

ARTHUR COX

**Incorporation and Registration:
Part 2 of the Companies Bill**

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Part 2 – Incorporation and Registration

- 50 sections of law in 6 chapters
- Contains some of the most basic company law:
 - How private companies are formed;
 - About their constitutions;
 - Corporate capacity & authority;
 - Corporate contracts;
 - Name, registered office and service of notices;
 - Converting existing private companies to the new model private company

Chapter 1 - preliminary

- Begins with a number of definitions used throughout Part 2 including the important initial definition of **transition period** (18 months after the status date) (s 15)
- The importance of timing is recognised and the transition period may be extended, by order of the Minister, to 30 months (s 16)

Chapter 2 – incorporation etc

- A private company may be formed for any lawful purpose by a person subscribing to a constitution and complying with the Act; the liability of members will be limited to the amount if any unpaid on shares; can have between 1 and 99 members excluding certain persons (s 17)
- A company must carry on some activity in the State (can include holding property e.g a share) (s 18)
- Constitution is one document stating the name, the status, authorised share capital, fact it can be divided into shares of fixed specified amounts, number of share taken and any regulations adopted in a form close to Schedule 1 and signed by each subscriber and witnessed (s 19)

Chapter 2 – incorporation etc

- A constitution may only be amended as provided for in the Act (s 20)
- Constitution must be delivered to Registrar with a s 22 statement and consent and a s 24 declaration; where necessary a s 22(6) bond and a s 23 statement is also needed (s 21)
 - S 22 statement sets out directors, secretary, registered office, place of central administration and related details
 - S 24 declaration confirms compliance with the Act, that it will carry on an activity in the State and that the s 21 particulars are correct.
 - S 22(6) bond may be needed if there are no EU/EEA directors
 - S 23 statement obliges a director who is disqualified in another State to disclose that and other facts.

Chapter 2 – incorporation etc

- On registration, the Registrar will issue a certificate of incorporation and from that date the company is a body corporate having perpetual succession and a common seal; the certificate is conclusive evidence that the company is duly registered (s 25)
- Private companies' names must end with the word "Limited" or "Teoranta" and names must not be undesirable in the Registrar's opinion (s 26)
- It is an offence to trade under a misleading name or imply one is a company (s 27)
- Provision is made for reserving names (s 28 & s 29)
- Names can be changed by special resolution and Registrar approval (s 30)

Chapter 2 – incorporation etc

- The effect of the constitution is that of a statutory contract between the company and its members to observe the constitution including terms implied by the Act (s 31)
- Constitutions can be amended by special resolution and company must deliver copy to CRO but amendments cannot require members to take more shares or increase their liability without their consent (s 32)
- A list of certain documents and particulars that are required to be delivered to the CRO for publication in the Gazette are set out (s 33)
- Documents filed in CRO must be in English or Irish but can be translated in any official EU language (s 34)

Chapter 2 – incorporation etc

- Provision is made for companies to authorise and remove electronic filing agents (s 35 and s 36)
- Members are entitled to a copy of the constitution and a failure to provide is a category 4 offence (s 37)

Chapter 3 – capacity & authority

- Private companies have full unlimited capacity to carry on and undertake any business or activity, do any act or enter into any transaction and ultra vires is abolished (s 38)
- Where companies appoint or remove persons entitled to bind the company they must notify the Registrar:
 - Entitlement to bind refers to authority to exercise company's powers or authorise others to do - excludes powers of management as distinct from power to transact with third parties or powers reserved to others e.g members
 - Excludes entitlements restricted to a particular transaction (e.g. a solicitor) or class of transactions (e.g. grocery checkout tellers)
 - Excludes directors' and officers' entitlements (s 39)

Chapter 3 – capacity & authority

- The board of directors and registered persons are deemed to have the authority to exercise any power of the company, regardless of constitutional limitations, but excepts transactions with insiders (s 40)
- Companies can appoint under its common seal persons with powers of attorney inside or outside the State (s 41)

Chapter 4 – contracts and other transactions

- The rules on the form of contracts (deed, writing or parole) for companies are the same as for natural persons (s 42)
- Companies must have a common seal and save as provided in the constitution shall only be used by the authority of the directors or a committee of the directors and a deed to which it is affixed signed by a director & secretary or two directors of a registered person and another (s 43)
- Companies continue to have power to have an official seal for use abroad (s 44)
- Companies can have securities seals (s 45)

Chapter 4 – contracts and other transactions

- Pre-incorporation contracts can continue to be ratified by companies post formation (s 46)
- Bills of exchange and promissory notes are made accepted and endorsed if done on behalf of the company by a person with authority (s 47)
- The correct name must be used on its seal, business letters, cheques, invoices etc and a failure to get it right can result in an officer or other person who authorises it incurring personal liability (s 48)
- Documents can be authenticated by a director, secretary, registered person or authorised officer and need not be under seal(s 49)

Chapter 5 – name, registered office and service of documents

- Company name must be displayed outside place of business and registered office and on all business letters, notices etc (s 50)
- A company must have a registered office in the State (s 51)
- Documents may be served on a company at its registered office or at the CRO (only where it has not given notice to CRO of its registered office or the particulars are not such as to identify its exact location) (s 52)
- Judgements or orders against companies may by leave of the court if wilfully disobeyed be enforced by sequestration against company's or directors/ officers property and attachment of directors or officers (s 54)

Chapter 6 – conversion of existing private companies

- Section 55 defines certain relevant terms.
- The default position is that at end of **transition period**, an existing private company (EPC) shall effectively be deemed to have adopted a constitution in the form provided for by s 19 and to have become a new model private limited company (s 56)
- An EPC may, however, by passing an ordinary resolution, and must if required to do so by members holding 25% of voting rights, re-register as a designated activities company (DAC) having an objects clause (s 57)

Chapter 6 – conversion of existing private companies

- Members with 15% of issued share capital (and certain rare creditors) can apply to court for an order requiring an EPC to re-register as a DAC (s 58)
- From the commencement of the law to the end of the transition period, the law set out in Part 16 (for DACs) will apply to EPCs unless an EPC elects to send the Registrar a s 19 constitution in which case from that date Parts 1 to 15 will apply (s 59)

Chapter 6 – conversion of existing private companies

- An EPC can after the commencement of the Act adopt a new constitution by passing a special resolution whereupon it becomes a new private company and the law in Parts 1 – 15 will apply to it; for a period EPCs whose articles refer to Table A can continue to rely on them although Table A has been repealed (s 60)
- The directors of an EPC are obliged to prepare a new constitution that preserves members rights, send a copy of it to each member and deliver it to the CRO for registration unless: the company has already adopted a new constitution, has elected or is required to re-register as a DAC (s 61)

Chapter 6 – conversion of existing private companies

- A simplified way of complying with s 61 is provided whereby the directors of an EPC may simply send the CRO a statement declaring the company is adopting as its constitution, its current articles of association and permitted clauses from its memorandum (excluding its objects clause). CRO will register this and issue a constitution in the form of s 19 and specifying the current articles and memorandum clauses to be its supplemental regulations. Again, Table A will be saved if referred to (unless inconsistent with a mandatory provision) (s 62).

Chapter 6 – conversion of existing private companies

- Where an EPC does not deliver any new constitution to the CRO during the transition period, then at the end its memorandum and articles of association, less certain provisions, will be deemed to constitute a s 19 constitution even if members' rights are jettisoned (s 63).
- Where an EPC ends up with a deemed constitution, members who are prejudiced can apply to court for an order under s 213 i.e. such action is deemed to be oppression/ disregard of the members' interests. Certain creditors also have a right to object (s 64).

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