



CONSULTATION

Companies Bill 2013 and

Foreign Companies Bill 2013

18 January 2013 to 17 May 2013

Issued by:
The Treasury
Isle of Man Government
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For the Isle of Man to continue to survive and thrive in an increasingly competitive world, it is vital that it constantly re-evaluates its position.

The competitors and near neighbours of the Isle of Man have all consolidated and updated their companies legislation in the relatively recent past. The companies legislation of the Isle of Man is due for reform. The Companies Bill 2013 ("the Bill") will ensure that the Isle of Man remains a premier international finance centre, with modern companies legislation. The Bill consolidates the existing companies legislation and updates it. In some instances this has resulted in new provisions being inserted into the legislation while in others, outdated provisions have been replaced or superseded with more modern solutions. Where provisions remain tried and tested and effective, amendments have been kept to a minimum and are likely only to manifest in slightly updated language.

The Companies Bill 2013 is being released for consultation, together with a Table of Derivations. Section 1 of this document sets out some of the main items to look out for. Background information, which may contribute to the understanding of the legislative processes and rationale for policy changes, has also been included. Additional Notes have been prepared that give a brief overview of what's in the Bill. These are set out in Section 2.

Many changes have been made in response to requests from the financial services sector. Some changes are considered to be necessary and appropriate by various government stakeholders. Please bear in mind at all times that this model of company is likely to continue to be used by and for business conducted locally in the Island. The needs of the local business community are also considered. The views of the local business community are also being sought on the draft Bill.

The Treasury is inviting comments on the draft Companies Bill 2013 and the Foreign Companies Bill. This can be found using the following links:

<http://www.gov.im/ConsultationDetail.gov?id=359>

<http://www.gov.im/ConsultationDetail.gov?id=360>

As part of the modernisation of the companies legislation, Part XI of the Companies Act 1931 has been put into a standalone Foreign Companies Bill 2013. While this Bill is being consulted on as part of the same exercise, this will be an Act in its own right and will no longer fall under the main companies legislation. Corporate bodies that are subject to this regime are not, by their very nature, Manx and should therefore be treated separately.

In recognition of the sheer volume of the Bill, the consultation period will take place over an extended period of 18 weeks.

Again, in recognition of the size of the Bill, respondents are asked to bear in mind that comments that are unclear or unspecific will make it less likely that comments will be considered. **Respondents are asked to clearly indicate which particular Part, Division or clause is being discussed at any point.**

Please note that submission of a response will not automatically result in a change being made to the draft Bill.

A summary of the responses received will be posted on the Companies Registry website at <http://www.gov.im/ded/companies/allnews.gov> and on the Treasury website at <http://www.gov.im/treasury/consultations.gov>.

Respondents must please provide contact details with their submissions.

Please note that the summary document will not contain sufficient information to permit identification of respondents. However, anonymous submissions will be disregarded.

Respondents are reminded to please clearly indicate which particular Part, Division or clause is being discussed at any point.

Responses should be sent in writing or by email to:

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Please ensure that comments are received by no later than Friday 17 May 2013.

Section 1

Background

The roots of the Companies Act 1931 lie in four Acts of the UK Parliament—1908, 1913, 1917 and 1928. Subsequent to 1928, the UK has updated its legislation several times – most notably in 1948, 1985 and 1989. At all times, the UK has had a reasonably comprehensive and consolidated body of companies legislation. The UK has now consolidated its legislation into the Companies Act 2006 of Parliament.

By way of contrast, the Isle of Man's companies legislation is more fragmented and is centred around the Companies Act 1931. This Act is based on the UK's Companies Act 1928. Over the years, the approach taken by the Isle of Man in updating its companies legislation has differed from the approach taken in the UK. What currently exists is a series of separate Acts that must be cross referenced with each other. These are the Companies Acts 1931 – 2004. This has created the situation where some provisions are perfectly adequate and remain fit for purpose, while others have been amended piecemeal, resulting in legislation that is not necessarily always entirely clear. The current legislation is without doubt, difficult to navigate and not particularly user-friendly.

At its most basic level, this Bill consolidates the Companies Acts 1931 to 2004 into one single piece of legislation. Every company that is incorporated under the 1931 Act is considered in this Bill.

Part of this consolidation considers Protected Cell Companies (PCCs) and Incorporated Cell Companies (ICCs) that are incorporated under the 1931 Act. Consequential amendments will be made to the Companies Act 2006 in respect of PCCs and ICCs that are incorporated under the Companies Act 2006. The Companies Bill 2013 sets out to be a "one stop shop" for all 1931 Act style companies (and their successors under the Bill).

The Companies Bill 2013 has taken those existing provisions that remain workable and fit for purpose and replicated them, sometimes with updated language and sometimes verbatim.

In other instances, there are fundamental changes to the legislation. The new provisions aim to make the legislation fit for a modern jurisdiction that prides itself on its good reputation as an international finance centre with the highest standards. Some of the new provisions have been introduced at the request of the financial services industry and allied professionals (lawyers, accountants etc). In other instances, new provisions have been introduced to ensure that the Isle of Man continues to meet its international obligations. In most instances this has moved, in line with Government's commitment, towards increased disclosure and transparency. There are however, instances where the Isle of Man's current provisions are in excess of what is commonly found in other jurisdictions. In these circumstances, and provided the reputation of the Island is not put at risk, provisions have been revised to reflect accepted practices and standards.

The Table of Derivations that accompanies this Bill aims to assist readers of the Bill by identifying where there are policy changes proposed and where there is simply a restatement of the current legislation. The Table itself is not exhaustive and may well

contain some errors. While every effort has been made to ensure that the Table is accurate, the inherent fragmentary nature of the companies legislation has made it difficult to be entirely confident that the desired level of accuracy has been achieved.

Clauses that are annotated with "updated, no change in policy", reflect those instances where the language may be slightly updated but the essence of the clause remains the same. It is also possible that no change has been made to parts of a particular provision. Where a provision has either been updated or replicated in the Bill, the "Derivation" column of the Table should give the section under the existing legislation that is the source of the clause. If there has previously been no equivalent in the legislation, the derivation will be shown as "New".

New clauses may not necessarily reflect a change in policy. In many instances these are explanatory and provide clarification of what is meant under a particular Part or Division of the Bill. New clauses can also be almost entirely procedural – to remove the guesswork from the legislation.

Some new clauses are entirely facilitative. Examples of these are clauses that are annotated "Policy change – electronic communications now permitted as standard", "Policy change – updated to reflect technological advances" and other similar explanations. These simply aim to ensure that the Isle of Man has legislation that takes account of the way in which business communications take place in the 21st century.

Some new clauses do reflect a change in policy that will affect some companies under the Bill but not others. The Companies Bill 2013 considers differential treatment for private companies and public companies. This takes account of the fact that most private companies in the Island are "closely held" (having directors and shareholders in common). Public companies, by their very nature, do not meet the definition of "closely held". In recognition of the different interests of stakeholders under private and public companies, the regime applied to private companies has, where possible, been relaxed while more onerous requirements remain in place in respect of public companies.

The more formal procedures, currently applicable to all companies, will be retained only for public companies. Private companies will be able to rely on more flexible administrative provisions. A good example of this is seen in the relaxation of the capital maintenance regime for private companies. The Bill proposes to permit the directors to reduce the capital of a company by means of a declaration of solvency. By way of contrast public companies, which may invite investment from the public, should be held to a higher standard to ensure that shareholder funds are adequately protected.

Secondary legislation under the Companies Acts

It may be helpful to begin with a quick, unscientific explanation of the differences between primary and secondary legislation.

Council of Ministers have introduced a Code of Practice on Consultation. Under the Code, it is expected that all legislation will be subject to a standard consultation period of six weeks.

In certain circumstances Council of Ministers may approve a shortened consultation period or, as in the case of this Bill, an extended period.

Primary legislation is what appears on the statute books as an "Act". The Companies Bill 2013 will, when enacted become the Companies Act 201X. Before this can happen, a Bill must be debated in both Branches of Tynwald (House of Keys and Legislative Council). Each clause is scrutinised, discussed and adopted (or adopted as amended in the Branches).

Once a Bill has completed its passage through the Branches it must be sent to the Ministry of Justice for additional scrutiny prior to permission being granted for the Bill to be given Royal Assent. The Bill returns to the Isle of Man for the Lieutenant Governor to sign on behalf of the Crown. The last stage prior to a Bill becoming an Act is promulgation of the legislation in Tynwald.

Finally, legislation is usually brought into operation by an Appointed Day Order ("ADO"). An ADO can make provision for some parts of the legislation to be brought in at the outset and others to be phased in over time.

The timescales involved in making primary legislation should not be underestimated. It can take several years before legislation is fully operational.

Secondary legislation is, by way of contrast, a relatively quick method of addressing particular matters that have been provided for in principle under the primary legislation. This is through the use of "enabling powers" in the primary legislation. Secondary legislation is likely to be operational in a matter of a few months. This includes the drafting time, consultation period and Tynwald approval.

Over the years, a number of matters have been addressed, amended or permitted under various powers for making secondary legislation (regulations, orders etc). This has resulted in a plethora of secondary legislation that sits under the already numerous different Companies Acts.

Powers to make provision for some matters to be dealt with in secondary legislation are undeniably useful in certain circumstances. These include matters that are subject to change, or where it appears to be desirable to include an element of "future proofing". The Companies Act 1931 to 2004 (Treasury Share) Regulations 2010, made under section 25A of the Companies Act 1992 provide an example of previous "future proofing" that has been brought into action at a later date. The Companies Audit Exemption Regulations 2007, made under section 324B of the Companies Act 1931, are an example of where the detail is subject to change – in this case, the thresholds for audit exemption are driven by external forces such as EU Directives on company law. Regulation making powers ensure that timely action can be taken to take advantage of the amendments to thresholds, as these change.

Part of the consolidation of the legislation has seen some of the existing regulations swept up into the new Bill. This includes the following:

- Protected Cell Companies (Eligibility) Regulations 2010 (all restrictions on the business that can be undertaken have been removed in their entirety);
- Companies Audit Exemption Regulations 2007 (updated to consider the latest thresholds, with a power to make further changes by order, as the EU thresholds for audit exemption change);
- Companies Act 1931 to 2004 (Treasury Share) Regulations 2010;
- Companies Act 1931 (Dispensation for Private Companies) AGM Regulations 2010 (updated to consider that no private company must hold an AGM but any private company may hold an AGM).

There are some proposed policy changes that will either see some secondary legislation falling away completely or matters simply being dealt with, for the first time, in the Bill itself. These include proposals to:

- De-restrict the business that can be undertaken by Incorporated Cell Companies (currently restricted to insurance business only);
- Automatically permit the electronic trading of shares, which must currently be expressly permitted under the Uncertificated Securities Regulations;
- Increase the thresholds for group companies to take advantage of the exemption from audit to reflect the latest EU allowances.

There has been a radical policy change in respect of electronic trading of securities. It is proposed that similar principles to those surrounding the issue of prospectuses are applied to the electronic trading of shares. Since the Isle of Man does not have a stock exchange, the current requirements in respect of what must be included in a prospectus to be admitted to trade on a market have always been loosely defined to ensure that there could be no conflict with the listing rules of any particular market. Essentially, the detail of what must be included is determined and regulated by the listing authority of the market on which admission to trade is being sought. It therefore appeared to be pragmatic to adopt a similar approach to the electronic trading of securities. The determination of what constitutes an appropriate system for the electronic trading of securities is a decision that is governed by the relevant listing authority of each particular market. As the Isle of Man does not have any power to influence the listing authorities, the current restrictions were seen simply to be additional red tape with no discernable purpose.

The new Bill does contain a raft of new powers for the making of future secondary legislation on matters that may be needed in future or that are identified as being likely to be subject to change. The approach taken by the UK on such matters under the Companies Act 2006 of Parliament has been followed. The ability to change primary legislation by secondary legislation will ensure that on certain specified matters, the Island

will be able to respond relatively quickly, without creating a raft of secondary legislation to sit under the primary legislation. Certain matters are not appropriate to deal with in this manner and the power has been used judiciously.

There are inevitably going to be some matters that will still be dealt with by means of standalone secondary legislation. This is unavoidable. However, it is hoped that there will be less secondary legislation under this Bill.

In some instances, secondary legislation has been identified as the most appropriate manner of dealing with matters previously dealt with under the primary legislation. An example of this sees the proposed replacement of sections 94A and 144 of the 1931 Act with regulations made under clause 67 of the Bill. These relate to the details which a company must disclose in its communications. The current position sees the Isle of Man having more onerous disclosure requirements than those in other jurisdictions. This area is likely to be one which will be subject to further changes in future. It is for this reason that it is proposed that the Treasury is given the power to prescribe by regulation what must be disclosed by companies. Again, the regulations made under new clause 67 will be produced and consulted on in due course.

The Bill contains many clauses that represent an update of the current position under the Companies Acts 1931-2004. In addition to this, there are several other more recent Acts that have been reproduced in this Bill. These include the Companies (Beneficial Ownership) Act 2012, Companies (Transfer of Domicile) Act 1998, Protected Cell Companies Act 2004 and Incorporated Cell Companies Act 2010 (all as applied to 1931 Act companies). Where relevant, provisions relating to names of companies are referred to in the legislation. The general rules surrounding names will remain in the Company and Business Names, etc Act 2012. Where necessary and appropriate, consequential amendments will be made to other legislation such as the Companies Act 2006 to apply the equivalent provisions to that Act.

Many clauses within this Bill elaborate on the processes and procedures that must be followed. These are largely reflective of current practices. A decision was taken to introduce certainty and clarity as to what is expected under the legislation. It is important to remember that the Companies Bill 2013, like the Companies Acts 1931-2004, is likely to be used by the local business community who may not choose to utilise a 2006 Act company. It therefore needs to be accessible to all and as user-friendly as possible.

Headline changes to look out for

Re-registration of companies

For the most part, there are few restrictions on how a company may change from e.g. private limited by shares, to private unlimited. The options available are set out in Part 8 of the Bill, clause 73. The new provisions aim to make this a fairly seamless exercise by setting out in detail what is required and expected.

Public companies may now only be companies limited by shares¹. The steps that must be complied with by a public company wishing to re-register as private or a private company wishing to re-register as public are contained in Part 8. The procedures involved here are more onerous and lengthier than for the re-registration of a private company. This is in keeping with the recognition that public companies benefit from the ability to raise funds from the public. It therefore follows that enhanced procedures are required to provide additional protection to investors.

While 1931 Act companies have been able to re-register as companies under the Companies Act 2006, the reverse has to date not been possible. In response to requests that additional flexibility be introduced, 2006 Act companies will now be permitted to re-register under the new companies legislation.

Resolutions and meetings

Public companies must still hold an annual general meeting. For private companies the default position is that companies are no longer required to hold an annual general meeting. They may however elect to hold an annual general meeting.

The procedures that must be followed to ensure that a meeting is properly convened and all matters associated therewith, are set out in full. This includes the provisions that deal with the appointment of proxies.

Matters that have previously been set out in the articles of association are now set out in statute.

There is no change to the subject matter of resolutions that must be filed at the Companies Registry. Any resolutions that affect the constitution or fundamental structure of a company must always be filed. This is, and remains, a matter of creditor and member protection.

Notice of Meetings

The notice period for calling a general meeting of the members of a company has been clarified. Public companies must still ensure that 21 days notice is given for the annual general meeting, but 14 days notice is now required for all other meetings. Private companies may call general meetings at 14 days notice.

The Bill considers the technological advances that have been made and the ensuing change in the way that communications routinely take place. Express provision is made to permit electronic communications. This includes the giving of notice of meetings using a company's website.

New form memorandum and articles of association

Since the judgement handed down by His Honour Deemster Kerruish in the Matter of Salvia Foundation Limited ("Salvia") in The High Court of Justice of the Isle Of Man, Common Law

¹ A lengthy transitional period of five years is proposed for existing public companies that are either not limited by shares and/or fail to meet the proposed new capitalisation requirements for public companies.

Division on 5th January 2005, there has been confusion about what must and what may be included in the memorandum of association, particularly in respect of the objects clause. The link below explains the background to this case.

www.gov.im/lib/docs/ded/companies/companiesReg/practicenotes/2011/pn19_2011.pdf

Going forward, it is proposed that the memorandum is used at the point of registration of a company only. Provision is made for the articles of association to include an objects clause if this is required. This is however always subject to the caveat that a third party must be able to rely on the company transacting any business, regardless of what the objects clause contains. In other words, a company cannot rely on a transaction being unenforceable by a third party on the grounds that it is ultra vires. Express provision is made for this under Division 1 of Part 5 of the Bill.

Provided that a company adopts the new model articles in full, there will be no need for a company to file its articles at the Companies Registry.

The capital clause of the memorandum has been replaced with an independent "statement of capital". This must set out the position of the position in respect of the capital position of the company. It is intended to be a snapshot of the position of the company at that point in time. The statement of capital must be re-filed on the happening of various events during the life of the company. This includes, but is not limited to, reductions in capital or increases in the capital of a company.

The concept of authorised share capital is to fall away. Shares will either be in issue or won't exist.

Arising from this, consideration is being given to removing the concept of capital duty payable on the creation of shares.

Changes to the capital structure and members of companies

From an administrative perspective, the statement of capital is the most obvious innovation. The statement of capital must be submitted to the Registrar on the happening of various events such as a reduction of capital. A statement of capital will also be included in the annual return form.

The Companies Act 1931 only permits the Registrar to accept notification of a change of shareholding within a company on submission of the annual return. This has created difficulties for those seeking official proof of ownership. It will now be possible for the Registrar to accept notification of a change of ownership if the company chooses to file this information.

To date, all reductions of issued share capital in company must be sanctioned by the Courts. As mentioned above, private companies may now reduce their share capital using an administrative procedure. Public companies may not avail themselves of this option.

A new procedure has been introduced that will permit limited companies to redenominate the whole of their share capital into another currency.

Repeated attempts have been made to determine whether companies continue to convert shares into stock or whether stock that could be converted to shares exist. Despite this, there has been no indication that stock in this context is still required. It is intended that all references to stock in this context will be removed from the Bill if this is no longer required.

Please consider whether or not you wish the concept of stock to be retained.

Officers of companies (directors and secretaries)

Under the Bill, it is now proposed that private companies will have the option to appoint a company secretary. Public companies must continue to ensure that a suitably qualified person is in place as secretary.

The minimum number of directors for private companies is now one. Public companies must still have two directors appointed. Corporate appointments are now permitted but may not be the sole director of a private company – a natural person must also be appointed.

The Companies Act 1931 does not specify that a person must be of a certain age to be appointed to the role of director. However, as the legal age for contractual purposes remains 18 years of age, it seemed appropriate to mirror the age required to be a director under the Companies Act 2006. This is the age of 18 years.

To deal with any unforeseen circumstances, the Treasury has a power to make exceptions on a case by case basis.

Directors may, for various and often very good reasons, not always wish to have their residential address recorded on the public register. Provision has been made to permit directors to use a service address on the public register. However, the residential address of a director must at all times be disclosed to both the company itself and the Registrar of companies, both of whom may use it for correspondence directly with the director.

This dispensation will not be retroactive and information that is currently on the public register will remain on the register.

Directors' duties and responsibilities have been codified and now appear in the legislation itself. This again takes into account that the users of this Bill will include the local business community. The codification has been introduced to ensure that anyone who uses this model of company can be reasonably confident that they know what standards are expected of them under the legislation.

Derivative claims

The concept of derivative claims has been introduced under this Bill. It should be noted that the Companies Act 2006 does have a shortened derivatives procedure. It has been suggested that it is possible to achieve a similar outcome by relying on case law and the common law. It is however uncertain whether or not this is widely known or considered to be effective.

Please consider this point carefully.

Accounts and audit

The Bill introduces the concept of an accounting reference date. This is an important change.

In the past, the holding of the annual general meeting has acted as the trigger for preparation and submission of accounts to the members. The existing provisions under the Companies Act 1982 are not entirely clear. There is evidence to suggest that the introduction of the Companies Act 1931 (Dispensation for Private Companies) AGM Regulations 2010 has further increased confusion in this area.

As part of its commitment to meeting internationally accepted standards and good practice, the Island must ensure that its companies are maintaining accounting records that meet the standards of the Organisation for Cooperation and Economic Development.

It is for these two reasons that the UK's model has been followed. This sees companies either choosing a particular accounting reference date or having the default date applied (the last day of the month of anniversary of incorporation).

Companies may elect to have a first accounting period of a maximum of 18 months.

The accounting reference date, and the accounting period, may be shortened as often as the company deems necessary. However, the accounting period may only be extended once in every two years. This is to prevent a company from repeatedly extending the accounting period without ever actually preparing accounts. The rationale is twofold. Firstly, this is a matter of ensuring that the Island meets its international obligations and secondly, it is a matter of shareholder protection.

The Bill has removed the Isle of Man specific accounting requirements which have led to the Island being out of step with competitor jurisdictions. Provided accounts comply with the requirements to provide a true and fair view etc., there is now inbuilt flexibility to permit companies to elect to adopt particular accounting practices.

Voluntary revisions of defective accounts and reports will be permitted. In order to ensure that auditors are protected, regulations will be drafted and consulted on in due course.

Public companies will continue to be required to file their accounts at the Companies Registry. The accounts of private subsidiaries of public companies will no longer automatically be a matter of public record.

Registration of charges

For the most part, the provisions relating to the registration of charges remain substantially the same, but have been updated and expanded.

There has however been a policy change in respect of the late registration of charges created by private companies. Private companies may now register a charge late, without making application to the Courts to do so. This is in keeping with the change in policy to permit private companies to make use of administrative provisions where possible.

Public companies must still follow the more onerous practice of making application to the Courts.

Publication of certain events in local press

The government is in the process of creating an electronic gazette which will be available for the public to view. This will provide a notice board for publication of certain events in the life of a company, available to view over the internet.

It is recognised that in an increasingly global business environment, it is important to ensure that information is either made available or disseminated as widely as possible. This is in keeping with the Island's commitment to being a transparent and responsible jurisdiction, and perhaps more crucially, being seen to be so.

The Companies Act 1931 contains, at various points, a requirement for a company to publish an event in two local newspapers. The Registrar has similar obligations in certain circumstances. Since clients and creditors of companies are, in a global economy, less likely to always be in the Isle of Man, it seemed to be sensible to replace the requirement to publish in the print media. The Companies Registry will be able to publish notices on the e-gazette which will be available to all.

In certain circumstances, such as where a company is seeking to transfer its domicile, it is the members and creditors of a company that need to be informed of the intention. The transfer of domicile provisions under the Bill now require the written consent of the members and creditors of a company.

The Bill treats all provisions requiring notification by the Registrar, or by the company, in a similar manner.

Dissolution and restoration of a company

The procedure for, and circumstances in which, the Registrar may strike a company off the register have been simplified.

The provisions relating to solvent dissolutions by a company have also been simplified. This simplification was introduced to encourage the use of best practice to dispense with companies that are no longer required.

It is acknowledged that it will, in certain limited circumstances, not be possible to follow the procedures for a solvent liquidation or dissolution. In recognition of this, "free fall" dissolutions will be tolerated only in limited circumstances.

The old section 335A of the Companies Act 1931 has been updated to ensure that correspondence can always still be submitted to the company at a particular address until that address is changed. This is a matter of creditor and member protection.

The procedure for administrative restoration has also benefited from an overhaul. It is now possible for any former director or member of a company to make application for restoration

to the register. In addition to this, a creditor may also make application for a company to be restored to the register. Again, this is a matter of member and creditor protection.

The Registrar

Part 36 of the Bill gives the Registrar wide ranging powers and discretions. Most of the powers given to the Registrar are facilitative. For example, the Registrar now has absolute power to determine what must be included in a document. As the content of a form or document is no longer prescribed by particular sections of the legislation, it will be possible to increase or decrease the amount of information that must be provided, as appropriate.

The Registrar has discretion to determine whether documents should be submitted electronically or in hard copy. He will also have the discretion to accept both electronic and paper copies.

The Bill also gives the Registrar the power to accept documents that do not entirely comply with either the form or content that would ordinarily be required (with the caveat that the Registrar may not be held accountable for such documents). In addition to this, the Registrar may now make corrections to documents where there are minor inconsistencies. This should see a significant reduction in the number of documents that are rejected by the Registrar.

A new express provision has been included that will enable amended documents to be filed by a company, where an error has subsequently been discovered.

In certain circumstances a company may wish to have additional information that is not required by the Registrar, placed on the public register. The Bill gives the Registrar the power to enter additional information to the register, at his discretion.

A regulation making power will permit the Registrar to make regulations that enable him to rectify or remove entries from the register at his discretion. The Court has the power to require the Registrar to remove an entry from the register. This includes those circumstances in which the Registrar has exercised discretion not to remove the entry from the register.

The Registrar's rules, which will include procedural matters, will be drafted publicised in due course.

Offences

Part 37 of the Bill deals with offences generally. Throughout the Bill there are specific offences that relate to particular matters. It is the expectation of supranational bodies such as the International Monetary Fund and the OECD that offences should attach to non-performance of particular duties in respect of companies. The power to ensure that matters are enforceable is a matter of member and creditor protection.

Few of the offences are completely new. There has always been a general offences provision in the existing legislation. What is new however, is the inclusion of the offences, together with the penalties that they attract, at relevant points throughout the legislation.

Two points must be borne in mind in relation to offences. The first is that it is relatively easy to prevent the commission of an offence by ensuring that companies and their officers comply with the provisions of the legislation. The Bill contains many procedural provisions and explanations that should make it easier to ensure that the legislation is understood and therefore complied with. The second point to remember is that while an offence may have been committed, it may continue to be the opinion of the Courts that to take any action would be disproportionate in many circumstances. In short, while the presentation may well have changed, the underlying policy remains unchanged in the absence of any circumstances that would indicate stronger action being taken for the commission of an offence.

Part XI of the Companies Act 1931

Part XI of the 1931 Act is titled "Companies Incorporated Outside the Isle Of Man Carrying on Business Within the Isle of Man". The title itself makes it clear that companies covered by this Part are not 1931 Act companies.

This part covers what has become known as the "F-Register".

The decision was taken to remove this part from the legislation and to create a separate standalone Act that deals only with foreign companies. This is in keeping with the policy change that the Companies Bill 2013 is intended to apply only to 1931 Act companies and their successors under the Bill.

The Foreign Companies Bill 2013 continues to apply to those non-Manx companies that either establish a place of business in the Island, own land in the Island, hold out to have a place of business in the Island, or wish to be included on the F-Register.

The Foreign Companies Bill has been updated to consider what information is relevant and necessary. For the most part, this has resulted in a reduction in the amount of information that must be submitted to the Registrar. This reduction is felt to be proportionate and reasonable as the information that is required for admission to the F-Register will clearly identify the jurisdiction of incorporation of the company.

The details of the officers of the company are felt to be less important than the identification of a person on whom notice can be served in the Isle of Man. The information about the internal details of a company on the F-Register will be available in the jurisdiction of incorporation and simply amount to an additional administrative burden and red tape, serving no particular discernable purpose.

Every attempt will be made to ensure that an entry on the F-Register will be in the name under which the company is incorporated. There may however be circumstances in which this is considered to be inappropriate.

The simplification of documentation to be filed on application includes the removal of the requirement to have documents certified.

In the past, there has been no simple mechanism that permits the Registrar to remove a company from the F-Register if it is no longer required. Not inconsiderable resources are

required in order for the Registrar to be certain that an entry can be removed from the F-Register. As this is not considered to be a good use of already scarce resources, the Registrar is now given the power to remove a company from the F-Register. This can either be on notification by the company (as now) or will be four months after the failure to submit the annual return.

The Bill widens the scope of application of this legislation to include other forms of corporate body such as foundations and limited partnerships with separate legal personality. Please note that it is the "what" that may be registered that is widened and not the "when" it must be registered.

The Foreign Companies Bill 2013 aims to ensure that only that information that is really needed is held on the F-Register.

Additional Notes

- 1 The notes are to be read in conjunction with the draft Companies Bill 2013 which has been released for consultation.
- 2 The Companies Bill is promoted by the Treasury. If enacted, it will reform company law. It will restate with amendments the greater part of the Companies Acts 1931 to 2004 (but not the Companies Act 2006) and also codify certain aspects of case law relating to companies. The Bill does not deal with foreign companies; they will be the subject of separate bespoke legislation.
- 3 These notes contain only a very brief synopsis of the Bill. Specific commentary is limited to provisions which depart from the existing regime for companies in circumstances where it is felt that such commentary may assist. However, consultees are requested study the Bill itself.
- 4 Part 1 (clauses 1 to 3) contains general **introductory** provisions (short title, commencement and interpretation).
- 5 Part 2 (clauses 4 to 8) specifies the **types of company** which may be formed. These are consistent with those that may currently be formed.
- 6 Part 3 (clauses 9 to 18) is about **company formation**.

A single person may form any type of company.

The memorandum of association serves a more limited purpose (evidence of intention to form the company and become members of it). It will look different to that currently used and will not be updated or amended. Provisions in existing memoranda will be treated as provisions in the articles going forward.

The statement of capital and initial shareholdings is a new provision. The requirement for a company to have an authorised capital is to be abolished and information about the shares subscribed for (currently in the memorandum) will be provided to the registrar in the statement of capital and initial shareholdings.

The statement of guarantee and statement of proposed officers are similarly new provisions.

- 7 Part 4 (clauses 19 to 39) deals with certain matters relating to a company's **constitution**.

The articles of association will effectively become the single constitution of the company (as supplemented by certain specified resolutions and agreements).

There is power for the Treasury to prescribe model articles and these will have default application in certain circumstances.

Provision is made for the entrenchment of specified provisions of a company's articles. Notice of such provision must be given to the registrar.

New provision is made concerning the statement of a company's objects. Companies will have unrestricted objects, unless deliberately restricted. Charitable companies need to restrict their objects. If no objects are stated, the company has unrestricted objects.

- 8 Part 5 (clauses 40 to 52) is about the **capacity** of a company and certain related matters.

The validity of a company's acts is not to be questioned on the ground of lack of capacity because of anything in the company's constitution. Objects do not affect capacity.

A person who deals with a company in good faith is not required to be concerned as to whether the company is acting within its constitution. However, transactions with "insiders" are voidable at the instance of the company. Protection is not afforded to an external party who deals with a charity in certain circumstances.

- 9 Part 6 (clauses 53 to 70) is concerned with the **name** under which a company is registered.

The provisions are in addition to those contained in the Company and Business Names etc Act 2012.

There is a new power for regulations to specify permitted characters which may be used in a name.

The Attorney General continues to have power to exempt a charitable company from having to use "limited" in its name. A further power of exemption has been added.

The trading disclosure provisions have been updated.

- 10 Part 7 (clauses 71 and 72) makes provision about a company's **registered office**.

- 11 Part 8 (clauses 73 to 99) provides for the **re-registration** of companies within specified parameters.

There are various ways that a company may alter its status by re-registration, with different requirements depending on the type of company involved. Companies may also use the re-registration process to become (or cease to be) subject to the Companies Act 2006.

- 12 Part 9 (clauses 100 to 121) defines who are a company's **members** and, subject to certain exceptions, prohibits a company from being a member of its holding company.

There is a new provision enabling a company to refer the matter to court if it thinks that a request to inspect its register of members may not be for a proper purpose.

- 13 Part 10 (clauses 122 to 195) is about **directors** of companies. It introduces a statutory statement of directors' general duties to the company.

Private companies may have one director but public companies must have at least 2. At least one director must be a natural person who is at least 18 years' old. The appointment of a director of a public company must be voted on individually unless there is unanimous agreement to a block resolution.

New provision is made about directors' residential addresses. A company must keep a register of the usual residential address of each director who is a natural person. Provided a director's service address is not the company's registered office, if the director's residential address is the same as the service address, the register need only contain an entry making that clear. The register is not open to public inspection.

Statutory provision is made about directors' duties. These form a code of conduct which sets out how directors are expected to behave. These duties are derived from equitable and common law rules. They are now contained in the Companies Act 2006 of Parliament and consultees are invited to consider academic writing in connection with the introduction of the provisions in the UK.

Payments to directors for loss of office require member approval. Directors' service contracts must be available for inspection by the members.

Information about directors' residential addresses is now referred to as "protected information". The company must not use or disclose protected information (except for certain specified purposes) and the registrar must omit protected information from information available for inspection. There are exceptions (communicating with the director, complying with the Bill, complying with a court order or under a statutory gateway).

The concept of shadow director is to be introduced.

- 14 Part 11 (clauses 196 to 200) makes provision about **derivative claims** which may be brought by members to enforce a right vested in the company rather than the member.

This is a new provision which provides modern, flexible and accessible criteria for determining whether a member can pursue an action on behalf of the company. It does not replace the rule in *Foss v Harbottle*. A two-stage procedure is introduced. The applicant must make a *prima facie* case for permission to continue the derivative claim. At the second stage, the court may require evidence to be provided by the company before the substantive action begins.

- 15 Part 12 (clauses 201 to 211) is concerned with company **secretaries**. A private company is not required to have a secretary.

- 16 Part 13 (clauses 212 to 272) is about **resolutions and meetings** of companies.

Private companies will not be required to hold an annual general meeting. A public company must hold such a meeting.

- 17 Part 14 (clauses 273 to 319) is about **accounts and associated reports**.

Public companies are required to lay their annual accounts and reports in general meeting and file the accounts and reports for each financial year with the registrar.

- 18 Part 15 (clauses 320 to 361) is concerned with the **audit** of companies.

The Part implements a more cohesive and, hopefully, coherent set of provisions about the audit of companies.

- 19 Part 16 (clauses 362 to 376) makes provision about company **auditors**.

It specifies the persons who may audit companies and certain related matters.

These provisions replicate provisions previously inserted into the Companies Act 1982 by the Companies (Amendment) Act 2009.

- 20 Part 17 (clauses 377 to 456) deals with various matters relating to a company's **share capital**.

Much of this Part restates the existing law. However, there are various additional matters.

A facility is added to enable the redenomination of share capital.

A private company may reduce its share capital using a new solvency statement procedure. However, both private and public companies will be able to use the court approved procedure for capital reductions.

Where a public company reduces its capital below the authorised minimum (to be set at £50,000), it will be required to re-register as a private company.

If a public company's net assets are half or less of its called-up share capital, the directors must call a general meeting of the company to consider the steps it should take to deal with the situation.

- 21 Part 18 (clauses 457 to 521) makes provision concerning the **acquisition by a limited company of its own shares**.

This mainly restates the current law. The ability to redeem redeemable preference shares (as opposed to other redeemable shares) out of the share premium account is retained.

The provisions relating to treasury shares are inserted in the primary legislation. Where a market traded company buys back its own shares, it normally has to cancel them. A company may now elect to hold them "in treasury" and sell them at a future point in time thus enabling it to raise more capital quickly.

- 22 Part 19 (clauses 522 to 536) is about **debentures**.

- 23 Part 20 (clauses 537 to 559) sets out the main differences between **private and public companies**.

Private companies may not offer their securities to the public. The High Court has power to restrain such an offer or require the company to re-register as a public company. It also has power to make a remedial order to place a person affected by an unlawful offer in the position the person would have been had the offer not been made.

The authorised minimum nominal value of a public company's allotted share capital is to be set at £50,000.

New provisions are made about a company's offering document. The document must contain certain material information. It must also be delivered to the registrar. There continue to be civil and criminal liabilities for mis-statements.

- 24 Part 21 (clauses 560 to 578) is about the **certification and transfer of shares and other securities**.

There are also provisions prohibiting bearer shares and provisions enabling securities in listed companies to be transferred without written instrument.

- 25 Part 22 (clauses 579 to 591) makes provision in connection with the **beneficial ownership** of a company's shares and other securities.

This restates the provisions of the Companies (Beneficial Ownership) Act 2013.

- 26 Part 23 (clauses 592 to 611) is concerned with **distributions**, when they may be made and the consequences of making an unlawful distribution.

- 27 Part 24 (clauses 612 to 618) requires every company to deliver an **annual return** to the registrar containing specified information.

- 28 Part 25 (clauses 619 to 636) provides a scheme for the registration of **charges** created by a company.

The one month requirement is preserved but there is scope for a private company to register late without requiring an order of the High Court to do so.

- 29 Part 26 (clauses 637 to 643) enables a company to apply to the High Court for an order sanctioning an **arrangement or reconstruction** agreed with a majority of members or creditors.

- 30 Part 27 (clauses 644 to 681) enables a public company, under certain conditions, to apply to the High Court for an order sanctioning an arrangement or reconstruction which concerns the **merger or division** of the company.

- 31 Part 28 (clauses 682 and 683) is about **takeovers**. The provisions are additional to obligations under Part 28 of the Companies Act 2006 of Parliament which extend to the Island by Order in Council.

- 32 Part 29 (clause 684) provides for an offence of **fraudulent trading**.

- 33 Part 30 (clauses 685 to 689) is about **unfair prejudice**.

It provides a remedy where a company's affairs are being conducted in a manner which is unfairly prejudicial to the interests of its members.

- 34 Part 31 (clauses 690 to 705) makes provision about the migration (**transfer of domicile**) of companies to and from the Island.

These are in line with the provisions of the Companies (Transfer of Domicile) Act 1998.

- 35 Part 32 (clauses 706 to 738) is about **protected cell companies**.

This restates the Protected Cell Companies Act 2004. However, the provisions regarding secondary liability have been changed to allow greater flexibility.

- 36 Part 33 (clauses 739 to 775) is about **incorporated cell companies**.

This restates the Incorporated Cell Companies Act 2010.

- 37 Part 34 (clauses 776 to 802) makes provision for the **striking off, voluntary dissolution and restoration** of companies. It also provides that the property of dissolved companies is to be *bona vacantia*.

The functionality of the Companies Act 1931 is preserved albeit some of the mechanics are different.

- 38 Part 35 (clauses 803 to 816) enables the appointment by the Treasury of **inspectors** to investigate the affairs of a company if it considers it to be in the public interest to do so.

These are new provisions.

- 39 Part 36 (clauses 817 to 862) sets out the basic functions of the **registrar** of companies.

Provision is made about matters such as delivering documents to the registrar, translation and transliteration and electronic communication. Power is given for the registrar to make rules. A person aggrieved by a decision of the registrar may appeal to the High Court.

- 40 Part 37 (clauses 863 to 869) deals with certain matters pertaining to the **offences** which may be committed under the Bill.

In particular, further explanation is given as to the meaning of "officer in default" and "daily default fine".

- 41 Part 38 (clauses 870 to 885) contains various **supplementary provisions** about companies.

These deal with matters such as company records, service addresses and communications to and by a company.

- 42 Part 39 (clause 886) provides a **power for the Treasury to apply UK or EU legislative provisions** to the Island by order (subject to Tynwald approval).

This is a new provision which will provide flexibility and a potentially quick response time.

- 43 Part 40 (clauses 887 to 899) contains further **interpretative** measures.

- 44 Part 41 (clauses 900 to 904) makes **supplementary** provisions about secondary legislation and about amendments and repeals.