
# The Law Commission

**and**

# The Scottish Law Commission

**(LAW COM. No. 126)**

**(SCOT. LAW COM. No. 83)**

## AMENDMENT OF THE COMPANIES ACTS 1948–1983

REPORT UNDER SECTION 116 OF THE
COMPANIES ACT 1981

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*Presented to Parliament*
*by the Lord High Chancellor and the Lord Advocate*
*by Command of Her Majesty*
*December 1983*

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# REPORT UNDER SECTION 116 OF THE COMPANIES ACT 1981

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# THE LAW COMMISSION
# AND THE SCOTTISH LAW COMMISSION

## AMENDMENT OF THE COMPANIES ACTS 1948–1983

## REPORT UNDER SECTION 116 OF THE COMPANIES ACT 1981

*To The Right Honourable The Lord Hailsham of St. Marylebone, C.H., Lord High Chancellor of Great Britain, and The Right Honourable The Lord Mackay of Clashfern, Q.C., Her Majesty's Advocate*

## INTRODUCTION

This Report is made by our two Commissions jointly, in pursuance of section 116 of the Companies Act 1981 (c. 62), subsection (1) of which is in the following terms:—

> "(1) Her Majesty may by Order in Council make such amendments of the Companies Acts and of any other enactment relating to companies, whenever passed, as may be jointly recommended by the Law Commission and the Scottish Law Commission as desirable to enable a satisfactory consolidation of the whole or the greater part of the Companies Acts to be produced."

Work is currently in hand for the production of draft Bills, which between them consolidate the greater part of the Companies Acts 1948 to 1983. It is envisaged that the Bills will be ready for presentation to Parliament early in 1984, with a view to their passage into law in the current Parliamentary Session. Each of the Bills is at present framed with a commencement provision to the effect that the resultant Act is to enter into force on 1 January 1985.

In May 1983 a draft of this Report was sent to the professional bodies principally concerned with company law. They were asked for their comments.[1] A considerable number of suggestions for additional amendments were made, together with some which related to those proposed in the draft. Although all the suggestions have been most carefully considered, the amendments which can properly be made under the order in council procedure require to be confined to such as are desirable to enable a satisfactory consolidation to be produced, and many of the amendments which were suggested seem to us to fall outside the confines of what we can properly recommend for that purpose. All those suggestions which we have felt unable to accept have been sent to the Department of Trade and Industry and they form a most valuable body of suggestions for further amendments of the companies legislation by the ordinary processes of amending legislation. We are grateful to those who took the trouble to respond for the immense amount of hard work which they put into replying to our request for comments.

[1] A list of those organisations to whom a draft of this Report was sent in May 1983 is to be found in Appendix II to this Report.

In the exercise of our functions under section 116 of the Companies Act 1981, we hereby jointly recommend on behalf of our respective Commissions certain amendments of the Companies Acts 1948 to 1983 as desirable to enable a satisfactory consolidation of the greater part of those Acts to be produced. We have consulted the Department of Trade and Industry in relation to all the amendments we recommend and are grateful to them. They agree with our recommendations. The amendments are set out in Appendix I to this Report, each separate amendment of one or other of the Acts being assigned a number for purposes of identification, and accompanied by a Note explaining our reasons for making the recommendation.

RALPH GIBSON *Chairman of the Law Commission*
PETER MAXWELL *Chairman of the Scottish Law Commission*

*18 November 1983*

## APPENDIX I

## RECOMMENDATIONS

### A. Amendments of the Companies Act 1948 (c. 38)

**Amendment No. 1**

In section 2(4) of the Companies Act 1948, for paragraph (*c*) there shall be substituted the following paragraph:

"(*c*) There must be shown in the memorandum against the name of each subscriber the number of shares he takes."

*Note:* Section 2 of the 1948 Act lays down certain formal requirements in connection with the first steps towards the formation and registration of a company. Subsection (4) specifies certain matters which are to be stated in the memorandum and must be complied with in order to enable the registrar to accept the company for registration in accordance with the Act.

Paragraph (*c*) of section 2(4) requires each subscriber to "write . . . the number of shares he takes". This provision dates back to the Companies Act 1862, passed at a time when no doubt each subscriber did indeed write in this information. It is, however, anachronistic at the present day, and is not in practice observed in the letter. The registrar accepts any memorandum on which the number of shares taken by each subscriber is clearly shown, whether in print, typescript or manuscript.

We consider that the requirement of section 2 should be brought into conformity with modern practice, since this can be achieved without any change of substance, or any relaxation of the controls properly exercised in respect of company formations.

**Amendment No. 2**

In section 7 of the Companies Act 1948, for subsection (1) there shall be substituted:

"(1) In the case of an unlimited company having a share capital, the articles must state the amount of share capital with which the company proposes to be registered.";

and subsections (2) and (3) shall be omitted.

*Note:* Section 7 of the 1948 Act provides that an unlimited company and a company limited by guarantee must include in its articles a statement of the number of members with which the company proposes to be registered. It also provides that an unlimited company which has a share capital must state the amount of that capital in its articles. It has been represented to us, and we are satisfied that the point is well made, that subsequent legislation has rendered purposeless so much of this section as requires articles to state the number of members.

This section originated as section 14 of the Companies Act 1862. By section 17 of that Act certain fees were payable to the registrar of companies on a scale laid down in a Schedule to the Act. The amount of the fee payable on registration was, in the case of a company of any constitution having a share capital, determined under the Schedule by reference to the amount

of the share capital. If the company had no share capital, it was required on registration to pay a fee determined by reference to the number of its members as stated in the articles. As a matter of effective administration, therefore, the registrar had to know the number of members with which a company proposed to be registered, so that he could apply the test of the number of members to determine the fee in a case where that test was applicable. From the actual wording of section 14 of the Act of 1862 it is clear beyond any possibility of doubt that this, and this only, was the purpose of requiring the articles of an unlimited company or of a company limited by guarantee to specify the number of members.

It is, of course, the case that a person dealing with a company limited by guarantee would be interested in knowing the number of members because the greater the number the greater the value of the guarantee. But what such a person would wish to know is the actual number of members. What the articles are required to specify is not the actual number of members but the maximum number. To discover the actual number of members one would need to inspect the register of members or the most recent annual return of the company, and not its articles.

By section 37 of the Act of 1976, new provision was made concerning the fees payable to the registrar of companies in respect of various matters arising under the Companies Acts. The amount of any fee, and the circumstances and cases in which it was payable, were to be laid down in regulations made by the Secretary of State by statutory instrument. Since then the whole matter of fees has been dealt with in regulations, and it is no longer provided that the amount of any fee is to be determined by reference either to the amount of a company's share capital or to the number of its members. There are, it appears, other reasons why it is desirable that the amount of share capital should be specified, if not in the memorandum then in the articles. As regards specification of the number of members, section 7 of the 1948 Act is now unnecessary and imposes a burden on the registrar and on those companies affected which has no purpose. It also provides a criminal sanction for failure by a company to carry out a meaningless obligation.

The amendment recommended reduces subsection (1) to a simple proposition that the articles of an unlimited company having a share capital must specify the amount of it. Subsections (2) and (3) are concerned solely with the number of members and can therefore be dispensed with altogether.

**Amendment No. 3**

In section 51 of the Companies Act 1948, in subsection (6), all the words following "in pursuance of the prospectus" in paragraph (*a*) shall be omitted; and after that subsection there shall be inserted:

"(7) Where a prospectus offers shares for sale—

(*a*) subsection (1) of this section applies as if the reference to allotment were a reference to sale;

(*b*) subsection (2) does not apply, but—

(i) if the permission referred to in subsection (1) has not been applied for as there mentioned, or has been refused as there mentioned, the offeror of the shares shall forthwith repay without interest all money received from applicants in pursuance of the prospectus, and

(ii) if any such money is not repaid within eight days after the offeror becomes liable to repay it, he shall become liable to pay interest on the money due, at the rate of 5 per cent. per annum from the end of the Eighth day;

(*c*) Subsections (3) to (6) apply, but in subsection (3) for the first reference to the company there shall be substituted a reference to the offeror, and for the reference to the company and every officer of the company who is in default there shall be substituted a reference to any person by or through whom the offer is made and who knowingly and wilfully authorises or permits the default."

*Note:* Subsections (1) to (6)(*a*) of section 51 of the 1948 Act are concerned with the issue by a company of a prospectus stating that application has been or will be made for permission for the shares or debentures offered by the prospectus to be dealt with on the stock exchange. The section makes special provisions as to what is to happen to money paid by applicants, both during the period before permission is granted and in the event that permission is refused. The subsections provide that upon the issue of such a prospectus application moneys must in the first instance be kept in a separate bank account and, if they are not, the company and the responsible directors commit a criminal offence. If the permission to deal is not granted by the stock exchange, allotments are rendered void and the application moneys have to be repaid. If they are not promptly repaid, the responsible directors are themselves made liable to repay the moneys with interest.

These provisions do not operate comfortably where the prospectus is issued by an issuing house offering for sale shares already in issue. Since the offer is of shares for sale and not for subscription there is no allotment. Moreover, the issuing house may not be a company. If it is not, the distinction made by the subsections between the company and the responsible directors is not appropriate. Subsection (6)(*b*) therefore makes adaptations in the earlier subsections to apply them in the case of an offer for sale. But the adaptation to subsection (2), which is contained in subsection (6)(*b*)(ii), whilst effectively substituting the issuing house for the company in relation to the primary obligation to repay application moneys promptly, fails to make what may be thought to be a necessary adaptation in relation to the obligation upon the directors to pay principal and interest where repayment by the issuing house is not made promptly. The amendment makes the necessary adaptation and ensures that when payment is delayed it is the issuing house which is responsible for repaying the principal with interest.

**Amendment No. 4**

In section 52 of the Companies Act 1948, in subsection (1)(*a*), for the words "names, addresses and descriptions" there shall be substituted the words "names and addresses".

*Note:* Section 52 of the Act of 1948 is concerned with the action to be taken by a company following the allotment of shares. Subsection (1) requires the company, within one month after the allotment, to make a return of the allotments to the registrar of companies. The return is to be in the prescribed form (in accordance with the section as amended by Schedule 1 to the Act of 1976, which to a large extent generalised the principle that returns,

etc. made to the registrar under the Companies Acts must be in the form prescribed by regulations). Among other particulars to be given, the company is required to state "the names, addresses and descriptions of the allottees". The requirement that "descriptions" are to be furnished has in recent years given rise to difficulty and doubt concerning the exact nature of the information that is to be given in respect of an individual or body corporate concerned. Study of the history of the companies legislation shows that the word originally may have meant what today would be referred to as an "occupation" but in the last century the word "occupation" might not have been regarded as apt for all shareholders. More modern companies legislation uses the word "occupation" when this is what is meant and "description" has now become an ambiguous word both in its intrinsic meaning and when contrasted with "occupation".

We have received representations from the professions in respect of this matter, and in particular one from the Institute of Chartered Secretaries and Administrators which is to the following effect:

> In practice, there has always been difficulty in interpreting the word "description". Before 1948, some companies did not attempt to distinguish between the words "description" (in section 52(1)(*a*)) and "occupation" (elsewhere in the Act) and included in a return of allotments the occupation which would appear subsequently in the register of members in respect of an allottee. Other companies used such words as "gentleman", "married woman" and "spinster" in an attempt to satisfy the requirement to state the description . . .
>
> Since 1948, it has been the practice of public companies and, it is believed, many private companies to use "Mr.", "Mrs." or "Miss" or other title . . . to denote the description of an allottee and returns of an allotment completed with such titles but without other description are accepted by the registrar of companies.
>
> Now that there is no longer a requirement to state the occupation of a member in the company's register of members (following the Report of the Committee on Company Law Amendment, 11 June 1945, Cmd. 6659 at page 38, given effect to by section 51 of the Companies Act 1947), it would seem that no useful purpose is served in continuing to require a company to state the description of an allottee, particularly as strict compliance with the requirement is impossible unless a company is in possession of, and prepared to give, information regarding an allottee in a form such as "male, 6 ft., brown hair".

The Institute recommended that section 52 be amended by removing the requirement to provide a "description" of the allottee. This proposal was supported from other quarters where experience over the years has been gained in the working and practicalities of the companies legislation. In particular, similar representations have been received from the Law Society.

Having regard to the uncertainty which attaches to the word "description" as used in section 52, to the practical impossibility of compliance with the section and the deletion of the requirement to state the occupation of members, we recommend that the requirement to state the "description" of allottees in section 52 should be deleted.

**Amendment No. 5**

At the end of section 106 of the Companies Act 1948, there shall be added as a subsection (2):

"(2) In relation to such a company sections 103 and 104 apply with the substitution, for the reference to the company's registered office, of a reference to its principal place of business in England and Wales."

*Note:* By section 106 of the 1948 Act (as amended by the Act of 1981, Schedule 3, paragraph 3), provisions of Part III concerning the registration of company-created charges, and their registration and enforceability, are extended to companies incorporated elsewhere than Great Britain, but having an established place of business in England and Wales. The application of Part III is, however, only in respect of charges on property in England and Wales.

Section 103 requires an English or Welsh company to cause a copy of every instrument creating a charge which requires registration to be kept at the company's registered office. A company incorporated elsewhere than Great Britain has, in the nature of the case, no registered office there; it follows that section 103 is in practice unworkable and inoperative in relation to companies so incorporated. The same applies also to section 104, which requires a company to keep at its registered office a register of charges affecting the company's property.

The amendment is recommended with a view to substituting, in relation to such a company, a reference to its principal place of business in England and Wales, as the place where copies are to be kept of instruments creating registrable charges, and the register of such charges created by the company.

**Amendment No. 6**

At the end of section 106K of the Companies Act 1948 there shall be added as a subsection (2):

"(2) In relation to such a company sections 106H and 106I apply with the substitution, for the reference to the company's registered office, of a reference to its principal place of business in Scotland."

*Note:* The purpose of the amendment is the same in all respects as that of Amendment No. 5 (supra), but in relation to Scotland.

**Amendment No. 7**

In section 124(1) of the Companies Act 1948, for the words "the form set out in Part II of that Schedule or as near thereto as circumstances admit" there shall be substituted the words "the prescribed form".

*Note:* The form in which a company's annual return is to be submitted to the registrar of companies was originally that set out in Part II of Schedule 6 to the Act of 1948. Section 454 of that Act empowers the Secretary of State (formerly the Board of Trade) to make certain changes in the Act by means of regulations under the section, these to be made by statutory instrument. By subsection (2)(*b*), the power extends to altering the form in Schedule 6 Part II. The power was last exercised in 1983 (S.I. 1983 No. 1023). Accordingly, the form to be used by a company in compliance with section 124 is the one set out in the statutory instrument.

It is at the present day unusual, if not positively anomalous, for forms to be set out in Schedules to Acts, unless the matter to be dealt with in the form is of particular importance or sensitivity. Almost invariably Acts provide for an applicable form to be prescribed by subordinate legislation, frequently without any Parliamentary control (the political or policy content, if any, of the instrument prescribing the form being insignificant). On the basis of strict consolidation practice, it would be necessary in the present instance to reproduce section 124 with the form now currently set out in a Schedule (as was the case in the Act of 1948), preserving however the power for the Secretary of State to change it further by statutory instrument under a re-enacted 1948 section 454.

The amendment is recommended with a view to making such provision unnecessary. It is right to remark, however, that the effect of the amendment is to take the statutory instrument out of the "negative resolution" procedure in 1948 section 454: the regulations prescribing this particular form would simply be laid before Parliament, as in the case of other forms required for the purposes of the Companies Acts. This change we consider justifiable in the particular circumstances, and in accordance with what we take to be the policy of the legislation.

The effect of the recommended amendment is to retain the substance of the present position: the form for the annual return is prescribed by statutory instrument, but does not actually appear in the text of the Act.

**Amendment No. 8**

In section 125(2) of the Companies Act 1948, for the words "annexed to" there shall be substituted the words "included in".

*Note:* Section 125 of the Act of 1948 imposes on a company not having a share capital the obligation to make an annual return, stating the matters set out in subsection (1) of the section. By subsection (2) it is required that there shall be *annexed to* the return a statement containing particulars of the company's outstanding indebtedness in respect of mortgages and charges registrable under Part III of the Act.

Practical convenience, both in company internal administration and in the office of the registrar of companies, requires that the statement of the company's indebtedness should no longer be annexed to the return, but should be included in it, as part of one single document. This reduces the likelihood of the requirements of section 125(2) being overlooked in the case of a company making its return under that section.

**Amendment No. 9**

In section 125 of the Companies Act 1948, in subsection (2), the words from "(or, in the case" to "would be required)" shall be omitted.

*Note:* Section 125(2) of the 1948 Act requires a company to provide with its annual return a statement showing its indebtedness "in respect of all mortgages and charges which are required (or, in the case of a company registered in Scotland which, if the company had been registered in England, would be required) to be registered with the registrar of companies" under the 1948 Act. At the time when section 125 was enacted, there was no provision for the registration of charges created by companies registered in Scotland, and

the words in brackets in section 125(2) were necessary to make subsection (2) applicable to Scottish registered companies. Section 6 of the Companies (Floating Charges and Receivers) (Scotland) Act 1972 (c. 67), however, inserted a section 106A into the 1948 Act, subsection (2) of which specifies the charges which a company registered in Scotland is required to register. The 1948 Act, therefore, now makes separate provision both for Scottish and English companies in relation to the registration of charges and it is unnecessary to re-enact the words in brackets in section 125(2).

**Amendment No. 10**

In section 126(2) of the Companies Act 1948, for the words from the beginning to "default fine" there shall be substituted:

> "If a company fails to comply with this section, the company and every officer of the company who is in default shall be liable on summary conviction to a fine not exceeding the statutory maximum or on conviction after continued contravention to a default fine (within the meaning of section 80(2) of the Companies Act 1980) not exceeding one-tenth of the statutory maximum."

*Note:* In consequence of section 80 of, and Schedule 2 to, the Act of 1980, penalties for the very large number of offences under the Companies Acts 1948, 1967 and 1976 were altered upwards to take account both of changes in the value of money and also of changes recently made in the jurisdiction and powers of magistrates' courts in criminal cases. As a result of that operation, the punishment for contravening provisions of the 1948 Act relating to a company's annual return, viz. section 124 (failure of company with share capital to make annual return), section 125 (failure of company not having a share capital), and section 126 (failure to complete annual return and send it to the registrar of companies in due time) was, in each case, a fine of one-fifth of the statutory maximum and, for continued contravention, a daily default fine of one-fiftieth of the statutory maximum per day on which the offence is continued. (The "statutory maximum" is, at the present time, £1,000; but it is subject to alteration by statutory instrument, to take into account changes in the value of money.) In all three cases the offence is punishable only on summary conviction.

At the time of the passage of the Companies Act 1981, it had become the policy to increase the penalties for the particular offence of failure to make and submit an annual return; and this change of policy was associated with section 95 of the 1981 Act, which had the effect of requiring a greater degree of disclosure concerning the past directorships held by members of a company's board.

By paragraph 4 of Schedule 3 to the 1981 Act, sections 124 and 125 of the 1948 Act were amended so as to make the punishment on summary conviction for failure to comply with either of those two sections a fine of the statutory maximum (instead of one-fifth of that maximum), and for continued contravention one-tenth of the maximum (instead of one-fiftieth). We think there can be no doubt that it was due to an oversight that only sections 124 and 125 were so amended, which sections only penalise failure to *make* an annual return. Section 126, which penalises failure to *submit* the return, was not amended, with the consequence that for that offence the penalty remains as under the Act of 1980.

This result is considered to be anomalous and illogical, and we recommend the amendment in order to bring section 126 of the 1948 Act into line with sections 124 and 125, as these last were amended by the Act of 1981.

**Amendment No. 11**

In section 143 of the Companies Act 1948, in paragraph (*c*) of subsection (4), after the word "resolutions" (where it first appears) there shall be inserted the words "or agreements".

*Note:* Under section 143 of the 1948 Act certain resolutions and agreements arrived at by, or among the members of, a company have to be copied to the registrar of companies within 15 days. Subsection (4) specifies the resolutions and agreements to which this rule applies. In that subsection, paragraph (*c*) specifies "resolutions which have been agreed to by all members of the company . . ."; and this provides a somewhat stark contrast with the opening words of the paragraph immediately following, viz. "resolutions *or agreements* which have been agreed to by all the members of some class of shareholders . . .". It is believed that this inconsistency must have been due to a slip in the drafting of the original section (section 26 of the Act of 1928), and we recommend that it should be corrected for the purposes of the present consolidation.

**Amendment No. 12**

In section 152 of the Companies Act 1948, in subsection (4), for the words from "the end of its financial year" to the end of the subsection there shall be substituted:

"the end of its relevant financial year, that is—

(*a*) if its financial year ends with that of the holding company, that financial year, and

(*b*) if not, the subsidiary's financial year ending last before the end of the financial year of the holding company dealt with in the group accounts,

and with the subsidiary's profit or loss for its relevant financial year."

*Note:* Section 152 of the 1948 Act was completely replaced by section 2 of the Act of 1981. The purpose of this amendment is to remove a minor ambiguity in subsection (4) of the replacement section.

By section 153(1) of the 1948 Act the holding company's directors must secure that "except where in their opinion there are good reasons against it, the financial year of each of its subsidiaries shall coincide with the company's own financial year". Exceptionally, therefore the financial year of a particular subsidiary may not coincide with that of the holding company: it may be shorter or longer and, in either case, it may or may not end with the financial year of the holding company. The Act seeks to specify which financial year of the subsidiary is, in these circumstances, to be selected for the preparation of group accounts. For this purpose the new section 152(4) specifies the financial year "ending with or last before that of the holding company". This works without ambiguity where the most recently completed financial year of the subsidiary ends before that of the holding company.

In that case that most recent year has to be selected. But if the most recently completed financial year of the subsidiary ends with that of the holding company a possible construction of the words "ending with or last before that of the holding company" could leave the directors of the holding company with an option to select, instead of the most recently completed financial year, the financial year immediately preceding it. The view generally taken of the new section 152(4) is that it is not, and never was, intended to leave that option and we consider that the ambiguity should be removed in the consolidation.

**Amendment No. 13**

In section 167(2) of the Companies Act 1948, for the word "business" there shall be substituted the word "affairs".

*Note:* Section 167 of the Act of 1948 relates to the case in which the affairs of a company are investigated by inspectors appointed by the Secretary of State under section 164 or 165. It becomes the duty of all officers and agents of the company, and of any body corporate whose affairs are being investigated at the same time by virtue of section 166, to co-operate to the full with the inspectors as regards the giving of information, and the production of books and papers, relating to the subject-matter of the investigation or any aspect of it.

Under both section 164 and 165, the inspectors are appointed "to investigate the *affairs* of a company"; and section 166 is in similar terms as respects a body corporate which under that section comes within the purview of the investigation. Section 167(1A) (added by amendment in section 87 of the Act of 1981) empowers the inspectors to call for information concerning the company's *affairs*. Section 167(3) imposes a penalty for failure, on the part of an officer or agent of the company, to produce books or documents, and for refusal to answer any question "put to him by the inspectors with respect to the *affairs* of the company . . .". By contrast, in section 167(2), provision is made for the inspectors to have power to "examine on oath the officers and agents of the company . . . in relation to its *business* . . .", and to administer an oath accordingly. This inconsistency between section 167(2) and 167(1A) should, in our view, be removed for the purposes of a satisfactory consolidation.

We do not think that the inconsistency can have been intended. If there is any difference between the two words, we are unable to form any view of how the inspectors could be expected to take account of it in the conduct of their investigation. It is noteworthy that section 165(*b*)(i), as originally enacted, gave power to appoint inspectors "if it appears to the Board (of Trade) that there are circumstances suggesting that its (the company's) *business* is being or has been conducted with intent to defraud its creditors . . ."; and this was altered by amendment in the Act of 1980 into a sub-paragraph beginning "that its *affairs* are being or have been conducted . . .". It might be supposed that the opportunity would have been taken to make a consequential alteration of the reference in section 167(2) to the company's business; this, however, was not done, and we think that the omission must have been due to a slip, which it is now appropriate to remedy by amendment.

**Amendment No. 14**

In section 249 of the Act of 1948:

(*a*) in subsection (4), after the words "has been audited" there shall be inserted the words "(or, as the case may be, forthwith if the Secretary of State decides not to have an audit)", and

(*b*) in subsection (5), for the words "shall cause the account when audited or a summary thereof" there shall be substituted the words "shall, when the account has been audited (alternatively, when he has been notified of the Secretary of State's decision not to have an audit) cause the account or a summary of it".

*Note:* In the case of a company wound up by the court in England and Wales, section 249 of the 1948 Act requires the liquidator to make a twice-yearly account of his receipts and payments in the liquidation. In section 249(3) as originally enacted there was provision requiring the Board of Trade (now the Secretary of State) to cause the account to be audited, after which copies were retained in the custody of the court, and also by the Department.

By section 2 of the Insolvency Act 1976 (c. 60), the obligation on the Secretary of State to audit the liquidator's account was replaced by a discretionary power to do so. However, section 249(4) and (5) were left unamended. In the former subsection there was retained the phrase "When the account has been audited"; and in the latter, the phrase "the account, when audited". These phrases became unapt in the case where the Secretary of State decides not to cause the account to be audited. The amendments of section 249 which are here recommended make the consequential changes in subsections (4) and (5) which might have been, but were not, made by section 2 of the 1976 Act and render the original section more easily workable by the liquidator and the court and departmental officials. There is no reason to suppose that they disturb the essential effect of section 249.

**Amendment No. 15**

In section 320 of the Companies Act 1948, in subsection (3), the words from "the expression" to "notour bankruptcy" shall be omitted.

*Note:* Section 320 of the 1948 Act deems certain transactions to be fraudulent preferences when they are granted within 6 months before the commencement of the winding up of the debtor company concerned. The expression "fraudulent preference" is not defined for England but in subsection (3) is defined for Scotland as including "any alienation or preference which is voidable by statute or at common law on the ground of insolvency or notour bankruptcy". It is not clear why any definition was thought necessary for Scotland, as the expression "fraudulent preference" has a recognised meaning in Scots law.

The definition is framed in such wide terms that it might be construed as including a *gratuitous* alienation. This would be inappropriate because gratuitous alienations are challengeable under Scots law not by reference to the time when they were created, but solely on the ground that the debtor was insolvent at the time of the gratuitous alienation, irrespective of when this occurred. Moreover, it can hardly have been in contemplation that the section should produce a different result north and south of the border.

For these reasons we recommend that the definition of "fraudulent preference" should not be re-enacted.

**Amendment No. 16**

In section 322(3) of the Companies Act 1948, for the word "Act" there shall be substituted the word "section".

*Note:* Section 322(1) of the Act of 1948 provides that a floating charge is invalid in whole or in part where it is created within 12 months of the commencement of a winding-up unless it is proved that the company was solvent immediately after the creation of the charge. There was previously some doubt in Scotland as to whether a floating charge could be challenged as a fraudulent preference only under section 322(1) of the Act, or whether challenge under the common law also remained and, in consequence, the Scottish Law Commission recommended in 1970 that this doubt should be removed (see paragraphs 31 and 32 of the Commission's Report on the Companies (Floating Charges) (Scotland) Act 1961; (1970) Cmnd. 4336; Scot. Law Com. No. 14). Section 322 was therefore intended to be expanded to provide that a floating charge was reducible only under section 322(1). Accordingly, the saving in section 322(3) should be restricted to a saving for challenge under section 322. There should not be a saving for challenge under the provisions of the Act of 1948 generally. The proposed amendment makes the required alteration.

**Amendment No. 17**

In the Companies Act 1948, the following shall be substituted for section 348:

"Commission for receiving evidence.

348.—(1) When a company is wound up in England and Wales or in Scotland, the court may refer the whole or any part of the examination of witnesses—

(*a*) to a specified county court in England and Wales, or

(*b*) to the sheriff principal for a specified sheriffdom in Scotland, or

(*c*) to the High Court in Northern Ireland or a specified Northern Ireland county court,

("specified" meaning specified in the order of the winding-up court).

(2) Any person exercising jurisdiction as a judge of the court to which the reference is made (or, in Scotland, the sheriff principal to whom it is made) shall then, by virtue of this section, be a commissioner for the purpose of taking the evidence of those witnesses.

(3) The judge or sheriff principal shall have in the matter referred the same power of summoning and examining witnesses, of requiring the production and delivery of documents, of punishing defaults by witnesses, and of allowing costs and expenses to witnesses, as the court which made the winding-up order.

These powers are in addition to any which the judge or sheriff principal might lawfully exercise apart from this section.

(4) The examination so taken shall be returned or reported to the court which made the order in such manner as that court requests.

(5) This section extends to Northern Ireland."

*Note:* Section 348 of the 1948 Act enables the court, in a winding-up either in England and Wales or in Scotland, to remit the hearing of specialised or local evidence to another court in the United Kingdom (including Northern Ireland) where it is considered convenient. Changes in the legal and judicial systems have taken place, in all three parts of the United Kingdom, which make it necessary to revise the terms of the section, while retaining its general effect and practical operation.

Firstly, as at present enacted, the section provides for the winding-up court to refer the taking of evidence to certain persons in England and Wales who are, by force of the section, constituted commissioners for this purpose. These are "the judges of the county courts in England who sit at places more than twenty miles from the General Post Office". This limitation on the power of county court judges to take evidence on commission would have been practical at a time when, if it could be done within twenty miles of the General Post Office, it could equally well be done in the High Court in the Strand. The phraseology of the section is also inappropriate, following the reorganisation of the courts and judiciary which took place under the Courts Act 1971 and subsequently. There is no longer any such personage as a judge of a particular county court: there are now only Circuit Judges, who are assigned administratively to sit in a particular county court normally only for a limited period.

In the case of reference to a county court in England and Wales, therefore, the section requires amendment so as to provide that the court having charge of the winding-up (whether in England and Wales or in Scotland) refers to the court, not the judge. The judge assigned to that court at the material time will then have the commissioner's powers which the section confers. Those powers, under the section as amended, will be exactly coincident with those which in the past have been exercisable by county court judges (other than those whose courts were inside the London area).

As regards Scotland, section 348 at present confers the powers of a commissioner on "the sheriffs of counties", and the winding-up court's power is to refer the examination of witnesses "to any person hereby appointed commissioner". By section 4(2) of the Sheriff Courts (Scotland) Act 1971 (c. 58), the reference to sheriffs is converted (in all prior enactments) to a reference to the sheriff principal. The winding-up court's power should now, therefore, be expressed in terms of "the sheriff principal for a specified sheriffdom". This will correspond to the position for England and Wales, where the reference is to a specified county court—it being within the discretion of the former to select the county court where the evidence in question can most conveniently be taken. If convenience requires the evidence to be heard in Scotland, the winding-up court will specify a particular sheriffdom; and the sheriff principal sitting there will be a commissioner by force of the section.

Turning to Northern Ireland, the winding-up court in either England and Wales or Scotland can refer the examination of witnesses to a court there.

At present those having commissioner's powers under section 348 are "the judge exercising the bankruptcy jurisdiction of the High Court and county court judges and recorders". It is not at the present day appropriate to distinguish between one High Court judge and another by reference to the particular jurisdiction excercised. As in England and Wales, each judge is empowered to exercise the whole jurisdiction of the Court. It follows that the winding-up court's reference under section 348 should now be to the Northern Ireland High Court, the commissioner's powers being exercisable by any judge of that court.

By the same token, although there is in Northern Ireland still the office of "county court judge", and although judges are assigned to a particular county court division, there is also provision whereby any county court judge can be assigned to sit in any division. Consequently, the balance of convenience here also is to allow for the winding-up court to refer to a specified Northern Ireland county court, the power to take evidence on commission being exercisable by the county court judge for the time being assigned to sit in that court.

We are advised that the reference in section 348 to Northern Ireland recorders can be omitted, this being only a ceremonial title for two of the county court judges.

Finally, since the section (both as now in force, and as proposed to be amended) specifies particular powers exercisable by courts and judges in Northern Ireland, it is necessary that provision to that effect should be made part of the law of Northern Ireland. Subsection (5) of the revised section is to that effect, remedying a technical deficiency in the present Act of 1948.

**Amendment No. 18**

In section 372 of the Companies Act 1948, in subsection (2) after the words "the last preceding abstract related" there shall be inserted the words "(or, if no preceding abstract has been sent under this section, from the date of his appointment)".

*Note:* Section 372 of the 1948 Act is contained in Part VI of the Act, which relates to receivers and managers. The section imposes on a receiver certain obligations with respect to keeping the company, the registrar, debenture holders and any trustee for them informed of the progress of his receivership and the state of the company's affairs from the time of his appointment. Subsection (2) requires him to circulate, twelve-monthly, an abstract of receipts and payments. Where he ceases to act, he is required to send out such an abstract in respect of "the period from the end of the period to which the last preceding abstract related up to the date of his so ceasing".

The section does not, therefore, allow for the case in which the receiver ceases to act within a period of less than 12 months from his appointment. In that case there will be no "last preceding abstract". His terminal abstract of receipts and payments cannot do other than relate to the period from the date of his appointment to the date of his ceasing to act as receiver. The amendment is recommended with a view to making this clear, and to placing the obligations of the receiver beyond doubt.

**Amendment No. 19**

In section 374 of the Act of 1948, in subsection (1), after the words "the last preceding abstract related" there shall be inserted the words "(or, if no preceding abstract has been delivered under this section, from the date of his appointment)".

*Note:* Section 374 of the Act of 1948 is also in the Part relating to receivers and managers. It requires a receiver or manager in certain circumstances to deliver to the registrar of companies an abstract showing his receipts and payments "during the period from the end of the period to which the last preceding abstract related" up to the date of his ceasing to act.

Exactly the same point arises as is proposed to be dealt with by Amendment No. 18. The receiver or manager may have ceased to act before he has delivered any abstract under the section; and in that case the period referred to must date from the time of his appointment. The reason for the amendment, and its effect, are as stated in the Note to Amendment No. 18.

**Amendment No. 20**

In section 384 of the Companies Act 1948, before paragraph (*a*) there shall be inserted the following paragraph:

"(*aa*) a statement in the prescribed form specifying the name with which the company is proposed to be registered".

**Amendment No. 21**

In section 384 of the Companies Act 1948, in paragraph (*c*), subparagraphs (iii), (iiia) and (iv) shall be omitted.

**Amendment No. 22**

In section 385 of the Companies Act 1948, before paragraph (*a*) there shall be inserted the following paragraph:

"(*aa*) a statement in the prescribed form specifying the name with which the company is proposed to be registered; and".

**Amendment No. 23**

In Part VIII of the Companies Act 1948, after section 387, the following section shall be inserted:

"Requirements as to name of company registering.

387A.—(1) The following applies with respect to the name of a company registering under this Part (whether a joint stock company or not).

(2) If the company is to be registered as a public company, its name must end with the words 'public limited company' or, if it is stated that the company's registered office is to be situated in Wales, with those words or their equivalent in Welsh ('cwmni cyfyngedig cyhoeddus'); and those words or that equivalent may not be preceded by the word 'limited' or its equivalent in Welsh ('cyfyngedig').

(3) In the case of a company limited by shares or by guarantee (not being a public company), the name must have 'limited' as

its last word (or, if the company's registered office is to be situated in Wales, 'cyfyngedig'); but this is subject to section 25 of the Companies Act 1981 (exempting, in certain circumstances, a company from the requirement to have 'limited' as part of the name)."

*Note:* This group of amendments is recommended with regard to the following considerations.

Sections 384 and 385 of the Act of 1948 are concerned with the formalities of registration under the Act of companies not formed under it. These would in many cases be "joint stock companies" (which expression is defined in section 383); but not necessarily so—see the categories of companies to which the procedure is applicable, in section 382(1). In order to obtain registration under Part VIII, a company has to provide certain particulars relating to itself, and submit these to the registrar of companies. Evidently it is requisite that the company should specify the name by which it is proposed to be registered, and that name must be subject to the same controls as are applicable in the case of companies first formed under the Act of 1948 and submitting a memorandum in the form prescribed under section 2 of the Act. It must have the same option, if it is to have a registered office in Wales, to have "cwmni cyfyngedig cyhoeddus" or "cyfyngedig" (as the case may be) as part of the name, in place of "public limited company" or "limited". And it must be within the same controls as any other company both as respects the categories of names which are not permitted, or permitted only subject to conditions (see Part II of the Act of 1981), and also as respects the circumstances in which exemption from the requirement to include the word "limited" is available (section 25 of that Act).

The difficulty in relation to sections 384 and 385 of the Act of 1948, as amended by the Acts of 1980 and 1981, is that they do not unambiguously give effect to these requirements, which are fundamental to the policy of the legislation in respect of company nomenclature.

For practical reasons of administration it is essential that a company proposing to register under Part VIII should be required to state the name with which it is proposed to be registered, in order that the registrar may, in appropriate cases, exercise his judgment as to whether it is a name which is permitted under the Companies Acts. Yet section 384 (which applies exclusively to joint stock companies registering), as amended by the Acts of 1976 and 1981, by paragraph (*a*) only calls for the name to be stated in an application by a company proposing to be registered as limited; and section 385 (which applies to companies other than joint stock companies) does not include any requirement to state the company's name. Moreover, section 384 only applies as regards informing the registrar of what the name is to be, instead of containing a positive requirement that it shall have a certain name, and a positive prohibition on certain other names. On the footing that these sections of the 1948 Act, as amended by Acts of later years, do not give adequate effect to the policy of the legislation, we consider that they require amendment in order that they shall do so.

Amendments Nos. 20 and 22 have the effect of requiring any company registering under Part VIII (whether a joint stock company or another) to

state to the registrar the name by which it is proposed to be registered. Consequentially, sub-paragraphs (iii) and (iiia) of paragraph (*c*) of section 384 are removed (Amendment No. 21), but the substance of those sub-paragraphs, as to what the company's name must be in order to comply with the Act's requirement and restrictions, is re-stated in a new section 387A added by Amendment No. 23. This new section, which applies both to joint stock companies and to other companies registering under Part VIII, is constructed essentially on the lines of section 2(1)(*a*) of the 1948 Act, combined with 1976 section 30(3) and 1980 section 2(2), whose joint effect is to impose certain requirements on companies as to the use of the appellations "public limited company" and "limited", while allowing specific dispensation for Welsh equivalents in the case of companies which are to have their registered office in Wales. The effect of all amendments together is to place companies registering under Part VIII on the same footing, as regards the name which they may or must have, as companies first formed and registered under the ordinary companies legislation.

Finally, it will be seen that Amendment No. 21 removes from section 384(*c*) of the 1948 Act not only sub-paragraphs (iii) and (iiia), but also sub-paragraph (iv), which requires a joint stock company intending to be registered as a company limited by guarantee to submit to the registrar the company's resolution declaring the amount of the guarantee. This requirement is in present circumstances superfluous, inasmuch as a joint stock company by definition has a share capital, and in consequence of section 1(2) of the Act of 1980, it is not now possible for a company to be formed as, or to become, a company limited by guarantee with a share capital.

**Amendment No. 24**

In section 384(*a*) of the Companies Act 1948, for the words "names, addresses and occupations" there shall be substituted the words "names and addresses".

*Note:* This amendment relates to a point not dissimilar from that which we recommend in Amendment No. 4, above. Section 384 is contained in Part VIII of the Act, which contains provisions enabling a company not formed and registered under the Act (for example a 19th century joint stock company) to register under the Act and thereby place itself on all fours with a company which was originally formed and registered under Part I. Section 384 requires a company registering under Part VIII to deliver to the registrar of companies "a list in the prescribed form showing the names, addresses and occupations of all persons who were (on a particular day) members of the company".

At the time when the statutory predecessor of section 384 was first enacted, companies had to register the occupation of their members. This requirement was, however, abolished by section 51 of the Companies Act 1947. A requirement to record the occupation of a member is today positively anomalous. It serves no useful purpose and the information may in practice be impossible to obtain. This amendment is recommended by us in consequence of representations made by a number of professional bodies with knowledge and experience of the working of the Companies Acts. We are satisfied that opportunity should now be taken to remove this anomaly for the purposes of the consolidation.

**Amendment No. 25**

In section 407 of the Companies Act 1948, the following amendments shall be made:

(*a*) For subsection (1) the following shall be substituted—

"(1) An oversea company which establishes a place of business in Great Britain shall, within one month of doing so, deliver to the registrar of companies for registration—

(*a*) a certified copy of the charter, statutes or memorandum and articles of the company, or other instrument constituting or defining the company's constitution and, if the instrument is not written in English, a certified translation of it; and

(*b*) a return in the prescribed form containing—

(i) a list of the directors and secretary of the company containing the particulars mentioned in subsection (2) below,

(ii) a list of the names and addresses of some one or more persons resident in Great Britain authorised to accept on behalf of the company service of process and any notices required to be served on the company,

(iii) a list of the documents delivered in compliance with paragraph (*a*) of this subsection, and

(iv) a statutory declaration (made by a director or secretary of the company or by any person whose name and address are given in the list required by subparagraph (ii)) stating the date on which the company's place of business in Great Britain was established."

(*b*) In subsection (2), for the words "paragraph (*b*)" there shall be substituted the words "paragraph (*b*)(i)"; and

(*c*) Subsection (2A) shall cease to have effect.

*Note:* This amendment is concerned with the procedure whereby an oversea company establishing a place of business in Great Britain gives statutory notice to the registrar of companies that it has done so. The amendment makes it clear that one form can be prescribed by statutory instrument for the purpose, instead of the present four.

As it at present has effect, section 407(1) operates as follows. Within one month of the company establishing its place of business, it must deliver to the registrar of companies for registration a certified copy of its charter, constitution or other instrument to the same effect, and *also*:

a list in the prescribed form of its officers,
a list in the prescribed form of persons who are authorised to accept service on the company's behalf, and
a list in the prescribed form of the documents previously mentioned in the subsection (that is to say, including the certified copy of the constitution, etc.).

("Prescribed" means prescribed by statutory instrument.)

Thus far, three lists have to be prescribed, one of these being a list of documents which are being simultaneously delivered to the registrar and, on

a certain view, hardly need listing. We are given to understand by the Department of Trade and Industry that this last-mentioned list (required by subsection (1)(*d*) of section 407, inserted by amendment by the Act of 1976) came to be required because of complaints, prior to 1976, that oversea companies were applying to register without submitting all the necessary documents.

A further requirement was introduced by amendment in the Act of 1981, which inserted a subsection (2A) in terms obliging the oversea company (within the statutory month from the establishment of a place of business, but only in the case of companies setting up after the coming into force of the amending paragraph of Schedule 3 to the Act) to deliver for registration a statutory declaration, signed by a director or secretary, as to the date on which the place of business was established.

It has come about, therefore, that four forms have been prescribed for the purposes of the section: they are Forms F1, F2 and F3, set out in Statutory Instrument 1979 No. 1547, and F14 set out in Statutory Instrument 1982 No. 674. This is the cause of some administrative inconvenience in the office of the registrar of companies, and an unnecessary complication of the necessary paperwork. It has been represented to us that simplification can be achieved, without any risk to the effectiveness of the Department's oversight of foreign companies, by so re-structuring section 407 as to enable registration to be effected by means of delivery of the certified copy of the company's constitution etc., and simultaneously a single return (requiring only a single prescribed form) containing all the information now required in the form of lists, and also the statutory declaration required by subsection (2A).

Of the three amendments to the section which we recommend, the first replaces subsection (1) with clear and explicit provision to the above effect; the second is a verbal consequential alteration of subsection (2), and the third removes subsection (2A), whose effect is now subsumed in the substituted subsection (1). It is assumed that the statutory instrument prescribing the single new form would come into force simultaneously with the coming into force of the consolidated Companies Acts.

**Amendment No. 26**

In section 409 of the Companies Act 1948, for the words "the prescribed time" (where they occur in each of subsections (1) and (2)) there shall be substituted the words "the time specified below"; and after subsection (2) there shall be inserted:

"(3) The time for delivery to the registrar of the return required by subsection (1) or (2) is—

(*a*) in the case of an alteration to which subsection (1)(*c*) applies, 21 days after the making of the alteration, and

(*b*) in any other case, 21 days after the date on which notice of the alteration or change in question could have been received in Great Britain in due course of post (if despatched with due diligence)."

*Note:* Section 409 of the Act of 1948 requires oversea companies (if carrying on business in Great Britain) to give notice to the registrar of companies in the event of any change in their constitution or management, or in the list of persons authorised to accept service on the company's behalf, or in

the company's name. Notice has to be given in the form of a return, which is to be made "within the prescribed time". The time for making the return is currently specified in the Companies (Forms) Regulations 1979 (S.I. 1979 No. 1547).

We understand from the office of the registrar of companies that the specification of the time in regulations, and not in the section imposing the liability to make the return, has given rise to a certain amount of inconvenience for managements of oversea companies. A copy of the regulations is not normally in the possession of a company required to comply with the requirement for the return; and in consequence its officers find themselves driven to telephoning the office of the registrar for an exact interpretation of the section of the Act with which compliance is required.

We consider that the convenience of the public, and also of the administration, would be served if section 409 were to be amended so that it specifies the time within which compliance is required, as and when each case arises. We therefore recommend this amendment, whereby a subsection is added to section 409 specifying a time which is the same in each case as that which is prescribed by S.I. 1979 No. 1547. An additional justification for the amendment is that this is the only instance in the Acts where a time for the taking of some required action is not specified in the body of the legislation, but left to prescription by subordinate instrument. In this respect, section 409 is anomalous, and we think it right that the anomaly should be eliminated.

**Amendment No. 27**

In section 455(1) of the Companies Act 1948, after the definition of "officer" there shall be inserted:

"'place of business' includes a share transfer or share registration office";

and accordingly the definition of "place of business" shall be omitted from section 415 in Part X of that Act.

*Note:* It has been pointed out to us that the definition of the expression "place of business" appears in section 415 of the 1948 Act, and operates only for sections 407 to 414 in Part X of the Act (oversea companies) and sections 9 to 11 of the Act of 1976. The expression also appears in other passages of the Act, notably in sections 106 and 106K, which relate to the registration of charges on company property. Although we have no reason to suppose that this restricted application of the definition has been the cause of any special confusion in the working of the Acts, we think there is a clear case for generalising the definition for the purposes of every place in the Companies Acts where the expression "place of business" is used. There can hardly be any doubt that this amendment would improve the quality and accuracy of the consolidation of the Acts.

**Amendment No. 28**

In Schedule 6 to the Companies Act 1948, in paragraph 4, the words from "(or, in the case" to "would be required)" shall be omitted.

*Note:* The amendment is recommended for the same reasons and purposes as Amendment No. 9. The words proposed to be omitted from Schedule 6, paragraph 4, are no longer apt in consequence of section 106A(2) of the

Act, inserted by section 6 of the Companies (Floating Charges and Receivers) (Scotland) Act 1972 (c. 67).

**Amendment No. 29**

In Schedule 8 to the Companies Act 1948, in paragraph 38(2)(*b*), after the words "of the company" there shall be inserted the words "or of the shareholder".

**Amendment No. 30**

In Schedule 8A to the Companies Act 1948, in paragraph 2(*a*), after the words "at the option of the company" there shall be inserted the words "or of the shareholder".

*Note:* These two amendments deal with the same point, and can therefore be explained in a single note.

Section 45 of the Act of 1981 authorises a company (if provisions in its articles allow it) to issue shares which are to be redeemed, or are liable to be redeemed at the option of the company or the shareholder. In the earlier version of the clause in the Bill which became section 45, provision was made only for shares to be redeemable at the option of the company. At a late stage in the progress of the Bill, the clause was amended so as to allow also redemption at the option of the shareholder. This amendment required various consequential alterations elsewhere in the Acts, and in the Bill itself. The consequential amendments in Schedule 8 to the 1948 Act, and in Schedule 8A to that Act, were overlooked; and we recommend that they now be made in order to give the 1981 Act the effect which it was undoubtedly intended to have.

Schedule 8 to the 1948 Act is the main body of provisions governing the make-up and content of a company's accounts. Paragraph 8 of the Schedule specifies the information which is to be provided in the accounts relative to the constituents of the company's share capital, and to any part of it which consists of redeemable shares. Schedule 8A is the previous Schedule 8, re-numbered by section 1 of the 1981 Act. It remains in force for banking, shipping and insurance companies. Paragraph 2 of it (as amended by paragraph 2 of Schedule 1 to the Companies Act 1967) also requires the balance sheet to state whether any part of the company's share capital consists of redeemable shares; and accordingly the same amendment is required.

### B. Amendments of the Companies Act 1967 (c. 81)

**Amendment No. 31**

In section 43 of the Companies Act 1967, the following shall be added after subsection (1):

> "(1A) A company cannot be re-registered under this section if it has previously been re-registered as unlimited."

*Note:* This amendment is associated and cognate with No. 39 below, which inserts a subsection (1A) in section 5 of the Act of 1980.

Under section 16 of the Act of 1948 it was possible for a company registered under the Act as unlimited to re-register as limited, but not vice versa. The law was altered by the Act of 1967, sections 43 and 44. It now became possible

both for a limited company to re-register as unlimited (section 43), and for an unlimited company to re-register as limited (section 44). The two sections were, however, so framed as to make it impossible for a company which had once made a change under either of those two sections to change back again under the other section. We infer that it was the policy of the legislation to provide that there should only be one change of status in a company's lifetime; and by corollary, that a company which had once had a particular status (by original registration), and had abandoned it, should not be allowed to revert to it.

The Act of 1980 introduced into the statute law the definition of "public company": see section 1. This is a company which is limited (either by shares or by guarantee), and is described in its memorandum of association as a public company. But it must have a share capital of at least the minimum laid down by the Act. Section 5 of the Act provides a machinery whereby a private company (within the meaning of the 1980 Act—that is to say a company which is not a public company) can by re-registration become a public company. A company formed as a private company can be either limited or unlimited. To become a public company under section 5 it has to make itself limited, if not already possessing that status.

A private company seeking to re-register as public under section 5 may have previously obtained a change of status under section 43 (limited to unlimited) or section 44 (unlimited to limited) of the 1967 Act. Accordingly, there is the possibility of a company which has become unlimited by re-registration under section 43, reverting at a later date to limited under section 5 of the 1980 Act. It appears to be a 'casus omissus' in the 1980 Act, that this possibility was not excluded, and the amendment of section 5 to this effect is recommended accordingly.

The recommended amendment of section 43 of the 1967 Act is for a cognate purpose. The framers of the 1980 Act envisaged the possibility of a public company seeking to re-register as unlimited under section 43, and deliberately provided against this by express amendment (Schedule 3, paragraph 43). There is, however, another apparent 'casus omissus', that is if a company which has been a public company (by definition limited), has re-registered as a private company under section 10 of the 1980 Act. A company re-registering under that section can only be re-registered as limited (by shares or by guarantee): see Amendment No. 41 recommended below. But it may have been originally formed as unlimited, and by becoming a public company under section 5 have obtained a change of its status. Again the policy, as we understand it, requires that it should be debarred from reverting to unlimited under section 43. The recommended amendment of section 43 achieves that result.

**Amendment No. 32**

In section 44 of the Companies Act 1967, the following shall be inserted after subsection (1):

"(1A) A company cannot under this section be re-registered as a public company."

*Note:* Section 44 of the Act of 1967 enables a company which is unlimited to be re-registered as limited, subject to the completion of certain formalities laid down in the section. The amendment is recommended on the ground

that a company should not be enabled to take advantage of the section so as to become a public limited company, thus avoiding the more stringent requirements for re-registration which are laid down by section 5 of the Act of 1980. The policy of the 1980 Act, as we understand it, is that a company (whether limited or unlimited) desiring to become a public company must proceed under section 5 in all cases; and we think it desirable that this should be made clear for the purposes of a satisfactory consolidation.

**Amendment No. 33**

In section 46 of the Companies Act 1967, after subsection (3) there shall be inserted the following subsection:

"(3A) Where a company changes its name under this section, the change has effect from the date on which the altered certificate of incorporation is issued by the registrar of companies."

*Note:* The amendment is recommended in order to remove a discrepancy between section 46 of the Act of 1967 and section 24 of the Act of 1981. The latter provides the Secretary of State with certain powers to require a company to change its name. In subsection (1) it is provided that the required change of name is to take effect from the date on which an altered certificate of incorporation is issued by the registrar of companies. This proposition is not, however, contained in section 46 of the Act of 1967, which enables the Secretary of State to require a company to abandon a name which he considers to be misleading as to the nature of its activities. It is considered that the sections as reproduced in the consolidation should be congruent in this, as in other, respects.

**Amendment No. 34**

In section 111(1) of the Companies Act 1967, in paragraph (*d*), for the reference to the Insurance Companies Act 1974 there shall be substituted a reference to the Insurance Companies Act 1982.

*Note:* Section 111(1) of the Act of 1967 provides generally for security of information obtained for official purposes under certain provisions of the Companies Acts and cognate legislation. There are exceptions, however, for the disclosure of certain information to competent authorities (which expression is defined in section 111(3)) and also for the case where such information is required for law enforcement or official purposes. One of these exceptions is in paragraph (*d*) of section 111(1), allowing disclosure "for the purpose of enabling the Secretary of State to exercise . . . his functions under . . . the Insurance Companies Act 1974 . . .". The words cited are those of section 111(1) as amended by section 104(1) of the Companies Act 1981.

Almost simultaneously with the passage of the Companies Act 1981, there was being enacted the Insurance Companies Act 1981 (c. 31), in which paragraph 18 of Schedule 4 also amended section 111(1) of the Companies Act 1967, so as to embody a reference to the Secretary of State's functions under the Insurance Companies Act 1981 (consequentially enlarging the categories of disclosure expressly permitted by the section). The amendment was in form textual, making a change in the actual words of paragraph (*d*).

The Insurance Companies Act 1981 came into force on 1 January 1982. The Companies Act 1981, section 104, had already by then come into force,

barely ten days previously. Accordingly, the textual amendment made by the Companies Act made impossible the operation of the textual amendment made by the Insurance Companies Act. Section 111(1)(*d*) now has effect, therefore, with no reference to the Insurance Companies Act 1981, or the Secretary of State's functions under it. This result is plainly inconsistent with the intention of Parliament at the time when these Acts went through.

It is considered that there is every justification for amending the 1967 section once again, so as to produce the result intended. It is not, however, any longer a case of incorporating a reference to the Insurance Companies Act 1981, in addition to the references to the Insurance Companies Act 1974. Both enactments have recently been consolidated into the Insurance Companies Act 1982 (c.50), and it is to this Act that section 111(1)(*d*) of the Companies Act 1967 should now refer.

### C. Amendment of the Companies (Floating Charges and Receivers) (Scotland) Act 1972 (c. 67)

**Amendment No. 35**

In section 25 of the Companies (Floating Charges and Receivers) (Scotland) Act 1972, in subsection (2), after the words "the last preceding abstract related" there shall be inserted the words "(or, if no preceding abstract has been sent under this section, from the date of his appointment)".

*Note:* The amendment is recommended on the same grounds as in the case of Amendment No. 18. Section 25(2) of the Act of 1972 applies only to Scotland and is in almost identical terms to section 372 of the Act of 1948, which applies only to England and Wales. The amendment, therefore, is intended to achieve the same result for Scotland as Amendment No. 18 is intended to achieve for England and Wales.

### D. Amendment of the European Communities Act 1972 (c. 68)

**Amendment No. 36**

In section 9(8) of the European Communities Act 1972, for the reference to section 107 of the Companies Act 1948 there shall be substituted a reference to section 23 of the Companies Act 1976.

*Note:* This amendment is concerned with the operation of section 435 of, and Schedule 14 to, the Act of 1948, by which provision is made for certain specified provisions of the Act of 1948 and of subsequent Companies Acts to apply to unregistered companies—that is to say, companies which by definition are not incorporated under the 1948 Act or its predecessors, but owe their corporate status to some other legal process operative in England and Wales or Scotland. Unregistered companies to which 1948 s.435 and Schedule 14 apply have, again by definition, a principal place of business in Great Britain.

The provisions of the 1948 Act which apply to unregistered companies are listed in 1948 Schedule 14, and they are for the most part subject to a power for the Secretary of State to modify and adapt their application, by regulations

under section 435. Companies Acts subsequent to 1948 have enlarged the number of provisions in the legislation as a whole which are to be treated, through 1948 s.435, as applying to unregistered companies. Section 9(8) of the European Communities Act 1972, implementing a Community obligation, provided expressly for section 107 of the 1948 Act, which relates to the requirement for a company to establish a registered office and keep the registrar of companies informed with respect to it and to any change in its location. Prior to the Act of 1972, this section of the 1948 Act was not included in Schedule 14.

Section 23 of the Companies Act 1976 was enacted by way of making new and altered provision with respect to a company's registered office; and it is expressed to replace 1948 s.107 (see s.23(5)), which section was consequentially repealed. The logical course at that time would have been to amend section 9(8) of the European Communities Act 1972, in the sense in which we now propose that it be amended, so as to replace the reference to 1948 s.107 with a reference to 1976 s.23. It is not clear why that course was not taken. At all events, it being impossible to apply s.23 of the 1976 Act to unregistered companies, it was equally impossible to bring into force the full effect of the repeal of s.107 of the 1948 Act, which therefore remains unrepealed in relation to such companies, although long since repealed and replaced by s.23 in relation to 1948 Act companies.

We think it would be virtually impossible, or at least highly inconvenient, for the present effect of 1948 s.435 and Schedule 14 to be reproduced in the consolidation in such a way that 1948 s.107 is kept alive for this limited purpose. We therefore recommend the amendment, which in our judgment could well have been made by the Act of 1976, being consequential on the repeals made by that Act.

## E. Amendments of the Companies Act 1976 (c. 69)

**Amendment No. 37**

In section 9 of the Companies Act 1976, the following shall be substituted for subsection (2):

> "(2) In respect of each accounting reference period of the company, an oversea company shall deliver to the registrar of companies copies of the accounts and other documents required by subsection (1); and, if any such account or document is in a language other than English, there shall be annexed to the copy so delivered a certified translation of it into English";

and in subsection (3) for the words "any accounts" there shall be substituted the words "any accounts or other documents".

*Note:* Section 9 of the 1976 Act imposes on oversea companies an obligation to file annual accounts with the registrar of companies. Subsection (1) requires the accounts to be prepared, and to have certain essential documents attached to them. Subsection (2) (as amended by section 19(*b*) of the 1981 Act) requires a copy of "any such account" to be delivered to the registrar, with a certified translation of it into English, if any part of the accounts is in another language.

Subsection (2) is inconsistent with the preceding subsection, in that it requires only copies of *accounts* to be filed, no mention being made of the documents which subsection (1) requires to be attached. The section would clearly be defective in operation if oversea companies were required to prepare internally, but not required to deliver to the registrar, documents which are not "accounts" in the strict sense. Subsection (2) is therefore anomalous, and the amendment is recommended in order to remove the anomaly, and to clarify the effect of section 9(2).

The amendment of section 9(3) is consequential on the replacement of subsection (2).

**Amendment No. 38**

In the Companies Act 1976, the following shall be substituted for section 29:

"Register of disqualification orders.

29.—(1) The Secretary of State may make regulations requiring officers of courts to furnish him with such particulars as the regulations may specify of cases in which—

(*a*) a disqualification order is made under section 188 of the Act of 1948 or section 9 of the Insolvency Act 1976, or

(*b*) any action is taken by a court in consequence of which such an order is varied or ceases to be in force, or

(*c*) leave is granted by a court for a person subject to such an order to do any thing which otherwise the order prohibits him from doing;

and the regulations may specify the time within which, and the form and manner in which, such particulars are to be furnished.

(2) The Secretary of State shall, from the particulars so furnished, maintain a register of such orders and of cases in which leave has been granted as mentioned in subsection (1)(*c*).

(3) When an order of which entry is made in the register ceases to be in force, the Secretary of State shall delete the entry from the register and all particulars relating to it which have been furnished to him under this section.

(4) The register shall be open to inspection on payment of such fee as may be specified by the Secretary of State in regulations made by him.

(5) Regulations under this section shall be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament."

*Note:* Section 29 of the Act of 1976 is concerned with the administrative consequences of an order being made by a court under section 188 of the Act of 1948, or section 9 of the Insolvency Act 1976 (disqualifying a person from being a director, manager, liquidator, etc., of a company without leave from the appropriate court, which may or may not be the court which actually made the order). On the making of an order under either section, and on the granting of such leave, particulars are to be furnished to the Secretary of State, who by subsection (2) is required to maintain a register showing

the cases in which orders have been made or leave granted. By subsection (4) the register is to be open to public inspection, on payment of a fee specified in regulations.

As originally enacted, and as amended by the Act of 1981, section 29(1) is in the form of a direct requirement for "the prescribed officer of a court" to furnish these particulars to the Secretary of State, where the court makes an order or grants leave in relation to it. This provision is incomplete in its application, because it fails to take into account the possibility of a case going to appeal. As a single instance, a disqualification order could be made by a county court (whose prescribed officer would furnish the requisite particulars to the Secretary of State, for entry in the register); but the order might be varied or quashed by the Court of Appeal, and the section at present contains no provision for particulars of such action by the appellate court being furnished. In consequence, the order could remain entered on the register, when the entry should be altered or removed altogether by virtue of the order having been varied or quashed.

The purpose of the amendment is to enable the Secretary of State to secure the necessary information in respect of disqualification orders with the maximum flexibility and expedition, and to ensure that the register of orders is kept regularly, accurately and in the most up-to-date form.

## F. Amendments of the Companies Act 1980 (c. 22)

**Amendment No. 39**

In section 5 of the Companies Act 1980, the following shall be inserted after subsection (1):

> "(1A) A company cannot be re-registered under this section if it has previously been re-registered as unlimited."

*Note:* An explanation of this amendment, and the reasons why we recommend it, will be found in the Note to Amendment No. 31 above.

**Amendment No. 40**

In section 5 of the Companies Act 1980, in subsection (5), for the words "subsections (2) to (7) and (11) and (12)" there shall be substituted the words "subsections (2) to (7), (11), (11A) and (12) (except paragraph (*a*))"; and at the end of the subsection there shall be added:

> "In subsections (2) and (2A) of section 24, as applied by this subsection, "another company" includes any body corporate and any body to which letters patent have been issued under the Chartered Companies Act 1837."

*Note:* The amendment is recommended for the following dual purpose.

Section 5 of the 1980 Act relates to the re-registration of companies as public. For the purpose of enabling the application for re-registration to go forward in the circumstances particularly mentioned in subsection (5) of the section (sc. where there has been allotment of shares, to be paid for otherwise than in cash, since the date of the relevant balance sheet prepared for the purposes of the application to re-register), certain parts of section 24 of the

same Act are applied. That section relates to the independent valuation of a non-cash consideration given for allotment of shares by a public company; and it was amended by paragraph 42 of Schedule 3 to the Act of 1981.

The subsections of section 24 which are applied by section 5(5) are (2) to (7), (11) and (12). Among the amendments of section 24 made by the 1981 Act is the insertion of a subsection (11A), declaring (for the avoidance of doubt) that the requirement of prior valuation for the non-cash consideration does not apply where the allotment in question is of bonus shares, paid up by means of capitalisation of the company's reserves or the balance of its profit and loss account. For logical consistency we consider that this clarification ought also to be made in relation to the case dealt with in section 5(5), by applying the inserted subsection (11A) of section 24 to the case where, immediately preceding an application to re-register as public, the company has allotted bonus shares in the parallel way.

That is the first purpose of the recommended amendment. The second purpose is to disapply paragraph (*a*) of section 24(12), which contains definitions for the purposes of the valuation provisions in that section. Section 24 applies only to a public company allotting shares for a consideration paid otherwise than in cash. The section refers, at certain points, to a company other than the one carrying out the allotment. By section 24(12)(*a*), this reference is made to include "any body corporate and any body to which letters patent have been issued under the Chartered Companies Act 1837". The definition is made to apply in the case of "any reference to a company, except where it is or is to be construed as a reference to a public company". A definition in those particular terms does not fit the circumstances in which section 5(5) applies, that is to say where a company is by (hypothesis) still private, but seeking to change its status from private to public. The recommended amendment achieves the result that any reference to a company other than the one proposing so to apply is to have the wider meaning given by section 24(12)(*a*).

**Amendment No. 41**

In section 10 of the Companies Act 1980, after subsection (2), the following subsection shall be inserted:

"(2A) A company cannot under this section be re-registered otherwise than as a company limited by shares or by guarantee."

*Note:* Section 10 of the 1980 Act enables a public company to be re-registered as private. The section, as presently drafted, does not place beyond doubt the question whether a public company can under the section be re-registered as an unlimited company. We think that it is clear that it cannot, although it would be better that in the consolidated statute the matter should be expressly stated.

Our conclusion as to the intended meaning of section 10 follows from the consideration that if a company is to change its status from "limited" to "unlimited", the assent of all the members of the company must be obtained, and a record of their consent forwarded to the registrar of companies (see section 44 of the 1967 Act). By contrast, re-registration under section 10 is obtainable with no more than a special resolution of the company (which, however, is subject to cancellation by the court under section 11, on appli-

cation by a specified minimum proportion of the membership). From this it is possible to infer that the policy of the section must have been *not* to permit re-registration as anything but a company limited by shares or by guarantee.

The amendment of section 10 is recommended in order to clarify by express words what is believed already to be the law and to enable section 10, for the purposes of producing a more satisfactory consolidation, to be a complete statement of the relevant rules of the re-registration of a public company as a private company.

**Amendment No. 42**

In section 14 of the Companies Act 1980, in subsection (10) after the words "such a right but" there shall be inserted the words "(subject to the following subsection)", and after that subsection there shall be inserted:

> "(11) In relation to authority under this section for the grant of such rights as are mentioned in subsection (10)(*b*), the reference in subsection (3) to the maximum amount of relevant securities that may be allotted under the authority (as also the corresponding reference in subsection (4)) is to the maximum amount of shares which may be allotted pursuant to the rights".

*Note:* Section 14 of the Companies Act 1980 obliges the directors of a company, if they wish to allot what are there referred to as relevant securities, to obtain authorisation for that purpose either in the articles or by way of a company resolution in general meeting. The object of our amendment is to ensure that the section gives guidance expressly rather than by implication as to the basis on which such authorisations require to be framed in the case of allotments of securities other than shares. It derives from a suggestion made to us that difficulty arose in the practical operation of the section because of the absence of such express guidance in the section at present.

The difficulty, as we understand it, arises in this way. Section 14(3) states that the authorisation for allotment will not comply with the requirements of the section unless it contains a limitation on the maximum amount of the securities authorised to be allotted. In the case of an allotment of shares this requirement does not create any difficulty since the shares will have a fixed nominal amount and the relevant maximum amount can be stated in terms of the nominal amount. Section 14 however applies not only to shares, but also to rights to subscribe for shares or to convert securities into shares at a future date. In the case of such rights (for example issues of subscription warrants or convertible loan stocks) there is no such convenient guide in terms of which a mandatory maximum amount can be stated as required by section 14(3). In the case of subscription warrants or other options entitling the holders to subscribe for shares in a company at a future date the shares in respect of which the warrants or options as such may be exercised will have a nominal value, but the warrant or option itself will not. In the case of a convertible loan stock, the stock will have an attributable amount as a debt obligation of the company, but that amount may well differ from the nominal amount of the shares into which the stock falls to be converted under the debt instrument creating the stock. For example, a company may allot £100,000 nominal of a loan stock on terms that each £1 unit thereof

will be convertible into one ordinary share of 50 pence. In such a case the nominal amount of the stock will obviously be different from the nominal amount of the shares which could arise on its conversion. In the same way, the number of shares which may fall to be reserved against the future exercise of warrants or options may be less than the number of individual warrants or options issued.

By virtue of section 14(10), however, the authorisation must be obtained in relation to the grant of the right, viz: the convertible loan stock or the subscription warrants in the situation described above. It was represented to us, and we think fairly, that the section gave no clear guidance in such a case as to the appropriate basis on which the maximum amount should be calculated and that it would be appropriate to clarify the section by making it clear that the "amount" of a right is the nominal amount of the shares in respect of which the right can be exercised. We think that the section should be so amended on consolidation as to give express guidance as to compliance with section 14(3) and section 14(4) on which a similar problem could arise.

The new subsection which we recommend will provide the necessary guidance as to the basis of calculation of the maximum amount in the circumstances referred to above. We have stated, for the avoidance of doubt, that the distinction presently made in section 14(10), between the date of the grant of a right and the date of the allotment of shares on its exercise, has no relevance to the new subsection, which is concerned with the measurement of the maximum amount and not with authorisation as such.

**Amendment No. 43**

In section 17(13) of the Companies Act 1980, for the words from "as including" to the end of the subsection there shall be substituted the words:

> "as references to whoever was at the close of business on a date, to be specified in the offer and to fall in the period of 28 days immediately before the date of the offer, the holder of shares of that description".

*Note:* Section 17 of the Act of 1980 is concerned with pre-emption rights enjoyed by a company's shareholders in the case of a fresh allotment of shares for cash. The company may not allot shares unless it has previously made an offer to existing shareholders to take up the new allotment on terms equally favourable with those on which the same shares are to be offered elsewhere. Difficulties arose when the section first came into force because it could be construed as requiring pre-emption offers to be made to shareholders on the register of members *on the date of the offer*. In recognition of the impracticability of such a requirement, the Companies Act 1981 introduced a new subsection (13) into section 17 with a view to enabling the record date to be a day not more than 28 days before the date of the offer. However it has been put to us that the new subsection could be construed as requiring the offer to be made to *every* person who held shares at any time during the 28-day period. The proposed amendment accords with what we believe must have been the intention of the subsection, namely that the offer should be made to holders of shares as at a fixed point in time within the 28-day period.

**Amendment No. 44**

In section 24(2A) of the Companies Act 1980, for the words "by a nominee" (where those words occur for the second time) there shall be substituted the words "by or by a nominee".

*Note:* Section 24 of the Act of 1980 provides that, in certain circumstances, a company allotting shares for a non-cash consideration must first obtain an independent report on the value of the consideration and furnish a copy of the valuer's report to the proposed allottee. The section was amended in a number of respects by paragraph 42 of Schedule 3 to the Act of 1981. One of these amendments was concerned with the case where the allotment of shares is in consideration of the transfer to the company, or the cancellation, of shares in another company. The requirement of prior valuation is excluded in that case; but for the exclusion to apply, all holders of shares in the other company (or all holders of shares of the relevant class) must be given the opportunity of participating in the arrangement. In determining whether that condition is satisfied, "shares held by or by a nominee of the company proposing to allot the shares . . . or by a nominee of a company which is that company's holding company or subsidiary . . . shall be disregarded".

The phrase underlined should have been "by or by a nominee of"; but in consequence of a printing error, which was observed too late for correction before the Bill for the 1981 Act passed the second House, the words "or by" came to be omitted. The amendment restores them, in accordance with what was plainly Parliament's intention.

**Amendment No. 45**

In section 37 of the Companies Act 1980, in subsection (9), the words "are otherwise acquired by the company" shall be omitted from paragraph (*a*), and after that paragraph there shall be inserted:

"(*aa*) are acquired by the company (otherwise than by such surrender or forfeiture, and otherwise than by any of the methods mentioned in section 35(4) above), the company having a beneficial interest in the shares, or"

*Note:* Section 35 of the Act of 1980 contains a general prohibition on a company with a share capital acquiring its own shares. By subsection (4) it was provided that where a company redeems preference shares, or acquires shares by virtue of a court order, or by accepting a forfeiture or surrender, this is not to rank as an infringement of that prohibition. The Act of 1981 amended and expanded subsection (4), consequentially on the enactment of new provisions permitting companies to redeem or purchase their own shares, subject to certain safeguards.

Section 37 of the 1980 Act specifies the consequences of a company acquiring its own shares. One of the cases in which the section originally applied was where "shares in the company are acquired by the company and the company has a beneficial interest in those shares". By paragraph 44 of Schedule 3 to the Act of 1981, section 37(1)(*b*) of the Act of 1980 was amended so as to read "where shares in the company are acquired *otherwise than by any of the methods* mentioned in section 35(4) above . . ." (sc. in any of the circumstances in which the acquisition is, by virtue of section 35(4) of the

1980 Act, not an infringement of the general prohibition on a company acquiring its own shares).

A precisely corresponding amendment should properly have been, but was not, made in section 37(9)(*a*), which specifies one of the cases in which the preceding provisions of the section are to apply to a private company re-registering as public, which has within a certain period before the application to re-register acquired its own shares. The amendment remedies that omission. A consequential amendment is required of the Companies (Beneficial Interests) Act 1983, so as to obtain for the amended version of section 37(9) the benefit of the same interpretation by the 1983 Act of the reference to "beneficial interest in shares" as is given to the existing reference in section 35(4) of the 1980 Act. For this amendment see No. 59 below.

**Amendment No. 46**

In section 48(1) of the Companies Act 1980, in paragraph (*a*), after the words "with such a director" there shall be inserted the words "acquires or"; and in paragraph (*b*), after the words "the company acquires" there shall be inserted the words "or is to acquire".

*Note:* Section 48 of the 1980 Act is concerned with the case where, under an arrangement between a company and one of its directors, some substantial piece of property ("a non-cash asset of the requisite value") is or is to be transferred from the company to the director, or vice versa. The section requires that an arrangement of this kind is not to be entered into unless and until it has been approved by a resolution of the company in general meeting.

There is an inconsistency between the wording of paragraphs (*a*) and (*b*) of subsection (1) of the section. The former is in terms of an arrangement whereby a director "...is to acquire" an asset; the latter, an arrangement whereby the company "acquires" it. The intention of the provision, taken as a whole, is plainly that the ban on arrangements of this character should operate whether the transfer of the asset in question (either to or from the company) is actually implemented by the arrangement itself, or the arrangement provides for it to take place at some future date. The amendment is recommended in order to produce harmony between the two halves of subsection (1).

**Amendment No. 47**

In section 48(3) of the Companies Act 1980, in paragraph (*a*) the words "or the person nominated by it" shall be omitted.

*Note:* The words proposed to be omitted from section 48(3) are a 'remanet' from an earlier version of the clause, which was amended in course of passage through Parliament of the Bill for the 1980 Act. They have no longer any relevance to other words in the clause, either preceding or following them. Their removal has no effect at all on the substance of this provision.

**Amendment No. 48**

In section 55 of the Companies Act 1980, in paragraph (*f*), for the words "any other transaction, arrangement or agreement" there shall be substituted

the words "any transaction, arrangement or agreement other than those mentioned in paragraphs (*d*) and (*e*) above".

*Note:* The wording of section 55(*f*) has given rise to some doubts in relation to the word "other", the question being asked "other than what?". The proposed amendment clarifies the drafting by putting it beyond doubt that "other" means "other than those mentioned in the two preceding paragraphs"; and we believe that this must always have been the intention.

**Amendment No. 49**

In section 57 of the Companies Act 1980, in subsection (1), for the words "if such a transaction or arrangement" there shall be substituted the words "if such a transaction, arrangement or agreement".

*Note:* By section 57 of the Act of 1980, a company which is a recognised bank (that is to say, recognised as a bank for the purposes of the Banking Act 1979), or is the holding company of such a company, is required to keep a register of "every transaction, arrangement or agreement" of which particulars would be required to be given in the annual accounts (or group accounts) of the company, but for the exemption provided by section 54(5) of the Act. The transactions, etc., in question are essentially contracts for the benefit of directors of the company or its holding company, or of persons connected with such directors, of a kind which it is proper to require to be disclosed to members of the company.

If the transaction, arrangement or agreement is in writing, a copy of it must be contained in the register kept under section 57. At the end of subsection (1) appears the requirement that "if such a transaction or arrangement is not in writing", the register must show a memorandum setting out its terms. It will be seen that in this phrase the words underlined do not conform with those in the earlier part of the subsection: the reference to an agreement not in writing is omitted.

There can hardly be any doubt that this was due to an oversight in the drafting of the subsection, which we recommend be remedied by the proposed amendment.

**Amendment No. 50**

In section 63 of the Companies Act 1980, in subsection (3), for the words from "and section 145" to the end of the subsection there shall be substituted:

> "and where a shadow director by means of such a notice declares an interest in a contract or proposed contract, section 145 of the 1948 Act shall apply, if it is a specific notice under paragraph (*a*) above, as if the declaration had been made at the meeting there referred to and otherwise as if it had been made at the meeting of the directors next following the giving of the notice, and the making of the declaration shall in either case be deemed to form part of the proceedings at the meeting."

*Note:* Section 199 of the 1948 Act requires a director of a company who is in any way interested, whether directly or indirectly, in a contract or proposed contract with the company to declare his interest to his fellow-directors. The declaration must be made either at a meeting of directors, or by a general notice to directors under section 199(3) (as amended by the 1980 Act, Schedule 3, paragraph 25).

Section 63 of the 1980 Act is contained in Part IV of that Act, which (inter alia) regulates the circumstances in which certain kinds of transaction between the company and its directors may be entered into and, if permitted at all, must be disclosed (see, for example, section 49 of the Act). The effect of section 63 is to apply Part IV to shadow directors (that is to say, persons in accordance with whose directions or instructions the directors are accustomed to act) as well as to directors. Subsection (3) of the section, whose amendment we here recommend, also applies section 199 of the 1948 Act (above), with certain adaptations, to shadow directors. Where a shadow director has an interest in a relevant contract, he may declare it either by a specific notice (relating to a particular contract), corresponding to the notice by a director under section 199(2), or by a general notice under section 199(3). Section 63(3) is rounded off by a provision to the effect that section 145 of the 1948 Act (minutes of proceedings of company meetings) is to apply to a declaration of interest under section 63(3)—sc. a declaration by a shadow director, whether by specific or general notice—as if it had been made "at the meeting in question and had accordingly formed part of the proceedings at that meeting". The intended result was evidently that a shadow director's declaration of interest should be brought up, read and minuted at the same meeting as if he had himself been a director complying with section 199. But that result is not achieved, for the provision is without obvious meaning in the case where his declaration is in the form of a general notice to the company's board, unrelated to any particular directors' meeting.

The words which we recommend for substitution for the last four lines of 1980 section 63(3) would more clearly convey what was the legislative intention, and provide more accurate guidance both for shadow directors who find themselves under an obligation to declare an interest in contracts made or to be made with the company, and for the directors themselves, who are responsible for ensuring that such declarations of interest are properly recorded in the minutes of board meetings.

| | | |
|---|---|---|
| 24(2) Not stating on company documents that a receiver has been appointed. | On summary conviction a fine not exceeding level 1 on the standard scale as defined in section 289G of the Criminal Procedure (Scotland) Act 1975. | On summary conviction a fine not exceeding one-fifth of the statutory maximum. |
| 25(7) Receiver making default in complying with provisions as to information where receiver appointed. | On summary conviction a fine not exceeding £5 for every day during which the default continues. | On summary conviction a fine not exceeding one-fifth of the statutory maximum or, on conviction after continued contravention, a default fine not exceeding one-fiftieth of the statutory maximum. |
| 26(5) Default in relation to provisions as to statement to be submitted to receiver. | On summary conviction a fine not exceeding £10 for every day during which the default continues. | On summary conviction a fine not exceeding one-fifth of the statutory maximum or, on conviction after continued contravention, a default fine not exceeding one-fiftieth of the statutory maximum." |

**Amendment No. 51**

In Schedule 2 to the Companies Act 1980, there shall be inserted after the references to the Companies Act 1967 the following:

"Companies (Floating Charges and Receivers) (Scotland) Act 1972 (c. 67)

| | | |
|---|---|---|
| 11(4) Body corporate or Scottish firm acting as a receiver. | On summary conviction a fine not exceeding level 3 on the standard scale as defined in section 289G of the Criminal Procedure (Scotland) Act 1975. | (*a*) On conviction on indictment a fine.<br>(*b*) On summary conviction a fine not exceeding the statutory maximum. |
| 13(2) Failing to deliver to the registrar a copy instrument of appointment of a receiver. | On summary conviction a fine not exceeding £5 for every day during which the default continues. | On summary conviction a fine not exceeding one-fifth of the statutory maximum or, on conviction after continued contravention, a default fine not exceeding one-fiftieth of the statutory maximum. |
| 14(4) Failing to deliver to the registrar the court's interlocutor making the appointment of a receiver. | On summary conviction a fine not exceeding £5 for every day during which the default continues. | On summary conviction a fine not exceeding one-fifth of the statutory maximum or, on conviction after continued contravention, a default fine not exceeding one-fiftieth of the statutory maximum. |
| 22(5) Failing to give notice to the registrar of cessation or removal of receiver. | On summary conviction a fine not exceeding £5 for every day during which the default continues. | On summary conviction a fine not exceeding one-fifth of the statutory maximum or, on conviction after continued contravention, a default fine not exceeding one-fiftieth of the statutory maximum. |

*Note:* In consequence of section 80 of, and Schedule 2 to, the 1980 Act, penalties for the very large number of offences under the Companies Acts 1948, 1967 and 1976 were updated to take account of changes in the value of money. However, penalties for offences contained in the Companies (Floating Charges and Receivers) (Scotland) Act 1972 were not specified in and updated by Schedule 2, despite the 1972 Act being included in the definition of the "Companies Acts" in section 90 of the 1980 Act. This omission has led to various anomalous results.

Offences which are substantially the same in Scotland under the 1972 Act and in England and Wales under the 1948 Act now give rise to different fines north and south of the border. There is a lower fine in Scotland for the offence of a body corporate or Scottish firm acting as a receiver (section 11(4) of the 1972 Act) than for a body corporate acting as a receiver in England and Wales (section 366 of the 1948 Act). Similarly, sections 24(2), 25(7) and 26(5) of the 1972 Act contain offences which closely correspond to offences under respectively sections 370(2), 372(7) and 373(5) of the 1948 Act, yet carry lower penalties in Scotland.

The divergence in the level of fines is also accompanied by divergence in the approach to future updating of fines, again as a result of the 1972 Act having been omitted from Schedule 2 to the 1980 Act. The Criminal Justice Act 1982 and the Criminal Procedure (Scotland) Act 1975 (as amended by the 1982 Act) sought to standardise the procedure for the updating of fines and introduced the concept of a standard scale of fines. An exception to this standardisation was granted in section 46(4)(*a*) of the 1982 Act and section 289G(8) of the 1975 Act to "an enactment mentioned in Schedule 2 to the Companies Act 1980". As the 1972 Act offences were not so mentioned, they are now subject to the standard scale whereas offences under the other Companies Acts (including the 1981 Act) define penalties in terms of the statutory maximum. Consequently, these penalties in the 1972 Act are likely to continue to diverge from the position regarding penalties generally under the Companies Acts.

We think it is clear from the foregoing that the omission of the 1972 Act from Schedule 2 to the 1980 Act was an oversight. Accordingly, we recommend the above amendment to restore the levels of fines in the two jurisdictions to the equivalence they had before 1980 and to bring the 1972 Act within the same procedure for updating of fines as under the rest of the Companies Acts. To be consistent in this approach, we also recommend that the penalties for offences under sections 13(2), 14(4) and 22(5) of the 1972 Act which have no clear equivalent in England and Wales be included.

## G. Amendments of the Companies Act 1981 (c. 62)

**Amendment No. 52**

In section 12 of the Companies Act 1981, the following shall be inserted at the end of subsection (5):

> "This subsection does not apply to a public company, or to a banking, insurance or shipping company (the definitions in paragraph 8 of Schedule 2 to this Act to apply)".

*Note:* The effect of this amendment, and the grounds on which we recommend it, can best be explained against the background of what we understand to be the policy of section 12 of the Act of 1981.

The section allows a company, in certain circumstances, to make itself exempt from the obligation to appoint auditors. The essential condition of the exemption is that the company is for the time being "dormant", which expression is defined in subsection (6) of the section to mean that over a certain period there has been no "significant accounting transaction" which it would normally be the responsibility of auditors to examine and monitor. The effect of the exemption is that, for so long as it remains operative, the directors are relieved from the annual obligation to lay before the company, and deliver to the registrar of companies, an auditors' report with the accounts.

It is for the company, and not for the directors, to claim the exemption, which has to be acquired by the passing of a special resolution. In the case of a company which has completed at least its first full financial year before becoming dormant (hereafter in this Note referred to as an "old company"), and whose directors will have laid audited accounts in the past, subsection (2) of the section requires the necessary special resolution to be passed at a general meeting of the company before which audited accounts for the immediately preceding year are laid. This requirement enables the company's membership to judge, by reference to those accounts, whether it is expedient that the directors should in the coming year be excused from having the accounts audited.

Turning now to a company whose directors have not in the past been required to lay accounts, not having completed its first financial year (here referred to as a "new company"), subsection (5) of section 12 allows the resolution granting the exemption from obligation to appoint auditors to be passed at a general meeting of the company before which there are no accounts to be laid. This may be and indeed (we are informed) often is, the situation where the company has been formed with the intention that it shall not immmediately carry on active trading, but be held in readiness to do so at immediate notice in the future. In such a case there would be no point or practicality in requiring the company's first annual accounts to be audited solely in order to gain for it the right not to appoint auditors in the future.

In the case of an old company, one of the conditions precedent to the entitlement to exemption is, under subsection (4)(*a*), that the accounts laid before the meeting of the company which is to pass the resolution for exemption are (or could have been, had the directors so elected) those of a "small company" for the purposes of sections 5 to 8 of the Act, which entitle the directors in certain circumstances to lay modified accounts. The effect of this provision is that certain companies are automatically and *ab initio* excluded from the privilege of resolving not to appoint auditors. Public companies are in this category, and also banking, shipping and insurance companies, none of these having the privilege of modified accounts (see 1981 s. 5(3)).

This condition precedent, however, is applied by section 12(4) to an old company, but not by section 12(5) to a new company. By hypothesis, the directors have not had to lay any accounts for any year; therefore the question whether the accounts of any particular year are, or could have been, modified accounts does not in its nature arise. In consequence, it is conceptually possible

for a new company, being a public company or a banking, shipping or insurance company, to claim for itself the privilege of not having to appoint auditors (if dormant), when an old company of the corresponding description could not do so. This represents an inconsistency in the structure of section 12 which we think it expedient to remove; and we are satisfied that its removal does no more than clarify the intent of the section.

**Amendment No. 53**

In section 24 of the Companies Act 1981, for subsection (3) there shall be substituted the following:

"(3) If it appears to the Secretary of State that misleading information has been given for the purposes of a company's registration with a particular name, or that undertakings or assurances have been given for that purpose and have not been fulfilled, he may within 5 years of the date of its registration with that name in writing direct the company to change its name within such period as he may specify."

*Note:* Section 24(3) of the 1981 Act, as enacted, provides a power for the Secretary of State to require a company to change its name where he is satisfied that the name was acquired by means of misleading information to the registrar, or on the strength of assurances or undertakings which have not been fulfilled. There can be no doubt that the intention was that the provision should operate both (*a*) where the company acquires the name to which objection is taken at the time of its first registration, and (*b*) where there has been a change of name and the change was brought about in consequence of misleading information being provided *by the company*. In the first case the information alleged to be misleading must, in the nature of the case, have been given before registration, and therefore before the company came into existence. It will not have been given by the company, but by some person or persons concerned with its formation. The amendment covers that case.

**Amendment No. 54**

In section 26 of the Companies Act 1981, in subsection (3), for the words "section 384(*c*)" there shall be substituted the words "section 384(*aa*) or 385(*aa*)".

*Note:* The amendment is consequential on the group of amendments numbered 20, 21, 22 and 23. Section 26(3) of the 1981 Act refers to a statement delivered to the registrar of companies under section 384(*c*) of the 1948 Act. The sub-paragraph of section 384(*c*) which requires that statement is removed by Amendment No. 21. The corresponding provision in section 384 as amended is paragraph (*aa*), and similar reference has to be made to section 385(*aa*), inserted by Amendment No. 22.

**Amendment No. 55**

In section 31(2) of the Companies Act 1981, after the words "any such word or expression" there shall be inserted the words "and a Government department or other body is specified under subsection (1)(*b*) of this section in relation to that word or expression".

*Note:* Section 31 of the 1981 Act enables the Secretary of State to make regulations controlling the use of certain words and expressions as part of

a company's name. The power is to specify the cases in which his approval is required for the use of a particular word or expression and, in any particular case, to require that the company concerned shall, before adopting that word or expression as part of its name, notify "a Government department or other body" specified (in relation to that word or expression) in regulations under the section, so as to enable that department or body to enter objections if it so wishes.

Subsection (2) of the section specifies the action to be taken by a company in a case to which the regulations apply, and is so drawn that it could be interpreted as meaning—or at least implying—that in every case where the Secretary of State's approval is required for the use of a certain word or expression, consultation is required with a "relevant body". That cannot, however, be the case, inasmuch as section 31(1)(*b*) is plainly a *power* to specify a relevant body, and not an indication that there will in all cases be a relevant body for the company to consult.

The amendment is recommended for the purpose of making clear that subsection (2) applies only where the regulations specify a relevant body in relation to a particular word or expression, and not in every case where official approval is sought for its use.

**Amendment No. 56**

In section 31(3) of the Companies Act 1981, after the words "any such word or expression" there shall be inserted the words "and a Government department or other body is specified under subsection (1)(*b*) in relation to that word or expression".

*Note:* The amendment is recommended for the same purposes as Amendment No. 55. Section 31(2) of the 1981 Act relates only to a company proposing to use a particular word or expression as, or as part of, its name. Section 31(3) is concerned with the case of a person (that is, an individual, a partnership or a company, or other body corporate) proposing to carry on business under a name other than his or its own. It should be made clear that it may not be necessary in all cases for a "relevant body" to be consulted.

**Amendment No. 57**

In section 43(6) of the Companies Act 1981, after the words "where the shares" there shall be inserted the words "acquired or".

*Note:* The general effect of section 42 of the 1981 Act is to restrict a company in giving financial assistance either (1) for the acquisition of its own shares at some future time or (2) towards the discharge of an obligation incurred by some person in the acquisition of the company's shares, sc. in a case where the shares have already been acquired.

Section 43 of the Act provides additional relaxation of the general rule, subject to certain safeguards, in the case of private companies. It is clear from the wording of section 43(1) that the section applies in respect of both past and future acquisitions. In subsection (6), however, which requires the company's directors to make a statutory declaration before advantage is taken of the section, the reference is only to "the shares *to be acquired*". It is thought that this is an oversight in the drafting of the subsection, and that the words

should have been "the shares acquired or to be acquired" (matching, for example, the words "is or was an acquisition" in subsection (1)). The amendment is recommended to correct this omission and to restore the effect which Parliament must have intended.

**Amendment No. 58**

In section 77(7) of the Companies Act 1981, for the words "the shares held or to be held by him" there shall be substituted the words "any interest held or to be held by him in any shares".

*Note:* Part IV of the 1981 Act has the effect of compelling a person, in certain circumstances, to disclose the fact and nature of his interests in a public company's voting shares, the object being (in brief) to prevent surreptitious takeovers through secret acquisitions. Section 74 enables a public company to serve notice on a person whom it knows, or has reason to believe, to be interested in its voting shares, requiring him to make due disclosure of his interest, if any. Section 77 provides a sanction in the event of non-compliance with the notice requiring disclosure: the company can apply to the court for an order imposing on any relevant shareholding the restrictions of section 174 of the 1948 Act (whereby it ceases to be possible to make any transfer of the shares, voting rights in respect of them are suspended etc.). Non-compliance also attracts criminal penalties (section 77(5)).

In certain circumstances, however, a person served with notice under section 74 is exempted from compliance. By section 77(7) the Secretary of State may allow that exemption; but it is provided that he is not to do so unless he has first consulted with the Governor of the Bank of England, and unless "satisfied that, having regard to any undertaking given by the person in question with respect to the shares held or to be held by him", there are special reasons why the person should be freed from the obligation of disclosure imposed under section 74.

The words underlined above are unsatisfactory, inasmuch as they relate the exemption to undertakings given by the person in respect of his shareholding. This is inconsistent with the policy and theme of Part IV of the Act, which are designed to obtain disclosure of *interests in shares*. The notice served by the company under section 74 may be on a person who is not himself a shareholder, but is suspected of acquiring control by means of nominee shareholdings. The proposed amendment is recommended with a view to the cure of a drafting defect in section 77(7), and render it more consistent with the tenor of the preceding provisions.

## H. Amendment of the Companies (Beneficial Interests) Act 1983 (c. 50)

**Amendment No. 59**

In section 1 of the Companies (Beneficial Interests) Act 1983, after paragraph (*d*) there shall be inserted:

"and (*e*) section 37(9)(*aa*) of that Act".

*Note:* This amendment of section 1 of the Companies (Beneficial Interests) Act 1983 is a necessary and logical consequential change to follow the amendment of section 37(9)(*a*) of the Act of 1980 (Amendment No. 45, above).

## APPENDIX II

**Organisations to whom a draft of this Report was sent in May 1983**

Association of British Chambers of Commerce
Association of Independent Businesses
Association of Scottish Chambers of Commerce
British Insurance Association
Committee of London Clearing Bankers
Confederation of British Industry
Consultative Committee of Accountancy Bodies
Council for the Securities Industry
The Department of Trade's Advisory Panel on Company Law
Faculty of Advocates
Institute of Chartered Accountants of Scotland
Institute of Chartered Secretaries and Administrators
Institute of Directors
The Law Society
The Law Society of Scotland
The Senate of the Inns of Court and the Bar

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