



The Law Commission
and
The Scottish Law Commission

(LAW COM. No. 136)
(SCOT. LAW COM. No. 87)

FURTHER AMENDMENTS OF THE COMPANIES ACTS
1948-1983

REPORT UNDER SECTION 116 OF THE
COMPANIES ACT 1981

Presented to Parliament
by the Lord High Chancellor and the Lord Advocate
by Command of Her Majesty
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**REPORT UNDER SECTION 116 OF
THE COMPANIES ACT 1981**

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SUMMARY: This Report is submitted pursuant to section 116 of the Companies Act 1981. In it the Law Commission and the Scottish Law Commission recommend certain further amendments of the Companies Acts 1948–83 as desirable for the purposes of enabling a satisfactory consolidation of such legislation to be produced.

THE LAW COMMISSION AND THE SCOTTISH LAW COMMISSION

FURTHER AMENDMENTS 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 Cameron of Lochbroom, 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 1948–1983. In November 1983 we submitted pursuant to section 116 a Report¹ recommending 59 amendments, all of which were included in the Companies Acts (Pre-Consolidation Amendments) Order 1984 (S.I. 1984 No. 134).

At the time of our earlier Report, it was envisaged that the Bills would be ready for presentation to Parliament early in 1984 with a view to their passage into law in the Parliamentary session 1983/84, leading to their coming into force on 1 January 1985. It has now been decided that the Bills will not be presented to Parliament until the 1984/85 session.²

A small number of additional points have come to light in the course of the continuing work of preparing the Bills and we think it desirable to take advantage of the opportunity now presented to recommend amendments to meet them. Accordingly, 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 further amendments of the Companies Acts 1948–1983 as desirable to enable a satisfactory consolidation of the greater part of those Acts to be produced. The Department of Trade and Industry agree with our recommendations. The amendments are set out in the Appendix

¹*Amendment of the Companies Acts 1948–1983: Report by the two Commissions under section 116 of the Companies Act 1981* Law Com. No. 126, Scot. Law Com. No. 83.

²*Hansard* (H.C.) 24 May 1984, vol. 60, written answers, col. 529.

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*

12 June 1984

APPENDIX

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

Amendment No. 1

In section 152A of the Companies Act 1948, in subsection (2), 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 152A of the 1948 Act (as renumbered by section 2 of the Companies Act 1981) relates to the content of group accounts where any member of the group is a banking, insurance or shipping company. The purpose of this amendment is to remove a minor ambiguity in subsection (2) of section 152A.

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 end on an earlier or later date than that 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 section 152A(2) 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 section 152A(2) 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.

This recommendation is similar in its effect to Amendment No. 12 in our earlier Report pursuant to section 116 of the 1981 Act.

Amendment No. 2

At the end of section 187 of the Companies Act 1948, the following subsection shall be added—

“(5) The power under section 193(2) of the Criminal Procedure (Scotland)

Act 1975 to substitute a fine for a period of imprisonment shall, in relation to a conviction on indictment under subsection (1) of this section, be construed as including a power to impose such fine in addition to that period of imprisonment.”.

Note: Section 187(1) of the 1948 Act makes it an offence for an undischarged bankrupt to take part in the management of a company and provides a penalty, on conviction on indictment, of up to two years' imprisonment. By virtue of section 30(1) of the Powers of Criminal Courts Act 1973, any offence punishable on indictment by imprisonment in England and Wales can also be punishable by a fine or by both imprisonment and a fine. The equivalent general Scottish provision is section 193 of the Criminal Procedure (Scotland) Act 1975 but, although it provides for a fine as an alternative to imprisonment, it does not provide for both imprisonment and a fine. Consequently, the same substantive offence under section 187 of the 1948 Act could be subject to different penalties on conviction on indictment in Scotland as compared with England and Wales.

The amendment is recommended to remove this anomaly and make the penalties on conviction on indictment for this offence the same in Scotland as they are in England and Wales.

Amendment No. 3

At the end of section 328 of the Companies Act 1948, the following subsection shall be added—

“(4) The power under section 193(2) of the Criminal Procedure (Scotland) Act 1975 to substitute a fine for a period of imprisonment shall, in relation to a conviction on indictment under subsection (2) of this section, be construed as including a power to impose such fine in addition to that period of imprisonment.”.

Note: This amendment is recommended for the same reasons and purposes as Amendment No. 2.

B. Amendments of the Companies (Floating Charges and Receivers) (Scotland) Act 1972 (c. 67)

Amendment No. 4

At the end of section 11 of the Companies (Floating Charges and Receivers) (Scotland) Act 1972, the following subsection shall be added—

“(7) The power under section 193(2) of the Criminal Procedure (Scotland) Act 1975 to substitute a fine for a period of imprisonment shall, in relation to a conviction on indictment under subsection (4) of this section, be construed as including a power to impose such fine in addition to that period of imprisonment.”.

Note: This amendment is recommended for the same reasons and purposes as Amendment No. 2.

Amendment No. 5

In section 32 of the Companies (Floating Charges and Receivers) (Scotland) Act 1972, in subsection (2), there shall be inserted after the word "Act" the words "except section 6 and the Schedule".

Note: Section 6 of the 1972 Act provides that the Schedule to that Act should have effect as a new Part IIIA of the Companies Act 1948. (The previous Part IIIA was inserted in the 1948 Act by the Companies (Floating Charges) (Scotland) Act 1961). Part IIIA deals principally with the registration with the registrar of companies in Scotland of charges created by Scottish companies. It is virtually a mirror-image of Part III of the 1948 Act, which makes provision for the registration with the English registrar of companies of charges created by English companies. Failure to register a charge in accordance with the provisions of Part III or, as appropriate, Part IIIA results in the charge being "void against the liquidator and any creditor of the company".

The language of Part IIIA of the 1948 Act makes it clear that its territorial application is not intended to be limited to Scotland. Thus, section 106A(2) of that Act provides for registration of "a charge on land *wherever situated*" (emphasis added), and the Court of Session has held that the use of these words necessarily means that a Scottish company must register a charge created by it over real property in England (*Amalgamated Securities Ltd., Petitioners* 1967 S.C. 56). It cannot be certain, however, that a court in England would hold that failure to comply with the Scottish registration requirements would vitiate such a charge, because section 32(2) of the 1972 Act provides that the Act "shall extend to Scotland only". This limitation is inappropriate for section 6 of the 1972 Act and the Schedule to the Act (that is, Part IIIA of the 1948 Act). There is no corresponding limitation to England and Wales affecting Part III of the 1948 Act, and it seems clear that Part III and Part IIIA should be similar in extent. Indeed, it is understood that there has been no difference in the practical application of Part III and Part IIIA and that charges granted by a Scottish company over its English property are, as a matter of practice, registered in Scotland. We consider that the doubts raised by section 32(2) of the 1972 Act as regards its effect in England and Wales should be resolved for the purposes of achieving a satisfactory consolidation. It is therefore recommended that section 6 and the Schedule be freed from the limitation to Scotland, and the purpose of the amendment is to provide accordingly.

C. Amendments of the Companies Act 1980 (c. 22)

Amendment No. 6

In section 53 of the Companies Act 1980, in subsection (4), after the word "transaction" there shall be inserted the words "or arrangement".

Note: Section 53 of the 1980 Act creates criminal offences for breaches of section 49 of that Act (prohibition of loans, etc. to directors and connected persons). Section 53(2) makes it an offence for a relevant company (as defined in section 65(1)) to enter into "a *transaction or arrangement* for one of its

directors or for a director of its holding company in contravention of section 49". Section 53(4) provides that a relevant company shall not, however, be guilty of an offence under section 53(2) "if it shows that, at the time the *transaction* was entered into, it did not know the relevant circumstances". The words in italics reveal an obvious discrepancy between subsections (2) and (4) of section 53 which seems to have been due to an oversight in the drafting of subsection (4). We therefore recommend the amendment.

Amendment No. 7

In section 64 of the Companies Act 1980, in subsection (1), at the end of paragraph (d) there shall be inserted:—

“(e) a Scottish firm in which—

- (i) that director is a partner,
- (ii) a partner is a person who, by virtue of paragraph (a), (b) or (c) above, is connected with that director, or
- (iii) a partner is a Scottish firm in which that director is a partner or in which there is a partner who, by virtue of paragraph (a), (b) or (c) above, is connected with that director.”.

Note: This amendment would include Scottish partnerships in the definition of connected persons for the purposes of Part IV of the Companies Act 1980.

Section 64 sets out categories of persons who are “connected” with directors for the purposes of Part IV of the 1980 Act (which *inter alia* by section 48 prohibits companies entering into certain transactions with, and by section 49 prohibits certain loans by, relevant companies to directors and their connected persons). Thus, for example, a person is connected with a director if that person is a body corporate with which the director is associated (section 64(1)(b)) or a person who acts in his capacity as partner of that director or of any person who is otherwise connected with the director by virtue of section 64 (section 64(1)(d)).

A Scottish partnership is “a legal person distinct from the partners of whom it is composed” by virtue of section 4(2) of the Partnership Act 1890. A Scottish partnership is, however, not included within the section 64 definition of connected persons. Accordingly, a company could enter into a transaction of the kind referred to in section 48 with, or a relevant company could make a loan of the type referred to in section 49 to, a Scottish partnership as such. As the law stands, such a transaction or loan would not be struck at where a director of the company was a partner in or otherwise connected with the partnership. The position in England and Wales is that such transactions with loans to an English partnership would be struck at by sections 48 and 49 respectively, because an English partnership is not a separate legal person.

Scottish partners of a director are covered by paragraph (d) of section 64(1) and it is considered that the omission from the definition of connected persons of a Scottish partnership as such was an oversight. The proposed amendment is recommended in order that a Scottish partnership can be regarded as a connected person in terms of section 64 of the 1980 Act.

D. Amendments of the Companies Act 1981 (c. 62)

Amendment No. 8

In section 4 of the Companies Act 1981, in subsection (3), for the words from “(a) the aggregate amount” to the end of the subsection there shall be substituted—

“the aggregate amount of the capital and reserves of that body corporate as at the end of its relevant financial year, and its profit or loss for that financial year; and for this purpose the relevant financial year is—

- (a) if the financial year of the body corporate ends with that of the company giving the information in a note to its accounts, that financial year, and
- (b) if not, the body corporate’s financial year ending last before the end of the financial year of the company giving that information.”.

Note: This Amendment is recommended for similar reasons and purposes as Amendment No. 1.

Amendment No. 9

In section 4 of the Companies Act 1981, in subsection (6)(a), for the words “the financial year mentioned in subsection (3)(a)” there shall be substituted “its relevant financial year mentioned in subsection (3)”.

Note: This amendment is recommended for similar reasons and purposes as Amendment No. 1.

Amendment No. 10

In section 9 of the Companies Act 1981, in subsection (6), for the words “the financial year of the subsidiary ending with or last before that of the holding company to which the group accounts relate” there shall be substituted the words “its relevant financial year”; and after that subsection there shall be added—

- “(7) For the purposes of subsection (6), the relevant financial year of the subsidiary is—
- (a) if its financial year ends with that of the holding company to which the group accounts relate, 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.”.

Note: This Amendment is recommended for similar reasons and purposes as Amendment No. 1.

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