



COMPANY LAW REVIEW GROUP

ANNUAL REPORT 2017

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Chairperson's Letter to the Minister for Business, Enterprise and Innovation

Ms Heather Humphreys T.D.,
Minister for Business, Enterprise and Innovation
23 Kildare Street
Dublin 2
March 2018

Dear Minister,

It is my pleasure to present to you the Annual Report of the Company Law Review Group (CLRG). The Report outlines the progress on the work programme of the CLRG for 2016-2018 to date. Throughout 2017, the CLRG delivered on substantive items of its work programme with reports submitted and published in Q1, Q2 and Q4 2017.

It is of the utmost importance to the CLRG that the Companies Act 2014 is operating as envisaged. Issues arising in relation to the operation of the Act have been periodically referred to the CLRG by the Department of Business, Enterprise and Innovation for scrutiny. Two reports, in relation to the shares and share capital and corporate governance provisions of the Companies Act 2014, have been published in 2017. I would like to commend the work of Mr. Paul Egan and Mr. Ralph MacDarby, together with the respective subcommittees of the CLRG chaired by them, in bringing forward these detailed recommendations and, where appropriate, proposals for legislative changes which were adopted by the CLRG.

In June 2017, the Company Law Review Group *Report on the Protection of Employees and Unsecured Creditors* was submitted for consideration. The deliberations that form its conclusions were conducted by a specially convened committee chaired by Mr. Vincent Madigan, whom I would like to sincerely thank, along with the committee members who undertook a wide-ranging review of the provisions of the Companies Act 2014 and identified those provisions which can be utilised to protect the interests of employees and unsecured creditors. Recommendations for legislative change were proposed in the report which could potentially alleviate some of the difficulties experienced by employees and unsecured creditors in an insolvency situation while improving transparency and accountability.

I believe it is critical to the continued success of the consolidation and reform project that recommendations identified by the Review Group are given urgent consideration with a view to their early consideration by the Houses of the Oireachtas.

At the end of 2017, a new committee, the Statutory Committee was established. The purpose of this Committee is to provide a structure whereby your Department can avail of the Review Group's expertise in company legislation and significant collective organisational memory when finalising draft legislation. The purpose is to avoid technical oversights and errors in proposed amendments to the Act. Ideally the Department will engage with the Statutory Committee prior to publication but, if necessary, of course an ex post facto review can be conducted and errors can be rectified in subsequent legislation.

The work of the CLRG is ongoing and it will continue to advise you on how it considers it best to update and improve company law, ensuring that Ireland continues to rank as a leading place to conduct business.

Yours sincerely,

Dr Thomas B Courtney
Chairperson

1. Introduction to the Annual Report 2017

1.1. The Company Law Review Group

The Company Law Review Group (CLRG) is a statutory advisory expert body charged with advising the Minister for Business, Enterprise & Innovation (“the Minister”) on the review and development of company law in Ireland. It was accorded statutory advisory status by the Company Law Enforcement Act 2001, which was continued under Section 958 of the Companies Act 2014. The CLRG operates on a two-year work programme which is determined by the Minister, in consultation with the CLRG.

The CLRG consists of members who have expertise and an interest in the development of company law, including practitioners (the legal profession and accountants), users (business and unions), regulators (implementation and enforcement bodies) and representatives from government departments including the Department of Business, Enterprise and Innovation (“the Department”). The Secretariat to the CLRG is provided by the Company Law Development and EU Unit of the Department.

1.2 The Role of the CLRG

The CLRG was established to monitor, review and give advice to the Minister on company law matters. In so doing, it is required to “*seek to promote enterprise, facilitate commerce, simplify the operation of the Act, enhance corporate governance and encourage commercial probity*” (section 959(2) of the Companies Act 2014).

1.3 Policy Development

The CLRG presents its recommendations on matters in its work programme to the Minister. The Minister reviews the recommendations of the CLRG and decides the policy direction to be adopted.

1.4 Contact information

The CLRG maintains a website www.clrg.org. In line with the requirements of the Regulation on Lobbying Act and accompanying Transparency Code, all CLRG reports and the minutes of its meetings are routinely published on the website. It also lists the members and the current work programme.

The CLRG’s Secretariat receives queries relating to the work of the Group and is happy to assist members of the public. Contact may be made either through the website or directly to:

Síona Ryan
Secretary to the Company Law Review Group
Department of Business, Enterprise and Innovation
Earlsfort Centre
Lower Hatch Street
Dublin 2

Tel: (01) 631 2774
Email: siona.ryan@djei.ie

2: The Company Law Review Group

2.1 Membership of the Company Law Review Group

The then Minister appointed the current members of the CLRG in June 2016, and their term of office runs to 31 May 2018.

Dr. Thomas B. Courtney	Chairperson
Deirdre-Ann Barr	DBEI Ministerial Nominee (Matheson Solicitors)
Sinead Boyle	Irish Auditing and Accountancy Supervisory Authority (IAASA)
Jonathan Buttimore	Office of the Attorney General
Barry Cahir	Irish Society of Insolvency Practitioners
Helen Curley (from October 2017)	DBEI Ministerial Nominee (DBEI nominee)
Eleanor Daly	The Law Society
Marie Daly	Irish Business and Employers' Confederation (IBEC)
Jeanette Doonan	The Revenue Commissioners
Ian Drennan	Director of Corporate Enforcement
Grainne Duggan	The Bar Council
Paul Egan	DBEI Ministerial Nominee (Mason Hayes & Curran Solicitors)
Bernice Evoy	Banking and Payments Federation Ireland
Mark Fielding (to December 2017)	The Irish Small and Medium Enterprises Association (ISME)
Michael Halpenny	Irish Congress of Trade Unions (ICTU)
Brian Hutchinson	DBEI Ministerial Nominee (University College Dublin)
William Johnston	DBEI Ministerial Nominee (Arthur Cox Solicitors)
Brian Kelliher	Irish Funds Industry Association
Gillian Leeson	Irish Stock Exchange

John Loughlin	The Consultative Committee of Accountancy Bodies – Ireland (CCAB-I)
Irene Lynch Fannon	DBEI Ministerial Nominee (University College Cork)
Ralph MacDarby	Institute of Directors in Ireland
Neil McDonnell (from December 2017)	The Irish Small and Medium Enterprises Association (ISME)
David McFadden	DBEI Ministerial Nominee (Legal Advisor, Companies Registration Office)
Vincent Madigan	DBEI Ministerial Nominee (Former DBEI staff)
Kathryn Maybury	The Small Firms Association
Salvador Nash	Institute of Chartered Secretaries and Administrators (ICSA)
Deirdre O’Higgins (to October 2017)	DBEI Ministerial Nominee (DBEI nominee)
Lynn O’Sullivan (to October 2017)	DBEI Ministerial Nominee (DBEI Legal Advisor)
Maureen O’Sullivan	Registrar of Companies
Eadaoin Rock	Central Bank of Ireland
Noel Rubotham	The Courts Service

Some members have nominated alternates for specific periods of time or areas of work.

Adrian Brennan	Office of the Director of Corporate Enforcement (ODCE)
Una Curtis	The Consultative Committee of Accountancy Bodies – Ireland (CCAB-I)
Margaret Devaney	The Revenue Commissioners
Maresa Hemenstall	The Revenue Commissioners
Mary Hughes	The Revenue Commissioners
Alan Kelly	The Revenue Commissioners
Aisling McArdle	Irish Stock Exchange

Aine McCarty	Irish Funds Industry Association
Conor O'Mahony	Office of the Director of Corporate Enforcement
Grace O'Mahony	Central Bank of Ireland
Paddy Purtill	The Revenue Commissioners
Mark Ryan	The Law Society
Cathy Shivanan	The Revenue Commissioners
Doug Smith	Irish Society of Insolvency Practitioners
John Smyth	Chartered Director
Paul Walsh	The Revenue Commissioners
Andrew Whitty	Central Bank of Ireland

2.2 Company Law Review Group - Work Programme 2016-2018

2.2.1 Introduction to the Work Programme 2016-2018

In exercise of the powers under section 961(1) of the Companies Act 2014, the Minister, after consultation with the CLRG, determines the programme of work to be undertaken by the CLRG over the ensuing two-year period. The Minister may also add items to the work programme as matters arise. The current work programme began in June 2016 and runs to the end of May 2018. The work programme is focused on continuing to refine and modernise Irish company law.

2.2.2 Work Programme 2016-2018

- 1) Examine and make recommendations on whether it will be necessary or desirable to amend company law in line with recent case law and submissions received regarding the Companies Act 2014.
- 2) Examine and recommend ways in which company law and indeed the wider legislative code could be potentially amended to ensure better safeguards for a company's employees and unsecured creditors.
- 3) Review the enforcement of company law and, if appropriate, make recommendations for change.
- 4) Review the provisions in relation to winding up in the Companies Act 2014 and, if appropriate, make recommendations for change.

- 5) Provide ongoing advice to the Department of Business, Enterprise and Innovation on request for EU and international proposals, including proposals in relation to the harmonisation or convergence of national company insolvency laws.
- 6) Examine and make recommendations on whether it is necessary or desirable to adopt, in Irish company law, the UNCITRAL Model Law on Cross-Border Insolvency.

2.3 Implementation of the Work Programme 2016 - 2018

2.3.1 Plenary Meetings of the Company Law Review Group

The CLRG meets in plenary session to discuss progress on the work programme and to formally adopt its recommendations and publications. Three CLRG Plenary Meetings were held in 2017 on 28 March, 13 June and 30 November.

2.3.2 Subcommittees of the Company Law Review Group

The CLRG has subcommittees which meet, as the need arises, in relation to items on the work programme, issues arising from the administration of the Companies Act 2014 or matters arising such as court judgments in relation to company law. CLRG Members are encouraged to volunteer to serve on subcommittees which are relevant to their specific interests and expertise. There are nine subcommittees which facilitate the on-going review of company law and the membership of these subcommittees is set out in Appendix A (1-9). Seventeen meetings of CLRG subcommittees were held in 2017.

2.3.2 Shares and Share Capital Subcommittee (Item 1)

The Companies Act 2014 introduced a significant number of reforms in the area of share capital and capital maintenance generally. A number of submissions regarding perceived anomalies as well as further proposals for amendment of the Companies Act 2014 were received by the Department of Business, Enterprise and Innovation regarding share capital, including some submissions in relation to the reforms introduced in the 2014 Act.

The subcommittee chaired by Mr Paul Egan met seven times from September 2016 to February 2017 to review 24 separate proposals related to shares and share capital. A submission was prepared by the subcommittee setting out the rationale and consideration for each proposal concluding with the subcommittee's recommendation on whether each proposal should be adopted. The submission was adopted by the CLRG at its plenary meeting on 28 March 2017. The recommendations largely relate to matters which have arisen in the operation of the Act and include proposals for amendment of discrete sections in Part 3 of the Act.

The report: [The Recommendations of the Company Law Review Group Relating to Shares and Share Capital in the Companies Act 2014](#) was submitted to the Minister for consideration and subsequently published on the CLRG website: www.clr.org/publications.

2.3.2 Corporate Governance Subcommittee (Item 1)

Part 4 and the appropriate chapters of Parts 16, 17, 18, and 19 of the Companies Act 2014 deal with the governance of a company. The provisions deal with such matters as a company's constitutional requirements regarding numbers of directors, qualifications of the company secretary, the powers of directors, the holding of members' meetings and the making of resolutions. A number of submissions regarding perceived anomalies as well as further proposals for amendment of the Companies Act 2014 were received by the Department of Business, Enterprise and Innovation.

The subcommittee chaired by Mr Ralph MacDarby, met six times from March to July 2017 to review 30 separate proposals related to corporate governance. These provisions of the Act were reviewed by the Corporate Governance subcommittee and a submission was prepared by the subcommittee setting out the rationale and consideration for each proposal, concluding with the subcommittee's recommendation on whether each proposal should be adopted. The resulting report was adopted by CLRG at Plenary on 30 November.

The recommendations contained in the Report are intended 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 CLRG's overall review of the operation of the Companies Act 2014 with a view to addressing any anomalies, unforeseen consequences and reaffirming the overall policy approach to the legislation. This report also fulfils a commitment given in the recent suite of measures announced by the Government aimed at enhancing corporate governance, increasing transparency and strengthening Ireland's response to White Collar Crime.

The report: [The Recommendations of the Company Law Review Group Relating to Corporate Governance in the Companies Act 2014](#) was submitted to the Minister for consideration and subsequently published on the CLRG website: www.clr.org/publications.

2.3.3 Protection of employees and unsecured creditors (Item 2)

The Chair of the Review Group received a request from Minister Bruton on 14th January 2016, to examine and recommend ways in which company law and indeed the wider legislative code could be potentially amended to ensure better safeguards for a company's employees and unsecured creditors. A specially convened committee of the CLRG was established for this purpose. The committee was chaired by Mr. Vincent Madigan and comprises of members of the Company Law Review Group who volunteered to participate as well as officials from relevant government departments. Full membership can be found at Appendix A (10).

During the course of thirteen meetings between February 2016 and March 2017, a detailed examination of relevant provisions of the Companies Act 2014 was undertaken by the committee. The

Report of the Company Law Review Group on Protections for Employees and Unsecured Creditors was adopted at the CLRG Plenary meeting on 13th June.

Proposals for legislative change were recommended in the Report which, while not representing a panacea, could potentially address some of the difficulties experienced by employees and unsecured creditors in situations of company insolvency, while improving transparency and accountability. The Report contains the following recommendations:

- The imposition of a statutory obligation on directors of companies to consider the interests of creditors where it appears that a company is, or is likely to be, unable to pay its debts as they fall due.
- A requirement that where it is the intention of a provisional liquidator to cease trading and/or terminate employees' contracts of employment, the provisional liquidator must seek the specific power to do so from the High Court.
- Directors of insolvent companies who fail to arrange for the appointment of a liquidator will be automatically deemed to be restricted in accordance with section 819. Restriction prohibits a director from acting as a director or secretary of any company for a period of five years, subject to some exemptions.
- The inclusion of a new question on the questionnaire used to compile the section 682 liquidator's report. The liquidator of an insolvent company will be required to specifically address the consideration given to employees by the directors of the company in the period immediately prior to liquidation.
- The consideration of a scheme to help directors of insolvent companies who want to wind up their company but cannot afford to pay a liquidator to do so. The Self-Administered Liquidation is designed for small companies with relatively minor amounts of debt and aims to offer an inexpensive way for directors to dissolve companies.
- A legislative change to allow for access to the Social Insurance Fund for employees whose employer has not entered into formal insolvency.

The report also highlights the funding of insolvency actions as a remaining issue. Irrespective of how comprehensive company law is, it is likely that there will always be a dearth of actions against directors in circumstances where there are insufficient finances available to fund litigation or where the prospective defendant would have insufficient funds to meet any award that might be made against them.

The report: [The Company Law Review Group Report on Protections for Employees and Unsecured Creditors](#) was submitted to the Minister for consideration and subsequently published on the CLRG website: www.clr.org/publications.

2.3.4 Review of the Enforcement of Company Law (Item 3)

A discussion document on the enforcement of company law was compiled by the secretariat to present an overview of issues related to the compliance with, and enforcement of company law in Ireland for discussion by the CLRG.

The discussion document explored the following topics:

- The current role, function and powers of the compliance and enforcement bodies of company law in Ireland.
- Whether there is a need for harmonisation of legislative language for the imposition of criminal sanctions on directors.
- The necessity of a potential criminal offence of reckless trading and the role of the common law offence of conspiracy.
- The potential for greater use of administrative sanctions in company law offences.
- The suitability of deferred prosecution agreements, plea bargaining and immunity for use in relation to company law offences.
- The trial of company law offences: jurisdiction, juries and procedural issues.

Following deliberations at Plenary meetings, the Chair tasked the sub-committee on Compliance and Enforcement to reflect on the issues raised in the discussion document and to develop recommendations for presentation to CLRG Plenary in due course. The subcommittee has met on three occasions to discuss the matters listed above. It is intended that the Discussion Document will be amended to form a report and presented for formal adoption by the CLRG.

The CLRG also notes the ongoing work of the Law Reform Commission with its Issues Paper '*Regulatory Enforcement and Corporate Offences*' published in 2016 and forthcoming report on this matter which has some overlap with the task of the CLRG under item 3 of its work programme. The secretariat has liaised with the Law Reform Commission on behalf of the CLRG and communication on relevant matters is ongoing.

2.3.4 Subcommittee on Corporate Insolvency (Items 4,5,6)

The Corporate Insolvency subcommittee is conducting a renewed examination of the UNCITRAL Model Law on Cross-Border Insolvency given its potential importance for post-Brexit cross border insolvencies. It is progressing its consideration of the necessity or advisability of the adoption of the UNCITRAL Model Law on Cross-Border Insolvency and in due course will make its recommendations.

The subcommittee, with participation by representatives from the Department of Justice and Equality and the Insolvency Service of Ireland, conducted an initial consideration of the European Proposal for a Directive on Insolvency, Restructuring and Second Chance at the request of the Department of Business, Enterprise and Innovation. Discussions on this dossier are continuing at European level and the subcommittee will continue to provide ongoing advice and stakeholder views as appropriate.

In recent years, as result of the economic downturn, there has been an increase in insolvency-related cases before Irish courts and a resulting increase in case law on this matter. The CLRG has been tasked with reviewing the legislation on the winding up of companies. The subcommittee will progress the review of winding up, building on the report published in relation to protections for employees and unsecured creditors.

Appendix A Subcommittees of the Company Law Review Group

(* denotes a representative who is not a formal member of the CLRG)

A (1) General Issues and Registration

Maureen O'Sullivan	(Vice Chairperson) Registrar of Companies
Brian Hutchinson	(Vice Chairperson) Ministerial nominee
Helen Curley	Department of Business, Enterprise & Innovation
Eleanor Daly	Law Society of Ireland
Maresa Hempenstall*	The Revenue Commissioners
Ralph MacDarby	Institute of Directors in Ireland
Vincent Madigan	Ministerial nominee
Salvador Nash	Institute of Chartered Secretaries & Administrators in Ireland
Nomination pending	Irish Congress of Trade Unions

A (2) Shares and Share Capital

Paul Egan	Chairperson
Deirdre Ann Barr	Ministerial nominee
Tara Coogan*	Department of Business, Enterprise & Innovation
Eleanor Daly	Law Society of Ireland
Marie Daly	Irish Business & Employers' Confederation
Alan Kelly*	The Revenue Commissioners
Gillian Leeson	Irish Stock Exchange
Ralph MacDarby	Institute of Directors in Ireland

David McFadden	CRO
Vincent Madigan	Ministerial nominee
Kathryn Maybury	Small Firms Association
Salvador Nash	Institute of Chartered Secretaries & Administrators in Ireland

A (3) Corporate Governance

Ralph MacDarby	Chairperson
Deirdre-Ann Barr	Ministerial nominee
Dr. Thomas B. Courtney	Chairperson (CLRG)
Helen Curley	Department of Business, Enterprise and Innovation
Marie Daly	Irish Business & Employers' Confederation
Aisling MacArdle	Irish Stock Exchange
Vincent Madigan	Ministerial nominee
Kathryn Maybury	Small Firms Association
Salvador Nash	Institute of Chartered Secretaries & Administrators in Ireland
Eadaoin Rock	Central Bank of Ireland
Doug Smith*	Irish Society of Insolvency Practitioners
John Smyth*	Chartered Director
Paul Walsh*	The Revenue Commissioners
Andrew Whitty*	Central Bank of Ireland

A (4) Directors' Duties

Dr. Thomas B. Courtney	Chairperson
Deirdre-Ann Barr	Ministerial nominee
Marie Daly	Irish Business & Employers' Confederation
Mark Fielding	Irish Small & Medium Enterprises Association (ISME)
Michael Halpenny	Irish Congress of Trade Unions
Brian Kelliher	Irish Funds Industry Association
Ralph MacDarby	Institute of Directors in Ireland
Vincent Madigan	Ministerial nominee
Kathryn Maybury	Small Firms Association
Salvador Nash	ICSA
Deirdre O'Higgins	Department of Business, Enterprise & Innovation
Paul Walsh*	The Revenue Commissioners

A (5) Financial Statements, Annual Return and Audit

John Loughlin	Chairperson
Deirdre-Ann Barr	Ministerial nominee
Una Curtis*	The Consultative Committee of Accountancy Bodies – Ireland (CCAB-I)
Jeanette Doonan	The Revenue Commissioners
Vincent Madigan	Ministerial nominee
John Moynihan*	Department of Business, Enterprise & Innovation
Salvador Nash	Institute of Chartered Secretaries & Administrators in Ireland

Orla O'Brien*	Department of Business, Enterprise & Innovation
Maureen O'Sullivan	Registrar of Companies
Nomination pending	Irish Auditing & Accounting Supervisory Authority

A (6) Charges and Registration

William Johnston	Chairperson
Helen Curley	Department of Business, Enterprise & Innovation
Bernice Evoy	Banking & Payments Federation Ireland
Colm Forde*	Department of Business, Enterprise & Innovation
Brian Kelliher	Irish Funds Industry Association
Vincent Madigan	Ministerial nominee
Maureen O'Sullivan	Registrar of Companies

A (7) Reorganisations, Acquisitions, Mergers and Divisions

Deirdre-Ann Barr	Chairperson
Paul Egan	Ministerial nominee
Alan Kelly*	The Revenue Commissioners
Vincent Madigan	Ministerial nominee
Salvador Nash	Institute of Chartered Secretaries & Administrators in Ireland
Deirdre O'Higgins	Department of Business, Enterprise & Innovation

A (8) Corporate Insolvency

Barry Cahir	Chairperson
Jonathan Buttimore	Office of the Attorney General
Helen Curley	Department of Business, Enterprise & Innovation
Gráinne Duggan	Bar Council of Ireland
Michael Halpenny	Irish Congress of Trade Unions
Irene Lynch Fannon	Ministerial nominee
John Loughlin	CCAB-I
Vincent Madigan	Ministerial nominee
Deirdre O'Higgins (to October 2017)	Department of Business, Enterprise & Innovation
Conor O'Mahony*	Office of the Director of Corporate Enforcement
Paddy Purtill*	The Revenue Commissioners
Noel Rubotham	The Courts Service

A (9) Compliance and Enforcement

Ian Drennan	Chairperson
Sinead Boyle	IAASA
Jonathan Buttimore	Office of the Attorney General
Tara Coogan*	Department of Business, Enterprise & Innovation
Gráinne Duggan	The Bar Council
Michael Halpenny	Irish Congress of Trade Unions

Mary Hughes*	The Revenue Commissioners
Irene Lynch Fannon	University College Cork
Vincent Madigan	Ministerial nominee
Salvador Nash	ICSA
Kevin O'Connell*	ODCE
Deirdre O'Higgins (to October 2017)	Department of Business, Enterprise & Innovation

A (10) Ad-hoc Committee on Protections for Employees and Unsecured Creditors

Vincent Madigan	Chairperson
Jonathan Buttimore	Office of the Attorney General
Barry Cahir	Irish Society of Insolvency Practitioners
Tara Coogan*	Department of Business, Enterprise and Innovation
Marie Daly	Irish Business and Employers Confederation (IBEC)
Mark Fielding	Irish Small & Medium Enterprises Association (ISME)
Michael Halpenny	Irish Congress of Trade Unions (ICTU)
Irene Lynch Fannon	Ministerial Nominee
Ralph MacDarby	Institute of Directors
Conor O'Mahony*	Office of the Director of Corporate Enforcement
Breda Power*	Department of Business, Enterprise and Innovation
Paddy Purtill*	The Revenue Commissioners
Jim Walsh	Department of Social Protection