

New Dawn Rising - The Companies Consolidation and Reform Bill

The Companies Consolidation and Reform Bill (the “Bill”) is scheduled for publication in mid to late 2009 and enactment in 2010. It will represent the most radical overhaul of Irish company law in over forty years and, with over 1,200 sections, one of the largest pieces of legislation in the history of the State. The Bill will establish a more modern and user friendly corporate legal framework in Ireland and will enhance Ireland’s attractiveness as a place to do business.

The Bill recognises that over 90% of companies currently registered at the Companies Registration Office are private companies limited by shares and accordingly provides that the new standard model Irish company will be a Company Limited by Shares or CLS. The Bill will set out the law as it applies to a CLS, the most common company type and then state how this law is applied, disapplied or varied for each other company type, such as the public limited company (plc) or guarantee company. In this way, a greater clarity and simplicity will be introduced into the layout of our company law.

Every existing private company limited by shares will have to become a CLS at the end of an eighteen month transition period following the enactment of the bill unless they have previously elected to become an alternative form of company known as a designated activity company, or DAC. A CLS will not be required to have an objects clause. This provision will remove the doctrine of ultra vires for a CLS which will have the same legal capacity as a natural person. This is a significant departure from the current requirements for a company to set out a definitive list of its objects in the memorandum of association and will make it easier for all companies to pursue a diversity of business opportunities as they arise. Unlike the freedom which will be afforded a CLS, a DAC’s activities will remain limited to the objects set out in its constitutional documents.

A CLS may have a single director (but must in that case have a separate company secretary) and will have a single-document constitution, thereby replacing the previous need for two documents in the form of a memorandum and articles of association. After the transition period and until they submit a new constitution, every CLS will automatically be deemed to have a simple one page constitution in place of their existing memorandum and articles of association. This ‘default constitution’ will include any Table A rules in the company’s existing articles of association (as Table A will be incorporated in the body of the Bill), but will not include any special provisions of a company's existing articles of association. This could result in potentially serious gaps in the internal governance structure of a company. Directors of companies should be aware of the need to act early and adopt a new constitution in order to ensure that any such special provisions continue to apply to their company. If they do not then the bill contains provisions for relief in the case of members and creditors who consider that their rights have been prejudiced by the failure to adopt a new constitution. The onus is on directors to prove that they have not acted or failed to act in a manner prejudicial to members or creditors.

The Company Law Review Group, who prepared the initial draft of the Bill, acknowledge in their explanatory notes accompanying the draft Bill, the significant changes to the current regime envisaged by the introduction of the new types of companies. In recognition of this the Minister for Enterprise, Trade and Employment is given a limited degree of flexibility to extend the time periods outlined in the Bill. For companies that fail to act appropriately within these time periods some leeway may therefore be available, although it is recommended that companies plan ahead and ensure the appropriate legal and regulatory compliance matters are dealt with in a timely manner rather than relying on the Minister's discretion in this regard.

Other provisions of the Bill will allow two or more CLSs to "merge", a new structuring option currently not available to private companies, which at present cannot merge with other private companies. These new merger provisions will in turn enable CLSs to avail of the options presented by the EU Cross-Border Mergers Directive. That Directive was the subject of a previous article by these authors in a recent edition of Accountancy Ireland and subsequent to the publication of that article the Cross-Border Mergers Directive was transposed into Irish law on 27 May 2008 (S.I. 157 of 2008).

A CLS will be able to avail of a standard validation procedure which will enable the company to carry out certain transactions, subject to the required verification of solvency, and with built-in safeguards for creditors and shareholders. The validation procedure provided for under the Bill will require the passing of a special resolution by the members of the company (i.e. approval of at least 75% of the members entitled to vote at a general meeting) and the swearing of a statutory declaration by the directors of the company's solvency and ability to pay its debts going forward. Companies will be able to avail of this validation procedure to carry out such transactions as a reduction of share capital, declaration of a dividend, providing financial assistance for the purchase of the company's own shares and the provision of loans to directors.

The Bill also provides for the codification of the common law fiduciary duties of directors for the first time, setting out a non-exhaustive list of such duties including the duty to act bona fide in the best interests of the company and to avoid conflicts of interest and secret profits. Directors will be required, on appointment, to sign a statement along the following lines acknowledging such duties:

"I acknowledge as a director I have legal duties and obligations imposed by the Companies Acts, other statutes and common law".

The same part of the Bill simplifies the law in relation to notification of interests in shares by directors and proposes the introduction of a sensible de minimis exception to the general rule that all interests in shares or debentures must be notified to the company.

A CLS will be able to dispense with the requirement to hold AGMs and instead allow shareholders to pass written resolutions by a majority. Up until now, written resolutions could only be adopted unanimously so this development removes the situation whereby a small minority of difficult members can frustrate the timetable of a company in relation to the adoption of resolutions.

In relation to winding-up, the most significant proposed change in the law is the placing of court ordered liquidations on a more similar plane to creditors' voluntary liquidations by transferring the powers of the court (and examiner's office) to the official liquidator in a controlled manner. One of the controls that will make this possible is mandatory insurance for liquidators and also the requirement that liquidators must be qualified to act.

Every Irish company will be required to take some action arising from the provisions of the Bill and company directors are advised to use the time between now and the enactment of the Bill to review corporate structures and consult advisors in order to decide which form of entity under the new legislation will be most suited to their company's business needs and to prepare accordingly.