COMPANY LAW REVIEW GROUP

THE RECOMMENDATIONS OF THE COMPANY LAW REVIEW GROUP RELATING TO CORPORATE GOVERNANCE IN THE COMPANIES ACT 2014

Contents

Chairperson's Letter to the Minister

Heather Humphries T.D.

Minister for Business, Enterprise and Innovation

23 Kildare Street

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Dear Minister,

I am pleased to submit for your consideration 'The Recommendations of the Company Law Review Group relating to Corporate Governance in Part 4 of the Companies Act 2014'. The recommendations contained in the Report intend to clarify certain corporate governance and other issues concerning the administration of company meetings which have come to light following the introduction of the Companies Act 2014. This review was conducted as part of the Company Law Review Group's overall review of the operation of the Companies Act 2014 with a review to addressing any anomalies, unforeseen consequences and reaffirming the overall policy approach to the legislation.

In preparation of the Report, the Review Group undertook an extensive review of matters relating Part 4 of the Companies Act 2014 as well as relevant associated Parts. In total, the Review Group considered thirty corporate governance submissions which were received following the introduction of the Companies Act 2014. Each of these sections was considered in turn and where recommendations for change are made, the necessity and justification for amending the Companies Act 2014 is set out in the Report.

As you will see from the Report, the deliberations that form its conclusions were conducted over the past twelve months during which there were 6 meetings of a working committee chaired by Mr. Ralph MacDarby. I would like to thank Ralph for his systematic approach to the task and to the members of the committee (set out in Appendix 1) who worked so hard to provide a clear and considered report which the Review Group adopted at its Plenary meeting on 30th November 2017. I must also acknowledge the sterling work of the secretariat, through the CLRG Secretary Ms. Siona Ryan and legal researcher Mr. Simon Halpin BL who provided essential support to the committee and the Review Group.

It is my strong belief that it is very important that the recommendations contained herein, together with those contained in our previous report on Shares and Share Capital (a review of Part 3 of the Companies Act 2014), are acted upon swiftly and that legislation is brought forward by your Department at the earliest possible opportunity. While I fully understand that Ireland has EU obligations to transpose EU company law directives, the recommendations in the Review Group's Reports on Parts 3 and 4 are more relevant for more Irish companies than most EU company law.

Company law is dynamic and having finally established a world-class company law code in the Companies Act 2014 it behoves us all to ensure that we keep it top of the class by swiftly moving to bring forward legislation to address improvements that have been identified as being necessary or desirable.

Finally, I would like to take this opportunity on behalf of the Review Group to wish you well in your new portfolio and look forward in working with you and your officials in the Department of Business, Enterprise and Innovation in continuing to update and improve company law.

Yours sincerely,

Dr Thomas B Courtney

Chairperson

Introduction

The Companies Act 2014 introduced a significant number of reforms in the area of corporate governance generally. These include:

- a framework for directors and other officers as regards their appointment, their interaction with the company and its members, and the ways in which the activities of the company are conducted on a day-to-day basis.
- allowing a "new LTD company" to have a single director. It also allows such a company to dispense with holding an AGM, where agreed unanimously by the members.
- Provision for unanimous written resolutions, allowing a company to pass resolutions, including special resolutions, in writing.
- the Summary Approval Procedure which deals with restricted activities such as the giving of financial assistance for the acquisition of shares, making reductions in company capital, varying company capital and giving loans to directors and connected persons. This reduces the burden and expense on companies who previously may have had to secure Court approval for certain transactions. Additionally, it simplifies and streamlines the current methods of effecting such transactions. To ensure balance, it incorporates safeguards in relation to directors' liability if the procedure is used inappropriately.

The Company Law Review Group's (CLRG) understanding is that the implementation of the reforms in this area has generally been warmly welcomed. That said, a number of perceived anomalies and other issues have arisen and have been referred to the CLRG for advice.

The anomalies and other issues explored in this report have arisen from several sources:

- submissions made directly to the Department of Business, Enterprise and Innovation;
- submissions received by Review Group members from representative bodies; and
- submissions made by members of the Review Group.

The recommendations by the CLRG contained in this report are submitted for the Minister's attention.

1. Incorporation and Registration- Part 2, section 54

1.1 Amendment to section 54 proposed to provide that "mandatory provision" and "optional provision" shall have the meanings provided for in a new section, section 19A

Current provision

"54 *(1) In this Chapter—*

"mandatory provision" means a provision of any of Part 1, this Part or Parts 3 to 14 that is not an optional provision;

"optional provision" means a provision of any of Part 1, this Part or Parts 3 to 14 that—

(a) contains a statement to the effect, or is governed by provision elsewhere to the effect, that the provision applies save to the extent that the constitution provides otherwise or unless the constitution states otherwise; or

(b) is otherwise of such import;"

Submission

The concept of optional provisions was a new concept introduced by the 2014 Act. Optional provisions operate in substitution for the concept of a table of regulations (i.e. Tables A and C) which companies can adopt in whole or in part to govern their internal administration. In its First Report, the Review Group recommended moving away from the Table A approach in favour of incorporating as many regulatory provisions as possible into the main body of the 2014 Act:

> *"The Group considered that the common modes of internal governance of companies ought to be readable immediately from the main body of the statute, even if certain variations from those common modes of governance are chosen by particular companies. It is thought that notwithstanding existing familiarity with Table A, there is no disadvantage to placing the Table A language in the main body of the statute."*

This objective has been achieved by the introduction of optional "default" provisions (in respect of those matters not governed by a mandatory provision) which will apply whether in whole or in part to the circumstances of each company unless the constitution of a company provides otherwise.

This was one of the main changes introduced by the 2014 Act. It has been welcomed as having resulted in a much-needed simplification of company law and means that smaller companies in particular can, without their incurring advisors' fees, rely on the fact that a modern standard of internal regulations will apply to them without the need to draft a bespoken constitution. At the same time, companies which have more complex requirements can elect in their constitutions to disapply the optional provisions and adopt bespoken provisions at their discretion.

It is of fundamental importance that whether companies apply, or disapply, the 2014 Act's "optional provisions" that there is complete certainty as to the provisions of the 2014 Act that are "optional provisions". Uncertainty is anathema to commerce and company law. The question of certainty is also relevant in the case of commercial contracts such as shareholders' agreements or joint venture agreements where the parties to such agreements may need to make reference to the 2014 Act's "optional provisions".

It has been suggested that there is some uncertainty as to what provisions of the 2014 Act are "optional provisions." This uncertainty relates to the fact that there are a number of mandatory provisions that are enabling in nature in that they permit companies and other persons to do things where particular conditions are met, such as, where a company's constitution so provides. These are not, in fact, "optional provisions" because the essence of an optional provision is that it is one that may be disapplied in its entirety in its application to a company. While it is thought that the Act is clear in defining an optional provision, given the importance of the concept to all companies, the definition can be further refined.

To resolve any confusion and to bring greater clarity, it is suggested that a new definitional provision be inserted for each type of company, e.g. in the case of an LTD, section 19A. The purpose of these provisions is to set out in greater specificity the meaning of "*optional provision*," "*mandatory provision*" and to introduce a new distinction within the concept of "*mandatory provision*" by the identification of a new categorisation of provisions, to be known as an "*enabling provision*".

> *"**19A** Mandatory, optional and enabling provisions*
> *(1) The terms "mandatory provision", "optional provision" and "enabling provision", when used in relation to a company limited by shares, shall have the meaning set out in this section.*
> *(2) In this section, a provision means a section, a subsection, a paragraph or a sub-paragraph.*
> *(3) "Mandatory provision" means a provision of any of Part 1, this Part or Parts 3 to 14 that is not an optional provision and includes an enabling provision.*
> *(4) "Optional provision" means a provision, other than an enabling provision, of any of Part 1, this Part or Parts 3 to 14 that –*
> *(a) contains a statement to the effect, or is governed by provision elsewhere to the effect, that the provision applies save to the extent that the constitution provides otherwise or unless the constitution states otherwise; or*
> *(b) is otherwise of such import.*
> *(5) "Enabling provision" means a mandatory provision that enables or permits something to be done in a number of ways, including where a company so provides in its constitution.*
> *(6) The constitution of a company may, with respect to the company:*
> *(a) disapply the totality of an optional provision;*
> *(b) disapply part of an optional provision;*
> *(c) replace, include or modify all or any part of an optional provision with any additions or variations as do not contravene a provision of Part 1, this Part or Parts 3 to 14.*
> *(7) Nothing in:*
> *(a) an optional provision; or*
> *(b) another provision of Part 1, this Part or Parts 3 to 14 which is expressed to govern an optional provision;*
> *shall limit or affect or be construed or interpreted as having limited or affected the ability of a company's constitution to provide otherwise in any respect whatsoever, whether by replacement, addition, variation or modification or in any other way."*

Section 54(1) of the Act to be amended to provide as follows:

"mandatory provision" has the meaning in section 19A;

"optional provision" has the meaning in section 19A.

Corresponding changes will be required for sections 968 (for DACs), 1007 (for PLCs), 1177 (for CLGs) and 1235 (for UCs) of the 2014 Act.

Further relevant considerations

- The rationale underlying the approach adopted in the 2014 Act is intended to be for the convenience of companies, to reduce the need for supplemental regulation and to streamline to the greatest extent possible the legislative provisions which would apply in the day to day operation of a company.

- Many companies' constitutions and other commercial contacts currently make reference to "optional provisions" as defined by section 54 (in the case of LTDs) section 968 (in the case of DACs), section 1007 (in the case of PLCs), section 1177 (in the case of CLGs) and section 1235 (in the case of UCs) and the suggested amendments must preserve the integrity of these contractual references. This is the basis for retaining the cross-reference in section 54 to section 19A: in this way, commercial contracts which define "optional provisions" by reference to section 54 will continue to be correct, even though the substantive definition will be found in section 19A.

- As noted, there are some 16 provisions that, in the case of a LTD, have given some users cause to question whether they are "optional provisions" because they envisage a constitution enabling a company or a person to do something. In fact, these are not optional provisions but examples of mandatory provisions, that cannot be disapplied i.e. a company's constitution cannot lawfully provide that any of those provisions "do not apply to the company". The confusion arises because these mandatory provisions allow or enable companies or other persons to do something where the constitution so provides; this is, however, in circumstances where *the provision will continue to apply to the company and cannot be disapplied, whether in whole or in part*. The recommendation is that this subset of mandatory provisions would be distinguished from optional provisions by being identified as "enabling provisions". The 16 provisions that would fall within the proposed definition of "enabling provision" are:

Section 69(1)	No shares may be allotted by a company unless the allotment is authorised, either specifically or pursuant to a general authority, by ordinary resolution or by the constitution of the company.
Section 69(6)	Subject to *subsections (8)* and *(12)* and *section 70*, a company proposing to allot any shares— (a) shall not allot any of those shares, on any terms— (i) to any non-member, unless it has made an offer to each person who holds relevant shares, of the class concerned, in the company to allot to him or her, on the same or more favourable terms, a proportion of those relevant shares which is, as nearly as practicable,

	equal to the proportion in nominal value held by him or her of the aggregate of the shares of that class; or (ii) to any person who holds shares in the company, unless it has made an offer to each person who holds relevant shares, of the class concerned, in the company to allot to him or her, on the same terms, a proportion of those shares which is, as nearly as practicable, equal to the proportion in nominal value held by him or her of the aggregate of the relevant shares of that class; and (b) shall not allot any of those shares to any person unless the period during which any such offer may be accepted (not being less than 14 days) has expired or the company has received notice of the acceptance or refusal of every offer so made. […] (12) Subsection (6) shall not apply— (a) to the extent that— (i) the constitution of the company, (ii) a special resolution, or (iii) the terms of issue of already allotted shares, provides or provide (either generally or in respect of a particular allotment or class of allotments), to the extent so provided;
Section 88(2)	Where the rights are attached to a class of shares in the company otherwise than by the constitution, and the constitution does not contain provisions with respect to the variation of the rights, those rights may be varied if, but only if— (a) the holders of 75 per cent, in nominal value, of the issued shares of that class, consent in writing to the variation; or (b) a special resolution, passed at a separate general meeting of the holders of that class, sanctions the variation, and any requirement (however it is imposed) in relation to the variation of those rights is complied with, to the extent that it is not comprised in the requirements in *paragraphs (a)* and *(b)*.
Section 95(8)	Save to the extent that a company's constitution regulates the execution of instruments by any particular company or other body corporate, this section is without prejudice to the Stock Transfer Act 1963.
Section 105(4)	Subject to this Part, the acquisition by a company of its own shares shall be authorised by— (a) the constitution of the company; (b) the rights attaching to the shares in question; or (c) a special resolution.
Section 117(9)	Notwithstanding anything in the preceding subsections of this section, but without prejudice to any contrary provision of— (a) an order of, or undertaking given to, the court; (b) the resolution for, or any other resolution relevant to, the reduction of company capital; or (c) the company's constitution,

	a reserve arising from the reduction of a company's company capital is to be treated, both for the purposes of this section and for purposes otherwise, as a realised profit.
Section 123(4)	The provisions of this Part are without prejudice to any enactment or rule of law or any provision of a company's constitution restricting the sums out of which, or the cases in which, a distribution may be made.
Section 136(1)	136(1) This section applies where the constitution of a company requires a director of the company to hold a specified share qualification (the "specified qualification"). (2) Where this section applies— (a) the office of director of a company shall be vacated if the director— (i) does not within 2 months after the date of his or her appointment or within such shorter time as may be fixed by the constitution, obtain the specified qualification; or […]
Section 146(3)	146(3) In the case of a resolution to remove a director under this section or to appoint somebody instead of the director so removed at the meeting at which he or she is removed the following provisions shall apply— […] (c) the company shall give its members notice of any such resolution at the same time and in the same manner as it gives notice of the meeting or, if that is not practicable, shall give them notice of it, either by advertisement in a daily newspaper circulating in the district in which the registered office of the company is situated or in any other manner allowed by this Act or by the constitution, not less than 21 days before the date of the meeting.
Section 181(1)	181(1) Save where the constitution of the company makes provision for the giving of greater notice, a meeting of a company, other than an adjourned meeting, shall be called— (a) in the case of the annual general meeting or an extraordinary general meeting for the passing of a special resolution, by not less than 21 days' notice; (b) in the case of any other extraordinary general meeting, by not less than 7 days' notice.
Section 183(5)	183(5) The instrument of proxy and the power of attorney or other authority, if any, under which it is signed, or a notarially certified copy of that power or authority, shall be deposited at the registered office of the company concerned or at such other place within the State as is specified for that purpose in the notice convening the meeting, and shall be so deposited not later than the following time. (6) That time is— (a) 48 hours (or such lesser period as the company's constitution may provide) before the time for holding the meeting or adjourned meeting at which the person named in the instrument proposes to vote; or (b) in the case of a poll, 48 hours (or such lesser period as the company's constitution may provide) before the time appointed for the taking of the poll.
Section 186	186. The business of the annual general meeting shall include— […] (d) where the company's constitution so provides, the election and re-election of directors; […]

	(f) where the company's constitution so provides, the remuneration of the directors.
Section 228(1)(d) and (e)	228(1) A director of a company shall— […] (d) not use the company's property, information or opportunities for his or her own or anyone else's benefit unless— (i) this is expressly permitted by the company's constitution; or (ii) the use has been approved by a resolution of the company in general meeting; (e) not agree to restrict the director's power to exercise an independent judgment unless— (i) this is expressly permitted by the company's constitution; (ii) the case concerned falls within *subsection (2)*; or (iii) the director's agreeing to such has been approved by a resolution of the company in general meeting;
Section 284(3)	284(3) No member (not being a director) shall have any right of inspecting any financial statement or accounting record of the company except— (a) as conferred by statute or by the company's constitution, or (b) authorised by the directors under *subsection (4)* or by the company in general meeting.
Section 424(1)	424(1) Where a company has redeemed any debentures then— (a) unless any provision to the contrary, whether express or implied, is contained in the constitution or in any contract entered into by the company, or (b) unless the company has, by passing a resolution to that effect or by some other act, shown its intention that the debentures shall be cancelled, the company shall have power to re-issue the debentures either by re-issuing the same debentures or by issuing other debentures in their place.
Section 620(8)	620(8) Unless the company's constitution or the conditions of issue of the shares in question provide otherwise, dividends declared by a company more than 6 years preceding the commencement date, being dividends which have not been claimed within that period of 6 years, shall not be a claim admissible to proof against the company for the purposes of the winding up.

- The recent CLRG Report '*The Recommendations of the Company Law Review Group relating to Shares and Share Capital in the Companies Act 2014*' has recently considered the interpretation of the expression *"save to the extent that the constitution provides otherwise"* in response to a suggestion that a company's constitution may only limit or restrict the operation of the terms of an optional provision of the 2014 Act (as opposed to conferring an even wider power). The Report observed that the optional provisions of the 2014 Act were intended to liberate companies to carry out particular tasks and not to restrict them. It has recommended an amendment by the insertion of a new subsection, section 31(2A) as follows:

  "***(2A)*** *(a) nothing in an optional provision or in another provision of this Act which is expressed to govern an optional provision shall limit or affect or be construed or*

interpreted as having limited or affected the ability of the company's constitution to provide otherwise in any respect whatsoever and, without limiting the foregoing, a company's constitution may in particular include all or part of an optional provision with such additions and variations as do not contravene any other provision of this Act.
(b) in this section "optional provision" has the same meaning as it has in Chapter 6 of Part 2."

The substance of this recommendation is carried over into the proposed new section 19A(7).

Recommendation

The Review Group recommends that the changes proposed in the form of the enactment of section 19A and the amendments to sections 54, 968, 1007, 1177 and 1235 be made.

2. Corporate Governance- Part 4, section 128

2.1 Amendment proposed to section 128(2) to substitute "officer" with "director"

Current provision

*"**128.** (1) A company shall have at least one director.*

(2) If default is made by a company in complying with subsection (1) for 28 consecutive days, the company and any officer of it who is in default shall be guilty of a category 3 offence."

Submission

The reference in section 128(2) to "officer" should instead be to "director" as a company secretary would not be capable of influencing a company to ensure it has directors.

Further relevant considerations

- The approach generally taken in the 2014 Act to the criminalisation of certain acts and omissions has been to specify that the "company and any officer of it who is in default" shall be guilty of an offence. Amending this section as proposed would therefore depart from that approach and place this provision at variance with other provisions of the Act. An analysis of the officer in default provisions (sections 270 and 271) suggests that it is highly unlikely that a company secretary would be in danger of prosecution under this section. In practical terms, the primary purpose of this section is to deter companies from not having a director.

- Under section 139 of the 2014 Act, where an individual ceases to be a director of a company and that time was either its sole director or the company (to his or her knowledge) had no other director resident in an EEA State, there is an obligation to both notify and advise the CRO of those circumstances.

- A difficulty may arise if the wording were changed from "officer" to "director" since it might not be possible to enforce section 128(2) by prosecuting a "director" of the company for the offence of failure to have at least one director of the company.

- Under previous companies legislation, there had been a statutory duty imposed on secretaries to ensure that companies complied with the requirements of the Companies Acts. (Section 100 of the Company Law Enforcement Act 2001, which was substituted for section 383 of the 1963 Act). However, this duty was removed by the 2014 Act because of a view that it would be illogical to hold a secretary to account in this way for matters which lay beyond their control.

- Where a B10 form is filed seeking to resign a company director where said director is the final director of the company, the normal procedure in the CRO is to return the B10 to advise it is unable to register same as it will leave the company without any director(s). However, if a director (final or otherwise) files the B69 (along with the required supporting documentation) to resign

themselves from a company, there is an obligation to register same and have the register reflect such changes.

Recommendation

The Review Group is not currently in favour of recommending the proposed amendment to section 128(2).

3. Corporate Governance- Part 4, section 131(2)

3.1 Amendment proposed to change reference in section 131(2) from "director" to "director or secretary"

Current provision

*"**131**. (1) No person shall be appointed a director or, in the case of an individual, secretary of a company unless he or she has attained the age of 18 years.*
(2) Any purported appointment of a minor as a director of a company shall be void."

Submission

The reference in section 131(2) to the purported appointment of a minor as a director of a company should be changed to refer to the purported appointment of a director or a secretary since, under subsection (1), neither can be less than 18 years old.

Further relevant considerations

- A minimum age for holding the office of director or secretary of a company was introduced into Irish law by the 2014 Act following a recommendation of the CLRG in its First Report (Page 250). While that recommendation stated that no individual under the age of 18 should become a director or secretary of a company, it is unclear whether it was also intended that the purported appointment of an underage secretary should (as with a director) be void. That recommendation, at para 11.9.13, stated:
    - *"(i) No individual shall become a director or secretary of a company unless such individual has attained the age of 18 years.*
    - *(ii) Any purported appointment of an individual before his having attained the age of 18 years shall be ineffective and void as between the company and the individual under 18. However, third parties would not be required to enquire as to the age of a director and the rules of ostensible authority of an individual to represent a company would apply.*
    - *(iii) The implementing legislation should provide for an 18-month time period within which directors would be obliged to ensure that all directors are aged 18 years or more."*

- In the United Kingdom, there is no obligation on a "private company" to have a secretary. (Section 270 of the 2006 Act). A "private company" is any company which is not a public company. A public company is required to have a secretary and although no minimum age is prescribed there are stringent experience and qualification requirements imposed. (Section 273).

Recommendation

The Review Group recommends a change to insert the words *"or secretary"* after *"director"* in section 131(2).

4. Corporate Governance- Part 4, section 135

4.1 Amendment proposed to change the wording of the provision governing the validity of acts of a company director or secretary so as to align it with the terms of Regulation 108 of Table A and include reference to committees of directors

Current provision

*"**135**. The acts of a director or of a secretary shall be valid notwithstanding any defect which may afterwards be discovered in his or her appointment or qualification."*

Submission

It should be noted that the scope of the relevant provision under the 2014 Act (section 135) differs from what was contained in Table A of the Companies Act 1963. Specifically, section 135 of the 2014 Act applies to *"acts of a director or of a secretary"*, while Regulation 108 of Table A applied to acts of a director, committee of directors or person acting as a director. Section 135 should be amended to include reference to committees established by directors in accordance with section 160 of the 2014 Act.

Further relevant considerations

- Section 135 is in fact founded on section 178 of the Companies Act 1963 but has extended its scope to include reference to the acts of a secretary. Section 178 had stated that:

  "178. —The acts of a director shall be valid notwithstanding any defect which may afterwards be discovered in his appointment or qualification."

- Regulation 108 of Table A under the 1963 Act had provided as follows:

  *"**108.** All acts done by any meeting of the directors or of a committee of directors or by any person acting as a director shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such director or person acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director."*

- In its Second Report, the CLRG recommended that Model Regulation 108 be imported into statute, unamended. (Page 67, CLRG Second Report). While Model Regulation 108 appeared in Pillar A (Part A4, Head 26(c)), this recommendation was not carried into the Companies Bill as published in 2012. There is therefore no direct equivalent to Regulation 108 in the 2014 Act.

- Head 26(c) appears to have been omitted from the 2012 Bill because of a view that its essential elements were already covered in section 135, which would also extend to capture directors comprising committees of directors. Similarly, inclusion of references to directors being "disqualified" may have given rise to confusion and cut across the provisions relating to the disqualification of directors in Part 14 of the 2014 Act. That a person has been disqualified is however not the only basis for qualification to be a director.

Recommendation

The Review Group recommends that section 135 be amended to include a reference to committees established by directors in accordance with section 160 of the Companies Act 2014.

5. Corporate Governance- Part 4, section 142(5)

5.1 Proposed amendment in respect of the limitation imposed on number of directorships held so as to allow for greater flexibility in the case of groups of companies

Current provision

*"**142.** (1) A person shall not, at a particular time, be a director of more than—*

(a) 25 private companies limited by shares; or

(b) 25 companies, one, or more than one, of which is a private company limited by shares and one, or more than one, of which is any other type of company capable of being wound up under this Act.

(2) Subsections (3) to (7) apply in reckoning, for the purposes of subsection (1) (the "relevant purposes"), the number of companies of which the person concerned is a director at a particular time (the "relevant time") and a reference in them to a company, without qualification, includes a reference to any type of company capable of being wound up under this Act.

(3) Without prejudice to the following subsections, there shall not be included for the relevant purposes any of the following companies of which the person is a director at the relevant time, namely—

(a) a public limited company;

(b) a company in respect of which a certificate under section 140 is in force.

(4) There shall not be included, for the relevant purposes, any company of which the person is a director at the relevant time (not being a time that is before the date of the giving of the certificate or direction referred to subsequently in this subsection) if—

(a) the person, or the company, delivers to the Registrar a notice, in the prescribed form, stating that the company is a company falling within one or more of the categories of company specified in the Table to this section; and

(b) either—

(i) the Registrar, having considered that notice and having made such enquiries as he or she thinks fit, certifies in writing, or as the case may be the Minister under subsection (7) so certifies, that the company is a company falling within one or more of the foregoing categories; or

(ii) the Minister directs, under subsection (7), that the company is not to be included amongst the companies for the relevant purposes.

(5) There shall, for the relevant purposes, be counted as the one company of which the person is a director at the relevant time, 2 or more companies of which he or she is a director at that time if one of those companies is the holding company of the other or others.

(6) For the purposes of subsection (4)(b)(i), the Registrar may accept as sufficient evidence that the company concerned falls within a category of company specified in the Table to this section a declaration, in the prescribed form, to that effect made by an officer of the company or the other person referred to in subsection (4)(a).

(7) If the Registrar refuses to certify that the company to which a notice under subsection (4)(a) relates is a company falling within a category of company specified in the Table to this section, the company or the person referred to in subsection (4)(a) may appeal to the Minister against such a refusal and the Minister may, having considered the matter and made such enquiries as he or she thinks fit, do one of the following:

(a) confirm the decision of the Registrar;

(b) certify in writing that the company is a company falling within a foregoing category; or

(c) notwithstanding that he or she confirms the decision of the Registrar, direct that the company is not to be included amongst the companies that shall be reckoned for the purposes of subsection (1) in so far as that subsection applies to the person concerned but shall only give such a direction if—

(i) the person concerned was a director of the company before 18 April 2000; and

(ii) in the opinion of the Minister the inclusion of the company amongst the companies that shall be reckoned for the purposes of subsection (1), in so far as that subsection applies to the person concerned, would result in serious injustice or hardship to that person; and

(iii) the giving of the direction would not operate against the common good.

(8) A notice referred to in subsection (4)(a) may, for the purposes of that provision, be delivered to the Registrar before the person concerned becomes a director of the company to which the notice relates."

Submission

In circumstances where a person is a director of a number of companies in a group, the directorships should count as one. As worded, the relationship must be holding company and subsidiary (directorships of both to be counted as one) but not two subsidiaries of a holding company (*i.e.* each of the directorships of a person who is a director of two subsidiaries but not of the holding company are counted, whereas if the person is also a director of the holding company, then all three directorships count only as one).

This distinction can give rise to difficulties in practice for US multinationals in particular, where it is common for a director to be on the board of a large number of Irish subsidiaries but not necessarily of the holding company. Sometimes this arises purely by happenstance depending on the overall corporate structure of the relevant group – where one group maintains quite a flat group structure and another has a more tiered group structure and the directors of the different groups are treated quite differently for the purposes of this rule. The different treatment between the relationship of holding company and subsidiary and that of two subsidiaries of a holding company in this context has created frustration and confusion for many multinationals with a number of Irish subsidiaries. Their directors struggle to understand the distinction and the rationale behind it and their advisors struggle to point to a policy reason for making a distinction between directorships of companies within the same group. Removing this distinction and allowing the directorships of companies in a group to be counted as one would increase Ireland's attractiveness as a place in which to do business and would be a positive change to the legislation.

In addition section 142(5) has been interpreted by certain practitioners as precluding the directorships of a person who is a director of a holding company and a subsidiary from being counted as one where the holding company is not an Irish company. It should be clarified that the holding company is not

required to be an Irish company in order for the directorships to be counted as one. This issue would be less relevant if the exemption were extended to all group companies.

Further relevant considerations

- Section 142(5) of the 2014 Act has not introduced a change to Irish companies' legislation.

- The exemption outlined in section 142(5) is a continuation of what was originally set out in section 45(3)(c) of the Companies (Amendment) (No. 2) Act 1999. Section 45 introduced for the first time (subject to certain exemptions) an upper limit on the number of companies in respect of which a directorship could be held. Section 45 was enacted in response to concerns at the time about the extent of Irish Registered Non-Resident corporate activity.

- Section 45(3)(c) also stated that two or more directorships would count as one for the purposes of the upper limit where the director in question was a director of two or more companies – one of which was the holding company of the other or others. Section 45 similarly did not allow for directorships of multiple subsidiaries to count as one without the director concerned also being the director of the holding company.

- The reforms introduced by the 1999 Act were considered by the CLRG in its First Report. On the specific question of a change to the prescribed maximum number of directors, the CLRG took the view that there was no movement seeking to amend this provision and therefore recommended no change. (CLRG First Report, p. 247).

Recommendation

The Review Group recommends an amendment to section 142(5) as follows:

Insert into the second line of subsection (5) after the word *"companies"* and before the words *"of which"* the words *"or bodies corporate".*

Insert into the third line of subsection (5) after the word *"companies"* and before the word *"is"* the words *"or bodies corporate".*

Insert at the end of subsection (5) after the words *"or others"* the words *"or where all of the bodies corporate are members of the same group of companies."*

6. Corporate Governance- Part 4, section 144(5)

6.1 Amendment proposed to permit a single member company to increase the number of directors appointed notwithstanding whatever upper limit may be set by its constitution

Current provision

*"**144.** (1) Any purported appointment of a director without that director's consent shall be void.*
(2) Subject to subsection (1), the first directors of a company shall be those persons determined in writing by the subscribers of the constitution or a majority of them.
(3) Save to the extent that the company's constitution provides otherwise and subject to subsection (5) in the case of a single-member company—

(a) subsequent directors of a company may be appointed by the members in general meeting, provided that no person other than a director retiring at the meeting shall, save where recommended by the directors, be eligible for election to the office of director at any general meeting unless the requirements of subsection (4) as to his or her eligibility for that purpose have been complied with;

(b) the directors of the company may from time to time appoint any person to be a director of the company, either to fill a casual vacancy or as an addition to the existing directors, but so that the total number of directors of the company shall not at any time exceed the number, if any, provided for in its constitution;

(c) any director appointed as mentioned in paragraph (b) shall hold office only until the next following annual general meeting, and shall then be eligible for re-election;

(d) the company may from time to time, by ordinary resolution, increase or reduce the number of directors;

(e) the company may, by ordinary resolution, appoint another person in place of a director removed from office under section 146 and, without prejudice to the powers of the directors under subsection (3)(b), the company in general meeting may appoint any person to be a director either to fill a casual vacancy or as an additional director.

(4) The following are the requirements mentioned in subsection (3)(a) for the eligibility of a person (the "person concerned") for election as a director at a general meeting, namely, not less than 3 nor more than 21 days before the day appointed for the meeting there shall have been left at the company's registered office—

(a) notice in writing signed by a member of the company duly qualified to attend and vote at the meeting for which such notice is given, of his or her intention to propose the person concerned for such election; and

(b) notice in writing signed by the person concerned of his or her willingness to be so elected.

(5) Subject to subsection (1), in the case of a single-member company, the sole member may appoint a person to be a director of the company by serving a notice in writing on the company which states that the named person is appointed director and this applies notwithstanding anything in subsection (3) (save for the requirement of it that any limit for the time being on the number of the directors is to be observed) or subsection (4)."

Submission

A sole member ought to be allowed to appoint directors regardless of any limit in the articles as the appointment in effect increases the number. Perhaps oblige the filing of revised articles where the

appointment increases the number of directors beyond the number previously filed in the Companies Registration Office.

Further relevant considerations

- The number of directors which can be appointed by a company (including a single member company) is governed by its constitution.

- While a minimum number of directors (one in the case of a LTD and single member company) is prescribed by section 128 there is no statutory upper limit as to how many directors a company may have. A company (including a single member company) may therefore have an unlimited number of directors, subject to adhering to whatever limitation (if any) is provided for in its constitution.

- A company may amend its constitution by the passing of a special resolution in the event that it wishes to appoint a number of directors which exceeds that already permitted under its constitution.

- In practical terms, how many directors are ordinarily likely to be appointed in the case of a single member private company?

- Section 144(3)(d), an optional provision, states that a company may, by ordinary resolution, increase or decrease its number of directors. However, the 2014 Act does not make clear the relationship between this entitlement and any upper limit which may be prescribed by the constitution.

Recommendation

The Review Group is not currently in favour of recommending the proposed amendment.

7. Corporate Governance- Part 4, section 151(4)

7.1 Suggestion received regarding whether clarification may be required as to how the obligation under section 151(4) to display certain information on a website applies where a group of companies shares a common website

Current provision

*"**151**. (2) A company shall further have the following particulars on all its business letters and order forms:*

(a) the name and legal form of the company;

(b) the place of registration of the company and the number under which it is registered; and

(c) the address of its registered office.

(3) If on any business letters or order forms of a company there is reference to the share capital of the company, the company shall ensure that the reference is not stated otherwise than as a reference to the issued share capital of the company that is paid up.

(4) Where a company has a website, it shall display in a prominent and easily accessible place on that website the particulars referred to in subsection (2)(a) to (c) and if there is reference in such a website to the share capital of the company—

(a) the same requirement under subsection (3) applies to such a reference as it applies to such a reference on business letters and order forms; and

(b) the reference shall be displayed in a prominent and easily accessible place on the website."

Submission

It is not clear how the requirement to display information on a company website under section 151 applies where a group of companies share a website. Provision ought to be made for regulations to prescribe compliance processes.

Further relevant considerations

- Has this issue arisen in the context of groups of companies and business letters and, if so, what is the approach that has been taken?

- There is no obligation on a company (or groups of companies) to maintain a website under subsection (4) specifying the information set out in subsection (2).

- In the experience of the Review Group members, the overwhelming majority of companies tend to have an individual website. In the case of a group of companies with a common website, there will usually be a link redirecting users to the websites of the individual companies in the group.

Recommendation

The Review Group is not currently in favour of recommending the proposed amendment.

8. Corporate Governance- Part 4, section 167

8.1 Suggestion received in respect of whether there should be a requirement for a company to have an audit committee in circumstances in which it has only one director

Current provision

*"**167.** (1) In this section—*
"amount of turnover" and "balance sheet total" have the same meanings as they have in section 275;
"relevant company" means either of the following—
(a) a company that, in both the most recent financial year of the company and the immediately preceding financial year, meets the following criteria—
(i) the balance sheet total of that company exceeds for the year—
(I) subject to clause (II), €25,000,000; or
(II) if an amount is prescribed under section 943(1)(i),), the prescribed amount;
and
(ii) the amount of turnover of that company exceeds for the year—
(I) subject to clause (II), €50,000,000; or
*(II) if an amount is prescribed under section 943(1)(i**)**, the prescribed amount;*
or
(b) a company which has one or more subsidiary undertakings, if the company and all those subsidiary undertakings together, in both the most recent financial year of that company and the immediately preceding financial year, meet the criteria set out in paragraph (a).
(2) The board of directors of a relevant company shall either—
(a) establish a committee (an "audit committee") that—
(i) has at least the responsibilities specified in subsection (7); and
(ii) otherwise meets the requirements of this section;
or
(b) decide not to establish such a committee.
(3) The board of directors of a relevant company shall state in their report under section 325 —
(a) whether the company has established an audit committee or decided not to do so;
(b) if the company has decided not to establish an audit committee, the reasons for that decision."

Submission

If a company has only one director it should not be obliged to have an audit committee.

Further relevant considerations

- The Companies Act 2014 does not stipulate any mandatory requirement to appoint an audit committee in respect of any type of company. The terms of section 167 extend only to "relevant companies" as defined under section 167: i.e. – a company which either, for two successive years,

has a balance sheet total exceeding €25 million as well as turnover exceeding €50 million or, in the case of a company with subsidiary undertakings, a combined balance sheet total exceeding €25 million.

- The extent of the obligation placed on the board of directors of large companies under section 167(2) is that they decide whether or not to establish an audit committee and, should they decide not to do so, to provide reasons for that decision in their directors' report.

- Section 167 has been amended by section 9 of the Companies (Accounting) Act 2017. The amendments:
  i). correct a referencing error which by the section was erroneously referred to section 945(1)(k) instead of 943(1)(i).
  ii). substitute the term "*relevant company*" for "*large company*".
  iii). substitute in the definitions of "*amount of turnover*" and "*balance sheet total*", in subsection (1) of "section 275" for "section 350"

- The concern identified in the submission would only apply in the case of LTDs which satisfy the threshold criteria set out in section 167(1) since other company types (DACs, PLCs, Unlimited and CLGs) must have at least two company directors.

Recommendation

The Review Group is not currently in favour of recommending the proposed amendment.

9. Corporate Governance- Part 4, section 175

9.1 Submission received concerning whether a definition of "annual general meeting" should be included in the Companies Act 2014

Current provision

*"**2.** (1) In this Act— …*

"annual general meeting" means the meeting provided for in section 175;"

…

*"**175.** (1) Subject to subsections (2) and (3), a company shall in each year hold a general meeting as its annual general meeting in addition to any other meetings in that year and shall specify the meeting as such in the notices calling it and not more than 15 months shall elapse between the date of one annual general meeting of a company and that of the next.*

(2) So long as a company holds its first annual general meeting within 18 months after the date of its incorporation, it need not hold it in the year of its incorporation or in the following year.

(3) A company need not hold an annual general meeting in any year where all the members entitled (at the date of the written resolution referred to in this subsection) to attend and vote at such general meeting sign, before the latest date for the holding of that meeting, a written resolution under section 193 —

(a) acknowledging receipt of the financial statements that would have been laid before that meeting;

(b) resolving all such matters as would have been resolved at that meeting; and

(c) confirming no change is proposed in the appointment of the person (if any) who, at the date of the resolution, stands appointed as statutory auditor of the company.

(4) Without prejudice to any specific provision of this Act providing for the contingency of an annual general meeting being so dispensed with, where a provision of this Act requires that a thing is to be done at an annual general meeting, then, if the thing is dealt with in the foregoing resolution (whether by virtue of the matter being resolved in the resolution, the members' acknowledging receipt of a notice, report or other documentation or, as the case may require, howsoever otherwise), that requirement shall be regarded as having been complied with.

(5) If default is made in holding a meeting of the company in accordance with subsection (1), the Director of Corporate Enforcement may, on the application of any member of the company, call or direct the calling of a general meeting of the company and give such ancillary or consequential directions as the Director of Corporate Enforcement thinks expedient, including directions modifying or supplementing the operation of the company's constitution in relation to the calling, holding and conducting of the meeting.

(6) The directions which may be given under subsection (5) may include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.

(7) A general meeting held in pursuance of subsection (5) shall, subject to any directions of the Director of Corporate Enforcement and subsection (8), be deemed to be an annual general meeting of the company.

(8) Where a meeting so held is not held in the year in which the default in holding the company's annual general meeting occurred, the meeting so held shall not be treated as the annual general meeting for the year in which it is held unless, at that meeting, the company resolves that it shall be so treated.

(9) Where a company resolves that a meeting shall be so treated, a copy of the resolution shall, within 21 days after the date of passing of it, be delivered by it to the Registrar.
(10) If default is made in holding a meeting of the company in accordance with subsection (1), or in complying with any direction of the Director of Corporate Enforcement under subsection (5), the company and any officer of it who is in default shall be guilty of a category 3 offence.
(11) If default is made by a company in complying with subsection (9), the company and any officer of it who is in default shall be guilty of a category 4 offence.

*"**177.** (1) All general meetings of a company, other than annual general meetings, shall be known, and in this Act are referred to, as "extraordinary general meetings".*
(2) The directors of a company may, whenever they think fit, convene an extraordinary general meeting.
(3) If, at any time, there are not sufficient directors capable of acting to form a quorum, any director of the company or any member of it may convene an extraordinary general meeting in the same manner as nearly as possible as that in which meetings may be convened by the directors."

Submission

The 2014 Act purports to introduce for the first time a definition in section 2(1) of "annual general meeting" by reference to section 175. However, section 175 fails to provide a definition. This also impacts upon the new definition of "extraordinary general meeting" which is defined in section 177 as all general meetings of a company other than "annual general meetings".

Further relevant considerations

- Section 2(1) does not seek to define an "annual general meeting" or intimate that a definition of an "annual general meeting" is contained in section 175. Rather, section 2(1) simply states that an annual general meeting "means the meeting provided for in section 175."

- The basic procedures in respect of the holding of an annual general meeting (AGM) are laid down in section 175 which addresses, inter alia, the general requirement to have an AGM, the possibility of dispensing with that requirement by unanimous written resolution, the time periods permitted to lapse between AGMs and the consequences of default. The conduct of the AGM is further regulated by the remaining sections of Chapter 6 of Part 4 of the 2014 Act, including section 186 which states that the business of the AGM shall include, inter alia, consideration of the company's statutory financial statements, the report of the directors and (where applicable) the report of the statutory auditors, the declaration of a dividend and the election and re-election of directors.

- The 2014 Act provides that any general meeting of the company must be either an AGM or an Extraordinary General Meeting (EGM). Under section 177(1), any general meeting of the company which is not an AGM is, by default, to be an EGM. The rules concerning the holding of EGMs are set out in the remaining sections of Chapter 6 of Part 4 – (notice, proxies, votes, et cetera.)

- Remaining requirements in respect of the AGM (for example the presentation of the directors' report and financial reports) are regulated within other Parts of the 2014 Act.

Recommendation

The Review Group is not currently in favour of proposing any legislative amendment.

9.2 Amendment proposed which would remove the need to dispense with the requirement to hold an AGM each year in favour of allowing a general dispensation

Current provision

The relevant section, section 175, is set out at 9.1, above.

Submission

The Act provides that the company dispensing with the requirement to hold an AGM must do so on an annual basis rather than (as was possible pre-Act) by general dispensation. Companies should be allowed to generally dispense with this requirement, particularly single member companies and not be required to do so on an annual basis.

Further relevant considerations

- There was no general right to dispense with the requirement to hold an annual general meeting under previous companies legislation. Section 131 of the Companies Act 1963 imposed a mandatory requirement on all companies to hold an annual general meeting.

- However, Regulation 8(1) of the European Communities (Single-Member Private Limited Companies) Regulations 1994 had provided for an exception in the case of single-member companies whereby the sole member could elect to dispense with the mandatory requirement for the holding of AGMs. Where the decision had been made to dispense with the requirement to hold an AGM under Regulation 8(1), Regulation 8(2) stated that the decision taken was to have effect both for that year and subsequent years. (Unless either the sole member or auditor giving notice demands the holding of the AGM).

- Section 196 (Single member companies - absence of need to hold general meetings) dis-applies the need for single member companies to have AGMs. This section replaced certain of the provisions of the EC (Single Member Private Limited company) Regulations which were revoked by CA 2014. It should be noted that section 196 is permissive and companies governed by the section are permitted to dispense with the holding of AGM but are not obliged.

- The option to dispense with the requirement to hold an AGM (which applies in the case of a single member company or multi-member LTD following the passing of a unanimous written resolution (UWR) is a reform introduced by the 2014 Act (following a recommendation by the CLRG). The UWR passed by the members must confirm:

i. that the members have received the financial statements that would have been laid at the AGM;
ii. that the statutory auditor remains as the auditor; and
iii. deal with all other matters that would have been resolved at the AGM.

- In its First Report, the CLRG observed as follows in respect of the then requirement imposed on companies to hold an AGM:

  "The Review Group considered whether it was either desirable or necessary to retain the requirement that all companies must hold an annual general meeting. The choices open to the Group in making its recommendations were threefold. In the first place, the law could continue to retain an unbending requirement for an annual general meeting. Secondly, the law could be changed to enable companies to establish paper procedures for arriving at decisions ordinarily dealt with at annual general meetings, including enabling resolutions to be passed by majority written resolution. Thirdly, a variation on this might be to provide that private companies limited by shares, i.e. the proposed CLS, would not be required to hold annual general meetings unless by a particular point in time each year any one member applied to the company for an annual general meeting be held. The Group considered whether a majority of members, including a qualified majority, could dispense with the need to convene and hold an annual general meeting in the face of minority opposition. The Group was not prepared to allow such a decision to be taken by a majority and believes that any relaxation must be conditional upon unanimous shareholder approval, including the approval of shareholders whose rights extend only to attending general meetings.

  Whilst the Group considers that a majority of private companies will survive without a requirement for annual general meetings, there will be a substantial minority for whom a meeting is unquestionably the best procedure to follow. Apart from the practical difficulties in seeking unanimous shareholder consent in large companies, it is considered to be undesirable that PLCs should be permitted to dispense with the holding of the annual general Meeting."

- The main purpose of the AGM is to enable the shareholders to: -
  i. consider the statutory financial statements and report of the directors;
  ii. to review the company affairs;
  iii. to question the directors face to face and thereby hold them accountable for their management of the company; and
  iv. any other governance matters contained in the constitution.

- There is an underlying principle which justifies the holding of an AGM on an annual basis. The directors of the company and the shareholders of the company are distinct from each other and the requirement for an AGM affords a statutory obligation, once a year, for a meeting to be held between those organs of the company.

- Should the AGM only be permitted to be dispensed with once shareholders are readily happy to confirm that they have sufficient financial information in relation to the company? If shareholders are so happy, then they will have no difficulty giving the confirmation each year that, in that particular year, the AGM is surplus to their requirements. If the requirement to hold an AGM is dispensed with generally, an onus (and inconvenience, expense *etc.*) would be placed on a

shareholder who did not consider that they were being kept adequately informed about the company's affairs to achieve a position that has for years, been enshrined in company law.

- There may be merit in providing for the ability to generally dispense in the case of a single member company where that member (individual) is also a director, but subject to certain safeguards for when there is a change in shareholder or when an additional shareholder is introduced.

- The following are important factors which require consideration in determining whether there is a need for an AGM each year:

  i. The 2014 Act does not require private companies to hold an EGM to consider its financial position when its net assets fall below the level of its share capital (as previously provided for by section 40 of the Companies (Amendment) Act, 1983).
  ii. Accordingly, there is no statutory obligation on the directors to inform a shareholder of the financial position of the company. The holding of an AGM or the passing of a unanimous written resolution at least puts that information in the hands of the shareholder; and
  iii. the existing option to dispense with the holding of an AGM is fit for purpose as it requires the yearly unanimous consent of all the shareholders thus preserving the right of a shareholder to the holding of an AGM, unless consent is obtained.

- While of understandable value to large public companies, the AGM is of limited value to private companies, especially smaller companies which comprise the vast majority of Irish registered companies. The AGM gets the accounts but does not approve them, it appoints the auditor and, if applicable, it appoints any directors following retirement under the rotation requirements of the company constitution. Small private companies are unlikely to have that requirement in their constitution. They tend also to have few shareholders and those they do have will typically be close to the ongoing operation of the company; much of the governance therefore in reality can be attended to by written resolution. Many private companies will therefore see the AGM requirement as simply a layer of bureaucracy and little else. Nevertheless, they should to be able to call upon it if necessary to call directors to account. It can help ensure good standards of governance.

- While the 2014 Act dispenses with the AGM requirement, it does so in a semi-detached manner in that it must be done annually thus preserving some of the bureaucracy it was intended to address. Without strong justification for doing so, the remaining element of that bureaucracy should be discontinued.

- There is a value in having an AGM simply to act as a pressure valve in the event that issues concerning shareholders or directors should arise. It would be prudent to devise a mechanism whereby an AGM could be called if and when the need arises. For example, there could be a requirement to renew the resolution not to call the AGM in the event of a change in shareholder or in the event that any shareholder threshold wants to call an AGM.

- The appointment of an auditor results in the auditor holding office until there is a resolution to remove that auditor or until the auditor's period in office ends.

Recommendation

The Review Group recommends an amendment to section 175(3) which would dispense with the requirement for single member companies, multi member limited companies and single member designated activity companies to hold an annual general meeting, subject to the proviso that any member, by notice to the company no later than three months before the end of the year, may require the holding of an annual general meeting.

10. Corporate Governance – Part 4, section 176

10.1 Proposal to amend procedural requirements in respect of the holding of AGMs outside the State

Current provision

*"**176.** (1) Subject to the provisions of this section, an annual general meeting of a company or an extraordinary general meeting of it may be held inside or outside of the State.*
(2) If a company holds its annual general meeting or any extraordinary general meeting outside of the State then, unless all of the members entitled to attend and vote at such meeting consent in writing to its being held outside of the State, the company has the following duty.
(3) That duty is to make, at the company's expense, all necessary arrangements to ensure that members can by technological means participate in any such meeting without leaving the State.
(4) A meeting referred to in subsection (1) may be held in 2 or more venues (whether inside or outside of the State) at the same time using any technology that provides members, as a whole, with a reasonable opportunity to participate."

Submission

Having regard to the notice provisions under section 181, it is virtually impossible to obtain the consent in writing of all the members of the company in accordance with section 176(2) so as to enable the holding of an AGM outside the State.

Further Relevant Considerations

- Section 176 does not prevent a company from holding its AGM outside the State in the event that it cannot secure the consent in writing of all members. Subsection (4) specifically allows for the meeting to be held outside of the State but there is a duty on the company to ensure than any Irish based shareholders can participate by use of technological means.

- In respect of the time periods which apply, section 181(1) states that a company must provide its shareholders with not less than 21 days' notice in writing of the holding of an AGM – unless the company's constitution provides for the giving of a greater period.

- The European Commission is currently examining the issue of use of e-participation tools and is expected to issue proposals in Q4 2017.

Recommendation

The Review Group is not currently in favour of proposing an amendment to section 176.

11. Corporate Governance- Part 4, section 181 and 191

11.1 Amendment proposed to remove the application of certain of the notice-related provisions contained in section 181(5) in the case of the passing of a special resolution

Current provisions

*"**2.** (1) In this Act - …*

"special resolution" has the meaning given to it by section 191;

…

***191** (2) In this Act "special resolution" means a resolution—*

(a) that is referred to as such in this Act, or is required (whether by this Act or by a company's constitution or otherwise) to be passed as a special resolution; and

(b) that satisfies the condition specified in subsection (3) or (3A); and

(c) without prejudice to subsections (4) and (5), as respects which notice of the meeting at which the resolution is proposed to be passed has been given in accordance with section 181 (1)(a) and (5).

(3) The condition referred to in subsection (2)(b) is that the resolution is passed by not less than 75 per cent of the votes cast by such members of the company concerned as, being entitled to do so, vote in person or by proxy at a general meeting of it.

(3A) Where section 1102(3) applies, the condition referred to in subsection (2)(b) is that the resolution is passed by not less than two-thirds of the votes cast by such members of the company concerned as, being entitled to do so, vote in person or by proxy at a general meeting of it.

(4) Notwithstanding section 181 (1)(a), for the purposes of subsection (2)(c) a resolution may be proposed and passed as a special resolution at a meeting of which less than 21 days' notice has been given if it is so agreed by a majority in number of the members having the right to attend and vote at any such meeting, being a majority either—

(a) together holding not less than 90 per cent in nominal value of the shares giving that right; or

(b) together representing not less than 90 per cent of the total voting rights at that meeting of all the members.

(5) Nothing in either subsection (2)(c) (as it relates to section 181 (1)(a)) or (4) prevents a special resolution from being regarded as having been passed (in a case where less than 21 days' notice of the meeting has been given) in the following circumstances:

(a) the agreement referred to in section 181 (2) exists as regards the meeting; and

(b) the condition specified in subsection (3) is satisfied in relation to the resolution.

…

181 (1) Save where the constitution of the company makes provision for the giving of greater notice, a meeting of a company, other than an adjourned meeting, shall be called—

(a) in the case of the annual general meeting or an extraordinary general meeting for the passing of a special resolution, by not less than 21 days' notice;

(b) in the case of any other extraordinary general meeting, by not less than 7 days' notice.

…

(5) The notice of a meeting shall specify—

(a) the place, the date and the time of the meeting;

(b) the general nature of the business to be transacted at the meeting;

(c) in the case of a proposed special resolution, the text or substance of that proposed special resolution; and

(d) with reasonable prominence a statement that—

(i) a member entitled to attend and vote is entitled to appoint a proxy using the form set out in section 184 or, where that is allowed, one or more proxies, to attend, speak and vote instead of him or her;

(ii) a proxy need not be a member; and

(iii) the time by which the proxy must be received at the company's registered office or some other place within the State as is specified in the statement for that purpose."

Submission

The definition of special resolution in section 2(1) should not include (by section 191(2)) the notice-related provisions contained in section 181(5) but perhaps instead should be limited either to the text of the special resolution or sufficient detail for members to understand what is proposed (*i.e.*, by referring in section 191(2)(c) to section 181(5)(c) and not section 181(5)). The definition of ordinary resolution does not refer to the notice of meeting requiring to be in certain format so why should a special resolution?

Further relevant considerations

- Many of the most significant actions which can be undertaken by a company (for example, alteration of its constitution, variation and reduction in capital, mergers and windings up) require the authority of a special resolution passed by members. Because of this, and for the protection of members' interests, certain safeguards have been incorporated in section 191(2) and (3) – the 75% threshold, the 21-day notice period (subject to exceptions) and contents of meeting notice requirements under section 181(5). Less stringent requirements operate in the case of the passing of an ordinary resolution which is typically (but not exclusively) required to carry out more routine, less contentious business.

- There is an appreciable difference as between the nature and effect of an ordinary resolution and a special resolution.

- The notice period prescribed by section 181(1) may be abridged by the procedure outlined in section 191(4). However, even when this procedure has been invoked, it appears that the requirements of section 181(5) in respect of delivering the content of the notice of meeting will still have to be observed.

- A special resolution was defined under previous companies' legislation in section 141(1) of the 1963 Act: *"**141**(1). A resolution shall be a special resolution when it has been passed by not less than three-fourths of the votes cast by such members as, being entitled to do so, vote in person or, where proxies are allowed, by proxy at a general meeting of which not less than 21 days' notice, specifying the intention to propose the resolution as a special resolution, has been duly given.*

- Section 141 of the 1963 Act did not specifically state that either the text or substance of the proposed special resolution had to be given to members in advance of the meeting. However, there is English case law which states that the notice given will be invalid unless it specifies either the text or substance of the proposed special resolution: *Re Moorgate Mercantile Holdings Limited* [1980] 1 WLR 227.

Recommendation

The Review Group recommends an amendment to section 191(2)(c) by inserting *"(c)"* immediately following *"and (5)"* at the end of the subsection.

11.2 Amendment proposed to realign the structure of the Companies Act 2014 so that Parts 2 to Parts 14, inclusive, apply only to companies limited by shares (i.e. LTDs)

Current provisions

The Companies Act 2014 was carefully and meticulously structured so that the law applicable to each type of company was to be found in its own Part or, in the case of companies limited by shares ("LTDs"), group of Parts. This structure is fundamental to the integrity of the Companies Act 2014.

Submission

Contrary to this structure, the European Union (Bank Recovery and Resolution) Regulations 2015 (SI 289 of 2015) made by the Minister for Finance, inserted provisions into Part 4 (and a number of other Parts) which can never apply to LTDs. So, Regulation 189(3) of SI 289 of 2015 made two amendments to section 191 of the Act, the effect of which is to insert a provision which can only apply to a PLC in Part 4.

Recommendation

The Review Group recommends that Regulation 189(3) be revoked and the Act amended by the insertion of a new subsection (5) in section 1102:

"(5) For the purposes of a special resolution passed in accordance with subsection (3), the following subsection shall be substituted for subsection (3) of section 191:

'(3) The condition referred to in subsection (2)(b) is that the resolution is passed by not less than two-thirds of the votes cast by such members of the company concerned as, being entitled to do so, vote in person or by proxy at a general meeting.' "

It is also recommended that similar changes are made in the case of Regulation 189(2) (which arises in Part 3 of the Act), Regulation 189(4) and (5) (which arise in Part 11 of the Act).

12. Corporate Governance- Part 4, section 181(5)

12.1 Amendment to the application of section 181(5)(d) in the case of CLGs regarding the entitlement to appoint proxies to attend and vote at meetings

Current provision

*"**181**. (1) Save where the constitution of the company makes provision for the giving of greater notice, a meeting of a company, other than an adjourned meeting, shall be called—*

(a) in the case of the annual general meeting or an extraordinary general meeting for the passing of a special resolution, by not less than 21 days' notice;

(b) in the case of any other extraordinary general meeting, by not less than 7 days' notice.

(2) A meeting of a company shall, notwithstanding that it is called by shorter notice than that specified in subsection (1), be deemed to have been duly called if it is so agreed by—

(a) all the members entitled to attend and vote at the meeting; and

(b) unless no statutory auditors of the company stand appointed in consequence of the company availing itself of the audit exemption under section 360 or 365 (and, where relevant, section 399 has been complied with in that regard), the statutory auditors of the company.

(3) Where notice of a meeting is given by posting it by ordinary prepaid post to the registered address of a member, then, for the purposes of any issue as to whether the correct period of notice for that meeting has been given, the giving of the notice shall be deemed to have been effected on the expiration of 24 hours following posting.

(4) In determining whether the correct period of notice has been given by a notice of a meeting, neither the day on which the notice is served nor the day of the meeting for which it is given shall be counted.

(5) The notice of a meeting shall specify—

(a) the place, the date and the time of the meeting;

(b) the general nature of the business to be transacted at the meeting;

(c) in the case of a proposed special resolution, the text or substance of that proposed special resolution; and

(d) with reasonable prominence a statement that—

(i) a member entitled to attend and vote is entitled to appoint a proxy using the form set out in section 184 or, where that is allowed, one or more proxies, to attend, speak and vote instead of him or her;

(ii) a proxy need not be a member; and

(iii) the time by which the proxy must be received at the company's registered office or some other place within the State as is specified in the statement for that purpose.

(6) Save to the extent that the company's constitution provides otherwise, the accidental omission to give notice of a meeting to, or the non-receipt of notice of a meeting by, any person entitled to receive notice shall not invalidate the proceedings at the meeting."

Submission

Section 181(5) requires the notice of a general meeting to specify certain details, including, at subparagraph (d), a statement to the effect that a member is entitled to appoint a proxy to attend, speak and vote at the meeting instead of him or her.

However, in the case of a CLG, by virtue of section 1205, the entitlement of members to appoint a proxy is an optional provision of the 2014 Act and the CLG's constitution (articles of association) may remove this entitlement and provide that members have no such right to appoint proxies. An amendment may be required to modify the application of section 181(5)(d) so as to make clear that it may not apply in the case of CLGs.

Further relevant considerations

- The entitlement of a member of a company to appoint a proxy to attend and vote in his or her place is stated in section 183(1) of the 2014 Act. (The full text of section 183 is set out in 13.1 below).

- Section 1205(1) (Part 18, Chapter 4) modifies the application of section 183 (proxies) in the case of CLGs. For CLGs, section 183(1) is modified to read:

  "Subject to subsection (3), ***and save to the extent that the constitution provides otherwise*** *any member of a company entitled to attend and vote at a meeting of the company shall be entitled to appoint another person (whether a member or not) as his or her proxy to attend and vote instead of him or her."*

- Section 183(1) (and by extension section 181(5)(d)) will therefore apply by default to all CLGs unless it has been dis-applied or modified by the company's constitution.

- A CLG in its company constitution can expressly draw attention to the non-application or modification of section 183 in the case of its members.

- There is nothing specific in section 181(5) to make it clear that it may not apply in the case of a CLG. Section 181(5) is not stated to be subject to section 183(1).

Recommendation

The Review Group recommends that a new section be inserted into Part 18, to be called section 1204A, which is to provide:

"Section 181(5)(d) shall not apply to a CLG where its constitution does not permit its members to appoint proxies."

13. Corporate Governance- Part 4, section 183-184

13.1 Amendment to sections 183 and 184 to restore the optional nature of certain rules around the provision of proxies by the insertion of a new section 183(13)

Current provisions

*"**183** (1) Subject to subsection (3), any member of a company entitled to attend and vote at a meeting of the company shall be entitled to appoint another person (whether a member or not) as his or her proxy to attend and vote instead of him or her.*[1]

(2) A proxy so appointed shall have the same right as the member to speak at the meeting and to vote on a show of hands and on a poll.[2]

(3) Unless the company's constitution otherwise provides, a member of a company shall not be entitled to appoint more than one proxy to attend on the same occasion.[3]

(4) The instrument appointing a proxy (the "instrument of proxy") shall be in writing—

(a) under the hand of the appointer or of his or her attorney duly authorised in writing; or

(b) if the appointer is a body corporate, either under seal of the body corporate or under the hand of an officer or attorney of it duly authorised in writing.[4]

(5) The instrument of proxy and the power of attorney or other authority, if any, under which it is signed, or a notarially certified copy of that power or authority, shall be deposited at the registered office of the company concerned or at such other place within the State as is specified for that purpose in the notice convening the meeting, and shall be so deposited not later than the following time.[5]

(6) That time is—

(a) 48 hours (or such lesser period as the company's constitution may provide) before the time for holding the meeting or adjourned meeting at which the person named in the instrument proposes to vote; or

(b) in the case of a poll, 48 hours (or such lesser period as the company's constitution may provide) before the time appointed for the taking of the poll.[6]

(7) The depositing of the instrument of proxy referred to in subsection (5) may, rather than its being effected by sending or delivering the instrument, be effected by communicating the instrument to the company by electronic means, and this subsection likewise applies to the depositing of anything else referred to in subsection (5).[7]

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[1] Similar provision under section 136(1) Companies Act, 1963.

[2] Similar provision under section 136(1) Companies Act, 1963.

[3] Similar provision under Section 136(2)(b) Companies Act, 1963. See also section 136(2A) in relation to companies traded on a regulated market.

[4] Similar provision under Regulation 69 of Table A.

[5] Similar provision under Regulation 70 of Table A.

[6] The effect of section 136(4) of the Companies Act, 1963 was that a company's articles of association could not require that the instrument appointing a proxy (or other documentation) had to be received "more than 48 hours" before a meeting; any such provision was deemed to be void. Accordingly, Regulation 70 of Table A required that the instrument (and other documentation) were required to be deposited "not less than 48 hours" before the meeting i.e. the maximum period permitted by section 136(4).

[7] Section 136(1A) Companies Act, 1963 (as amended) permitted the appointment and notification of a proxy by electronic means only in the case of a company traded on a regulated market, so had very limited applicability.

(8) If subsection (5) or (6) is not complied with, the instrument of proxy shall not be treated as valid.[8]

(9) Subject to subsection (10), a vote given in accordance with the terms of an instrument of proxy shall be valid notwithstanding the previous death [or insanity][9] *of the appointer or revocation of the proxy or of the authority under which the proxy was executed or the transfer of the share in respect of which the proxy is given.*[10]

(10) Subsection (9) does not apply if notice in writing of such death, insanity, revocation or transfer as is mentioned in that subsection is received by the company concerned at its registered office before the commencement of the meeting or adjourned meeting at which the proxy is used.[11]

(11) Subject to subsection (12), if, for the purpose of any meeting of a company, invitations to appoint as proxy a person or one of a number of persons specified in the invitations are issued at the company's expense to some only of the members entitled to be sent a notice of the meeting and to vote at it by proxy, any officer of the company who knowingly and intentionally authorises or permits their issue in that manner shall be guilty of a category 3 offence.[12]

(12) An officer shall not be guilty of an offence under subsection (11) by reason only of the issue to a member, at his or her request in writing, of a form of appointment naming the proxy or of a list of persons willing to act as proxy if the form or list is available on request in writing to every member entitled to vote at the meeting by proxy.[13]

184[14] *An instrument appointing a proxy shall be in the following form or a form as near to it as circumstances permit—*

[name of company] ("the Company")

[name of member] ("the Member") of [address of member] being a member of the Company hereby appoint/s [name and address of proxy] or failing him or her

[name and address of alternative proxy] as the proxy of the Member to attend, speak and vote for the Member on behalf of the Member at the (annual or extraordinary, as the case may be) general meeting of the Company to be held on the [date of meeting] and at any adjournment of the meeting."

The proxy is to vote as follows:

[8] Previously, as noted above, section 136(4) rendered void any provision of the company's articles to the extent the statutory timeframe was extended (beyond 48 hours).
[9] Reference to insanity to be removed by Companies (Accounting) Act 2017.
[10] Similar provision under Regulation 73 of Table A.
[11] Similar provision under Regulation 73 of Table A.
[12] Similar provision under Section 136(5) Companies Act, 1963 (as amended).
[13] Similar provision under Section 136(6) Companies Act, 1963.
[14] Similar provision under Regulation 71 of Table A.

Voting Instructions to Proxy (choice to be marked with an 'x')			
Number or description of resolution:	In Favour	Abstain	Against
1			
2			
3			
Unless otherwise instructed the proxy will vote as he or she thinks fit.			
Signature of member ..... Dated: [date]			

"

Submission

The 2014 Act has made sections 183(4), (5), (6), (8), (9), (10) and section 184 mandatory provisions. Previously, the provisions now contained in sections 183(4), (5), (8), (9) and (10) and section 184 were regulations contained in Table A and so were capable of being adopted in whole or in part or excluded in accordance with the requirements of individual companies. The provision now set out in section 183(6) was a regulation contained in Table A, however it must be read in light of a mandatory obligation under section 136(4) of the Companies Act, 1963 which stipulated that any provisions in a company's articles which required that a proxy be delivered more than 48 hours before a meeting" would be void.

Companies Act, 2014 provision	**Historic provision**	
	Companies Act, 1963 (Mandatory provision)	**Companies Act, 1963 Table A Regulation**
183 *(5) The instrument of proxy and the power of attorney or other authority, if any, under which it is signed, or a notarially certified copy of that power or authority, shall be deposited at the registered office of the company concerned or at such other place within the State as is specified for that purpose in the notice convening the meeting, and shall be so deposited not later than the following time.* *(6) That time is—* *(a) 48 hours (or such lesser period as the company's constitution may provide) before the time for holding the meeting or adjourned meeting at which the person named in*	*136 (4) Any provision contained in a company's articles shall be void in so far as it would have the effect of requiring the instrument appointing a proxy, or any other document necessary to show the validity of or otherwise relating to the appointment of a proxy, to be received by the company or any other person more than 48 hours before a meeting or adjourned meeting in order that the appointment may be effective thereat.*	*70. The instrument appointing a proxy and the power of attorney or other authority, if any, under which it is signed, or a notarially certified copy of that power or authority shall be deposited at the office or at such other place within the State as is specified for that purpose in the notice convening the meeting, not less than 48 hours before the time for holding the meeting or adjourned meeting at which the person named in the instrument proposes to vote, or, in the case of a poll, not less than 48 hours before the time appointed for the taking of the poll, and, in default, the instrument of proxy shall not be treated as valid.*

the instrument proposes to vote; or *(b) in the case of a poll, 48 hours (or such lesser period as the company's constitution may provide) before the time appointed for the taking of the poll.*		

The mischief that this provision seems intended to have prevented was companies requiring members to deliver proxies for periods far in excess of 48 hours before general meetings as the effect would be to reduce the time within which members had to act from receiving notice of meetings. Traded PLCs are subject to their own rules (as provided for in Part 17) and PLCs listed on non-EU exchanges are subject to the rules and regulations of those exchanges such that it can be questioned whether it is necessary to reach into unlisted companies and restrict private shareholders from regulating their own affairs.

The other provisions in section 183, namely subsections (1), (2), (11) and (12), were and should remain mandatory provisions – for example, the inalienable right of a shareholder in a company limited by shares to appoint a proxy and a proxy's right to vote and speak. Section 183(7), dealing with electronic communications, is a significant change.[15]

Subsection (3) (concerning the entitlement to appoint more than one proxy) is therefore the only provision in section 183 which is expressed as an optional provision (it is prefaced with *"unless the company's constitution otherwise provides"*).

In practice, many Irish companies — especially PLCs, listed in the US, Ireland or elsewhere, did not adopt the regulations contained in Table A which corresponded with section 183(4), (5), (6), (8), (9), (10) and section 184. As a consequence, these companies now find that they are either prevented from operating as they once operated or are forced to stretch the language of these provisions to breaking point in order to meet the service standards expected of their shareholders and the securities markets in which they operate.

A solution to the difficulties identified would be to amend the 2014 Act to provide that in their application to listed PLCs, section 183(4), (5), (6), (8), (9), (10) and section 184 are *"optional provisions"* in the manner defined by section 1007(1) of the Act. In this way, they would apply by default unless a company's constitution provides otherwise.

A head to effect this change would be the insertion as a new section in Part 17, to provide:

[15] Previously section 136(1A) of the Companies Act 1963 permitted the appointment and notification of a proxy by electronic means, only in the case of a company traded on a regulated market, so had limited applicability.

1103A Proxies for PLCs with listed securities

"(1) In the case of listed PLCs, section 183 shall apply as if the following subsection were inserted after subsection (12):

"Subsections (4), (5), (6), (8), (9), (10) and section 184 apply save to the extent that the company's constitution provides otherwise."

(2) For the purposes of subsection (1), the reference to a listed PLC shall include a traded PLC and a PLC whose securities (or whose receipts in respect of those securities) are listed on a stock exchange."

A solution to the difficulties identified would be to amend the 2014 Act to provide that section 183(4), (5), (6), (8), (9), (10) and section 184 are *"optional provisions"* in the manner defined by section 54(1) of the Act. In this way, they would apply by default unless a company's constitution provides otherwise.

A head to effect this change would be the insertion as a new subsection (13) in section 183 to provide: *"Subsections (4), (5), (6), (8), (9), (10) and section 184 apply save to the extent that the company's constitution provides otherwise."*

Further relevant considerations

- Under the previous law, a company's articles of association would typically have contained a broadly written provision to the effect that a proxy and the manner and timing of its delivery could be in whatever form the directors so approve.

- Depositing the instrument of proxy (along with any power of attorney or other authority under which it is signed) in the State can now be effected by communication through electronic means (Subsection (7)).

- In its Second Report, the Review Group recommended importing the majority of the provisions of the old Table A regulating proxies (68, 69, 70, 71, 73) into statute.[16] In some cases, the Review Group recommended that regulations of Table A would apply subject to a company prescribing otherwise in its constitution. However, no such qualification was made to its recommendations relating the importing of the proxy provisions.

- In practice, US listed companies will generally request their shareholders to return proxies to their proxy solicitor in the US (which has the resources and expertise to handle the receipt of thousands of proxies in a short space of time). In many instances the "cut-off' for receipt of proxies from shareholders will have to be even greater than 48 hours, to allow additional time for delivery by the proxy solicitor to Ireland.

- Subsection (6) of section 183 can facilitate companies which operate to tight deadlines and provides that the company through its constitution may permit the instrument of proxy to be

[16] CLRG, Second Report, page 60.

deposited within a shorter timeframe than 48 hours of the time for holding the relevant meeting – *"48 hours (or such lesser period as the company's constitution may provide)"*. As observed above, it is possible for the instrument to be deposited in the State by electronic communications, including email. It is thought that section 183(6) can safely be recast as optional in relation to the timeframe specified, that is, to allow a company elect in its constitution to prescribe a time period other than 48 hours before the meeting, for the depositing of a proxy instrument. As noted above, traded and otherwise listed PLCs will be subject to their own statutory or contractual regime to protect shareholders and there is arguably no need to interfere in the private affairs of unlisted companies.

- The requirement in subsection 183(5) that all instruments of proxy should be deposited at the registered office of the company (or such other place within the State specified in the notice convening the meeting) presents real compliance difficulties for PLCs which are listed abroad. Requiring companies to return proxies to Ireland within a tight time frame is an unnecessary burden that adds no value especially where such companies are already regulated in their affairs with their investing shareholders.

- The provisions for the appointment of proxies (and the timeframes specified) should be read in conjunction with section 181 of the 2014 Act which regulates the giving of notice for general meetings of the company. Section 181(1) provides that 21 days must be given in the case of an AGM or EGM to pass a special resolution and 7 days' notice must be given in the case of all other EGMs. A company's constitution may provide for greater (but not shorter notice periods). However, there is provision under subsection (2) to shorten these notice periods by agreement of all members or by a company's statutory auditors.

- Section 184 states that the instrument appointing the proxy shall be in the prescribed form *"or a form as near to it as circumstances permit"*. This requirement could mean that large PLCs may have to make wholesale changes to a standard form of proxy which they have been operating for some time, which their shareholders are very used to, and which is usually much more detailed and instructive than the form set out in section 184.

- The model proxy form under section 184 is modelled on Regulation 71 of Table A and is stated in broadly similar terms.

- Under the proposed head, the affected subsections of section 183 and section 184 would continue to apply (and the issues identified will persist) until such time as companies opt to either dis-apply or modify these provisions in their constitution.

- Confining the recommended change to listed and traded PLCs means that the shareholder safeguards inherent in listing rules will operate.

Recommendation

The Review Group recommends the insertion as a new section in Part 17:

1103A. Proxies for PLCs with listed securities

"(1) In the case of listed PLCs, section 183 shall apply as if the following subsection were inserted after subsection (12):

"(13) Subsections (4), (5), (6), (8), (9), (10) and section 184 apply save to the extent that the company's constitution provides otherwise."

(2) For the purposes of subsection (1), the reference to a listed PLC shall include a traded PLC and a PLC whose securities (or whose receipts in respect of those securities) are listed on any stock exchange."

13.2 Amendment to form of proxy prescribed by section 184 so as to refer to the right of proxy to either demand or join in demanding a poll

Current provisions

Section 184, including the prescribed form of proxy is set out at 13.1, above.

*"**189**. (7) The instrument appointing a proxy to vote at a meeting of a company shall be deemed also to confer authority to demand or join in demanding a poll, and for the purposes of subsections (2) and (3), a demand by a person as proxy for a member shall be the same as a demand by the member."*

Submission

The form of proxy prescribed by section 184 might usefully refer to the right of proxy to demand or join in a demand for a poll (as provided for in section 189(7)).

Further relevant considerations

- Section 189(7) specifically provides for the right of a proxy to either demand or join in a demand for a poll. The right of a proxy to do so is not specifically recorded on the face of the proxy form specified under the 2014 Act. However, there is nothing to prevent a proxy from being separately advised (in a side a document or otherwise) of his or her right to do so.

- No provision was made for reference to this right in the instrument of proxy specified by previous companies' legislation, which was set out in Regulation 71 of Table A under the 1963 Act. However, Regulation 72, like section 189(7), stated that the instrument of proxy was deemed to confer authority to demand or join in demanding a poll.

- Although it may be implied, the prescribed form of proxy similarly does not specifically state that the proxy has a right equal to the member to speak and vote at the meeting either on a show of hands or on a poll as provided for under section 183(2).

- Notwithstanding that the 2014 Act does not expressly deem section 184 to be an optional provision, it is thought that a company's constitution may prescribe a different form of proxy. In that event, it would be open to any company to enunciate the right of the proxy to either demand or join in demanding a poll in its instrument of proxy.

Recommendation

The Review Group recommends an amendment to section 184 as follows:

Insert a comma after the word *"speak"* and delete the word *"and"* at the end of the sixth line of section 184 and insert after the word *"vote"* on the seventh line "*and to demand or join in demanding a poll."*

13.3 Amendment to prescribed form of proxy by moving position of "Abstain" column to the right of the "Against" column

Current provision

The text of section 184, including the prescribed instrument of proxy, is set out at 13.1, above.

Submission

The position of the "Abstain" column beside the "In Favour" column has led to confusion among some shareholders who have voted to "Abstain" when in fact they had intended to vote "Against" resolutions. Further, the prescribed instrument of proxy does not include a "Withheld" option.

Further relevant considerations

- Model Regulation 71 of Table A, which set out the previous model proxy instrument, did not make provision for abstaining on a vote and made reference only to voting "in favour of" or "against" a resolution.

- In the case of Oireachtas votes, the order in which the voting options appear is "Yes," "No," "Abstain."

- Since section 184 is not expressed to be an optional provision, a change in the prescribed instrument of proxy would result in companies having to undertake wholesale changes to the proxy regulations contained in their constitutions.

Recommendation

The Review Group is not currently in favour of recommending an amendment to the form of proxy prescribed by section 184.

13.4 Consideration of the relationship between the general regulation of time periods set out in section 3(1) and the requirements under section 183(6) that all instruments of proxy are deposited not later than 48 hours in advance of the meeting at which the person named in the instrument proposes to vote

Current provision

*"**3**. (1) Where the time limited by any provision of this Act for the doing of anything expires on a Saturday, a Sunday or a public holiday, the time so limited shall extend to and the thing may be done on the first following day that is not a Saturday, a Sunday or a public holiday.*

(2) Where in this Act anything is required or allowed to be done within a number of days not exceeding 6, a day that is a Saturday, a Sunday or a public holiday shall not be reckoned in computing that number."

The text of section 183, including sections 183 (5) and (6) is set out at 13.1, above.

Submission

How do the terms of section 3 impact on the appointment of proxies for a meeting on a Monday or Tuesday where the proxy form must be received by a time not more than 48 hours before the meeting?

Do proxies for a Monday meeting discount Saturdays and Sundays and would the deadline for receipt be a Thursday (under subsection (2) or a Monday (under subsection (1))?

Further relevant considerations

- The calculation of the expiry of the time periods before which notice of the appointment of a proxy must be received (not less than 48 hours) is a matter of statutory interpretation, having regard to what is stated in section 183, which in turn is regulated by section 3(1).

- Determining the time limit which applies in a given case may depend on the terms of a company's constitution and the terms of section 3(1) will not always impact upon the time limits which apply to the delivery of proxies. It is open to a company in its constitution to provide for a time limit of less than 48 hours for the delivery of proxies.

Recommendation

The Review Group is not currently in favour of proposing an amendment on this matter.

14. Corporate Governance- Part 4, section 193

14.1 Suggestion received as to whether it should be stated in section 193 that a unanimous written resolution shall not take effect until such time as all of the documents constituting the resolution are delivered by its signatories to the company

Current provision

*"**193.** (1) Notwithstanding any provision to the contrary in this Act—*

(a) a resolution in writing signed by all the members of a company for the time being entitled to attend and vote on such resolution at a general meeting (or being bodies corporate by their duly appointed representatives) shall be as valid and effective for all purposes as if the resolution had been passed at a general meeting of the company duly convened and held; and

(b) if described as a special resolution shall be deemed to be a special resolution within the meaning of this Act.

(2) For the avoidance of doubt, the reference in subsection (1) to a provision to the contrary includes a reference to a provision that stipulates that the company in general meeting, or the members of the company in general meeting, must have passed the resolution concerned.

(3) A resolution passed in accordance with subsection (1) may consist of several documents in like form each signed by one or more members.

(4) A resolution passed in accordance with subsection (1) shall be deemed to have been passed at a meeting held on the date on which it was signed by the last member to sign, and, where the resolution states a date as being the date of his or her signature thereof by any member, the statement shall be prima facie evidence that it was signed by him or her on that date.

(5) If a resolution passed in accordance with subsection (1) is not contemporaneously signed, the company shall notify the members, within 21 days after the date of delivery to it of the documents referred to in subsection (6), of the fact that the resolution has been passed.

(6) The signatories of a resolution passed in accordance with subsection (1) shall, within 14 days after the date of its passing, procure delivery to the company of the documents constituting the written resolution; without prejudice to the use of the other means of delivery generally permitted by this Act, such delivery may be effected by electronic mail or the use of a facsimile machine.

(7) The company shall retain those documents as if they constituted the minutes of the proceedings of a general meeting of the company; without prejudice to the requirement (by virtue of section 199 (1)) that the terms of the resolution concerned be entered in books kept for the purpose, the requirement under this subsection that the foregoing documents be retained shall be read as requiring those documents to be kept with the foregoing books.

(8) It is immaterial, as regards the resolution's validity, whether subsection (5), (6) or (7) is complied with.

(9) If a company fails to comply with subsection (5), the company and any officer of it who is in default shall be guilty of a category 4 offence.

(10) If a signatory fails to take all reasonable steps to procure the delivery to the company, in accordance with subsection (6), of the documents referred to in that subsection, the signatory shall be guilty of a category 4 offence.

(11) This section does not apply to—

(a) a resolution to remove a director;

(b) a resolution to effect the removal of a statutory auditor from office, or so as not to continue him or her in office, as mentioned in section 382 (2), 383 (2)(b) or 394.

(12) Nothing in this section affects any rule of law as to—

(a) things done otherwise than by passing a resolution;

(b) circumstances in which a resolution is or is not treated as having been passed; or

(c) cases in which a person is precluded from alleging that a resolution has not been duly passed."

Submission

In relation to unanimous written resolutions, subsection 193(8) provides that it is immaterial to the validity of the resolution whether subsection 193(6) is complied with. Subsection 193(6) requires the provision of the documents constituting the resolution to the company by the members. In the absence of another provision requiring communication of the members' assent to the resolution to the company, how is this to operate?

Further relevant considerations

- Section 193(6) imposes a positive obligation on the members of the company to ensure that the unanimous written resolution is delivered to the company within 14 days of all signatories having signed the relevant resolution. Subsection (8) provides that compliance or otherwise with subsection (6) is immaterial to the validity of the resolution. The failure to observe this requirement (or those specified by subsections (5) and (7)) will not impugn the validity of the resolution passed.

- In the case of a majority written resolution passed by the company, section 195(5) prevents the resolution from having effect until such time as the documents constituting the resolution are delivered to the company. Section 194(9) generally sets out the dates upon which a majority written resolution is deemed to have been passed: (7 days after last signed in the case of an ordinary resolution and 9 days in the case of a special resolution).

- The absence of a provision similar to section 195(5) from section 193 may in part be explained by the fact that section 193 is concerned with a resolution which has been passed by all the members of a company who will presumably be deemed to have notice of the fact that the resolution has been passed.

- The purpose of section 193(6) is to promote efficient corporate administration. There would be a disproportionate undermining of the will of all company members if a unanimous resolution could be invalidated by reason of a delay in delivery to the company.

Recommendation

The Review Group is not currently in favour of proposing an amendment to section 193.

14.2 Amendment proposed which would allow for a unanimous written resolution to be used in the case of the acquisition by a company of its own shares under section 105

Current provision

*"**105.** (1) A company may acquire its own shares by purchase, or in the case of redeemable shares, by redemption or purchase*

…

(4) Subject to this Part, the acquisition by a company of its own shares shall be authorised by—

(a) the constitution of the company;

(b) the rights attaching to the shares in question; or

(c) a special resolution

...

(6) With respect to subsection (4) and the matter of passing a special resolution for the purpose thereof by the written means provided for under this Act—

(a) the procedure under section 193 (unanimous written resolutions) is not available for that purpose;

(b) if a resolution referred to in section 194 (majority written resolutions) for the purpose of subsection (4) is signed by a member of the company who holds shares to which the resolution relates, then, in determining whether the requirement under section 194 (4)(a)(ii) — that the resolution be signed by the requisite majority — has been fulfilled, no account shall be taken of the percentage of voting rights conferred by the foregoing shares of that member."

Submission

It is unclear what is the rationale for not permitting the unanimous written resolution to be used in the acquisition of a company's own shares and so this prohibition in section 105(6)(a) should be removed.

Further relevant considerations

- Shareholders with a conflict are presumably not "entitled" (within the meaning of section 193(1)(a) to vote on the resolution and, in that case, the resolution would be unanimous notwithstanding the absence of their assent.

Recommendation

The Review Group recommends the deletion of section 105(6)(a) of the Act.

15. Corporate Governance- Part 4, section 202(6)

15.1 Amendment proposed which would allow for a director's declaration required in the case of a Summary Approval Procedure (SAP) to be signed in counterpart

Current provisions

*"**161.** (1) A resolution in writing signed by all the directors of a company, or by all the members of a committee of them, and who are for the time being entitled to receive notice of a meeting of the directors or, as the case may be, of such a committee, shall be as valid as if it had been passed at a meeting of the directors or such a committee duly convened and held.*

(2) Subject to subsection (3), where one or more of the directors (other than a majority of them) would not, by reason of—

(a) this Act or any other enactment;

(b) the company's constitution; or

(c) a rule of law,

be permitted to vote on a resolution such as is referred to in subsection (1), if it were sought to pass the resolution at a meeting of the directors duly convened and held, then such a resolution, notwithstanding anything in subsection (1), shall be valid for the purposes of that subsection if the resolution is signed by those of the directors who would have been permitted to vote on it had it been sought to pass it at such a meeting.

(3) In a case falling within subsection (2), the resolution shall state the name of each director who did not sign it and the basis on which he or she did not sign it.

(4) For the avoidance of doubt, nothing in the preceding subsections dealing with a resolution that is signed by other than all of the directors shall be read as making available, in the case of an equality of votes, a second or casting vote to the one of their number who would, or might have been, if a meeting had been held to transact the business concerned, chairperson of that meeting.

(5) The resolution referred to in subsection (1) may consist of several documents in like form each signed by one or more directors and for all purposes shall take effect from the time that it is signed by the last director.

(6) A meeting of the directors or of a committee referred to in section 160 (9) may consist of a conference between some or all of the directors or, as the case may be, members of the committee who are not all in one place, but each of whom is able (directly or by means of telephonic, video or other electronic communication) to speak to each of the others and to be heard by each of the others and—

(a) a director or member of the committee taking part in such a conference shall be deemed to be present in person at the meeting and shall be entitled to vote and be counted in a quorum accordingly; and

(b) such a meeting shall be deemed to take place—

(i) where the largest group of those participating in the conference is assembled;

(ii) if there is no such group, where the chairperson of the meeting then is;

(iii) if neither subparagraph (i) or (ii) applies, in such location as the meeting itself decides.

(7) Subject to the other provisions of this Act, a director may vote in respect of any contract, appointment or arrangement in which he or she is interested and he or she shall be counted in the quorum present at the meeting.

(8) The directors of a company may exercise the voting powers conferred by the shares of any other company held or owned by the company in such manner in all respects as they think fit and, in particular, they may exercise the voting powers in favour of any resolution—

(a) appointing the directors or any of them as directors or officers of such other company; or

(b) providing for the payment of remuneration or pensions to the directors or officers of such other company.

(9) Any director of the company may vote in favour of the exercise of such voting rights notwithstanding that he or she may be or may be about to become a director or officer of the other company referred to in subsection (8) and as such or in any other way is or may be interested in the exercise of such voting rights in the foregoing manner.

202. *(1) In this Act "Summary Approval Procedure" means the procedure whereby the following conditions are satisfied:*

(a) authority for the carrying on of the restricted activity has been conferred by—

(i) other than in the case of a merger, a special resolution of the company; or

(ii) in the case of a merger, a resolution of each of the merging companies which every member of the company entitled to vote at a general meeting of it has voted in favour of (a "unanimous resolution");

being a special resolution or unanimous resolution passed not more than, subject to subsections (2) and (3), 12 months prior to the commencement of the carrying on by the company, or as the case may be, by each of the merging companies of the activity; and

(b) either—

(i) the company or, as the case may be, each of the merging companies has forwarded with each notice of the meeting at which the special resolution or other foregoing resolution is to be considered, or

(ii) if the written means for passing the resolution is used, the company or, as the case may be, each of the merging companies has appended to the proposed text of the resolution,

a copy of a declaration which complies with subsection (6) and the other relevant provisions of this Chapter as regards its contents or the documents to be attached to it.

…

(6) The declaration referred to in subsection (1)(b) is a declaration in writing that is made at a meeting of the directors held—

(a) not earlier than 30 days before the date of the meeting referred to in subsection (1)(b), or

(b) if the written means for passing the resolution is used, not earlier than 30 days before the date of the signing of the resolution by the last member to sign,

and that is made by the directors or, in the case of a company having more than 2 directors, by a majority of the directors."

Submission

This provision should state that the directors' declaration required for the Summary Approval Procedure under section 202(1)(b) of the Act can be signed in counterpart. Section 161(1) of the Act also permits (save where the company's constitution provides otherwise) any action required to be taken at a directors' meeting to be effected by written resolution of the directors instead. Under section 161(5) such a written resolution may be signed in counterpart.

Further relevant considerations

- The procedure under section 161(1) (an optional provision) permits the passing of a written resolution (and not a declaration) by the directors of a company provided that the resolution in issue is signed by all of the directors entitled to vote on it. The provision in respect of signing in counterpart (section 161(5)) appears to only apply in the case of a directors' written resolution signed in accordance with section 161(1).

- A declaration under section 202(6) need only be passed by a majority of a company's directors (in the case of a company which has more than two directors). The provisions of section 161 may therefore not apply in the case of a SAP declaration.

- There is nothing in the 2014 Act which states that a declaration may issue on foot of the written resolution procedure in section 161, which in any event could only apply (if it did so) where the declaration is to be signed by all of the company's directors.

- It is a matter of statutory construction as to whether the provisions of section 161 would apply in the context of the making of a directors' declaration for the purposes of a SAP.

- Notwithstanding what is contained in section 161(1), the terms of section 202(6) appear to require that a meeting of directors takes place. Although in reality the directors' declaration will be signed, there is nothing in section 202(6) which stipulates that it must be signed.

- The terms of section 202(6) seem to preclude the use of a directors' written resolution (under section 161(1)) for the purpose of making the declaration.

- In amending section 202(6) it should be made clear that the aim of the amendment is to provide certainty and that the validity of any historic declarations is not being cast into doubt.

Recommendation

The Review Group recommends the insertion of the following clause at the end of Section 202 (6):

The declaration referred to in subsection (1)(b) may consist of several documents in like form each signed by one or more directors and for all purposes shall take effect from the time that it is signed by the last director and this subsection shall be taken to have so provided from its commencement

16. Corporate Governance – Part 4, section 203

16.1 Consideration of potential amendment to section 203 to specifically provide for assessment of whether it remains appropriate to continue to grant a repayable on demand and non-interest bearing loan to a director in the event that the net assets of the company should fall

Current provision

"203. (1) Where the restricted activity is a transaction or arrangement that would otherwise be prohibited by section 82 (2) or 239, the declaration shall state—

(a) the circumstances in which the transaction or arrangement is to be entered into;

(b) the nature of the transaction or arrangement;

(c) the person or persons to or for whom the transaction or arrangement is to be made;

(d) the purpose for which the company is entering into the transaction or arrangement;

(e) the nature of the benefit which will accrue to the company directly or indirectly from entering into the transaction or arrangement; and

(f) that the declarants have made a full inquiry into the affairs of the company and that, having done so, they have formed the opinion that the company, having entered into the transaction or arrangement (the "relevant act"), will be able to pay or discharge its debts and other liabilities in full as they fall due during the period of 12 months after the date of the relevant act.

(2) For the purposes of a declaration under this section, in determining whether or not a company will be able to pay or discharge its debts and other liabilities in full, the declarants shall not be required to assume (in circumstances where the following are relevant) either that the company will be called upon to pay moneys on foot of a guarantee given or, as the case may be, that security given will be realised.

(3) A copy of the declaration under this section shall be delivered to the Registrar not later than 21 days after the date on which the carrying on of the restricted activity concerned is commenced.

(4) On application to it by any interested party, the court may, in any case where there has been a failure to comply with subsection (3), declare that the carrying on of the restricted activity concerned shall be valid for all purposes if the court is satisfied that it would be just and equitable to do so."

Submission

In the event that the net assets of a company fall, ought there be a reassessment of whether it remains appropriate to continue to grant a repayable on demand and non-interest bearing loan to a director?

Should consideration be given to introducing a requirement for a new SAP to be done to continue with the repayable on demand and non-interest bearing loan to a director when the loan exceeds 10% of the net assets of the company?

Further relevant considerations

- In essence, the requirement on a company's directors (which is similar to that which applies in the case of other SAP transactions) under section 203(1)(f) in making the declaration is that they have made a full inquiry into the affairs of the company and that, having done so, they are satisfied that, entering into the relevant transaction (loan to director), the company will remain solvent for the following 12 months.

- Directors are further required under section 203(1)(e) to consider the nature of the benefit which will accrue to the company from entering into the transaction concerned.

- A legal requirement which would necessitate the review of a previous SAP transaction in respect of a loan to a director (in certain circumstances) would place an undue administrative burden on a company which would not be justified when it is considered that there are other provisions in the 2014 Act which govern irresponsible and improper conduct on the part of company directors. Section 228 sets out a statement of the fiduciary duties which are owed to a company by its directors.

Recommendation

The Review Group is not currently in favour of recommending the proposed amendment to the Act.

17. Corporate Governance- Part 4, section 205

17.1 Proposed amendment to section 205(2) to amend the statutory solvency test which applies for the purposes of the SAP declaration so as to align it with the test applicable under section 203(2)

Current Provision

*"**205** (1) Where the restricted activity is to provide in a company's financial statements a treatment that is otherwise prohibited by section 118(1) of the profits or losses attributable to shares of a subsidiary of the company for the period referred to in section 118(2) as the "pre-acquisition period", the declaration shall state—*

(a) the amount of the profits or losses that will be subject to the alternative treatment and the amount so stated is referred to in this section as the "proposed distribution";

(b) the total amount of the company's assets and liabilities as stated in its last statutory financial statements or interim financial statements properly prepared as of a date specified in the declaration, and the date so specified shall be the date which is the latest practicable date before the date of making of the declaration and in any event shall not be a date more than 3 months before the date of such making;

(c) that the declarants have made a full inquiry into the affairs of the company and that, having done so, they have formed the opinion that, if the company were to make the proposed distribution within 2 months after the date of the making of the declaration, the company would be able to pay or discharge its debts and other liabilities included in the financial statements referred to in paragraph (b) as they fall due during the period of 12 months after the date of that distribution.

(2) In determining whether or not a company will be able to pay or discharge its debts and other liabilities as they fall due, the declarants shall be required to consider the likelihood (in circumstances where the following are relevant) either that the company will be called upon to pay moneys on foot of a guarantee given or, as the case may be, that security given will be realised.

(3) The reference in subsection (1)(b) to a company's last statutory financial statements or interim financial statements or to their being properly prepared shall be read in accordance with section 121.

(4) A copy of the declaration under this section shall be delivered to the Registrar not later than 21 days after the date on which the carrying on of the restricted activity concerned is commenced; if a failure to comply with this subsection occurs, a like power to that under section 203(4) is available to the court to declare valid for all purposes the carrying on of the activity."

Submission

By contrast with the terms of section 203(2) of the 2014 Act (which apply to the solvency aspect of a directors' declaration required for the purposes of a summary approval procedure (SAP) in the case of financial assistance for the acquisition of shares or transactions with directors), section 205(2) (which is the equivalent provision permitting the use of SAP in respect of the treatment of the pre-acquisition profits of a subsidiary) requires that in determining the solvency of the company for the purposes of the declaration, the directors *"shall be required to consider the likelihood … either that*

the company will be called upon to pay moneys on foot of a guarantee given or, as the case may be, that security given will be realised."

There is a difference in language as between the solvency tests applicable to section 203 and section 205 respectively and for which there appears to be no obvious justification.

Consideration should be given to redrafting section 205(2) to include the following after the word *"realised": "within the two-month period referred to in subsection (1)(c)".* Section 205(2) would then read:

> *"(2) In determining whether or not a company will be able to pay or discharge its debts and other liabilities as they fall due, the declarants shall be required to consider the likelihood (in circumstances where the following are relevant) either that the company will be called upon to pay moneys on foot of a guarantee given or, as the case may be, that security given will be realised within the two-month period referred to in subsection (1)(c)."* (Underlining added).

Further relevant considerations

- Section 118 of the 2014 Act provides for a general prohibition on the treatment in a holding company's financial statements of the pre-acquisition profits or losses of a subsidiary as profits available for distribution. This is the "restricted activity" which is the subject of section 205. Where the summary approval procedure has been followed, section 118(3) provides for an exception to the prohibition in subsection (1) and allows for the whole or a proportion of a subsidiary's pre-acquisition profits or losses to be treated as profits available for distribution by the holding company.

- An amendment to section 118(4) has been recommended by the Shares and Share Capital Review Group which would clarify that the prohibition in section 118(1) does not apply to transactions covered by sections 72, 73 and 75 (mergers, group reconstructions and certain share-for-share transaction) irrespective of whether or not the shares the subject of those transactions are issued at a premium.

- Section 205 is the successor provision to section 149(5) of the 1963 Act, which set out a similar general prohibition on the treatment of pre-acquisition profits before stating: *"Provided, however, that where the directors and the auditors are satisfied and so certify that it would be fair and reasonable and would not prejudice the rights and interests of any person, the profits or losses attributable to any shares in a subsidiary may be treated in a manner otherwise than in accordance with this subsection."*

- Pillar A outlines the "Validation Procedure" model (now the Summary Approval Procedure) and refers to its application and prescribes the form of the statutory declaration which would apply in a number of specific instances – the giving of financial assistance and capital maintenance issues. (Part A4, Chapter 7, Head 71). Head 71 does not make any reference to pre-acquisition profits – the provisions now contained in section 205 – or what would be the requirements for its validation procedure. However, it is referenced in a separate section of Pillar A – (Part A3, Chapter 7, Head

49(10) (c)) which states that the prohibition will not apply where such treatment is approved by the validation procedure.

- Is there a legitimate policy justification for discriminating as between these objectives by imposing differing obligations upon directors in preparing a statutory declaration?

- There is a difference in language as between the provisions of section 203(2) and 205(2). Section 203(2) states:

  > *"For the purposes of a declaration under this section, in determining whether or not a company will be able to pay or discharge its debts and other liabilities in full, the declarants shall not be required to assume (in circumstances where the following are relevant) either that the company will be called upon to pay moneys on foot of a guarantee given or, as the case may be, that security given will be realised."* (Underlining added to highlight distinction with section 205(2)."

- The SAP procedure in respect of, for example, the provision of financial assistance for the acquisition of shares is intended to protect a company's creditors while in the case of section 205 (pre-acquisition profits) it is aimed towards the protection of shareholders and the avoidance of a "dividend trap" scenario. What is the practical or substantive effect of the difference in language as between the provisions of section 203(2) and section 205(2)? In the case of providing financial assistance for the acquisition of shares, the declarants *"shall not be required to assume … either that the company will be called upon to pay moneys on foot of a guarantee given … that security given will be realised."* In regulating the distribution of pre-acquisition profits, section 205(2) requires the declarants "*to consider the likelihood"* either that will be called upon to pay moneys on foot of a guarantee or that security given will be realised.

Recommendation

The Review Group recommends an amendment to section 205(2) by substituting the words *"the declarants shall not be required to assume"* for the words *"the declarants shall be required to consider the likelihood"*.

18. Corporate Governance- Part 4, section 212

18.1 Proposal to amend the test providing remedy for minority shareholders from oppression under section 212

Current Provision

"212. *(1) Any member of a company who complains that the affairs of the company are being conducted or that the powers of the directors of the company are being exercised—*

(a) in a manner oppressive to him or her or any of the members (including himself or herself), or

(b) in disregard of his or her or their interests as members,

may apply to the court for an order under this section.

(2) If, on an application under subsection (1), the court is of opinion that the company's affairs are being conducted or the directors' powers are being exercised in a manner that is mentioned in subsection (1)(a) or (b), the court may, with a view to bringing to an end the matters complained of, make such order or orders as it thinks fit.

(3) The orders which a court may so make include an order—

(a) directing or prohibiting any act or cancelling or varying any transaction;

(b) for regulating the conduct of the company's affairs in future;

(c) for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital; and

(d) for the payment of compensation.

(4) Where an order under this section makes any amendment of any company's constitution, then, notwithstanding anything in any other provision of this Act, but subject to the provisions of the order, the company concerned shall not have power, without the leave of the court, to make any further amendment of the constitution, inconsistent with the provisions of the order.

(5) However, subject to the foregoing subsection, the amendment made by the order shall be of the same effect as if duly made by resolution of the company, and the provisions of this Act shall apply to the constitution as so amended accordingly.

(6) A certified copy of any order under this section amending or giving leave to amend a company's constitution shall, within 21 days after the date of the making of the order, be delivered by the company to the Registrar.

(7) If a company fails to comply with subsection (6), the company and any officer of it who is in default shall be guilty of a category 4 offence.

(8) Each of the following—

(a) the personal representative of a person who, at the date of his or her death, was a member of a company, or

(b) any trustee of, or person beneficially interested in, the shares of a company by virtue of the will or intestacy of any such person,

may apply to the court under subsection (1) for an order under this section and, accordingly, any reference in that subsection to a member of a company shall be read as including a reference to any such personal representative, trustee or person beneficially interested as mentioned in paragraph (a) or (b) or to all of them.

(9) If, in the opinion of the court, the hearing of proceedings under this section would involve the disclosure of information the publication of which would be seriously prejudicial to the

legitimate interests of the company, the court may order that the hearing of the proceedings or any part of them shall be in camera."

Submission

Other than the inclusion of a provision for the payment of compensation, section 212 of the 2014 Act is almost identical to section 205 of the Companies Act 1963. The provision, which offers a remedy to minorities in the case of oppression, is now more than 50 years old and is no longer fit for purpose. As a potential remedy for shareholder disputes, it has been criticised by the judiciary as an ineffective mechanism to resolving issues between parties.

Further relevant considerations

- The remedy for minority oppression and the statutory test contained under section 212(1) is a re-enactment of the provision which was previously contained in section 205(1) of the Companies Act 1963. The only substantive change made to the remedy by the 2014 Act was the insertion of a new provision which expressly permits the Court to direct the payment of compensation to a member petitioner. While section 205 of the 1963 Act had permitted a court to "make such order as it thinks fit" it had been determined by the Supreme Court in *Irish Press PLC v Ingersoll Irish Publications Ltd* [1995] 2 IR 175 that this did not extend to making an award of damages. However, in practice, that ruling had been circumvented by a court order directing the purchase of shares by a company at an inflated price.

- Section 212 was passed by the Oireachtas without any amendment having been made to the Companies Bill 2012 as initiated in December 2012.

- The Review Group considered the test for oppression in 2001 in its First Report and recommended no change from the law then in operation under section 205:
  "This section provides for any member of a company, who complains that the affairs of the company are being conducted in a manner oppressive to him or in disregard of his interests, to make an application to court for an order. The court may make any order it deems fit for the circumstances. The Review Group noted that there is considerable jurisprudence on this section with the rights of members and the role of the High Court properly defined. Accordingly, no change is recommended."

- The Review Group further recommended that no statutory percentage should be built into the minority oppression remedy. (Page 104, First Report). Following a discussion, the Review Group also decided against making any recommendation regarding the introduction of some form of statutory valuation mechanism to regulate the price for or compensation to be paid in respect of cancellation of minority shares in cases where minority shareholders were exiting a company further to proceedings under section 205 of the 1963 Act. (Page 109).

- One drawback, which may particularly affect smaller companies, is the potential for section 212 proceedings to incur significant legal costs. Further, the time taken up in defending an action

brought by a minority shareholder may impact on the day to day management of a company by its directors.

- Other remedies exist under company law to protect the interests of minority shareholders including the power to apply to wind up on just and equitable grounds (section 569(1)(e)) as well as in certain specified circumstances – for example, resistance by a dissenting shareholder to the squeeze out of minorities (section 459(5)).

- Contrary to the submission, there is no evidence of reported judicial criticism of the oppression remedy.

- The comparable relief in the United Kingdom[17] is contained in section 994 of the Companies Act 2006 and involves a consideration of whether the affairs of the company have been conducted in a manner which is "unfairly prejudicial". It provides that:

  "A member of a company may apply to the court by petition for an order under this Part on the ground—

  (a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or

  (b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial ..."

- In Australia, the relevant sections of the Corporations Act 2001 provide as follows:

  *"**232.** The Court may make an order under section 233 if:*

  (a) the conduct of a company's affairs; or

  (b) an actual or proposed act or omission by or on behalf of a company; or

  (c) a resolution, or a proposed resolution, of members or a class of members of a company;

  is either:

  (d) contrary to the interests of the members as a whole; or

  (e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.

  ***233** (1) The Court can make any order under this section that it considers appropriate in relation to the company, including an order:*

  (a) that the company be wound up;

  (b) that the company's existing constitution be modified or repealed;

  (c) regulating the conduct of the company's affairs in the future;

  (d) for the purchase of any shares by any member or person to whom a share in the company has been transmitted by will or by operation of law;

  (e) for the purchase of shares with an appropriate reduction of the company's share capital;

[17] Applicable to England and Wales, Scotland and Northern Ireland.

(f) for the company to institute, prosecute, defend or discontinue specified proceedings;

(g) authorising a member, or a person to whom a share in the company has been transmitted by will or by operation of law, to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company;

(h) appointing a receiver or a receiver and manager of any or all of the company's property;

(i) restraining a person from engaging in specified conduct or from doing a specified act;

(j) requiring a person to do a specified act.

Order that the company be wound up

(2) If an order that a company be wound up is made under this section, the provisions of this Act relating to the winding up of companies apply:

(a) as if the order were made under section 461; and

(b) with such changes as are necessary.

Order altering constitution

(3) If an order made under this section repeals or modifies a company's constitution, or requires the company to adopt a constitution, the company does not have the power under section 136 to change or repeal the constitution if that change or repeal would be inconsistent with the provisions of the order, unless:

(a) the order states that the company does have the power to make such a change or repeal; or

(b) the company first obtains the leave of the Court.

Recommendation

The Review Group is not currently in favour of recommending any amendment in this instance.

19. Corporate Governance- Part 4, section 214

19.1 Proposed amendment to section 214 to permit a company to keep minute books in computer form

Current provision

*"**214.** (1) Subject to subsections (2) and (6), the power conferred on a company by section 213 (1) to keep a register or other record by recording the matters in question otherwise than by making entries in bound books includes power to keep the register or other record by recording the matters in question otherwise than in a legible form so long as the recording is capable of being reproduced in a legible form.*

(2) Subsection (1) does not apply to the books required to be kept by section 199 for the purpose mentioned in subsection (1) of that section."

*"**213.** (1) Any register, index or minute book required by this Act to be kept by a company or by the Registrar may be kept either by making entries in bound books or by recording the matters in question in any other manner.*

(2) Where any register, index or minute book to be kept by a company is not kept by making entries in a bound book but by some other means, adequate precautions shall be taken for guarding against falsification and facilitating discovery of such falsification, should it occur."

*"**199.** (1) A company shall, as soon as may be after their holding or passing, cause—*

(a) minutes of all proceedings of general meetings of it, and

(b) the terms of all resolutions of it,

to be entered in books kept for that purpose; all such books kept by a company in pursuance of this subsection shall be kept at the same place."

Submission

These sections of the 2014 Act allow a company to keep its statutory records, other than minute books, on computer rather than in hard copy form. It is not clear what is the rationale as to why minute books are excluded.

Further relevant considerations

- The exclusion concerning minute books provided for under section 214(2) is a re-enactment of what was contained in previous companies' legislation. Section 4(1) of the Companies (Amendment) Act 1977 stipulated that:

  *"**4.**—(1) It is hereby declared that the power conferred on a company by section 378 (1) of the Act of 1963 to keep a register or other record by recording the matters in question otherwise than by making entries in bound books includes power to keep the register or other record other than minute books kept pursuant to section 145 of the Act of 1963 [Minutes of general meetings] by recording the matters in question otherwise than in a legible form so long as the recording is capable of being reproduced in a legible form."*

- The question of the maintenance of company records in electronic form was touched upon by the CLRG in its First Report (p. 63-64) in the context of the requirements of section 18 of the Electronic Commerce Act 2000. However, as part of its general discussion of the issue, the CLRG does not appear to have addressed the specific question of meeting minutes. The CLRG noted that:

  "Section 378 of the 1963 Act provides for record keeping by a company or the Registrar in bound books or any other manner. This has been further amplified by s 4 of the 1977 Act which specifically provides for recording the matters in question otherwise than in a legible form so long as the recording is capable of being reproduced in a legible form … Section 18(3)(a) of the ECA 2000 preserves existing statutory provisions on "procedural requirements". The Review Group recognises that that provision was intended to ensure that any specific rules, laid down for example under s 4(4) of the 1977 Act, would not be prejudiced. However, the consequence of this is that provisions regarding company records are now covered by both areas of law, as illustrated above. From the point of view both of simplification and of legal certainty it seems clear that only one legal basis should apply to the maintenance of company records in electronic form. Section 4 of the 1977 Act provides that: a register kept in non-legible form shall be capable of being reproduced in legible form. Section 18(2)(b) of the ECA 2000 takes the more generalised approach that information must be "capable of being displayed in intelligible form to the person or public body to whom it is to be produced". While in due course it will be possible to assume that direct computer access will be reasonable for all persons, there are circumstances where written copies are still required. The Review Group makes the following recommendations:

  (i) That the ECA 2000 should be taken as the principal legislation on the keeping of electronic records by companies under the Companies Acts.

  (ii) The provisions of the Companies Acts, other than s 239 of the 1990 Act,23 regarding companies and their ability to keep records in electronic form should be repealed.

  (iii) That the Minister be enabled to make regulations to give better effect to those provisions of the ECA 2000 as they apply to the maintenance of records of companies."

- Under UK company law, "company records" which includes minutes of meetings, may be kept in hard copy or electronic form, provided the information is adequately recorded for future reference. Where the records are kept in electronic form, they must be capable of being reproduced in hard copy form. (Section 1135 Companies Act 2006).

- While section 214(2) explicitly precludes a company's meeting minutes from being kept in computer form no such exclusion is stated to apply in the case of the minutes of directors' meetings which are governed by section 166.

- The concept of electronic signatures on documents has gained increased prominence in recent times. There is likely to be further developments in the near future at European Union level in respect of the electronic maintenance and storage of documents.

Recommendation

The Review Group is not currently in favour of recommending an amendment to section 214.

20. Corporate Governance – Part 4, section 216

20.1 Amendment proposed to relax the requirement under section 216(5) that registers or documents held separately shall be kept at the one place

Current provision

"216. (1) This section applies to—

(a) the copies of directors' service contracts and memoranda;

(b) the copies of instruments creating charges;

(c) the directors' and secretaries' register;

(d) the disclosable interests register;

(e) the members' register; and

(f) the minutes of meetings.

(2) An obligation imposed on a company under this Act to keep a register or document to which this section applies may be discharged by another person keeping, on its behalf, the register or document.

(3) Subject to subsections (4) and (5), a register or document to which this section applies shall be kept at—

(a) the registered office of the company;

(b) its principal place of business within the State; or

(c) another place within the State.

(4) Where the register or document is kept by another person on behalf of the company pursuant to subsection (2), the place at which that register or document is kept by that person shall be a place within the State.

(5) In a case where a company keeps several of the registers or documents (or both) to which this section applies at a place other than that referred to in subsection (3)(a) or (b), those registers or documents (or both) shall be kept by it at a single place."

Submission

The keeping of the register of members is, in the case of the vast majority of listed companies, outsourced to a third party while the other registers are typically kept at the company's registered office. This makes compliance with the requirement under section 216(5) impossible as all the registers will not be kept in a single place as required.

Recommendation

The Review Group recommends an amendment to Part 17 of the 2014 Act. In Chapter 8 Part 17 of Companies Act 2014, insert a new section as follows:

Modification of section 216(5) in the case of a PLC whose shares are admitted to trading on a regulated market.

In its application to a members' register of a PLC section 216 shall apply as if the following subsection were substituted for subsection (5):

(5) In a case where the members' register of a PLC, whose shares are admitted to trading on a regulated market, is not kept at a place referred to in section 216 (3) (a) or (b), that register may be kept at another place in the State, notwithstanding that the company's other registers or documents to which this section applies are not kept at that place.

21. Corporate Governance- Part 4, section 217

21.1 Amendment to section 217(1) to provide for a change to the amount of the "relevant fee" payable in the case of PLCs upon request for a copy register

Current Provision

"***216*** *(1) This section applies to—*

(a) the copies of directors' service contracts and memoranda;

(b) the copies of instruments creating charges;

(c) the directors' and secretaries' register;

(d) the disclosable interests register;

(e) the members' register; and

(f) the minutes of meetings.

…

(11) A member of the company may request a copy, or a copy of any part, of—

(a) the directors' and secretaries' register;

(b) the disclosable interests register;

(c) the members' register; or

(d) the minutes of meetings.

(12) Any other person may request a copy, or a copy of any part, of—

(a) the directors' and secretaries' register;

(b) the disclosable interests register; or

(c) the members' register.

(13) A company shall, within 10 days after the date of receipt of a request under subsection (11) or (12) and on payment to it of the ***relevant fee*** *by the requester, cause to be sent to the requester the copy, or part of it, concerned.*

217 *(1) In section 216 "****relevant fee****" means—*

…

(b) in a case falling within subsection (13) of that section, €10.00 per copy or such less sum as the company may determine."

Submission

Section 217(1)(b) of the 2014 Act provides that a company may impose a charge of up to €10.00 per copy upon a request made for a copy of its register of members. In the case of large PLCs, limiting the charge in this way fails to adequately compensate for the time, effort and outlays associated with furnishing such copies. It has been indicated that the nominal charge applicable is in fact encouraging journalists and media interests in seeking many and regular copies of same which imposes a significant cost burden on such companies in discharging their responsibilities under the Act.

It is appreciated that the 2014 Act was framed from the perspective of the small private limited company and as such the allowable charge of €10.00 or less is appropriate to the circumstances of a majority of companies. However, there would be merit in considering if a mechanism could be found to also accommodate the concerns of listed PLCs in this regard.

Separately, does a 'part' of any of the registers specified in section 216(11) include 'analysis' (for example, information regarding shareholders with a shareholding of 3% and above) which will involve costs of greater than €10.00?

Does the company also have to bear the cost of supplying the register as section 216 stipulates that the company shall 'cause to be sent' to the requester any copy of the register concerned. This has the potential to be extremely burdensome as certain large registers can be extremely costly to send.

Further relevant considerations:

- An average printing cost of €0.05 per sheet would allow for a total of 200 pages to be printed under the maximum charge permitted by section 217(1)(b).

- In practice, large PLCs (and all companies) will have a list of their members readily available in computer form which is capable of being produced in hard copy without any great administrative hardship. A soft copy of the requested register may also be provided which would enable a company to avoid having to incur the expense of producing a hard copy.

- Under the Data Protection Acts 1988-2009, for a maximum fee of €6.35, irrespective of the volume of material involved or the time taken to assemble, an individual is entitled to receive copies of any information held by any entity or organisation which concerns them which is stored either on a computer or in a manual filing system.

- In 2011, the average total payable in respect of information concerning a "non-personal" request for information under Freedom of Information legislation was €21.59. However, in contrast with the subject matter of this proposed amendment, documents provided under Freedom of Information legislation will usually have to be gathered and assembled and will involve a drain on the resources of the public body in issue.

- In the case of PLCs, the levying of a heavier charge could have the potential to impede the ready availability under statute of information about a public company. An increase in the prescribed charge would have the potential to reduce transparency and scrutiny of the affairs of PLCs.

Recommendation

The Review Group is not currently in favour of recommending any amendment.

22. Part 20 – Public Limited Companies, section 1106

22.1 Consideration of the status of a meeting which takes place with the assistance of electronic means but where there is a failure or disruption of such means during the course of the meeting

Current Law

*"**1106.** (1) A traded PLC may provide for participation in a general meeting by electronic means including—*

(a) a mechanism for casting votes, whether before or during the meeting, and the mechanism adopted shall not require the member to be physically present at the meeting or require the member to appoint a proxy who is physically present at the meeting;

(b) real time transmission of the meeting;

(c) real time two way communication enabling members to address the meeting from a remote location.

(2) The use of electronic means pursuant to subsection (1) may be made subject only to such requirements and restrictions as are necessary to ensure the identification of those taking part and the security of the electronic communication, to the extent that such requirements and restrictions are proportionate to the achievement of those objectives.

(3) Members shall be informed of any requirements or restrictions which a traded PLC puts in place pursuant to subsection (2).

(4) A traded PLC that provides electronic means for participation at a general meeting by a member shall ensure, as far as practicable, that—

(a) such means—

(i) guarantee the security of any electronic communication by the member;

(ii) minimise the risk of data corruption and unauthorised access;

(iii) provide certainty as to the source of the electronic communication; and

(b) in the case of any failure or disruption of such means, that failure or disruption is remedied as soon as practicable."

Submission

What is the position in respect of a general meeting which is disrupted in the manner envisaged by section 1106(4)(b) but where the difficulty cannot practicably be remedied? Does the meeting have to be suspended because some of the participants can no longer participate? Is there a requirement for the 2014 Act to specify what happens in such a scenario?

Further relevant considerations

- The underlying purpose of section 1106 is to allow for the participation of members in a meeting of the PLC. That objective would be undermined if a meeting was permitted to go ahead notwithstanding a failure or disruption in the electronic means relied on.

- Section 1106 is derived from Article 8 of the Shareholder's Rights Directive (Directive 2007/36/EC) which provides:

"1. Member States shall permit companies to offer to their shareholders any form of participation in the general meeting by electronic means, notably any or all of the following forms of participation:

(a) real-time transmission of the general meeting;

(b) real-time two-way communication enabling shareholders to address the general meeting from a remote location;

(c) a mechanism for casting votes, whether before or during the general meeting, without the need to appoint a proxy holder who is physically present at the meeting.

2. The use of electronic means for the purpose of enabling shareholders to participate in the general meeting may be made subject only to such requirements and constraints as are necessary to ensure the identification of shareholders and the security of the electronic communication, and only to the extent that they are proportionate to achieving those objectives. This is without prejudice to any legal rules which Member States have adopted or may adopt concerning the decision making process within the company for the introduction or implementation of any form of participation by electronic means."

- Article 8 is silent on the specific question of what steps must be followed in the event that a breakdown in electronic communications during the course of the meeting cannot be restored. A revised Shareholders Rights Directive has been recently adopted by the European Council. However, it has not proposed any changes to Article 8 and there is no greater regulation of e-participation in meetings and what is to happen in the event that there is a breakdown in communications.

- Article 8 was originally transposed into Irish law through the insertion of section 134B into the 1963 Act. Section 134B(2)(c) is expressed in similar terms to the current provision and stated that a company providing electronic means for participation at a general meeting shall ensure as far as practicable that such means are remedied as soon as practicable in the event of any failure or disruption. On this point, both section 1106 and section 134B have gone beyond what is prescribed by the Shareholders Rights Directive.

- There is a possibility that expressly regulating for what is to happen in this scenario through the 2014 Act will have knock-on effects and result in a requirement to similarly regulate in respect of other (as yet unforeseen) scenarios which may give rise to uncertainly. It is open to a PLC to further regulate the conduct of e-participation in meetings through its company constitution.

- The failure of the electronic communications could present a serious issue in some scenarios – for example, if the breakdown in the electronic means and the consequent exclusion of members results in there no longer being a quorum present. It is generally the role of the chairperson to preside over the running of the meeting and, if necessary, to decide to adjourn the meeting because of a failure in the electronic communications.

Recommendation

The Review Group is not currently in favour of recommending any amendment to section 1106 of the Act.

23. Guarantee Companies- Part 18, section 1173

23.1 Possible amendment to permit CLGs to avail of the majority written resolution procedure under section 194 unless it has been dis-applied by the CLG's constitution

Current provisions

*"**1173**. (1) The provisions of Parts 1 to 14 apply to a CLG except to the extent that they are disapplied or modified by—*
(a) this section, or
(b) any other provision of this Part.
…
(5) The provisions of this Act specified in the Table to this section shall not apply to a CLG.

… Table Majority written resolutions section 194
…
***"194**. (1) Notwithstanding any provision to the contrary in this Act, a resolution in writing—*
(a) that is—
(i) described as being an ordinary resolution, and
(ii) signed by the requisite majority of members of the company concerned, and
(b) in respect of which the condition specified in subsection (7) is satisfied,
shall be as valid and effective for all purposes as if the resolution had been passed at a general meeting of the company duly convened and held.
…
(3) In subsection (1) "requisite majority of members" means a member or members who alone or together, at the time of the signing of the resolution concerned, represent more than 50 per cent of the total voting rights of all the members who, at that time, would have the right to attend and vote at a general meeting of the company (or being bodies corporate by their duly appointed representatives)."

Submission

Why should the majority written resolution facility in section 194 be dis-applied in the case of a CLG? It is suggested that it ought to be available unless dis-applied by the constitution of a CLG.

Further relevant considerations

- Section 194 of the 2014 Act is similarly dis-applied in the case of PLCs and unlimited companies. However, section 194 does apply in the case of a DAC unless its company constitution provides otherwise. (Section 990 of the 2014 Act).

- The non-availability of the majority written resolution procedure in the case of CLGs, PLCs and unlimited companies is intended to emphasise the importance of holding members' meetings to discuss and regulate the business of the company, in particular where the membership of the company is large and can experience a high turnover.

Recommendation

The Review Group is not currently in favour of recommending the proposed amendment.

24. Corporate Governance, Directors' Duties – Parts 4 and 5

24.1 Consideration of practice which requires the submission of undated letters of resignation from company directors as part of the securities offered for the purpose of obtaining a loan

Relevant provisions

*"**148.** (2) Save to the extent that the company's constitution provides otherwise, the office of director shall be vacated if—*

(a) the director resigns his or her office by notice in writing to the company; … "

*"**158.** (1) The business of a company shall be managed by its directors, who may pay all expenses incurred in promoting and registering the company and may exercise all such powers of the company as are not, by this Act or by the constitution, required to be exercised by the company in general meeting, but subject to—*

(a) any regulations contained in the constitution;

(b) the provisions of this Act; and

(c) such directions, not being inconsistent with the foregoing regulations or provisions, as the company in general meeting may (by special resolution) give.

(3) Without prejudice to the generality of that subsection, subsection (1) operates to enable, subject to a limitation (if any) arising under any of paragraphs (a) to (c) of it, the directors of the company to exercise all powers of the company to borrow money and to mortgage or charge its undertaking, property and uncalled capital, or any part thereof."

"221. (1) Subject to subsection (2), a person in accordance with whose directions or instructions the directors of a company are accustomed to act (in this Act referred to as a "shadow director") shall be treated for the purposes of this Part as a director of the company unless the directors are accustomed so to act by reason only that they do so on advice given by him or her in a professional capacity."

Submission

A certain lending practice has arisen which may have implications for company law. It has been reported that, as part of a package of undertakings, securities and guarantees supporting a loan, a bank has required the submission of undated letters of resignation from a company's directors.

Some issues may arise which impact upon company law including questions of corporate governance, directors' duties and charges and there may also be consequences for other creditors.

Further relevant considerations

- The security requirements of a lender vary from case to case and will typically be the subject of negotiations between the lender and the borrower.

- The requirement for company directors to provide conditional letters of resignation is not a new lending practice and has operated over many years. It most often arises in circumstances where the lending institution is taking a charge over shares held by that director.

- Typically, where such letters are furnished the intention of the parties is that the resignation only takes effect where enforcement occurs.

- It is open to a director to resign by giving notice to the company at any time. Moreover, the taking effect of a letter of resignation can be made conditional on the happening of a particular event (for example, default in the repayment by the company of a loan facility). Section 148(2)(a) (an optional provision which applies unless the company's constitution provides otherwise) does not prescribe the form which that notice must take (or the details which it must include) but simply states that it must be in writing. However, it seems that the letter would have to be served on the company before the resignation will take effect. As to that requirement, there is case law[18] which states that the notice of resignation will take effect if served on all other directors of the company, notwithstanding the failure to directly serve the company's registered offices.

- The same case law also states that the validity of a director's resignation (by the serving of notice in the manner outlined above) is not affected by a failure to comply with procedural requirements to send notification of it to the CRO.[19]

- Section 158(1) states that the business of a company shall be managed by the directors who may exercise all powers of the company – but subject to its constitution and the remaining provisions of the 2014 Act. Section 158(3) specifically empowers directors to exercise a company's powers to borrow money, and to mortgage or charge its undertaking, property and uncalled capital. In practice, the application of section 158(3) is usually subject to further regulation by a company's constitution will generally outline the extent of the delegation of such authority to the directors.

- In exercising the company's powers to borrow money, directors are implicitly subject to the statutory duties contained in Part 5 of the 2014 Act which require directors to act bona fide and in the interests of the company and its members. There is a further duty on directors to act honestly and responsibly in respect of the conduct of the affairs of the company. While any breach of the within duties by a director will not invalidate a loan agreement entered into, there may be personal implications for a director under section 232 if he or she is found to have breached fiduciary duties owed to the company. While the holding of resignation letters by a lender has the potential to create a perception of undue influence, directors cannot escape the statutory and common law duties which are owed to the company.

- A shadow director for the purposes of company law is defined under section 221 as "a person in accordance with whose directions or instructions the directors of a company are accustomed to act." Notwithstanding the specific reference to a shadow director being "a person" under the 2014 Act (which replicates the definition under the 1990 Act) and the specific ban on a body corporate from becoming a director in section 130, the Supreme Court in *Re Worldport Ireland Limited* ruled

[18] *POW Services Limited and Another v Clare et all* [1995] 2 BCLC435.

[19] Notice is sent by the company to the CRO using a Form B10. Section 149(8) provides that this notice must be sent within 14 days. In the event that the company fails to send notification to the CRO, the former director (under section 152) may send notice to the CRO using a form B69.

that a body corporate could be considered a shadow director for the purposes of company law. In *Ex Parte Copp*,[20] an English decision, the Court held that a sustainable case had been established that a bank could be regarded as a shadow director.

- To establish that either a person or body corporate is a shadow director under section 221, it is necessary to prove, inter alia, that the directors of a company purporting to act as such did not in fact exercise any discretion or engage in any decision-making of their own but acted in accordance with the direction or instruction of others. It must be shown that the directors were accustomed to act in accordance with the stipulations of the alleged shadow director in a habitual sense: there is a requirement for the instruction to be repetitive, customary and recurring.[21]

- The fact that a lender holds a conditional resignation letter does not of itself mean that the lender is a shadow director.

- In practice, by taking this security a lender is protecting its own position by preparing for the possibility that a company will be unable to repay its loan facilities. From a corporate governance point of view, a lending institution is unlikely to want to assume the directorship of a company and exercise control since it would then be responsible for discharging the duties imposed on directors by the 2014 Act.

- The holding of unsigned or undated letters of resignation by one creditor of a company does/will not affect the position of other creditors vis-à-vis the company.

Recommendation

The Review Group held a lengthy debate in respect of this submission and gave detailed consideration to all of the issues outlined above under "Further Relevant Considerations". Having done so, the Review Group concluded that the lending practice described does not raise any issues of concern which would necessitate an amendment in company law. The Review Group is accordingly not in favour of recommending any changes to the Act in this instance.

[20] [1989] BCLC 12.
[21] *Re Hocroft Developments Limited* [2009] IEHC 580.

Appendix 1

Corporate Governance Subcommittee

Ralph MacDarby	Chairperson
Deirdre Ann Barr	Ministerial Nominee
Dr. Thomas B. Courtney	Chairperson (CLRG)
Helen Curley	Department of Business, Enterprise & Innovation
Marie Daly	Irish Business & Employers Confederation
Mark Fielding	ISME
Aisling MacArdle	Irish Stock Exchange
Vincent Madigan	Ministerial Nominee
Kathryn Maybury	Small Firms Association
Salvador Nash	ICSA
Conor O'Mahony	ODCE
Eadoin Rock	Central Bank of Ireland
John Smyth	Chartered Director
Doug Smith	Irish Society of Insolvency Practitioners
Paul Walsh	The Revenue Commissioners
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