

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

COMPANIES ACT 2006

EXPLANATORY NOTES

COMMENTARY

Part 23: Distributions

1150. This Part restates the provisions on distributions in Part 8 of the 1985 Act. The only substantive change is to the rules on distributions in kind, and the new provisions are in sections 845, 846 and 851.

Sections 845 and 846: Distributions in kind

1151. In Capital Maintenance: Other Issues (paragraphs 24 to 43) the CLR explored the difficulties created by the decision in *Aveling Barford Ltd v. Perion Ltd* [1989] BCLC 626 and made a number of suggestions as to how these difficulties might be overcome. Section 845 is a new provision which removes doubts to which the decision in this case has given rise: in particular when a transfer of an asset to a member amounts to a distribution. The concern behind this section is that, following the decision in the *Aveling Barford* case, it is unclear when intra-group transfers of assets can be conducted by reference to the asset's book value rather than its market value (which will frequently be higher than the book value).

1152. The decision in *Aveling Barford* concerned the sale of a property by a company (which had no distributable profits) at a considerable undervalue to another company controlled by the company's ultimate sole beneficial shareholder. The transaction was held to be void as an unauthorised return of capital. Whilst this case decided nothing about the situation where a company that has distributable profits makes an intra-group transfer of assets at book value, there was a concern that, as such a transfer of an asset at book value may have an element of undervalue, the transaction would constitute a distribution thereby requiring the company to have distributable profits sufficient to cover the difference in value. The result has been that companies are often required either to abandon a transfer or to structure it in a more complex way, for example, having the assets revalued and then sold (or distributed under section 276 of the 1985 Act) so that the distributable reserves are increased by the "realised profit" arising on the sale/distribution followed by a capital contribution of the asset to the relevant group member.

1153. **Section 845** does not disturb the position in the *Aveling Barford* case such that where a company which does not have distributable profits makes a distribution by way of a transfer of assets at an undervalue, this will be an unlawful distribution contrary to Part 23 of the Act.

1154. It clarifies, however, the position where a company does have distributable profits and provides that where the conditions referred to in *subsection (1)(a) and (b)* are met, the amount of any distribution consisting of or arising from the sale, transfer or other disposition by a company of a non-cash asset to a member of the company should be calculated by reference to the value at which that asset is included in the company's accounts, that is, its "book value". Thus, if an asset is transferred for a consideration not less than its book value, the amount of the distribution is zero, but if the asset is

transferred for a consideration less than its book value, the amount of the distribution is equal to that shortfall (which will therefore need to be covered by distributable profits) – see *subsection (2)(a) and (b)*. This avoids the potential need for many companies to carry out asset revaluations requiring professional advice and incurring fees to advisors prior to making a distribution of a non-cash asset.

1155. The conditions that must be satisfied for *subsection (2)(a) and (b)* to apply are that at the time of the disposition of the asset, the company must have profits available for distribution and that if the amount of such a distribution were to be determined in accordance with this section, it could be made without contravening any of the provisions of this Part (for example, section 830 and section 831).
1156. Under *subsection (3)*, in determining whether it has profits available for distribution (as defined in section 830), a company may treat any profit that would arise on the proposed disposition of the non-cash asset (that is, the amount (if any) by which the consideration received exceeds the book value of the asset) as increasing its distributable profits.
1157. [Section 846](#) replaces section 276 of the 1985 Act which applies where a company “*makes a distribution of or including a non-cash asset*” and allows a company which has revalued assets showing an unrealised profit in the accounts, to treat that profit as a realised profit where the distribution is one of, or including, a non-cash asset. Section 846 tracks the drafting of section 845 so that it applies not only where the company makes a distribution consisting of or including a non-cash asset, but also where a company makes a distribution arising from the sale, transfer or other disposition by it of a non-cash asset, in other words in the same circumstances that are described in section 845.

Section 851: Application of rules of law restricting distributions

1158. This section is a new provision which preserves the existing common law rules on unlawful distributions (see *subsection (1)*) – which continue to be an essential component in determining what amounts to an unlawful distribution.
1159. *Subsection (2)* makes an exception to this: in particular, it provides that the lawfulness and amount of distributions in kind are established by the statutory rules in sections 845 and 846 and not by any applicable common law rules.