The Companies Consolidation and Law Reform Bill

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One of the priorities of the next legislative session of the 30th Dail is the publication of the ***Companies Consolidation and Law Reform Bill*** which will substantially reflect proposals by the Company Law Reform Group. It is the **first major reform of company legislation in Ireland since the Companies Act 1963.** These articles are based on the General Scheme for the Bill published by the Company Law Reform Group.

The Company Law Reform Group (CLRG) was established in February 2000 and put on a statutory footing in 2001 by the Company Law Enforcement Act 2001. The purpose of the CLRG is to review the entire body of company legislation in Ireland including the existing thirteen Acts, the numerous statutory instruments introduced over the years and the influence of various EU Directives and of the Common Law. The guiding principles of the review have been the enhancement of competitiveness in Ireland, together with improving and simplifying the regulatory structure for Irish businesses, whilst optimising shareholder and creditor protection.

The CLRG's *Report on the General Scheme of Companies Consolidation and Reform Bill states:-*

"To truly modernise company law…requires …reforming the existing provisions so as to reflect modern business practices, and simplifying them to better facilitate business creation and operation."

The inspiration behind the simplification process is to make company law a competitive advantage for the Irish economy. In its proposals, the CLRG have taken account of the technological and organisational developments in the conduct of business and communications as well as best practice in corporate governance. In doing so, the CLRG hopes that this will lighten the regulatory burden faced by companies, whilst balancing the interests of company members, creditors and the public.

The CLRG's First Report proposed a root and branch reform of company legislation. This reform originated from the fact that 90% of companies currently registered in Ireland are private limited companies. In contrast, the Companies Act 1963 was based around the needs of the public company.

This "think small first" approach adopted by the CLRG means that the new bill reverses the focus of company legislation away from the large company and onto the private company limited by shares. It is this type of company which forms the backbone of Irish enterprise. The private company limited by shares becomes the model company under the proposals with all of the provisions concerned with it contained in a single volume, presently known as 'Pillar A'. In a second separate volume, presently known as 'Pillar B', this law is applied, disapplied or varied for the other company types identified in the proposals.

The General Scheme provides for five generic types of company:-

1. the new model company, specifically, the private company limited by shares;
2. the public limited company (PLC);
3. the designated activity company (DAC);
4. the guarantee company; and
5. the unlimited company.

The key features of the 'new' private company are:-

- it is to be limited by shares and have a share capital;
- it is to have the same contractual capacity as a natural person;
- it is to have a one document modernised constitution;
- it will have a limit of 99 members;
- it requires just one director and a company secretary;
- it can have just one member;
- the member(s) can waive the requirement to hold an AGM.

So what are the differences between the present situation and this 'new' type of private company? One of the main differences will be that **the new private company will not require a two**

continued overleaf

Dont Miss Out

O'Rourke Reid will issue regular newsletters and updates concerning the changes proposed in the Bill. We intend to hold a number of briefings to outline in more detail these changes.
If you would like to be included in any of these briefings, please contact either Helen Whelan on 240 1232 or hhigginswhelan@orourke.com or John Higgins on 240 1263 or jhiggins@orourkereid.com

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document Memorandum and Articles of Association as the CLRG recommended that the doctrine of *ultra vires* be abolished. It proposed that private companies limited by shares should not be required to set out any objects or powers such as those now contained in the Memorandum of Association. This means that **it will have unlimited capacity to carry on any business or activity with the exception that it must always act within the law.** Thus the 'new' private company will have the capacity of a natural person.

A second difference will be that **the private company may have only one director** who must now be over the age of 18 years. Where there is only one director, that director may not also act as company secretary, thus a single director company will be required to have a separate company secretary.

The defining feature of the new designated activity company (DAC) (a private company limited by shares or by guarantee) will be the continued existence of the objects clause. This means that the DAC will continue to have a two document constitution consisting of a Memorandum and Articles of Association. The DAC will be the closest type of company to existing private company under the Companies Acts.

It is proposed that existing private companies limited by shares may elect to convert to the new model private company. However, a **default conversion procedure** will apply to convert existing companies to the new model, unless the company passes a resolution making it into one of the other types of generic company.

Existing private companies that do not want to convert to the new simplified model will only be obliged to replace "Limited" in its name to "Designated Activity Company". It is envisaged that DACs will continue to be required as special purpose vehicles for joint ventures or as vehicles for financing specific projects. Unlike the new model company it will be required to have two directors and a company secretary. However, it will still be possible to have single member DACs.

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Set out below are just some of the changes which are proposed in the new Bill.

Incorporation

The requirement for a private company limited by shares to have a Memorandum and Articles of Association is rendered obsolete: instead a single document constitution of the company will replace them. This will simplify incorporation but will require existing companies to elect whether they want to become the new type of private company or become a Designated Activity Company. There will be a well publicised lead-in time to the changeover.

Company Officers

At present all companies are required to have at least two directors. In many small companies this means that a husband and wife act as directors, even though one spouse may play no active role in the business. Despite this lack of day to day involvement, there have been a number of court decisions including disqualification orders made against these 'silent partners' including prohibition orders. Under the proposed legislation, a private company limited by shares will require just one director and a company secretary (who cannot be the same person).

Annual General Meetings

Members of the new private limited company can unanimously waive the requirement to hold an AGM if they so choose. This will facilitate corporate governace in many companies, where the need for AGMs is often unnecessary. The draft legislation takes cognisance of the reality of how such companies are run on a daily basis.

Directors Duties

Until now, the sources of directors' duties have been diverse, as they can be found in common law, in equity and in statute. One of the most significant changes proposed by the Bill is the codification of directors' fiduciary duties which in the view of the CLRG were both inaccessible and incomprehensible. These duties are owed to and are enforceable by the company. The fiduciary duties are stated in general rather than specific terms and they are derived from principles established by the Courts. The main duties are to act in good faith in what the director considers to be in the best interests of the company and to act honestly and responsibly in the conduct of the affairs of the company.

Registration of charges over the assets of a Company

The CLRG recommended that all charges should be subject to the requirement to register particulars with the Companies Registration Office. Charges include mortgages over land, stock and machinery as well as what are known as "floating charges", that is charges which are not attached to any specific asset of the company. At present not all charges are required to be registered. If a charge does not fit into one of the legislative categories it does not have to be registered. The CLRG described the present categorisation of charges as both historical and anachronistic.

It is also proposed to change the system whereby charges acquire their priority based on the date of their creation rather than the date of their registration. In order to obtain priority they must be filed in the Companies Registration Office within 21 days of their creation. Whilst the 21 day period for registration of the charge remains, a new system for filing a preliminary notice of the intention to create a charge prior to completion of the transaction is proposed. If a preliminary notice is filed, a further notice of the actual creation of the charge must be filed with the Registrar within 21 days of the preliminary notice.

Dissolution (Strike Off) of a Company

The Registrar of Companies will notify a company of his intention to dissolve or strike off a company from the register. Where a strike off notice is issued, the Registrar of Companies will be required to notify the Office of the Director of Corporate Enforcement (ODCE) of the names and details of the directors of the company. The ODCE then has the option to take further action against any of the directors which may include disqualification.