risk. The company remains the choice of corporate vehicle for over a million businesses, and the core principles established by company law have served our economy well for over 150 years. But significant parts are outmoded or have become redundant, and they are enshrined in law that is often unnecessarily complicated and inaccessible.

3 Company law provides the infrastructure which enables people to collaborate in productive business relationships, generating the wealth on which the whole community depends. It is the basis on which companies are formed, given legal powers, operated and managed. It lays down the rules and procedures through which companies are controlled and financed, ultimately by millions of savers and pensioners. It sets out the basis for the large majority of our business, employment and investment decisions. It provides rules for company boards and shareholders, the means of accountability for the exercise of corporate economic power, and the remedies and punishment for negligent, irresponsible and fraudulent abuses of that power. Its effectiveness impacts upon all of us.

4 Our company law was created in the nineteenth century to provide this infrastructure for wealth-creation and growth. It set a standard that other countries followed. However, like many legacies of the Victorians, it has fallen behind the times. Other countries – Australia, New Zealand, Canada, South Africa, – who in the past looked to us to lead the way, have modernised their law, while ours now trails behind. This is the first fundamental review for at least 40 years – and arguably in the law’s 150 year history. For the past four decades reform has been limited to implementation of EC directives and piecemeal re-engineering. Throughout its history, the approach to reform has been to add new detailed provisions designed to deal with the particular

corporate scandal of the times. This has left us with a body of law which lacks coherence and does not respond to today's needs.

5       The result is that companies labour under unnecessary costs and burdens. Those seeking to streamline their administration and increase efficiency have to pick their way through the obstacles to be found in the Companies Act. Small and medium-sized companies suffer regulation that was designed for large, publicly-owned companies. Company directors who seek to act honestly and in good faith are given no clear guidance on what is expected of them, while the minority that act dishonestly can still find refuge in the gaps and obscurity of the law. The main providers of capital – those who invest through individual savings and pension schemes – and employees are denied a clear view of the drivers upon which effective deployment of their resources depends. Foreign companies doing business here face the barrier of mastering arcane aspects of the law. Companies striving to act responsibly – not only for their shareholders, but also their employees, creditors, trading-partners and the wider community – are uncertain where their legal duties lie. And those who make up the wide range of interests to whom any company is accountable are not receiving the information necessary to assess the nature of the company and its business. All these problems have helped lead to a culture in which wealth-creation is constrained by regulation, yet still misunderstood and mistrusted by the public which that regulation is ultimately designed to serve.

6       How, with simplification of all regulatory burdens high on the agenda for many years, has company law remained unscathed? The problem is that company law is largely inaccessible to those who create, run and own companies. It is seen as the preserve of expert lawyers and academics. The men and women who provide the engine-room for our economy through small businesses rarely have the time or means to understand what their obligations and rights are. Those who manage our large companies, which are crucial to our international competitiveness as well as wealth-generation and employment, have to rely more than should be necessary on expert advisors. The real basis on which our economic success depends has been imperfectly exposed and understood. As a result, the costs are hidden, the problems concealed, and the solutions have been impossible to see. In summary, the subject has been just too impenetrable and time-consuming for companies and legislators alike to take on.

7        So, we welcome the decision to tackle the problem by setting up this Review, with the objective of major reforming legislation. Inspired by this commitment to act, many companies – large and small – together with a wide range of others from the business, industrial, academic and professional worlds have devoted considerable resources to telling us what they believe is wrong with the current law and how it should be put right. All agree on the objective – we need to turn our Victorian infrastructure into a modern framework designed for the 21st century.

8        This Report contains our model for a new company law. Our aim has been that British company law should once more be world class, setting the example that others will wish to follow.

9        A key principle has been that company law should be primarily enabling or facilitative – it should provide an effective vehicle for business leadership and enterprise to flourish freely in a climate of discipline and accountability. We need an accessible framework for channelling the resources of the community to wealth generation. Small companies should be liberated from many of the constraints that were originally designed for large businesses. The framework should provide the necessary safeguards to allow people to deal with and invest in companies with confidence. It should enable our companies to be competitive in a global market where businesses can choose which jurisdiction to adopt for their regulation. Our law should provide the maximum possible freedom combined with the transparency necessary to ensure the responsible and accountable use of that freedom. We should strip out regulation that is no longer necessary. We should make more effective and accessible those rules which enable markets to work efficiently and which prevent patterns of abuse that disrupt and add cost to economic activity. Finally, company law should reflect the reality of the modern corporate economy, where those who run successful companies recognise the need to develop positive relationships with a wide range of interests beyond shareholders – such as employees, suppliers and customers.

10 The potential rewards are great:

- A framework for business that puts small companies first, not last.
- A reduction in costs and burdens for all businesses.
- A climate which encourages people to set up businesses and make them grow.
- A framework which promotes international competitiveness, encourages inward investment, and provides flexibility and responsiveness to changing business needs.
- Clear rules which enable people to deal with and invest in companies with confidence.
- Renewed public confidence in the legitimacy of an approach to wealth-creation that is based on clear and widely accepted principles.

In short, the prize is a modern company law for a competitive economy.

## Glossary of Abbreviations and

### Technical Matters

ADR	Alternative Dispute Resolution
AGM	Annual General Meeting
APB	Auditing Practices Board
ASB	Accounting Standards Board
CDDA	Company Directors Disqualification Act 1986
CIO	Charitable Incorporated Organisation
CLRC	Company Law and Reporting Commission
DTI	Department of Trade and Industry
ECHR	European Convention on Human Rights
ECS	European Company Statute
EEA	European Economic Area
EGM	Extraordinary General Meeting
FRC	Financial Reporting Council
FRRP	Financial Reporting Review Panel
FRSSE	Financial Reporting Standard for Smaller Entities
FSA	Financial Services Authority
IAS	International Accounting Standard(s)
IASB	International Accounting Standards Board
IFRS	International Financial Reporting Standard(s)
IMRO	Investment Management Regulatory Organisation
IPR	Independent Professional Review
NED	Non-executive Director
OFR	Operating and Financial Review
POS Regulations	Public Offers of Securities Regulations
RRP	Reporting Review Panel
SE	Societas Europaea (a European Company)
SLIM	Simpler Legislation for the Internal Market
US SEC	US Securities and Exchange Commission

## **The Companies Act 1985 and other Legislation**

In this Report, references to the Act are to the Companies Act 1985, and references to parts, sections and schedules are references to parts, sections and schedules of that Act (unless otherwise specified). The Act does not apply to companies incorporated in Northern Ireland (see section 745), though it does cover Scotland and Wales. Company law matters relating to Scotland are reserved to the UK Parliament under the Scotland Act 1998 and those relating to Wales have not been transferred to the National Assembly for Wales under the Government of Wales Act 1998.

References to the 1989 Act are to the Companies Act 1989 and references to directives are to the series of EC directives dealing with company law.

Additional copies of this Report may be obtained by telephoning 0870 1502 500; it is also available from the Review pages on the DTI's Internet site  
<http://www.dti.gov.uk/cld/review.htm>

## Summary of Recommendations

This Report is divided into three parts:

- Part I is an overview of the Review's objectives, approach and core proposals, focusing on the key areas of:
  - simplifying and modernising the law for small companies;
  - providing a legal framework for all companies which reflects the needs of the modern economy, combining streamlined procedures for business with greater transparency and accountability; and
  - ensuring a flexible and responsive institutional structure for rule-making and enforcement;
- Part II sets out our recommendations in more detail; it covers the issues outlined in Part I, together with recommendations for reform of other – sometimes more technical – parts of the Act;
- Part III contains illustrative draft clauses. While they cover only a proportion of the output of the Review, they demonstrate how our recommendations could be implemented in a new Companies Act, in a more up-to-date and accessible style. Part III also contains a draft model constitution for a private company limited by shares.

### **Small and Private Companies (Chapters 2 and 4)**

Our recommendations which will have most impact on private companies are:

- to simplify decision-making procedures, including:
  - codifying and extending the common law “unanimous consent rule” by stating expressly in statute that any decision which the company has power to take may be taken without observing any of the formalities of the Act or the company's constitution where the members unanimously agree. (This codification will also apply to public companies, although the practicalities involved mean it is unlikely to be used in larger companies);

- making it easier for private companies to take decisions by written resolution, without the need for a general meeting;
- to streamline other internal administrative procedures so that private companies:
  - need not hold annual general meetings (AGMs), lay accounts in general meeting or appoint auditors annually unless they positively opt to do so (in effect making the present “elective regime” the normal regime for private companies);
  - are no longer obliged to appoint a company secretary;
  - have access to a new, simpler model constitution, designed especially for small private companies;
- to encourage mediation and arbitration as alternatives to litigation, in particular by creating an arbitration scheme specifically to deal with shareholder disputes;
- to reduce the burden of financial reporting and audit, while improving the usefulness of small company accounts, by:
  - extending the small company accounting regime to the maximum permitted under European law by increasing the thresholds to cover companies which meet any two of the following criteria: turnover no more than £4.8 million (currently £2.8 million); balance sheet total no more than £2.4 million (currently £1.4 million); no more than 50 employees (as now);
  - raising the threshold below which companies are exempt from the requirement to have their accounts audited up to the European maximum limit (i.e. turnover of £4.8 million etc.);
  - simplifying the format and content requirements for small company accounts, while removing the ability for small companies to file uninformative “abbreviated accounts” at Companies House;

- shortening the time limit for private companies to file accounts from the present ten months to seven months after their financial year-end;
- to simplify rules on capital maintenance, including abolishing the complex rules on financial assistance for private companies.

### **Improving Governance: Directors (Chapters 3 and 6)**

We recommend a statutory statement of directors' duties which will:

- give directors a clear authoritative statement of what their duties are;
- bring the law into line with modern business practice and accepted standards of behaviour;
- encourage responsible behaviour by making clear that in promoting the success of the company for the benefit of its members as a whole, directors must take account of long-term as well as short-term consequences; and that they must recognise, where relevant, the importance of relations with employees, suppliers, customers and others, the need to maintain a reputation for high standards of business conduct, and the impact of their actions on the community and the environment.

Other recommendations are:

- to clarify and update Part X of the Companies Act, dealing with directors' conflicts of interest;
- to limit directors' contracts of employment to three years on first appointment and one year thereafter, unless shareholders authorise a longer period;
- to preserve the strengths of the Combined Code and its "comply or explain" approach, rather than converting any of the Code's contents into substantive requirements;
- better disclosure on directors' training, qualifications and other relevant information;

- clarification of the common law on attribution, contributory negligence and contribution, to ensure that the company bears a fair share of the responsibility and the loss where its directors are at fault.

### **Improving Governance: Shareholders (Chapters 3 and 7)**

Our recommendations to facilitate responsible exercise of shareholders' powers include:

- measures to facilitate the exercise of membership rights by companies' "real" or "beneficial" shareholders;
- requiring quoted companies to circulate members' resolutions free of charge with the AGM papers, where the resolution has the requisite level of support and is received by a clear deadline (proposals to require quoted companies to publish their report and accounts on a website at least 15 days before settling the AGM papers for circulation will improve shareholder access to information in time to table resolutions);
- greater transparency in the way in which institutional investors exercise their powers – in particular companies should disclose in their annual report their major relationships with financial institutions; institutional investors who manage funds on behalf of others should disclose how they have voted their shares; and votes on key company resolutions should be audited.

Our recommendations on the rights of minority shareholders are aimed at making the law clearer and striking the right balance between protecting the minority and discouraging undue disruption or damage to the company and its business. Key recommendations are:

- to maintain the effect of the decision in *O'Neill v Phillips* clarifying the circumstances in which members can take action for unfair prejudice under section 459;
- to place the derivative action on a statutory basis, and make provision for the circumstances where a member may take action on behalf of the company where the directors fail to do so;

- to clarify the nature of the company's constitution and give increased certainty as to what rights are enjoyed and may be pursued by members personally under the constitution.

### **Improving Governance: Company Reporting and Audit (Chapters 3 and 8)**

We put forward improvements to the quality, timeliness and accessibility of company reporting.

In particular we recommend that:

- most public companies and large private companies should be required to publish an operating and financial review (OFR) as part of the annual report; this would provide a review of the business, its performance, plans and prospects, and information the directors judge necessary for an understanding of the business, such as relationships with employees, suppliers and customers, environmental and community impact, corporate governance and management of risk. The OFR would be subject to review by the auditors;
- where a quoted company publishes a preliminary announcement this should, after release to the market, be immediately published on a website, with electronic notification to those shareholders that want it;
- quoted companies should make their annual report and accounts (including, where relevant, the OFR) available on a website within four months of the year-end; further time would be allowed for preparing the hard copy, with all public companies being required to lay the accounts in general meeting and file them at Companies House within six months.

On auditors' duties and liability we recommend that:

- there should be no statutory extension of the auditors' duty of care on their report (nor of the corresponding duties of directors and their companies on the accounts and report) to extend it beyond that set out in the *Caparo* case – although this could be developed by the courts;

- directors and employees should have wider duties to assist the auditors;
- auditors should be able to limit their liability contractually with the company and in tort (or delict) with third parties, within appropriate limits to be set by the Secretary of State.

### **Institutional Arrangements (Chapters 3 and 5)**

If the law is to remain up-to-date and to respond flexibly to changing needs, it must be supported by an institutional framework which provides for: rule-making on detailed or technical matters which are inappropriate for primary legislation; keeping the law under review; and enforcing reporting and accounting requirements. We recommend building on the existing very successful model provided by the Financial Reporting Council (FRC), Accounting Standards Board (ASB) and Financial Reporting Review Panel (FRRP) so that:

- the Company Law and Reporting Commission (CLRC – in effect a successor to the FRC, with a significantly expanded remit) would: keep company law under review; prepare an annual report to the Secretary of State on the state of company law and corporate governance and any need for reform; issue guidance on company law and governance; and advise on proposed secondary legislation, and on other matters referred to it by the Secretary of State;
- the Standards Board (building on the ASB) would: make detailed rules on accounting and reporting (including the OFR, and all the form and content rules currently in the Act); make disclosure rules in areas such as the Combined Code and on information to be provided to shareholders; keep the Combined Code under review; make substantive rules on matters such as the conduct of AGMs; and publish guidance on issues within its remit;
- the Private Companies Committee would examine the impact of company law and reporting requirements on private companies, with the CLRC and the Standards Board being required to take due account of its advice;

- the Reporting Review Panel (RRP – a successor to the FRRP) would be responsible for reviewing the accounts and reports of public and large private companies and for seeking revisions to accounts which do not comply with the requirements of the Act; it would be authorised to apply to the courts for an order requiring the preparation of revised accounts; similar procedures would apply to the OFR.

### **Simplifying and Streamlining the Law: Further Proposals (Chapters 9 to 14)**

We make a number of additional recommendations designed to make company law more efficient:

- modernising the process of forming a company, including the replacement of the memorandum and articles of association with a constitution in a single document;
- reform of the capital maintenance rules, including:
  - simplifying the rules for public companies on giving financial assistance for the acquisition of shares (as well as abolishing the restrictions altogether for private companies);
  - providing an alternative to the present court procedure for capital reductions;
  - abolishing authorised share capital;
  - codifying the common law rules on company distributions;
- ensuring public access to information about companies, while restricting scope for abuse, including:
  - preserving access to companies' registers of members, while restricting the use which can be made of the information to purposes relevant to the holding of interests recorded in the register, or the exercise of rights attached to them and other purposes approved by the company (so as, for example, to prevent the use of shareholder lists for commercial mailshots);

- allowing directors the possibility of filing a “service address” on the public record at Companies House, at which they would accept service of documents and correspondence relating to the company; their residential address would continue to be available to certain public authorities (e.g. enforcement bodies) with others such as members and creditors having the right to apply to the court for access;
- reforming the law on the registration of company charges where, because the issues raised go wider than company law, we recommend that the Law Commissions should be invited to undertake a more wide-ranging study;
- updating the law on “trading disclosures” (principally the information companies must disclose in business communications), to reflect modern conditions, such as increasing use of electronic communications;
- facilitating company restructuring, while protecting the interests of creditors and minority shareholders, including:
  - improvements to the procedures for company reconstructions in Part XIII and under section 110 of the Insolvency Act 1986;
  - clarifying and modernising the procedures on compulsory purchase of shares following a takeover offer (Part XIII A);
- providing a new mechanism for companies to migrate to and from Great Britain, and between England and Wales and Scotland, without having to be wound up;
- rationalising the existing procedures for restoring dissolved companies to the register, and providing a new administrative procedure enabling restoration in straightforward cases without the need for court intervention;
- increased flexibility on company re-registration, including enabling companies limited by shares to re-register as companies limited by guarantee and vice versa;
- simplifying the law on overseas companies – replacing the two existing overlapping and inconsistent regimes with a single set of procedures, and updating disclosure requirements;

- updating the law on unregistered companies;
- providing a separate form of incorporation designed specifically for charities.

## **Effective Sanctions (Chapter 15)**

A reformed Companies Act must be underpinned by effective and proportionate sanctions and enforcement. We set out an overall approach to devising an appropriate sanctions regime, together with a number of more specific recommendations.

We recommend strengthening the criminal law for Companies Act offences involving dishonesty, including for fraudulent trading by British and foreign companies; modernising and clarifying company law on the criminal liability of directors, officers and managers; and codifying the civil sanctions against directors.

We recommend that companies should be required to disclose in the annual report any criminal convictions during that reporting year for breaches of Companies Act requirements on the part of the company or its officers.

We also make recommendations to tackle the abuse of limited liability where directors seek to avoid obligations to creditors and maintain their trading goodwill by transferring assets from a failing company to another company (the “phoenix” syndrome). We recommend:

- strengthening the existing provisions on transactions between a company and its director(s) (under section 320) in the context of insolvency;
- stronger safeguards where a director of a failed company applies to the court to be a director of, or concerned in the management of, another company with the same or a similar name (section 216, Insolvency Act 1986);
- interim orders for disqualification of directors in advance of final disqualification proceedings, to enable speedy preventative action in serious cases.

