





Contents

Chairman's Letter	o1
Membership of CLRG	o2
1 Introduction – Overview and Update on Company Law Reform and Consolidation Bill	o3
2 Public Limited Companies and Securities Markets	o8
3 Designated Activity Companies	o15
4 Guarantee Companies	o19
5 Unlimited Companies	o24
6 Winding Up	o27
7 Directors' Compliance Statement	o37
8 EU Developments	o48
9 Funds Issues	o51
Appendix 1 – Part 7, Company Law Enforcement Act 2001	o54

"References throughout this Report to specific numbered Heads of the Company Law Consolidation and Reform Bill were correct as of 31 March 2006.

However, as the Draft Bill is a work in progress, the numbering of specific Heads is liable to change. Updated versions of Parts of the Draft Bill will be posted on the CLRG's website at www.clr.org as they become available"

Chairman's Letter

Dear Minister,

I have pleasure in attaching for your consideration the Third Substantive Report of the Company Law Review Group, which covers its work programme for 2004-2005. The Review Group's third work programme continued the simplification and consolidation project which will, in the coming months, result in the heads of a new Bill to replace the Companies Acts, 1963 to 2005. In this respect the Review Group is following the approach that it set out in its First Report (February 2002) which was accepted by the Government and which was continued in its Second Report (March 2004).

In accordance with the work programme set for the Review Group for 2004-2005, we have been engaged in the drafting of Heads of the General Scheme of the Company Law Consolidation and Reform Bill to implement the recommendations in the First and Second Report of the CLRG. There have been upwards of 50 meetings of the CLRG Steering Group during the period under review to design, draft and consider the Heads and I would like to pay tribute to the members and the Secretariat for their commitment to regular attendance at unsocial hours for the purpose of progressing the Review Group's work. When you take the General Scheme of the Consolidation and Reform Bill to Government for agreement to draft the Bill proper the Review Group will move on to prepare the Heads of a Bill on the introduction of Limited Liability Partnerships in Ireland while our resources also remain available to the Department for consultation and advice as the actual provisions of the Bill are drafted by the Parliamentary Counsel.

In addition to our set work programme, you will be aware that the Review Group spent a considerable amount of time in 2005 reviewing the appropriateness of section 45 of the Companies (Auditing and Accounting) Act, 2003. It was very heartening for the Review Group that the Government accepted the Review Group's recommendations in toto for the compromise proposal for a Directors' Compliance Statement, as detailed in Chapter 7 of this report. This amended version of the Directors' Compliance Statement is, I believe, both proportionate and effective, and as such is a significant contribution to both good governance and Irish competitiveness.

The Review Group continues to work very closely with your Department in formulating and drafting the Heads for the new Bill and I would like to take this opportunity for thanking the Department and in particular the Review Group's Secretary, Mr Pat Nolan, and his staff for their commitment and assistance to the Review Group.

Yours sincerely,

Dr Thomas B Courtney

Chairman

Company Law Review Group

Membership of the Company Law Review Group

Chair:

Dr. Thomas B. Courtney Solicitor, Arthur Cox

Members:

Paul Appleby	ODCE
Noel Rubotham	Courts Service
Conall O'Halloran	CCAB - Ireland
Jonathan Buttimore	Office of the Attorney General
Paul Egan	Law Society of Ireland
Ralph MacDarby	Institute of Directors
Enda Twomey	Irish Bankers' Federation
Deirdre Somers	Irish Stock Exchange
Marie Daly	IBEC
Paul Farrell	Companies Registration Office
Muriel Hinch	Revenue Commissioners
Michael Halpenny	ICTU
Lyndon MacCann	Bar Council
Vincent Madigan	Department of Enterprise, Trade and Employment
Tanya Holly	Department of Enterprise, Trade and Employment
Nora Rice	Companies Registration Office
Máire O'Connor	Ernst & Young
William Johnston	Arthur Cox, Solicitors
Fiona Delahunty ¹	Institute of Chartered Secretaries and Administrators
Jon Rock	Institute of Chartered Secretaries and Administrators
Ian Drennan	IAASA
Mary Burke	IFSRA

Alternate Members:

Brian Binchy
Kevin O'Connell
Adrian Brennan
Eamonn McHale
John Olden
Marie Hurley
Aidan Lambe
Ambrose Loughlin
Donncha Connolly
Des Fullam
Geraldine McWeeney

Secretariat:

Pat Nolan (Secretary)
Conor Verdon
Brooke O'Rourke
Eileen Bolger

¹ Ms. Fiona Delahunty represented the Institute of Chartered Secretaries and Administrators during 2004, and was replaced by Mr. Jon Rock in January 2005.

Introduction – Overview and Update on Company Law Reform and Consolidation Bill

Activity of Company Law Review Group in 2004 and 2005

The main function of the Company Law Review Group over this two year period was to continue its work of drafting the General Scheme of the Bill to reform and consolidate company law. This report records in summary form the output of the CLRG over this period, which derives from rigorous analysis of the existing provisions in the Companies Acts coupled with a general objective of simplifying and modernising. In order to fulfil its work programme the CLRG functions through a committee-based system, from the full representative Plenary which is composed of all members, guided by a smaller Steering Group, and supported by dedicated committees constituted to examine individual areas, such as guarantee companies, plcs, or winding up, in greater detail.

The CLRG met in plenary session on fifteen occasions during 2004 and 2005, while the Steering Group met upwards of fifty times to prepare draft material for the consideration by the plenary or to review draft material in the light of comments received from members of the plenary or made in the form of submissions from third parties.

Reform and consolidation of company law

The project to consolidate, simplify and modernise Irish company law has been underway now for six years. It is not hard to understand why the project was initiated. One only has to look at the publications which informally consolidate company law to see the complexity required to understand and interpret a code based on 12 Acts, numerous Statutory Instruments and provisions derived from both common law and EU law.

In the latter half of 2006 the Minister for Enterprise, Trade and Employment anticipates taking the General Scheme of the Bill to give effect to the consolidated and reformed companies code to Government for agreement to draft the Bill proper.

The innovative aspect of this major project to reform market governance in Ireland is the inclusion of key stakeholders in the project, in the form of the Company Law Reform Group (CLRG), from its inception. Market players, social partners, regulators and professional bodies all share in the work of the Review Group under the expert chairmanship of Dr. Thomas B. Courtney of Arthur Cox and contribute their expertise and experience towards the goal of an efficient and effective code, shaped by market principles.

The main elements of reform

The dynamic element of the reform is to place the private company limited by shares (cls) at the heart of the new code by making the cls, rather than the plc as at present, the standard type of company in Ireland.

The framework for the new Companies Bill will bring the totality of the content of the Companies code, insofar as it applies to private companies, into a single Part of a new Companies Act, Part A. A director or other stakeholder in a private company will only have to read Part A of the new Act instead of, as at present, having to plough through many provisions spread over a number of Acts which relate only to public companies limited by shares (plcs) or to specialised forms of company. This will bring the advantage, particularly to small and medium sized businesses, of clarity and relative simplicity in the regulatory and compliance regime. Those very substantial Parts of the Act that only concern plcs

Introduction – Overview and Update on Company Law Reform and Consolidation Bill

and which also deal with other more esoteric types of company will be physically distinct from the Part applying to private companies limited by shares. The proposed framework of the new Act is as follows:

Pillar A	Pillar B
A1 Definitions and Interpretation	B1 Definitions & Interpretation
A2 Incorporation and Consequential Matters	B2 PLCs
A3 Share Capital	B3 DACs
A4 Corporate Governance	B4 Guarantee Companies
A5 Duties of Directors and Other Officers	B5 Unlimited Companies
A6 Accounts, Audit and Annual Return	B6 Conversion & Re-registration
A7 Debentures and Charges	B7 External Companies
A8 Receivers	B8 Unregistered Companies (and Joint Stock Companies)
A9 Reconstructions and Arrangements	B9 Investment Companies
A10 Examinership	B10 Miscellaneous
A11 Winding Up	
A12 Strike-Off and Dissolution	
A13 Investigations and Inspectors	
A14 Regulatory and Advisory Bodies	

The private company limited by shares, or cls, is the main focus of reform in the new code. Key changes proposed for the cls include the abolition of the *ultra vires* concept through granting a cls the legal capacity of a natural person and replacing the existing memorandum and articles by a single-document constitution.

With regard to winding up it is envisaged that court initiated windings up will be placed, as far as possible, on the same footing as creditors' voluntary windings up, once the order for winding up had been made. This will streamline and simplify the operation of liquidations as well as reducing their costs.

With regard to plcs, which are economically very important, if small in number, the motivation in drafting Part B2 has been for the preservation of legal certainty and against forcing plcs into a legal straitjacket. As a consequence of this 'light touch' approach it is proposed to retain the memorandum and articles format of constitution for plcs. Further, the *ultra vires* doctrine has been addressed by a new formulation which permits a plc to have an objects clause but which also furthers creditor and shareholder protection. This approach is reinforced with the ousting of the doctrine of constructive notice by providing that a person is not bound to enquire as to whether an activity is *intra vires*.

Introduction – Overview and Update on Company Law Reform and Consolidation Bill

The CLRG has also addressed the issue of how best to deal with those elements of the EU Financial Services Action Programme (FSAP) impacting on plcs and has decided the best approach to take is to include ‘foundation stone’ or ‘anchor’ sections for Statutory Instruments implementing FSAP measures, on the model used successfully in the Investment Funds, Companies and Miscellaneous Provisions Act 2005.

Ongoing consultation

Since publication of the first report of the CLRG in April 2002 it has been the policy of the Department of Enterprise, Trade and Employment to engage with all interested parties on the proposed Heads of the new Bill. The Heads are available for consideration and comment on the website of the Company Law Review Group, www.clrg.org and are regularly updated as the Parts of the new Bill are drafted and renewed. As of mid-March 2006, Parts A2-A5 and A8-A11 and Parts B3, B4 and B5 are available on the website for scrutiny and these will be joined imminently by Parts B2, B8 and B9. The principle behind this standing consultation is that comments received can inform the final shape of the proposals to be presented by the Minister for Enterprise, Trade and Employment to Government for consideration and approval.

Directors’ Duties

The issue of Directors’ Duties has been a hot topic not only in Ireland but also:

- in the US, where some commentators believe that the costs of Sarbanes-Oxley have been significant and the benefits elusive; and
- in the UK where the current consultation on corporate reporting rules is taking place after an initial proposal to scrap, as a deregulatory measure, such reporting rules.

In Ireland, meanwhile, a substantial part of the work and time of the Company Law Review Group in 2005 was taken up by a review of the Directors’ Compliance Statement as enacted in Section 45 of the Companies (Auditing and Accounting) Act 2003, although never commenced.

Opposition to the Directors’ Compliance Statement was founded on the perceived additional costs which it was expected to impose on the business community, on the degree of prescription required to complete the DCS, and on the potential adverse effects on competitiveness, investment and job creation in Ireland, particularly in terms of foreign direct investment. The degree of opposition to Section 45 was such that the Minister for Trade and Commerce, Michael Ahern, TD, referred the issue to the CLRG for review in May 2005².

On foot of its intensive review examining the proportionality, efficacy and appropriateness of 45/2003 the CLRG, by majority, recommended a new, mitigated, model for the Directors’ Compliance Statement³. This proposal was accepted by the Government and will be given effect in the Company Law Consolidation and Reform Bill. The new model differs from existing 45/2003 in restricting and clarifying the obligations on which directors must report, in being less prescriptive about the methods a company uses to review its compliance procedures, and in not requiring review of the compliance statement by an external auditor. This brings both more legal certainty and lower compliance costs to the reporting obligation.

The First Report of the CLRG in 2002 recommended that the main fiduciary duties of a director to his company as identified by the Irish courts should be set out in statute law and the proposals in this regard may be viewed at Part A5 on the CLRG website.

² The Minister for Enterprise, Trade and Employment, Micheál Martin TD, has delegated responsibility for company law matters to the Minister for Trade and Commerce, Michael Ahern TD.

³ A comprehensive account of the CLRG’s review of the Directors’ Compliance Statement is contained in Chapter 7 of this Report.



Introduction – Overview and Update on Company Law Reform and Consolidation Bill

Ongoing issues – and beyond

The current issue of paramount concern to the CLRG is to complete the drafting of the General Scheme of the Company Law Consolidation and Reform Bill such that the Minister for Enterprise, Trade and Employment can bring it to Government for agreement in the latter half of this year. When the General Scheme goes to the Office of the Parliamentary Counsel the Department of Enterprise, Trade and Employment will continue to engage on the development of the Bill proper, and the CLRG will continue to assist the Department in that regard.

With regard to EU-derived law it is necessary in the immediate future to consider the Regulations which will give effect to the Takeovers Directive, which is due for implementation on 20 May 2006. It is also necessary to consider the transposition of the Transparency Directive, due for implementation on 20 January 2006, and in particular to reflect on the timeframe and methodology of the enactments required.

Finally, looking forward to the work programme of the CLRG in 2006-7, the Minister for Trade and Commerce has asked the CLRG to consider, once the General Scheme of the Company Law Consolidation and Reform Bill has been approved by Government, the issue of Limited Liability Partnerships and other reforms to Partnership Law which may be appropriate.

Public Limited Companies and Securities Markets

Introduction

Although small in number, public limited companies (plcs) are economically very important and accordingly the motivation in drafting Part B2, which deals with plcs and securities markets, has been the preservation of legal certainty and against forcing plcs into a legal straitjacket. As a consequence of this 'light touch' approach it is proposed to retain the memorandum and articles format of constitution for plcs.

An important innovation is that Head 8 of Part B2 mitigates the effect of a plc having an objects clause whilst, contemporaneously, furthering creditor (subsection 1) and shareholder (subsection 2) protection. The mitigation of the doctrine of *ultra vires* in Section 8 of the Companies Act 1963 has been abandoned in favour of this formulation which is based on Section 35 of the UK's Companies Act, 1985. Whilst persons dealing with a plc that is acting *ultra vires* will not be prejudiced, the directors of a plc can be held to account for causing a plc to take such action; this will be in the form of an *in personam* action against the directors and not an *in rem* action that would set aside the validity of the *ultra vires* transaction. Furthermore, UK law is mirrored in subsection (5) which ousts the doctrine of constructive notice by providing that a person is not bound to enquire as to whether an activity is *intra vires*.

Provision is also made for the ratification of an act beyond the capacity of the company by special resolution. This reverses the common law position stated in *Ashbury Railway & Iron Co. v Riche* (1875) LR 7 HLC 653 where not even a unanimous agreement of the shareholders would suffice.

Such ratification offers the other party greater assurance. Ratification validates the transaction

whilst a separate special resolution is required to absolve the directors or any registered persons from any liability arising. The second special resolution absolves directors and registered persons. It also applies to "...any other persons" – this includes any third party who may be liable as a constructive trustee on the basis of either providing knowing assistance in a breach of trust [see *Royal Brunei Airlines V Tan* (1995) 3 ALL ER 97] or knowing receipt of trust funds applied in breach of duty [see *BCCI v Akindele* (2000) 4 All ER 221].

EU Financial Services Action Plan (FSAP) Measures

The EU's Financial Services Action Plan (FSAP)⁴ is a series of policy objectives and specific measures to improve the single market for financial services. It indicates priorities and time-scales for legislative and other measures to tackle three strategic objectives, namely ensuring a single market for wholesale financial services, open and secure retail markets, and state-of-the-art prudential rules and supervision. A number of FSAP measures are dealt with in Part B2, as their application is most relevant to plcs. These measures are detailed below.

The Market Abuse Directive (Directive 2003/6/EC), which was initially implemented in Ireland by Part 4 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005 and Regulations made thereunder, is addressed in Chapter 12 of Part B2. This Chapter largely re-enacts the relevant provisions of Part 4 of the 2005 Act, including definitions, the Minister's power to make Regulations, offences, civil liability, supplementary rules, and necessary amendments of the Central Bank Acts. Further, Head 61 disapplies the generic provisions on disclosure of interests by a director which are contained in Part A5, from a director who is considered to be a person discharging managerial responsibility under the Regulations which

⁴The Commission's Financial Services Action Plan was launched in Commission Communication COM(1999)232 of 11 November 1999, which is accessible at: http://europa.eu.int/comm/internal_market/finances/docs/actionplan/index/action_en.pdf

Public Limited Companies and Securities Markets

implement the Market Abuse Directive, as such a director will be subject to the requirements of the latter legislation.

Chapter 13 of Part B2, on Public Offers of Securities, deals with the implementation of the Prospectus Directive (Directive 2003/71/EC). This had previously been achieved by Part 5 of the 2005 Act and Regulations made thereunder, and again the relevant sections of that Act are re-enacted here. The Chapter therefore covers, *inter alia*, definitions, civil liability, exemptions, restriction of liability and indemnification, the power to make Regulations, and offences.

Head 72 facilitates the application of the Takeover Bids Directive (Directive 2004/25/EC) by providing that Part A9 Chapter 2 Head 5 (the equivalent of Section 204 of the Companies Act 1963) shall not apply where the target company concerned is a company to which the Directive applies.

Finally, Chapter 14 of Part B2 addresses the requirements of the Transparency Obligations Directive (Directive 2004/109/EC) by providing for the appropriate definitions, the Minister's power to make Regulations, indictable offences, civil liability and supplementary rules.

The approach in each case is to include Heads in Part B2 for any aspects which require to be implemented in primary legislation, and to include anchor Heads to provide a Regulation-making power for the Minister to make further detailed Statutory Instruments which will complete the implementation of each Directive.

Single-member plc

An innovation of Part B2 is that it will now be possible to have a single-member plc. Head 3(1)

provides that a plc “may be formed for any lawful purpose by any person subscribing to a constitution and complying with the registration requirements in this Act”, thereby permitting formation by a single member.

Dematerialisation

The Review Group considered the issue of dematerialisation of shares, and in this context the CLRG Plenary, at its meeting on 20 April 2005, heard a presentation from Albert Farrell of Horwath Bastow Charleton on *Developments in the Dematerialisation of Registers and Share Transfers*. The presentation noted the clearly signalled trend to dematerialisation in leading jurisdictions, notably in the UK and pointed out that while shareholder enfranchisement could complement dematerialisation, these were two distinct initiatives and dematerialisation did not have to be done in tandem with enfranchisement. It was argued that dematerialisation would greatly simplify the process of trading in shares and allow for completion of purchase or sale of shares more cheaply in a shorter time with security and certainty.

The presentation made the case that dematerialisation would not affect the rights of shareholders adversely, but it would be likely to lead to more individuals holding share accounts in their own name rather than such accounts being held by pool nominees, a position that with regard to the rights conferred was likely to enhance the position of shareholders. The key attribute of the proposed dematerialisation would be that shareholders would automatically be sent a statement every time a movement of shares took place.

On the basis of the analysis provided and the ensuing exchange of views the Review Group was unanimously in favour of the principle of

Public Limited Companies and Securities Markets

introducing dematerialisation, and it was considered that this could most appropriately be done as part of the Consolidation Bill. The Review Group felt that Part B2 on plcs would be the logical place to include the necessary provisions. Head 54 is therefore intended to provide the power for the Minister to make Regulations to facilitate dematerialisation at the appropriate time.

Structure

Part B2 has been structured as follows:

Chapter 1 – Preliminary and Definitions

1. Defined terms
2. Interpretation of this Part

Chapter 2 – Incorporation and Consequential Matters

3. Way of forming a PLC
4. The form of a PLC's constitution
5. Provisions as to names of PLC's
6. Restriction on commencement of business by a PLC
7. Corporate capacity of a PLC
8. Corporate capacity not limited by a PLC's constitution.
9. Corporate authority and the power of directors to bind a PLC
10. Alteration of objects clause by special resolution.
11. Alteration of articles by special resolution
12. Securities seal of a PLC

Chapter 3 – Share Capital

13. Power to allot and pre-emption rights
14. Further provisions relating to pre-emption rights.
15. Authority to allot.
16. Subscription of share capital
17. Prohibition on allotment of shares at discount
18. Payment for allotted shares
19. Payment of non-cash consideration
20. Experts' reports on non-cash consideration before allotment of shares.
21. Experts' reports: supplementary.
22. Experts' reports on non-cash assets acquired from subscribers, etc.
23. Provisions supplementary to Head 22 [equivalent of section 32 Companies (Amendment) Act 1983]
24. Relief.
25. Special provisions as to issue of shares to subscribers.
26. Contravention of Heads 16 – 25 [equivalent of sections 26 to 35 Companies (Amendment) Act 1983]
27. Treatment of shares held by or on behalf of a public limited company.

Public Limited Companies and Securities Markets

- 28. Charges taken by PLC on own shares.
- 29. Financial assistance.
- 30. Variation of rights attached to special classes of shares.
- 31. Restriction on transfers of shares.
- 32. Disclosure obligation.
- 33. Enforcement provisions.
- 34. Agreement to acquire interests in a PLC.
- 35. Obligations of disclosure arising under Head 42 [equivalent of section 73 of Companies Act 1990]
- 36. Obligation of persons acting together to keep each other informed.
- 37. Interest in shares by attribution.
- 38. Interests in shares which are to be notified.
- 39. Register of interests in shares.
- 40. Substantial holdings.
- 41. Company investigations.
- 42. Registration of interest disclosed under Part B2, Head 41 [equivalent of section 81 Companies Act 1990]
- 43. Company investigations on requisition by members.
- 44. Company report to members.
- 45. Penalty for failure to provide information.
- 46. Removal of entries from register.
- 47. Entries, when not to be removed.
- 48. Inspection of register and reports
- 49. Right of recognised stock exchange to require disclosure under section Head 32

Chapter 4 – Distribution by a PLC

- 50. Restriction on distribution of assets
- 51. Relevant accounts.
- 52. Limitation on reduction by a PLC of its allotted share capital.

Chapter 5 – Uncertificated Securities

- 53. Transfer in writing.
- 54. Power to make regulations for the transfer of securities.

Chapter 6 – Corporate Governance

- 55. Number of directors.
- 56. Restriction on appointment or advertisement of director.
- 57. Attendance and voting at meetings.
- 58. Notice of meetings.
- 59. Audit Committees.

Public Limited Companies and Securities Markets

Chapter 7 – Duties of Directors and Other Officers

- 60. Obligation to convene extraordinary general meeting in event of serious loss of capital.
- 61. Disclosure of interests by a director of a PLC that is a Directive Company
- 62. Qualifications of secretary of public limited company.

Chapter 8 – Accounts, Audit and Annual Return

Chapter 9 – Debentures and Registration of Charges

- 63. Provisions as to register of debentures holders.
- 64. Rights of inspection of register of debenture holders and to copies of register and trust deed.

Chapter 10 - Reconstructions

- 65. Application for confirmation of merger by court.
- 66. Protection of creditors
- 67. Confirmation order
- 68. Application for confirmation of division by court.
- 69. Protection of creditors.
- 70. Confirmation order.
- 71. Notices under [equivalent of section 204 of the 1963 Act]
- 72. Disapplication of Part A9 Head 5 [equivalent of s 204 of Companies Act 1963] to a Directive Company.

Chapter 11 – Dissolution and Reinstatement

- 73. Power of Registrar to strike public limited company off register.
- 74. Reinstatement as PLC

Chapter 12 – Market Abuse

- 75. Interpretation.
- 76. Regulations (Chapter 12)
- 77. Conviction on indictment of offences under Irish market abuse law: penalties.
- 78. Civil liability for certain breaches of Irish market abuse law.
- 79. Supplementary rules, etc, by competent authority
- 80. Amendment of [section 33AJ of Central Bank Act 1942]
- 81. Amendment of [section 33AK of Central Bank Act 1942]
- 82. Application of Irish market abuse law to certain markets.

Chapter 13 – Public Offers of Securities

- 83. Interpretation.
- 84. Civil liability for misstatements in prospectus
- 85. Exceptions and exemptions
- 86. Restriction of liability where non-equity securities solely involved.
- 87. Indemnification of certain persons.



Public Limited Companies and Securities Markets

- 88. Experts' consent to issue of prospectus containing statement by him or her.
- 89. Regulations (Chapter 13)
- 90. Penalties on conviction on indictment and defences in respect of certain offences.
- 91. Untrue statements and omissions in prospectus: criminal liability.
- 92. Minimum subscription and amount payable on application.
- 93. Document containing offer to state whether shares will be allotted where issue not fully subscribed
- 94. Effect of irregular allotment.
- 95. Allotment of securities to be dealt in on stock exchange or regulated market.
- 96. Local offers
- 97. Exclusions of Investment Intermediaries Act 1995
- 98. Power to make certain rules and issue guidelines.
- 99. Avoidance of certain agreements.

Chapter 14 – Transparency Obligations of Publicly Quoted Companies

- 100. Interpretation
- 101. Regulations (Chapter 14)
- 102. Conviction on indictment of offences under Irish transparency law: penalties.
- 103. Civil liability for certain breaches of Irish transparency law.
- 104. Supplementary rules, etc, by competent authority.

First Schedule

- Part One – Form of Memorandum of Association of a PLC
- Part Two – Regulations for Management of PLC

The full text of Part B2 is available on the CLRG website at www.clrg.org

Designated Activity Companies

The Review Group progressed work on, and adopted a draft of, Part B3 on Designated Activity Companies. The concept of a designated activity company originated in paragraphs 10.9.9 to 10.9.13 of the First Report of the Company Law Review Group. The concept originally came from a recognition that, in light of the fact that the new default company type (the company limited by shares) would not have an objects clause, there would be a need to provide for a type of company similar to the existing private company limited by shares, i.e. a private company with an objects clause. On further reflection it was felt that it would also be appropriate to include private companies limited by guarantee and having a share capital within this type of company.

The First Report of the Review Group said in this regard:

“The Review Group accepts that public policy considerations require certain companies to have objects. A company limited by guarantee and not having a share capital may be used also as a management company in residential apartment schemes. It is suggested that the members of such companies would wish their companies to have very specific and restrictive objects and powers. Similarly, companies whose functions are to carry out activities of a charitable nature, and which may be granted charitable status by the Revenue Commissioners, may require the retention of designated objects. Accordingly, the Review Group recommends that the *ultra vires* doctrine should be retained by companies limited by guarantee. (paragraph 10.9.9)

Individuals or corporations often form what are described as “special purpose companies” or “special purpose vehicles”. As the name suggests,

these are companies incorporated for a special purpose such as a joint venture or a financing company used in a single specific financing transaction. Many of these entities are used in transactions concluded in the International Financial Services Centre and are a recognised mechanism for achieving the legitimate expectations of the parties involved. It is considered by the company’s promoters, in many such cases, to be essential that such companies are not empowered to enter into other transactions. Accordingly, the Review Group recommends that the doctrine of *ultra vires* be retained for special purpose companies. (paragraph 10.9.10)

To identify to a third party that a company has specific objects, as is therefore subject to the *ultra vires* rule, for a public company the word “plc” or for any other special category company, including companies limited by guarantee the word “dac” (standing for designated activity company) should form the last part of the name of such company. (paragraph 10.9.11)

A transition period of 12 months should be allowed for (non-public) companies wishing to retain objects to pass a special resolution to change their name (with the addition of “dac” to their name). No filing fee should be required for notifying the CRO of such special resolutions. A subvention should be provided by the State to the CRO to make up the shortfall in such filing fees. (paragraph 10.9.12)

To avail of the *ultra vires* rule for its own benefit or for the benefit of certain creditors over other creditors, a private company (being a company limited by guarantee and having a share capital or a special purpose company) should be

Designated Activity Companies

required to change its name within 12 months to identify it as a designated activity company. Failure to do so at the expiration of 12 months should have the automatic effect of removing the company’s objects and giving it the capacity of a natural person. (paragraph 10.9.13)”

Part B3 of the Draft Bill, as approved by the Review Group, provides in Head 1 for two types of designated activity company. The first is a private company limited by shares with the capacity, including the power, to do only those acts or things set out in its constitution. The second is a private company limited by guarantee and having a share capital with the capacity, including the power, to do only those acts or things set out in its constitution. It should be noted that the second type, the guarantee company with a share capital, is distinctive from the “classic” guarantee company which forms the subject of Part B4 of the Draft Bill and which by definition does not have a share capital.

Head 3 provides that the number of members of a designated activity company can be as low as one and as high as 99, not including current or former employees. The characteristic feature of the designated activity company, in comparison to the other company types, is that the memorandum of association under Head 4 is required to state the objects of the company.

However, Head 10 mitigates the effect of a designated activity company having an objects clause in the context of furthering creditor and shareholder protection, in Head 10(1) and 10(2) respectively. The mitigation of the doctrine of *ultra vires* in section 8 of the Companies Act 1963 has been abandoned in favour of this formulation which is based on section 35 of the UK’s Companies Act 1985. Whilst persons dealing with a designated activity

company that is acting *ultra vires* will not be prejudiced, the directors of the designated activity company can be held to account for causing it to take such action; this will be in the form of an *in personam* action against the directors and not an *in rem* action that would set aside the validity of the *ultra vires* transaction. Furthermore, UK law is mirrored in Head 10(5) which ousts the doctrine of constructive notice by providing that a person is not bound to enquire as to whether an activity is *intra vires*.

Provision is also made in Head 10(3) for the ratification by special resolution of an act beyond the capacity of the designated activity company. This reverses the common law position stated in *Ashbury Railway & Iron Co. v Riche*⁵ where not even a unanimous agreement of the shareholders would suffice.

Such ratification offers greater assurance to the other party involved in the transaction. Ratification validates the transaction whilst a separate special resolution is required to absolve the directors or any registered persons from any liability arising. The second special resolution absolves directors and registered persons. It also applies to “...any other persons” – this includes any third party who may be liable as a constructive trustee on the basis of either providing knowing assistance in a breach of trust [see *Royal Brunei Airlines V Tan*⁶] or knowing receipt of trust funds applied in breach of duty [see *BCCI v Akindele*⁷].

Continuing this theme, Head 11 provides that in favour of a person dealing in good faith with a designated activity company, the power of the directors to bind the company or to authorise others to do so is deemed to be free of any limitation under the constitution. However, shareholders may avail of Head 11(5) to seek an injunction to restrain the doing

5. (1875) LR 7 HLC 653

6. [1995] 3 All ER 97

7. [2000] 4 All ER 221

Designated Activity Companies

of an act which is beyond the power of the directors. This remedy will not lie where the act is to be done in fulfilment of a legal obligation arising from a previous act of the designated activity company.

In keeping with the Review Group's recommendation in its First Report that the minimum requirement of two directors should be retained for all companies save for the company limited by shares (cls), Head 14 requires a designated activity company to have at least two directors.

Head 15, dealing with share or interest qualifications of directors, reflects the fact that the relevant interest of a director in a designated activity company may be a guarantee or interest instead of a share qualification. The definition of member in Head 16 is wide enough to contemplate, in subsection (3), membership conditions relating to events or acts which may terminate membership, such as membership of an apartment management company ceasing when the person ceases to be the owner of an apartment in the complex.

The winding-up provisions in Head 19 reflect the fact that a designated activity company may be limited either by shares or by guarantee, and consequently each is provided for separately.

Designated Activity Companies

Structure of Part B3

Part B3 – Designated Activity Companies

Chapter 1 Preliminary and Definitions

- Head 1 Defined terms
- Head 2 Interpretation of this Part

Chapter 2 Incorporation and Consequential Matters

- Head 3 Way of forming a designated activity company
- Head 4 The form of the constitution
- Head 5 Provisions as to names of DACs
- Head 6 Power to dispense with “designated activity company” or “Irish equivalent” in name of charitable and other companies
- Head 7 Effect of constitution
- Head 8 Way in which and extent to which objects of a DAC may be altered
- Head 9 Corporate Capacity of a DAC
- Head 10 Corporate Capacity Not Limited by the constitution of a DAC
- Head 11 Corporate Authority and the Power of Directors to Bind a DAC
- Head 12 Re-registration of existing private companies limited by shares as DACs

Chapter 3 Share Capital

- Head 13 **Holding by subsidiary of shares or [an interest/membership by guarantee] in its holding company**

Chapter 4 Corporate Governance

- Head 14 Directors
- Head 15 Share or interest qualifications of directors
- Head 16 Definition of member
- Head 17 Annual General Meeting
- Head 18 Unanimous written resolutions

Chapter 5 Duties of Directors and other Officers

Chapter 6 Accounts, Audit and Annual Return

Chapter 7 Debentures and Registration of Charges

Chapter 8 Receivers

Chapter 9 Reconstructions

Chapter 10 Examinerships

Chapter 11 Winding-Up

- Head 19 Liability as contributories of past and present members

Chapter 12 Dissolution and Reinstatement

Chapter 13 Compliance, Investigation and Enforcement

Chapter 14 Regulatory and Advisory Bodies

The full text of Part B3 is available on the CLRG website at www.clrg.org

Guarantee Companies

The Review Group concluded its draft of Part B4 on Guarantee Companies. This Part applies only to guarantee companies not having a share capital, due to the fact that a guarantee company with a share capital will be a designated activity company under Part B3 of the Draft Bill (see Chapter 4 of this Report). The concept of a guarantee company, which already existed under Irish company law, was addressed in paragraph 10.9.9 of the First Report of the Company Law Review Group.

The First Report of the Review Group said in this regard:

“The Review Group accepts that public policy considerations require certain companies to have objects. A company limited by guarantee and not having a share capital may be used also as a management company in residential apartment schemes. It is suggested that the members of such companies would wish their companies to have very specific and restrictive objects and powers. Similarly, companies whose functions are to carry out activities of a charitable nature, and which may be granted charitable status by the Revenue Commissioners, may require the retention of designated objects. Accordingly, the Review Group recommends that the *ultra vires* doctrine should be retained by companies limited by guarantee. (paragraph 10.9.9)

Head 1 therefore provides that a “company limited by guarantee” or “guarantee company” means a company which does not have a share capital and which has the liability of its members wholly limited by the constitution to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being

wound up. This definition follows the precedent in Section 2 of the Companies Act 1963.

Head 4 provides that the number of members of a guarantee company can be as low as two and there is no maximum. The characteristic feature of the guarantee company, in comparison to the other company types, is that, as provided by Head 4(4), the liability of the members is limited to such amount as the members have undertaken to contribute to the assets of the guarantee company in the event of its being wound up

Head 6 deals with the name of a guarantee company, including the permitted shortening of the name “company limited by guarantee” to the abbreviation “clg” or “CLG” (or the Irish language equivalent). Further, in recognition of the fact that many charities and non-profit making entities are legally constituted as guarantee companies, Head 7 permits the registration of a company’s name without the inclusion of the suffix “company limited by guarantee” (or the abbreviation “clg”) provided that certain conditions are met. These conditions are:

- the objects of the guarantee company are the promotion of commerce, art, science, education, religion, charity or any other prescribed object;
- the constitution requires the profits (if any) or other income to be applied to the promotion of its objects;
- the constitution prohibits the payment of dividends to its members;
- requires all the assets which would otherwise be available to its members to be transferred on its winding up to another company which similarly satisfies these conditions;
- a director of the guarantee company must

Guarantee Companies

deliver the prescribed form to the Companies Registration Office to confirm that the above conditions are complied with.

Further to the provision in Head 5(2)(c) that the memorandum of association of a guarantee company shall contain objects, Head 11(1) states that a guarantee company shall have the power to do any act or thing stated in the objects set out in its constitution. Head 11(2), however, offers protection to a third party seeking to rely on an act or thing done by the company, in circumstances where the third party did not have actual notice that it was not permitted by the objects. Further, shareholder protection and creditor protection are addressed by the two-limbed provisions offered by Head 11(2) which can both render a defaulting director in this regard liable to the company for any loss or damage, and which also permits either a member of the company or a holder of debentures to apply to the court for an order restraining the guarantee company from doing any act or thing which it has no power to do. Head 11(2) in this regard draws upon the precedent of Section 8 of the Companies (Amendment) Act 1983. Head 11(3) gives further protection to a third party dealing in good faith with the guarantee company by deeming a transaction to be within the capacity of the company, and preventing the company from relying on any limitation in its powers against a person acting in good faith.

Transition provisions are contained in Head 12, which stipulates that every existing guarantee company without a share capital shall, at the end of the transition period⁸, become a company limited by guarantee. As noted above, an existing guarantee company with a share capital will, pursuant to Head 13(3), be regarded as a designated activity company under the new Act (see Chapter 4 of this Report).

This characteristic distinction is reinforced by Head 13(1), which prohibits a company limited by guarantee being formed with the power to issue share capital, and Head 13(2) which nullifies, after the transition date, any power which an existing guarantee company had to issue share capital.

In keeping with the Review Group’s recommendation in its First Report that the minimum requirement of two directors should be retained for all companies save for the company limited by shares (cls), a company limited by guarantee is required by Head 16 to have at least two directors, while the effect of Head 18 is that a director can be removed by ordinary resolution.

The requirement of a company limited by guarantee to have an audit committee is governed by Head 19, and is subject to the same turnover and balance sheet thresholds as will be applied generally in Part A6 of the Bill. The responsibilities of the audit committee are indicated in the non-exhaustive list contained in Head 19(2).

The requirements in relation to the register of members, under Head 21, have been modified so as to remove the obligation to record particulars of a shareholding. Similarly, the following Heads, dealing with annual and extraordinary general meetings, have been drafted so as to omit any references to shares or share capital.

A member of a company limited by guarantee who is entitled to attend and vote at a meeting of the company is also entitled to appoint a proxy to do so on his or her behalf, pursuant to Head 25, although the constitution may provide otherwise. This is a change from the previous position under Section 136 of the Companies Act 1963, where the default position is that members by guarantee do not have

⁸ Head 12(1) defines the transition period as the period ending 30 months after the commencement of this Part.

Guarantee Companies

the right to attend by proxy but that the articles may provide otherwise.

Head 32 deals with the duty of a director of a company limited by guarantee to disclose his interest in a contract made by the company. The generic provisions on this issue are contained in Head 13 of Part A5, subsection (5) of which requires a copy of any relevant declaration made or notice given to be entered in a book which is open to inspection by persons connected with the company. While Head 13 of A5 does not provide for the prosecution of an offence in respect of a breach of this obligation, on the grounds that shares in a private company cannot be offered to the public and so the rationale of public investor protection is not applicable, Head 32 here makes provision for such a breach in the case of a company limited by guarantee to be an offence and to be prosecutable, as the Review Group considers that this is appropriate for guarantee companies.

In Chapter 9 on Reconstructions, Head 35 disapplies the provisions on mergers by acquisition and mergers by formation of a new company as these essentially involve the issue of shares to members, and in a company limited by guarantee, which by definition does not have a share capital, this will not be possible. The option remains, therefore, of a simplified merger by validation procedure as provided for in respect of a cls.

Similarly, Head 36 disapplies division by acquisition and division by formation of a new company, again on the basis that these methods involve the issue of shares and this is not possible for a company limited by guarantee. As with merger, this leaves the possibility of a division by validation procedure.

Structure of Part B4 Guarantee Companies

Chapter 1 Preliminary and Definitions

- Head 1 Defined terms
- Head 2 Interpretation of this Part

Chapter 2 Incorporation and Consequential Matters

- Head 3 Definitions
- Head 4 Way of forming a Guarantee Company
- Head 5 The form of a Guarantee Company's constitution
- Head 6 Provisions as to names of guarantee companies
- Head 7 Power to dispense with "company limited by guarantee" or "cuideachta faoi theorainn ráthaíochta" in name of charitable and other companies
- Head 8 Effect of Constitution
- Head 9 Way in which and extent to which objects of company may be altered
- Head 10 Corporate Capacity of a CLG
- Head 11 Corporate Capacity Not Limited by a CLG's Constitution
- Head 12 Corporate Authority and the Power of Directors to Bind a PLC
- Head 13 Conversion of Existing Guarantee Companies

Chapter 3 Share Capital

- Head 14 Prohibition on issue of shares by a guarantee company
- Head 15 Shares
- Head 16 Holding by subsidiary of shares or [an interest/membership by guarantee] in its holding company



Guarantee Companies

Chapter 4 Corporate Governance

- Head 17 Directors
- Head 18 Disqualification of Directors
- Head 19 Removal of Directors
- Head 20 Audit Committee
- Head 21 Definition of member
- Head 22 Register of Members
- Head 23 Annual General Meeting
- Head 24 Convening of Extraordinary General Meeting on Requisition
- Head 25 Persons Entitled to Notice of General Meetings
- Head 26 Proxies
- Head 27 Votes of Members
- Head 28 Right to demand a poll
- Head 29 Unanimous written resolutions
- Head 30 Registration of and obligation of company to supply copies of, certain resolutions and agreements
- Head 31 Remedy in case of oppression

Chapter 5 Duties of Directors and other Officers

- Head 32 Interpretation Provisions
- Head 33 Duty of Director to disclose his interest in contracts made by the company
- Head 34 Directors' compliance statement and related statement

Chapter 6 Accounts, Audit and Annual Return

Chapter 7 Debentures and Registration of Charges

Chapter 8 Receivers

Chapter 9 Reconstructions

- Head 35 Reconstructions of Guarantee Companies
- Head 36 Merger of Guarantee companies
- Head 37 Division of Guarantee companies

Chapter 10 Examinerships

Chapter 11 Winding-Up

- Head 38 Liability as contributories of past and present members

Chapter 12 Dissolution and Reinstatement

Chapter 13 Compliance, Investigation and Enforcement

Chapter 14 Regulatory and Advisory Bodies

The full text of Part B4 is available on the CLRG website at www.clrg.org

Unlimited Companies

An unlimited company is defined in Head 1 of Part B5 of the Draft Bill to include a public company with or without a share capital, or a private company, with the distinctive feature that it does not have any limit on the liability of its members. This definition is, therefore, a re-enactment of Section 5(2)(c) of the Companies Act 1963.

The effect of Head 3 is that it is possible to have a single-member private unlimited company, whereas a minimum of two members is required to form a public unlimited company. In either case there is no maximum number of members.

An unlimited company may be formed, pursuant to Head 3, by initial registration, by re-registration of an existing company of another type, by the merger of existing unlimited companies, or by the division of an existing unlimited company. The memorandum of association of an unlimited company is required by Head 5(2)(c) to contain an objects clause.

However, Head 9 mitigates the effect of an unlimited company having an objects clause in the context of furthering creditor and shareholder protection, in Head 9(1) and 9(2) respectively. Similarly to the position in respect of a designated activity company and a guarantee company, the directors of the unlimited company can be held to account for causing it to take such action; this will be in the form of an *in personam* action against the directors and not an *in rem* action that would set aside the validity of the *ultra vires* transaction. Head 9(5) reinforces the protection of an innocent third party by providing that a person is not bound to enquire as to whether an activity is *intra vires*.

Upon the commencement of Part B5, all existing private and public unlimited companies will become unlimited companies under this Part.

The provisions of Part A3 Head 11 concerning variation of company capital are disapplied by Head 12 of this Part so that there is no limitation on an unlimited company's ability to vary its capital. Given that the members of an unlimited company have unlimited liability in relation to the debts of the company, it was not considered necessary to include any restriction on variance of capital. Head 13 contains related provisions in respect of reduction of capital, and permits an unlimited company by special resolution to reduce its capital in any way, including by reducing the liability on any of its shares in respect of share capital not paid up, canceling any paid up capital which is lost or unrepresented by available assets, or paying off any paid up share capital which is in excess of the wants of the unlimited company.

Head 37 of Part A3 imposes certain restrictions upon the distribution of profits by a company limited by shares. These restrictions, which are an amended re-enactment of Section 45 of the Companies (Amendment) Act 1983, are compelled by the 2nd EU Company Law Directive. It has been argued that the provisions relating to the distribution of profits are not necessary for unlimited companies and were extended by the 1983 Act to unlimited companies without specific intention. Head 14 of this Part therefore disapplies Head 37 of Part A3 from an unlimited company.

Consistent with the recommendation of the Review Group's First Report that the minimum requirement of two directors should remain for all companies other than the company limited by shares, Head 15 requires an unlimited company to have at least two directors.

Unlimited Companies

Continuing with corporate governance, the effect of Head 16 is to require an unlimited company to hold an annual general meeting, and cannot benefit from the exemption in this regard which is afforded to a company limited by shares under Head 36(3) of Part A4. Similarly, the ability enjoyed by a company limited by shares to make majority written resolutions is not extended to an unlimited company, and so Head 17 disapplies Heads 54 and 55 of Part A4 to unlimited companies and instead re-enacts subsection 141(8) of the Companies Act 1963.

The Review Group decided that an unlimited company should not be able to avail of the audit exemption under Part A6 on Accounts. This will be reflected by an appropriate disapplication under Chapter 6 of Part B5. Also in relation to accounts, it is anticipated that the less onerous filing requirements which unlimited companies enjoy under existing legislation will be maintained and that the fact of whether or not an unlimited company is private or public will impact upon the filing requirements imposed.

All of the provisions regarding the filing of accounts are expected to apply to an unlimited company all of whose members have limited liability. However, an exemption will be provided for an unlimited company which either has one member with unlimited liability, or which has one member who is an individual.

Head 19 deals with the liability as contributories of past and present members. The provisions in this regard are largely similar to the generic Head in Part A11 (Head 86 of that Part), which in turn is modelled on the existing position under Section 207 of the Companies Act 1963. However, some modifications have been made to reflect the distinctive considerations applying to liability in the context of

an unlimited company. Given that Head 86(i)(d) of Part A11 provides that “no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member”, this paragraph has been disapplied here as it is clearly inconsistent with the characteristics of an unlimited company.

The provisions in Head 20, on the payment of debts due by a contributory to the company and the extent to which set-off is allowed, are similar to the generic provisions in Head 90 of Part A11, and these in turn are an amended re-enactment of Section 237 of the Companies Act 1963. An amendment has been made, however, to reflect the Review Group’s recommendation that the power of companies to make directors’ liability unlimited should be deleted from the Companies Acts.

Structure of Part B5 Unlimited Companies

Chapter 1 Preliminary and Definitions

- Head 1 Defined terms
- Head 2 Interpretation of this Part

Chapter 2 Incorporation and Consequential Matters

- Head 3 Way of forming an unlimited company
- Head 4 The form of a the constitution for a private unlimited company
- Head 5 The form of the constitution for a public unlimited company
- Head 6 Effect of registration
- Head 7 Provisions as to names of unlimited companies
- Head 8 Corporate capacity of an unlimited company
- Head 9 Corporate capacity not limited by the constitution of an unlimited company
- Head 10 Transitional Measures

Unlimited Companies

Chapter 3 Share Capital

- Head 11 Allotment of shares
- Head 12 Variation of company capital
- Head 13 Reduction of company capital
- Head 14 Profits available for distribution

Chapter 4 Corporate Governance

- Head 15 Directors
- Head 16 Annual General Meeting
- Head 17 Unanimous written resolutions

Chapter 5 Duties of Directors and other Officers

- Head 18 Director’s compliance statement and related statement

Chapter 6 Accounts, Audit and Annual Return

Chapter 7 Debentures and Registration of Charges

Chapter 8 Receivers

Chapter 9 Reconstructions

Chapter 10 Examinerships

Chapter 11 Winding-Up

- Head 19 Liability as contributories of past and present members
- Head 20 Payment of debts due by contributory to the company and extent to which set-off allowed

Chapter 12 Dissolution and Reinstatement

Chapter 13 Compliance, Investigation and Enforcement

Chapter 14 Regulatory and Advisory Bodies

The full text of Part B5 is available on the CLRG website at www.clrg.org

Winding Up

Part A11 of the Draft Bill contains the provisions on winding up. While it is important to note that the Review Group has not finished its deliberations on this Part, the following is a summary of the proposed changes in the regime for compulsory winding up of companies which are envisaged by Part A11.

In general, the scheme of Part A11 envisages that court initiated windings up would be placed, as far as possible, on the same footing as creditors' voluntary windings up, once the order for winding up had been made. The court's function would be restricted largely to the giving of directions and making of orders in respect of issues arising in the liquidation or the exercise, or proposed exercise, of powers by a liquidator, which function would be performed where the court was requested to do so by the liquidator, a member, creditor, or the Director of Corporate Enforcement (Head 65). The court would also have a residual role in the determination of the basis on which a liquidator's remuneration could be charged, and in fixing of the amount due in respect of such remuneration (Head 78).

Currently, the rule-making function in respect of the winding up of companies either by the court or voluntarily is vested in the Superior Courts Rules Committee with the concurrence of the Minister for Justice, Equality and Law Reform (s. 312, Companies Act 1963). In consequence of the reduction of the role of the court in compulsory liquidations envisaged, it was considered that it would be more logical and appropriate that, save in respect of matters of pleading, practice and procedure in proceedings before a court, this function would be transferred to the Minister for Enterprise, Trade and Employment (Head 4).

The chart below contains a comparison of the current position with that which would arise in the event of Part A11 coming into operation.⁹

Current position	Position under Part A11
<p>1. Security</p> <p>Court determines security, if any, to be entered into by liquidator – s. 228(a). The standard form of security involves the liquidator entering into a bond with the court with two or more sureties for an amount fixed by the Court - Order 74, rule 31. In practice, this amount is fixed by the Examiner of the High Court. The bond covers cases where the liquidator does not account for all moneys received, does not receive moneys through "wilful default", or does not apply the moneys due by him/her as directed by the Court (Form 22, Appendix G, Rules of the Superior Courts).</p>	<p>The requirement to enter into security would be replaced by an obligation on the part of a liquidator to enter into insurance indemnity cover in such amount and on such terms as may from time to time be prescribed by IAASA. The insurance indemnity cover will require to be provided by a mutual fund for the time being recognised by the Supervisory Authority for the purpose, or an insurance company or insurance underwriter authorised to carry on general insurance business within the State.</p> <p style="text-align: right;">– Head 67(2),(3) and (10).</p>

⁹ Reference to sections are to sections in the Companies Act 1963, as amended. References to Order 74 are to Order 74, Rules of the Superior Courts, as amended. References to heads are to heads of Part A11.

Winding Up

Current position	Position under Part A11
	<p>Liquidators would require, apart from compliance with the insurance indemnity aforementioned, to</p> <ul style="list-style-type: none"> • be a member of a prescribed accountancy body, of the Law Society or of such other professional body as IAASA may recognise, with permission to practice from the body concerned, unless prohibited by such body from acting as a liquidator, or • if not a member of one of the bodies aforementioned, have been authorised by IAASA, having applied within 2 years of the operative date, to be appointed as a liquidator on grounds of adequate relevant experience, expert knowledge and fitness to act as a liquidator <p style="text-align: right;">- Head 67(1)</p> <p>A person shall not act as liquidator of a company at a time when he is not qualified under this section for appointment to that office. If, while acting as liquidator of a company, a person ceases to be qualified for appointment they will be required to vacate office and give notice in writing of this.</p> <p style="text-align: right;">- Head 67(4) and (5)</p> <p>Contravention of Head 67(4) or (5) will be an offence.</p> <p style="text-align: right;">– Head 67(7)</p>
<p>2. Accounts</p> <p>Court specifies the periods within which the Official Liquidator is lodge accounts of receipts and payments with the Examiner's Office – Order 74, rule 32 (see also Heading 9 below).</p>	<p>Where the winding up continues for more than 12 months, the liquidator would be required, within 14 days of the first anniversary of the winding up and every anniversary thereafter, to</p> <ul style="list-style-type: none"> (a) summon a meeting of the committee of inspection or (if there is no such committee) the creditors, (b) lay before the meeting an account of the liquidator's acts and dealings and of the



Winding Up

Current position	Position under Part A11
	<p>conduct of the winding up in the preceding year, and</p> <p>(c) within 7 days after such meeting send a copy of the account to the Registrar of Companies.</p> <p>Failure to comply with these requirements will be an offence.</p> <p style="text-align: right;">- Head 111</p>
<p>3. Banking arrangements</p> <p>Liquidator is required to lodge moneys received to a bank account at a specified bank, payments from which are subject to countersignature by the Examiner of the High Court.</p> <p style="text-align: right;">- Order 74, rules 32 and 121</p>	<p>The liquidator would not require to lodge moneys to a bank account approved or subject to countersignature by the Examiner.</p>
<p>4. Claims by creditors</p> <p>The Court fixes the time within which creditors are to prove their debts or claims.</p> <p style="text-align: right;">- s. 241</p>	<p>The liquidator would fix the time within which creditors are to prove their debts or claims. The court would have discretion, on the application of a creditor, on notice to the liquidator, to extend that time.</p> <p style="text-align: right;">- Head 103</p>
<p>The liquidator must investigate the debts and claims sent to him/her, furnish to the Examiner's Office a list of all the debts and claims sent in to him, distinguishing which of these are in his/her opinion properly allowable without further proof (the liquidator must confirm this category by affidavit) and which require proof.</p> <p style="text-align: right;">- Order 74, rule 97</p>	<p>The liquidator would be given power to ascertain the debts and liabilities of the company</p> <p style="text-align: right;">- Head 62(1)(i)</p>
<p>The Examiner conducts the adjudication on claims on the basis of the list supplied by the liquidator.</p> <p style="text-align: right;">- Order 74, rule 98</p>	

Winding Up

Current position	Position under Part A11
<p>5. Contributories</p> <p>The Court is required to settle the list of contributories, unless it dispenses with same as being unnecessary.</p> <p style="text-align: right;">- s. 235</p> <p>The Examiner settles the list of contributories on behalf of the Court on the basis of a list of contributories prepared by the liquidator and verified by the latter on oath. - Order 74, rules 87 and 88</p>	<p>The liquidator would be given power to settle the list of contributories, and to dispense with same as being unnecessary.</p> <p style="text-align: right;">- Head 87</p>
<p>6. Powers exercisable by liquidator generally</p> <p>The following powers are exercisable by the liquidator with the sanction and subject to the control of the Court or committee of inspection:</p> <p>(a) to bring or defend any action or other legal proceeding in the name and on behalf of the company;</p> <p>(b) to carry on the business of the company so far as may be necessary for the beneficial winding up thereof;</p> <p>(c) to appoint a solicitor to assist him in the performance of his duties;</p> <p>(d) to pay any classes of creditors in full;</p> <p>(e) to make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable;</p> <p>(f) to compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person</p>	<p>Head 62 (1) restates and enhances the powers exercisable by a liquidator in a winding up, and removes their exercise from court control or from the requirement, in the case of those powers specified in section 231(1), that court sanction be obtained.</p> <p>The liquidator would be entitled to exercise the powers at (a), (b) and (d) to (f) mentioned in the left-hand column on giving 14 days' notice of intention to do so to the committee of inspection, or if there is no such committee, to all creditors of the company, provided that such notice may be dispensed with by order of the court or by resolution of the committee of inspection or (in the absence of such a committee) the creditors of the company.</p> <p style="text-align: right;">- Head 63(1)</p> <p>Note: The requirement in section 231(1A)(a) (viz. that the liquidator of a company shall not sell by private contract a non-cash asset of the requisite value to a person who is, or who, within three years prior to the date of commencement of the winding-up, has been, an officer of the company unless the liquidator has given at least 14 days'</p>

Winding Up

Current position	Position under Part A11
<p>apprehending liability to the company, and all questions in any way relating to or affecting the assets or winding up of the company, on such terms as may be agreed, and take any security for the discharge of any such call, debt, liability or claim, and give a complete discharge in respect thereof.</p> <p style="text-align: right;">- s. 231(1)</p> <p>The following powers are exercisable by the liquidator without sanction of but subject to the control of the court:</p> <p>(a) to sell the real and personal property and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or company or to sell the same in lots and for the purpose of selling the company's land or any part thereof to carry out such sales by fee farm grant, sub fee farm grant, lease, sublease, or otherwise, and to sell any rent reserved on any such grant or any reversion expectant upon the determination of any such lease;</p> <p>(b) to do all acts and to execute, in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose to use, when necessary, the company's seal;</p> <p>(c) where any contributory has been adjudged bankrupt or has presented a petition for arrangement with his creditors in pursuance of the Bankruptcy Acts, to prove, rank and claim in the bankruptcy or arrangement for any balance against his estate, and to receive dividends in the bankruptcy or arrangement in respect of that balance, as a separate debt due from the bankrupt or arranging debtor, and rateably with the other separate creditors.</p> <p>(d) to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company, with the same effect</p>	<p>notice of intention to do so to all creditors of the company) has not been altered.</p> <p style="text-align: right;">- Head 63(4)</p>

Winding Up

Current position	Position under Part A11
<p>with respect to the liability of the company as if the bill or note had been drawn, accepted, made or endorsed by or on behalf of the company in the course of its business;</p> <p>(e) to raise on the security of the assets of the company any money requisite;</p> <p>(f) to take out in his official name letters of administration to any deceased contributory and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company, and in all such cases the money due shall, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator himself;</p> <p>(g) to give security for costs in any proceedings commenced by the company or by him in the name of the company;</p> <p>(h) to appoint an agent to do any business which the liquidator is unable to do himself;</p> <p>(i) to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets.</p> <p style="text-align: right;">- s. 231(2)</p> <p>7. Liquidator's remuneration</p> <p>The Court fixes the remuneration of the liquidator, whether by way of percentage or otherwise.</p> <p style="text-align: right;">- s. 228(d)</p> <p>The Court may direct that the Examiner or the Master of the High Court enquire into and report as to the remuneration payable to the Liquidator.</p> <p style="text-align: right;">- Order 74, rule 46</p>	<p>The terms on which the liquidator is entitled to receive remuneration (whether by way of percentage, by reference to time expended, or otherwise) would, as soon as practicable after appointment of the liquidator,</p> <ul style="list-style-type: none"> • be agreed with the committee of inspection or • where there is no such committee or the committee and the liquidator fail to agree, be approved by resolution of the creditors or

Winding Up

Current position	Position under Part A11
	<ul style="list-style-type: none"> • where the creditors fail to give their approval, be fixed by the Court. <p style="text-align: right;">- Head 78(2) and (4)</p> <p>Provided the terms of remuneration have been set in the manner aforementioned, the amount to be paid, whether on account or in full discharge of the liquidator's remuneration, would be agreed with the committee of inspection or, where there is no such committee or the committee and the liquidator fail to agree, be approved by resolution of the creditors or, where the creditors fail to give their approval, be fixed by the Court or the Taxing Master.</p> <p style="text-align: right;">- Head 78(6)</p> <p>Where the terms of or the amount payable in respect of remuneration have been agreed by the committee of inspection or approved by resolution of the creditors, any creditor or member may, not later than 28 days thereafter, apply to the Court to review and fix such terms or amount. The Court may direct the Taxing Master to fix the amount.</p> <p style="text-align: right;">- Head 78(9) and (10)</p> <p>In the approval, fixing or review of the terms of or the amount payable in respect of remuneration, the following criteria will require to be taken into account:</p> <ol style="list-style-type: none"> (a) the time properly required to be given by him as liquidator and by his assistants in attending to the company's affairs; (b) the complexity (or otherwise) of the case; (c) any respects in which, in connection with the company's affairs, there falls on the liquidator any responsibility of an exceptional kind or degree;

Winding Up

Current position	Position under Part A11
	<p>(d) the effectiveness with which the liquidator appears to be carrying out, or to have carried out, his duties; and</p> <p>(e) the value and nature of the property with which he has to deal.</p> <p><i>Report of Mr Justice Ferris' Working Party on the Remuneration of Office-holders in the UK (http://www.dca.gov.uk/civil/ferrisfr.htm).</i></p>
<p>8. Unclaimed dividends and Companies Liquidation Account</p> <p>At present, the provision establishing the Companies Liquidation Account – s.307 - is confined in its application to unclaimed dividends admissible to proof and unapplied or undistributable balances arising in voluntary liquidations. In practice, liquidators in compulsory windings up have been directed to lodge such amounts or balances to that account. The Companies Liquidation Account is under the control of the High Court</p> <p style="text-align: right;">- s. 307(2)</p>	<p>The statutory remit of the Companies Liquidation Account will extend to compulsory liquidations, the Account will no longer require to be maintained at the bank of Ireland and the Account will be under the control of the Minister for Enterprise, Trade and Employment.</p> <p style="text-align: right;">- Head 58(1) and (2)</p>
<p>9. Termination of winding up</p> <p>Once the Examiner has passed the liquidator's final account, the liquidator applies to the Court for directions as to how the balance due is to be applied. When the application of that balance as directed has been vouched to the Examiner, the Examiner issues a certificate confirming vouching of the disposal of the balance as directed and that the affairs of the company have been completely wound up. If the company has not already been dissolved, the liquidator is required, immediately after the certificate becomes binding (i.e. after it has been transmitted to the Central Office), to apply to</p>	<p>The Court of its own motion may direct the liquidator to apply to the Court for the dissolution of the company whereupon the Court, if satisfied that the affairs of the company have been completely wound up, would make an order that the company be dissolved from the date of the order.</p> <p style="text-align: right;">Head 118(2)</p> <p>An office copy of the order must be sent by the liquidator to the registrar of companies within 21 days of the making of the order.</p> <p style="text-align: right;">- Head 118(3)</p>

Winding Up

Current position	Position under Part A11
<p>the Court for an order that the company be dissolved.</p> <p style="text-align: right;">- Order 74, rule 137</p> <p>The Court, on the making of the application last mentioned, makes an order that the company be dissolved from the date of the order, and the company is thereupon dissolved.</p> <p style="text-align: right;">- s. 249(1)</p> <p>An office copy of the order must be sent by the liquidator to the registrar of companies for registration within 21 days of the making of the order.</p> <p style="text-align: right;">- s. 249(2)</p>	<p>If the Court has not directed that the application last mentioned be made, as soon as the affairs of the company have been fully wound up, the liquidator would be required to call a general meeting of the company and a meeting of the creditors, on not less than 28 days written notice, lay before those meetings an account of the winding up showing how the winding up has been conducted and the property of the company disposed of, and give any explanation of the account.</p> <p style="text-align: right;">- Head 120(1) and (2)</p> <p>Within 7 days of the date of the last of the two meetings – if they are not held on the same date – the liquidator would be required to send to the registrar of companies a copy of the account and return of the holding of the meetings for registration forthwith. The company would be deemed to be dissolved at the expiry of 90 days from registration.</p> <p style="text-align: right;">- Head 120(3) and (4)</p> <p>The Court may on application by the liquidator or other interested person, defer dissolution of the company for such period as it thinks fit.</p> <p style="text-align: right;">- Head 120(5)</p>

The current draft text of Part A11 is available on the CLRG website at www.clrg.org

Directors' Compliance Statement

Background to review of the Directors' Compliance Statement

On 21 April 2005, the Minister for Trade and Commerce, Michael Ahern T.D., referred the issue of the Directors' Compliance Statement (DCS) required by Section 45 of the Companies (Auditing and Accounting) Act 2003 (45/2003) to the Company Law Review Group for review. The CLRG was asked for its views on the proportionality, efficacy and appropriateness of the DCS as set out in 45/2003. Referral of this provision was prompted by numerous representations against the DCS by IBEC, the funds industry, and others. Opposition to the DCS was founded on the perceived additional costs which it was expected to impose on the business community, on the degree of prescription required to complete the DCS, and on the potential adverse effects on competitiveness, investment and job creation in Ireland, particularly in terms of foreign direct investment. Indeed, the vast majority of the submissions which the CLRG received in the course of the review opposed the DCS in part or in whole. These submissions are considered in detail in the CLRG Report on the Directors' Compliance Statement¹⁰.

Risk Analysis

When charged with the task of reviewing 45/2003 the CLRG worked intensively over a fourteen week period on the DCS moving through the stages of initial exchange of views, risk analysis, regulatory impact analysis, impact assessment, conclusions and recommendations, and reported to the Minister on 28 July 2005. The Review Group focused on issues raised by the scope, content, degree of prescription, verification and timing of the DCS as set out in 45/2003. The Review Group carried out a risk analysis of the likely outcomes of:

- leaving 45/2003 as is;
- repealing 45/2003 in its entirety; or
- mitigating the obligations imposed by 45/2003¹¹.

Regulatory Impact Analysis

The CLRG carried out a Regulatory Impact Analysis (RIA) on 45/2003 and on alternatives to 45/2003, having regard in particular to the many improvements in corporate governance provisions and enforcement mechanisms which had taken place since the Review Group on Auditing first proposed a DCS in July 2000¹². The CLRG found that while a number of hard-to-quantify benefits in terms of improved compliance by companies with their legal obligations might result from commencement of 45/2003 these were greatly outweighed by seriously negative and disproportionate outcomes as regards costs and national competitiveness. Chief among these likely negative impacts were the following:



¹⁰. The Report is available on the CLRG website at www.clrg.org/1streport/directors.asp

¹¹. These outcomes are detailed in Chapter 5 of the CLRG Report on the DCS.

¹². These improvements are documented comprehensively in Chapter 2 of the CLRG Report. The RIA is dealt with in Chapter 9 of the Report and the conclusions and recommendations drawn from the RIA are set out in Chapter 10.

Directors' Compliance Statement

- Compliance with Section 45 would give rise to additional costs over and above the existing expenditure of companies on compliance issues. This was because the highly prescriptive nature of the Section was seen to require additional certification procedures, documentation of policies, and extensive and formal ongoing monitoring;
- Taking the minimum cost estimates developed for the additional work needed for compliance with 45/2003, on the basis of material collated by the CLRG and analysed by Goodbody Economic Consultants, the estimated 2,490 companies affected would incur a total of €224m in set-up costs and €100m p.a. in ongoing costs.
- With regard to national competitiveness the DCS, as currently drafted in 45/2003, would undoubtedly lead to an increased cost base for those Irish companies within its scope – Public Limited Companies (PLCs), whether listed or unlisted, and large private companies which meet the monetary requirements for application of the provision.
- From a national competitiveness perspective there were considerable concerns about the opportunity costs of the DCS. Because 45/2003 is uniquely stringent and prescriptive vis à vis competitor jurisdictions, potential foreign direct investment in Ireland might go elsewhere and indigenous companies might re-locate to another jurisdiction to avail of a less onerous compliance verification regime.

Conclusions of Report

The Review Group concluded¹³, on the basis of its risk and cost analyses of 45/2003, that it was not feasible to pursue the option of implementing 45/2003 as currently drafted. However, on balance, the Review Group considered that there is merit in the concept of a compliance statement which is confined to tax law, indictable offences in company law, and places an obligation on the directors of companies within the scope of the DCS to acknowledge their responsibilities with regard to these codes, requires the directors to adopt a compliance policy statement and have arrangements in place for securing compliance, subject to a 'comply or explain' approach.

Main differences between 45/2003 and the proposed new DCS

The main differences between the proposed new model of the DCS which was recommended by the CLRG and the existing 45/2003 are:

- (a) the omission of the requirement that the DCS should have regard to relevant enactments other than company law and tax law;
- (b) the removal of the very prescriptive nature of the requirements for company compliance statements, while still requiring such a statement;
- (c) the removal of the requirement that a company's auditors must specifically give their opinion on the reasonableness or otherwise of the proposed revised Annual Statement on Compliance in Directors' Reports; and
- (d) the adjustment upwards of the annual balance sheet and turnover levels above which thresholds the DCS applies to private companies. The thresholds are now proposed to be set at €12.5m and €25m, respectively, as compared with thresholds of €7.6 and €15.2 in 45/2003.

¹³ Chapter 10 of the CLRG Report sets out in detail the conclusions of the review.

Directors' Compliance Statement

It was clear from the impact analysis of 45/2003 in the Report of the Review Group that increased costs were created (a) where there was a lack of clarity as to the compliance obligations required (e.g. with regard to "other relevant enactments" or auditor review) and (b) when there was undue specification as to the procedures to follow which might duplicate existing control procedures or ignore actual standard business practice. The changes from 45/2003 address those concerns.

It is expected that the new model of DCS will be given effect in the Company Law Consolidation and Reform Bill. Thus the DCS in its new form will be enacted as an integral part of that Bill and 45/2003 will not be commenced.

The new model DCS, given the title "Section X", is set out at the end of this chapter, together with 45/2003.

Minority reservations

Three members of the CLRG - the ODCE, ICTU, and the Revenue Commissioners - dissented from the recommendation of the CLRG on the new DCS¹⁴.

Reservations notwithstanding, the CLRG proposal on the DCS had the support of sixteen members of the CLRG, representing both business and regulatory/administrative interests (including the Department of Enterprise, Trade and Employment, the Registrar of Companies and the Financial Regulator). The proposal is a genuine compromise, and represents the outcome of a genuine effort to find a solution which was in the overall national interest.

¹⁴ Their reservations are set out in full in Appendices B, A and C respectively of the CLRG Report. In addition, the text of the Report is annotated in a small number of places where those bodies dissented from the agreed text.

¹⁵ The Forum's statement can be seen at: http://europa.eu.int/comm/internal_market/company/docs/ecgforum/ecgf-comply-explain_en.pdf
The Commission press release and further background information can be seen at: <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/06/269&format>

Government Decision

The Government, at its meeting held on 29 November 2005, agreed to take forward the proposal for a new model of DCS as proposed by the CLRG on foot of its intensive risk and regulatory impact analysis of 45/2003, in the context of the Company Law Consolidation and Reform Bill.

European Corporate Governance Forum "Comply or Explain" Principle

It is also useful to note the public statement made by the European Corporate Governance Forum in late February 2006¹⁵, which clarified the "comply or explain" principle. This concept is central to the revised model of DCS as proposed by the CLRG.

The Forum's public statement explains:

"The 'comply or explain' principle has become a feature of Europe's approach to corporate governance. National corporate governance codes lay down rules or recommendations which are not of mandatory application, but companies must either comply with them or explain publicly why they are not complying with some of their provisions.

The Forum strongly and unanimously supports this approach, which is best suited to take into account the variety of situations of individual companies, and fits well with the differences between national legal and governance frameworks. The Forum believes that, when it is effectively implemented, this is a better and more efficient approach than detailed regulation.

Directors' Compliance Statement

The experience of countries which have implemented this approach for several years shows that it does lead to a movement of convergence towards better governance practices.”

On the specific issue of corporate governance statements, the Forum continues:

“[T]he Forum believes the corporate governance statement which explains the areas of compliance as well as the reasons for non-compliance, is the responsibility of the company's board(s), for review and discussion with the shareholders.

It therefore inclines to the view that regulatory authorities should limit their role to checking the existence of the statement, and to reacting to blatant misrepresentation of the facts. They should not try and second-guess the judgement of the board(s) or the value of its/their explanations. This is a matter for the company's shareholders.”

It can therefore be seen that the CLRG's revised model for the DCS, by providing a more flexible approach to regulation in this context, is consistent with the most up-to-date and progressive thinking on corporate governance at EU level.

Section 45 of the Companies (Auditing and Accounting) Act 2003

45.—The Act of 1990 is amended by inserting the following in Part X:

205E.—(1) In this section—

‘amount of turnover’ and ‘balance sheet total’ have the same meanings as in section 8 of Companies (Amendment) Act 1986;

‘relevant obligations’, in relation to a company, means the company's obligations under—

- (a) the Companies Acts,
- (b) tax law, and
- (c) any other enactments that provide a legal framework within which the company operates and that may materially affect the company's financial statements;

‘tax law’ means—

- (a) the Customs Acts,
- (b) the statutes relating to the duties of excise and to the management of those duties,
- (c) the Tax Acts,
- (d) the Capital Gains Tax Acts,
- (e) the Value-Added Tax Act 1972 and the enactments amending or extending that Act,
- (f) the Capital Acquisitions Tax Act 1976 and the enactments amending or extending that Act,
- (g) the statutes relating to stamp duty and to the management of that duty, and
- (h) any instruments made under an enactment referred to in any of paragraphs (a) to (g) or made under any other enactment and relating to tax.

(2) This section applies to—

- (a) a public limited company (whether listed or unlisted), and
- (b) a private company limited by shares, but it does not apply to a company referred to in paragraph (a) or (b) that is of a class exempted under section 48(1)(j) of the Act of 2003 from this section or to a company referred to in paragraph (b) while that company qualifies for an exemption under subsection (g).¹⁶

(3) The directors of a company to which this section applies shall, as soon as possible after the commencement of this section or after this section becomes applicable to the company, prepare or cause to be prepared a directors' compliance statement containing the following information concerning the company:

- (a) its policies respecting compliance with its relevant obligations;
- (b) its internal financial and other procedures for securing compliance with its relevant obligations;
- (c) its arrangements for implementing and reviewing the effectiveness of the policies and procedures referred to in paragraphs (a) and (b).

Section 45 of the Companies (Auditing and Accounting) Act 2003

- (4) The directors' compliance statement (including any revisions) must—
- be in writing,
 - be submitted for approval by the board of directors,
 - at least once in every 3 year period following its approval by the board, be reviewed and, if necessary, revised by the directors, and
 - be included in the directors' report under section 158 of the Principal Act.
- (5) The directors of a company to which this section applies shall also include in their report under section 158 of the Principal Act a statement—
- acknowledging that they are responsible for securing the company's compliance with its relevant obligations,
 - confirming that the company has internal financial and other procedures in place that are designed to secure compliance with its relevant obligations, and, if this is not the case, specifying the reasons, and
 - confirming that the directors have reviewed the effectiveness of the procedures referred to in paragraph (b) during the financial year to which the report relates, and, if this is not the case, specifying the reasons.
- (6) In addition, the directors of a company to which this section applies shall in the statement required under subsection (5)—
- specify whether, based on the procedures referred to in that subsection and their review of those procedures, they are of the opinion that they used all reasonable endeavours to secure the company's compliance with its relevant obligations in the financial year to which the annual report relates, and
 - if they are not of that opinion, specify the reasons.
- (7) For the purposes of this section, a company's internal financial and other procedures are considered to be designed to secure compliance with its relevant obligations and to be effective for that purpose if they provide a reasonable assurance of compliance in all material respects with those obligations.
- (8) Where the directors of a company to which this section applies fail—
- to prepare, or to cause to be prepared, a directors' compliance statement as required by subsections (3) and (4)(a) to (c),
 - to include a directors' compliance statement in the directors' report as required by subsection (4)(d), or
 - to comply with subsections (5) and (6), each director to whom the failure is attributable is guilty of an offence.

Section 45 of the Companies (Auditing and Accounting) Act 2003

- (9) A private company limited by shares qualifies for an exemption from this section in respect of any financial year of the company if—
- its balance sheet total for the year does not exceed—
 - €7,618,428, or
 - if an amount is prescribed under section 48(1)(l) of the Act of 2003 for the purpose of this provision, the prescribed amount, and
 - the amount of its turnover for the year does not exceed—
 - €15,236,856, or
 - if an amount is prescribed under section 48(1)(l) of the Act of 2003 for the purpose of this provision, the prescribed amount.

205F.—(1) The auditor of a company to which section 205E applies shall undertake an annual statement and review of—

- the directors' compliance statement under subsections (3) and (4) of that section, and
- the directors' statement under subsections (5) and (6) of that section, to determine whether, in the auditor's opinion, each statement is fair and reasonable having regard to information obtained by the auditor, or by an affiliate of the auditor within the meaning of section 205D, in the course of and by virtue of having carried out audit work, audit-related work or non-audit work for the company.

(2) The auditor shall—

- include in the auditor's report appended to the company's annual accounts a report on, and the conclusions of, the review undertaken under subsection (1), and
- where any statement reviewed under subsection (1) is not, in the auditor's opinion, fair and reasonable—
 - make a report to that effect to the directors, and
 - include that report in the auditor's report appended to the annual accounts.

(3) Where, in the auditor's opinion, the directors have failed—

- to prepare, or to cause to be prepared, a directors' compliance statement as required by section 205E(3) and (4)(a) to (c),
- to include a directors' compliance statement in the directors' report as required by section 205E(4)(d), or
- to comply with section 205E(5) and (6), the auditor shall report that opinion and the reasons for forming that opinion to the Director of Corporate Enforcement.

(4) Section 194(6) applies, with the necessary modifications, in relation to an auditor's compliance with an obligation imposed on him by or under this section as it applies in relation to an obligation imposed by or under section 194.

(5) A person who contravenes this section is guilty of an offence.

Revised working of Directors' Compliance Statement proposed by CLRG

Section X.—(1) In this section—

'amount of turnover' and 'balance sheet total' have the same meanings as in section 8 of Companies (Amendment) Act 1986;

'relevant obligations', in relation to a company, means the company's obligations under—

- (a) the Companies Acts, where the failure to comply with any such obligation is an indictable offence under the Companies Acts, and
- (b) tax law,

'tax law' means—

- (a) the Customs Acts,
- (b) the statutes relating to the duties of excise and to the management of those duties,
- (c) the Tax Acts,
- (d) the Capital Gains Tax Acts,
- (e) the Value-Added Tax Act 1972 and the enactments amending or extending that Act,
- (f) the Capital Acquisitions Tax Act 1976 and the enactments amending or extending that Act,
- (g) the statutes relating to stamp duty and to the management of that duty, and
- (h) any instruments made under an enactment referred to in any of paragraphs (a) to (g) or made under any other enactment and relating to tax.

(2) This section applies to—

- (a) a public limited company (whether listed or unlisted), and
- (b) a private company limited by shares, but it does not apply to a company referred to in paragraph (a) or (b) that is of a class exempted under section 48(1)(j) of the Act of 2003 from this section or to a company referred to in paragraph (b) while that company qualifies for an exemption under subsection (6).

(3) The directors of a company to which this section applies shall also include in their report under section 158 of the Principal Act a statement—

- (a) acknowledging that they are responsible for securing the company's compliance with its relevant obligations, and
- (b) confirming that the company has in place a compliance policy statement that is, in the opinion of the directors, appropriate for the company; and, if this is not the case, specifying the reasons, and
- (c) confirming that the company has in place, appropriate arrangements or structures that are, in the opinion of the directors, designed to secure material compliance with its relevant obligations, which arrangements or structures may (at the discretion of the directors) include the company's reliance upon internal and or external advisors who appear to the directors to have the requisite knowledge and experience to advise the company on compliance with its relevant obligations); and, if this is not the case, specifying the reasons, and

Revised working of Directors' Compliance Statement proposed by CLRG

(d) confirming that the company's arrangements or structures referred to in paragraph (c), have been reviewed during the financial year to which the report relates, and, if this is not the case, specifying the reasons.

(4) For the purposes of this section, a company's arrangements or structures are considered to be designed to secure material compliance with its relevant obligations if they provide a reasonable assurance of compliance in all material respects with those obligations.

(5) Where the directors of a company to which this section applies fail to comply with subsection (3), each director to whom the failure is attributable is guilty of an offence.

(6) A private company limited by shares qualifies for an exemption from this section in respect of any financial year of the company if, either—

(a) its balance sheet total for the year does not exceed—

(i) €12,500,000, or

(ii) if an amount is prescribed under section 48(1)(l) of the Act of 2003 for the purpose of this provision, the prescribed amount,

or, in the alternative to the provisions in (a),

(b) the amount of its turnover for the year does not exceed—

(i) €25,000,000, or

(ii) if an amount is prescribed under section 48(1)(l) of the Act of 2003 for the purpose of this provision, the prescribed amount.



EU Developments

EU Company Law Legislation implemented in Ireland

Prospectus (Directive 2003/71/EC) Regulations 2005 (SI No. 324 of 2005)

These Regulations, along with Part 5 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005, transposed EU Directive 2003/71/EC and the implementing Commission Regulation 809/2004 which together set down new rules for the drawing up, approval and distribution of prospectuses when securities are offered to the public or admitted to trading on a regulated market. A prospectus is a disclosure document containing all the necessary information to enable investors to make an accurate evaluation of the financial position and prospects of the issuer and of the rights derived from the securities being offered. The new legislation took effect on 1 July 2005 and updated and upgraded earlier requirements in this area.

The primary objective of the new legislation is to enhance investor protection through the production of high quality prospectuses and to improve the efficiency of raising capital by issuers through the issue of a single approved prospectus, which will be valid for use across the EU.

The CLRG oversaw a tender process in early 2005 pursuant to which a leading law firm was engaged on a consultancy basis to prepare the Draft Prospectus Regulations. The consultancy project was completed on time and within budget, and the Regulations were duly signed into law by the implementation date of 1 July 2005.

Market Abuse (Directive 2003/6/EC) Regulations 2005

These Regulations along with Part 4 of Investment Funds, Companies and Miscellaneous Provisions Act 2005 transposed the Market Abuse Directive (MAD) which provides for the prevention, detection, investigation and sanctioning of insider dealing and market manipulation. The MAD consists of four EU Directives - the principal 'framework' Directive 2003/6/EC on insider dealing and market manipulation (Market Abuse) and detailed implementing Directives, 2003/124/EC, 2003/125/EC and 2004/72/EC. (Another related instrument, EU Regulation 2273/2003, which has direct application, implements Directive 2003/6/EEC as regards exemption for buy-back programmes and stabilisation of financial instruments.)

The new legislation applies to any financial instrument admitted to trading on a regulated market (or where a request for admission to trading has been made). It introduced a new offence in Irish law, namely, market manipulation.

The new legislation largely replaces Part V of the Companies Act 1990, which hitherto provided for insider dealing and the Companies (Amendment) Act 1999 which provided for stabilising activity in relation to the issue or sale of securities.

Key features common to the new Prospectus and Market Abuse Legislation

The Financial Regulator (formerly Irish Financial Services Regulatory Authority (IFSRA) has been designated as the competent authority for carrying out the obligations provided for in the legislation in each case.

EU Developments

The legislation in each case provide for administrative sanctions, in addition to criminal and civil sanctions. The earlier legislation was limited to criminal and civil sanctions only.

Directives in the process of being transposed

Directive of the European Parliament and of the Council of 21 April 2004 on takeover bids

The Directive sets out to establish minimum guidelines for the conduct of takeover bids involving the securities of companies where all or some of those securities are admitted to trading on a regulated market. Given the differences existing between legal systems in the Member States, the European Council decided to limit this Directive to a framework of certain common principles and a limited number of general requirements which Member States will be required to respect through detailed implementing rules.

The Directive is viewed as being an essential step towards the objective of fully integrating European capital markets and must be transposed in Member States not later than 20 May 2006.

Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC

The aim of the Directive is to upgrade the information available to investors, thus helping them to allocate their funds on the basis of a more informed assessment. It seeks to ensure that investors receive interim management statements from those share issuers who do not publish quarterly reports, and half yearly financial reports from issuers of shares or debt securities. In addition, all securities issuers will have to provide annual financial reports within four months after the end of the financial year. The Directive will also improve dissemination of a range of information on issuers,

in particular concerning changes in major shareholdings.

The Directive completes a package of Financial Services Action Plan measures adopted over the last two years (the International Accounting Standards Regulation, the Market Abuse Directive, the Prospectus Directive) to establish a common financial disclosure regime across the EU for issuers of listed securities. It is due to be implemented not later than 20 January 2007.

Recommendation on Remuneration of Directors and on the role of Non-Executive Independent Directors

The Commission's Action Plan to modernise company law and enhance corporate governance in the EU contains a wide range of initiatives, which the Commission are rolling out over the short, medium and long term. One of the short-term measures on the corporate governance side, which has already been adopted, relates to the remuneration of directors and the role of non-executive directors in the case of listed companies.

On 6 October 2004 the European Commission adopted a Recommendation on directors' remuneration. It recommends that Member States should ensure listed companies disclose their policy on directors' remuneration and tell shareholders how much individual directors are earning and in what form, and ensure shareholders are given adequate control over these matters and over share-based remuneration schemes.

On 6 October 2004 the European Commission also adopted a Recommendation on the role of independent non-executive directors on listed companies' boards. The Recommendation concentrates on the role of non-executive or supervisory directors in key areas where executive or

EU Developments

managing directors may have conflicts of interest. It includes minimum standards for the qualifications, commitment and independence of non-executive or supervisory directors.

Directives on the horizon and being negotiated

Proposal to simplify the formation, maintenance and alteration of companies' capital

On 21 September 2004, the European Commission presented a proposal for a Directive to make it easier for public limited liability companies to take certain measures affecting the size, structure and ownership of their capital. The proposal would amend the parts of the 1976 Second Company Law Directive covering the formation, maintenance and alteration of capital. Negotiations on an agreement between the Council and the European Parliament are at a very advanced stage in relation to this proposal.

Proposal for a Directive of the European Parliament and of the Council on the exercise of voting rights by shareholders of companies having their registered office in a Member State and whose shares are admitted to trading on a regulated market and amending Directive 2004/109/EC

This proposal, which arises from the European Commission's "Action Plan on Modernising Company Law and Enhancing Corporate Governance in the European Union", is for a minimum harmonisation Directive. It seeks to achieve effective simplification of the cross-border voting process and reduction in the disparities between Member States and focuses on selected rights of shareholders in the general meeting. It introduces minimum standards to ensure that company shareholders have a timely access to complete information in relation to general meetings of the company and have simplified ways of voting without attending the general meeting. Member States are left free to maintain or

introduce provisions that are more favourable to shareholders.

Appointment of CLRG Chairman to European Commission Advisory Expert Group on Corporate Governance and Company Law

The European Commission, in a decision made on 28 April 2005¹⁷, established a group of non-governmental experts on corporate governance and company law. The role of the Group is to provide technical advice to the Commission on initiatives in the field of corporate governance and company law at the Commission's request, and the Chairman of the Group may also suggest that the Commission consults the Group on any related matter. The Chairman of the CLRG, Dr. Thomas B. Courtney, was appointed as a member of Group.

Funds and Financial Services Developments

Investment Funds, Companies and Miscellaneous Provisions Act 2005 (No.12 of 2005)

The Investment Funds, Companies and Miscellaneous Provisions Act 2005 (enacted on 29 June 2005) made a number of changes to the existing law on investment funds, with a view to providing the greatest flexibility to the Funds Industry while at the same time keeping appropriate controls in place. It provided for the introduction of a new type of investment fund vehicle - the non-UCITS (Undertakings for Collective Investment in Transferable Securities) Common Contractual Fund (CCF) and it also provided for the introduction of cross investment and segregated liability for investment funds.

A number of other changes were made to general company law to remove existing anomalies and pave the way for smooth transposition of EU Directives on Market Abuse and Prospectuses. In addition, some minor amendments to Consumer Law were made mostly to increase the level of maximum fines that can be imposed on parties found guilty of breaches of specific consumer legislation and an immediate requirement of the co-operative sector was answered by the provision of increases in certain financial limits relating to co-operatives. Amendments were also made to the Takeover Panel Act and the Competition Act.

In summary, therefore, the Act provided for:

- (1) the introduction of a Non-UCITS contract fund structure i.e. the Common Contractual Fund (CCF) structure;
- (2) the amendment of the Companies Act 1990 to provide for the introduction of segregated liability and cross investments for investment funds;
- (3) the amendment of the Companies Acts to enable the transposition of the EU relating to Market Abuse
- (4) the amendment of the Companies Acts to enable the transposition of the EU Prospectus Directive;
- (5) other miscellaneous amendments to the Companies Acts to remove anomalies and make other changes that were considered needed to be made;
- (6) the amendment of certain pieces of consumer protection legislation largely to increase the maximum fines that can be imposed on conviction;
- (7) the amendment of the Industrial and Provident Societies Act 1893 to allow an increase in certain financial limits;
- (8) the amendment of the Takeover Panel Act 1997 regarding its scope; and
- (9) the amendment of the Competition Act 2002 concerning retention of evidence seized by the Authority.

Funds and Financial Services Developments

As regards the provisions relating to the introduction of a Non-UCITS contract fund structure i.e. the Common Contractual Fund (CCF) structure, the Act provided the legislative framework for an Irish authorised and regulated investment fund structure which allows for the pooling of assets by institutional investors. For example, many multinational companies operate pension schemes in a number of different jurisdictions for the benefit of employees in those jurisdictions. When these local pension funds are centralised/pooled a number of cost savings are achieved through economies of scale. These savings include a reduction of management fees, administration costs and custodian fees. In addition, the pooling of assets allows smaller individual funds to diversify their risk by using a larger number of investment managers than would be possible if they were to operate on a stand-alone basis.

As already mentioned, the Act also amended the Companies Act 1990 to provide for the introduction of segregated liability and cross investment for investment funds. Ideally, an investor who invests in a particular sub-fund should be in the same position as if that sub-fund were itself a limited liability company. The investor should be subject only to investment risks and liabilities incurred in the pursuance of the investment strategy attributable to the sub-fund in which it has chosen to invest and should not be exposed to potential liability as a result of activities in other sub-funds. The legislation also facilitates investment by one sub-fund of an umbrella fund into another sub-fund of the same umbrella. This had been permitted in investment funds which were structured as unit trusts but was not possible in investment companies because the legislation provided that shares which are purchased by an investment company must be cancelled. This meant that an

investment company couldn't purchase shares in itself and hold these for the benefit of the investors in a particular sub-fund. The 2005 Act removed this prohibition.

The provisions in the Companies Acts relating to Market Abuse were amended to facilitate the implementation of the EU Directive on Market Abuse and related Instruments. Most of the transposition was done by Regulation but it was necessary to retain indictable criminal sanctions for breach of the Market Abuse legislation and this could only be done in primary law.

Provisions of the Companies Acts dealing with Offers to the Public were amended to facilitate the transposition of the EU Directive dealing with Prospectuses to be published when securities are listed or offered to the public. The new prospectus provisions offers the opportunity to benefit from passport – once approved by a national competent authority, the prospectus can be used in the other Member States. Another main feature of the legislation is that offers of securities that are excluded from the Prospectus Directive are not subject to national prospectus rules although they will be required to contain a clear warning that such offers are not prepared pursuant to the Prospectus Directive and have not been reviewed prior to issue by any regulatory authority.

The Act made other miscellaneous amendments to the Companies Acts to remove anomalies, rectify incomplete or incorrect cross references in existing law and facilitate operators using electronic technology.

Funds and Financial Services Developments

The Act also amended certain pieces of consumer protection legislation largely to increase the maximum fines that can be imposed on conviction.

The amendment of the Industrial and Provident Societies Act 1893 allowed an increase in the maximum amount which a member of a society may have by way of interest in the shares of a society (including co-operatives) to €150,000 or an amount equal to 1 per cent of the total assets of the society, whichever is the greater. The amounts which may be distributed by a society by way of testamentary nomination or on intestacy were raised to €15,000 and €10,000 respectively.

The amendment to the Irish Takeover Panel Act 1997 was designed to exclude issuers of non-voting debt instruments from the remit of the Takeover Panel, if those instruments are listed on the Irish Stock Exchange.

The amendment to the Competition Act 2002 related to retention of evidence by the Authority. It provided that any books, documents or records which are seized or obtained by the Authority could be retained for a period of 6 months, or such longer period as may be permitted by a judge of the District Court. It further provided that if, within that period, proceedings had been commenced (to which those books, documents or records were relevant) they could be retained until the conclusion of those proceedings.

Further details of changes made by the Investment Funds, Companies and Miscellaneous Provisions Act 2005 will be contained in the Companies Report 2005 which will be published on the website of the Department of Enterprise, Trade and Employment (www.entemp.ie).

Collective Investment Schemes Consolidation Bill

Purpose of Bill

The purpose of the Collective Investment Schemes Consolidation Bill is to consolidate and streamline all the legislative provisions relating to collective investment schemes (CIS). Both the first and the second reports of the CLRG recommended that CIS legislation should be decoupled from mainstream company law and consolidated in one Act.

The relevant legislation includes:

- Part XIII Companies Act 1990 (as amended)
- Unit Trusts Act 1990 (as amended)
- Investment Limited Partnerships Act 1994
- Part 2 Investment Funds Companies and Miscellaneous Provisions Act 2005
- UCITS Regulations 2003 (as amended)

Present position

Initial consultation is currently being carried out with the funds industry and with the Financial Regulator regarding the proposed Bill. Following this initial consultation process, an RIA will be carried out in accordance with the Government Decision of 21 June 2005.

Timeframe

The timeframe for the Bill will be informed by the consultation process. It is anticipated that the Draft Heads of the Bill will be submitted to Government for approval in December 2006.

Appendix 1

Part 7, Company Law Enforcement Act 2001

Company Law Review Group

Section 67 Establishment of Company Law Review Group

There is hereby established a body to be known as the Company Law Review Group.

Section 68 Functions of the Review Group

(1) The Review Group shall monitor, review and advise the Minister on matters concerning—

- (a) The implementation of the Companies Acts,
- (b) The amendment of the Companies Acts,
- (c) The consolidation of the Companies Acts,
- (d) The introduction of new legislation relating to the operation of companies and commercial practices in Ireland,
- (e) The Rules of the Superior Courts and case law judgements insofar as they relate to the Companies Acts,
- (f) The approach to issues arising from the State's membership of the European Union, insofar as they affect the operation of the Companies Acts,
- (g) International developments in company law, insofar as they may provide lessons for improved State practice, and
- (h) Other related matters or issues, including issues submitted by the Minister to the Review Group for consideration.

(2) In advising the Minister the Review Group shall seek to promote enterprise, facilitate commerce, simplify the operation of the Companies Acts, enhance corporate governance and encourage commercial probity.

Section 69 Membership of Review Group

(1) The Review Group shall consist of such and so many persons as the Minister from time to time appoints to be members of the Review Group

(2) The Minister shall from time to time appoint a member of the Review Group to be its chairperson.

(3) Members of the Review Group shall be paid such remuneration and allowances for expenses as the Minister, with the consent of the Minister for Finance, may from time to time determine.

(4) A member of the Review Group may at any time resign his or her membership of the Review Group by letter addressed to the Minister.

(5) The Minister may at any time, for stated reasons, terminate a person's membership of the Review Group.

Section 70 Meetings and business of Review Group

(1) The Minister shall, at least once in every 2 years, after consultation with the Review Group, determine the programme of work to be undertaken by the Review Group over the ensuing specified period.

(2) Notwithstanding *subsection* (1), the Minister may, from time to time, amend the Review Group's work programme, including the period to which it relates.

(3) The Review Group shall hold such and so many meetings as may be necessary for the performance of its functions and the achievement of its work programme and may make such arrangements for the conduct of its meetings and business (including by the establishment of sub-committees and the fixing of a quorum for a meeting) as it considers appropriate.

Appendix 1

(4) In the absence of the chairperson from a meeting of the Review Group, the members present shall elect one of their numbers to be chairperson for that meeting.

(5) A member of the Review Group, other than the chairperson, who is unable to attend a meeting of the Review Group, may nominate a deputy to attend in his or her place.

Section 71 Annual Report and provision of information to Minister

(1) No later than 3 months after the end of each calendar year, the Review Group shall make a report to the Minister on its activities during that year and the Minister shall cause copies of the report to be laid before each House of the Oireachtas within a period of 2 months from the receipt of the report.

(2) A report under subsection (1) shall include information in such form and regarding such matters as the Minister may direct.

(3) The Review Group shall, if so requested by the Minister, provide a report to the Minister on any matter—

- (a) Concerning the functions or activities of the Review Group, or
- (b) Referred by the Minister to the Review Group for its advice.





Earlsfort Centre,
Hatch Street Lower,
Dublin 2.

Tel: 353 1 6312763

Fax: 353 1 6312553

www.clrg.org