

ARTHUR COX

**Corporate Governance:
Part 4 of the Companies Bill**

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Part 4 – Corporate Governance

- The governance of companies and law concerning directors, secretaries and members and their proceedings is set out in Part 4.
- Law is set out in 10 Chapters.
- Contains 92 sections of law.
- The most significant feature of this part is that the regulations contained in Parts I and II of Table A of the First Schedule to the Companies Act 1963 have been incorporated into the Bill on an “*unless otherwise provided in the constitution*”. The effect is intended to be shorter constitutions comprised of exceptions to the norm.

Chapter 2 – Directors and Secretaries

- A private company must have at least 1 director (s 129(1))
- It must also have a secretary who may be a director (s 130(1))
- The directors appoint the secretary and set the terms (s 130(3))
- Directors have a duty to ensure the secretary has the skills necessary to discharge the statutory and other duties delegated by the directors (s 130(4))
- Where there is 1 director s/he can't be secretary (s 130(6))
- A body corporate cannot be a company director (s 131(1))
- A minor cannot be a director or secretary (s 132(1))
- An undischarged bankrupt cannot be a director or secretary (s 133(1))
- The ODCE has powers of enquiry where it is suspected a director or secretary is an undischarged bankrupt (s 134)

Chapter 2 – Directors and Secretaries

- A provision of the Act, an instrument under it or the constitution that requires a thing to be done by a director and secretary cannot be satisfied by the same person (s 135)
- The acts of a director and secretary will be valid notwithstanding any defect in their appointment or qualification (s 136)
- Where the constitution contains a share qualification, the office of director will be vacated where it is not met in 2 months or where the director ceases to hold the shares (s 137)
- Companies must have one EEA resident director (s 138)
- The limit on the number of directorships remains (s 143)

Chapter 2 – Directors and Secretaries

Appointment of directors (s 145)

- Directors must consent or appointment void (subs (1));
- The first directors will be determined by the subscribers (Subs (2));
- Unless the constitution provides otherwise:
 - Directors can be appointed in general meeting but subject to subs (4), only retiring directors are eligible for election (subs (3)(a));
 - The board may appoint directors to fill vacancies or as additional directors subject to the max number in the constitution (subs (3)(b));
 - Directors appointed by the board only hold office until the next AGM (subs (3)(c));

Chapter 2 – Directors and Secretaries

- A non-retiring director is only eligible for election where notice from a voting member of the intention to propose is left at the company's registered office not less than 3 nor more than 21 days before the day appointed for the meeting and the proposed director consents (subs (4));
- In single member companies the sole member by appoint a director by serving notice on the company (subs (5)).
- Appointments are to be voted on individually (s 146)

Chapter 2 – Directors and Secretaries

- Directors may be removed by ordinary resolution and where proposed other than by the directors, 28 days' notice must be given to the company of the intention to move such a resolution (s 147)
- The right to remove directors is without prejudice to any rights they might have to compensation (s 148)
- The office of director is vacated if a director becomes bankrupt or disqualified and, unless the constitution otherwise provides, where the director resigns, becomes of unsound mind, is restricted, sentenced to a term of imprisonment for an indictable offence or is absent for 6 months without permission (s 149).

Chapter 2 – Directors and Secretaries

- Companies must maintain a register of directors and secretaries and file changes in the register (ss 150, 151)
- Particulars of directors must be shown on business letters (s 152)
- Where companies fail to notify CRO that persons have ceased to be directors or secretaries, they can self-report (s 153)
- Directors cannot assign their office unless permitted by the constitution or other agreement and approved by special resolution (s 154).

Chapter 3 – Service Contracts etc

- Copies of contracts or memoranda of contracts of service with directors of the company and of its subsidiaries and variations to them must be kept and so-called “rights of inspection” apply (s 155);
- Only applies to contracts of greater than 3 years or which can be terminated by the company within 3 years without paying compensation.
- Directors’ remuneration is determined by the company in general meeting unless the constitution provides otherwise (s 156)
- Companies are not permitted to make tax free payments to directors (s 157)

Chapter 4 – Proceedings of Directors

- With two exceptions (keeping minutes and audit committees) all of Chapter 4 will apply to private companies unless it is disapplied in the constitution (s 158)
- The business of the company is to be managed by the directors (s 159)
- The directors may appoint a managing director having such powers as are delegated to him or her (s 160)
- The directors shall meet as they think fit, determine questions by majority, the chair having a casting vote, be entitled to “reasonable notice” of board meetings, elect a chairperson, establish committees etc (s 161)

Chapter 4 – Proceedings of Directors

- Directors may utilise written resolutions to take decisions; written resolutions can exclude directors (but not a majority of them) not permitted to vote by operation of law or the constitution; telephonic meetings are permitted; directors can vote on contracts in which they are interested (s 162)
- Directors can hold other office or place of profit under the company (except statutory auditor) (s 163) and may be counted in the quorum of the meeting to so appoint him or her and may vote on it (s 164)
- The directors can determine how cheques and other negotiable instruments are to be signed, drawn up etc (s 165)

Chapter 4 – Proceedings of Directors

- Any director can appoint an alternate director with the approval of a majority of the directors and provision is made for when that happens (s 166)
- It is **mandatory** that minutes of all appointments, names of directors present and resolutions and proceedings at meetings of directors and of directors' committees are kept – not open to inspection by members but can be viewed by ODCE (s 167)
- It is also **mandatory** that large private companies (b/s. €25m and turnover >€50m) establish an audit committee on a comply or explain basis (s 168).

Chapter 5 - Members

- Members are defined as the subscribers to the constitution and every other person who agrees to be a member and whose name is entered in the register of members (s 169)
- Every company must have a register of members containing specified information and rights of inspection apply to the register (s 170) subject to closure up to 30 days a year (s 175)
- Trusts may not be entered in the register (s 171)
- The register is prima facie evidence of the matters required or authorised to be inserted in it (s 172)
- Where the register is maintained by an agent, that person is responsible for any defaults concerning it (s 173)
- Rectification can be done by court or with consent (s 174)

Chapter 6 – General Meetings & Resolutions

- Companies must hold an AGM unless all of the members entitled to attend and vote sign a written resolution acknowledging receipt of the financials and resolving on all matters as would require to be resolved at that meeting and confirming there is no change to the auditor (s 176)
- AGMs and EGMs can be held inside or outside the State provided that unless all of the members entitled to attend and vote consent in writing, the company must make technological means available for members to participate without leaving the State (s 177)
- EGMs can be convened by the directors or if there are insufficient directors, any director or member (s 178)

Chapter 6 – General Meetings & Resolutions

- 10% of voting members may requisition the holding of a general meeting by calling on the directors to convene one; it is also provided that unless the constitution provides otherwise, 10% of voting members will have a direct right to convene a meeting (s 179)
- The court has a power to direct the convening of a meeting (s 180)
- Members, member's PRs, a bankrupt member's assignee and the directors and secretary are entitled to notice of general meetings (s 181)

Chapter 6 – General Meetings & Resolutions

- The quorum is 2 unless the constitution provides otherwise and shall be one in the case of a single member company (s 183)
- Proxies can be appointed by members and the procedures are set out (s 184)
- The form of proxy is provided (s 185)
- Bodies corporate can appoint authorised persons (s 186)
- The business of the AGM is expressed to *include*: considering the accounts; reviewing the company's affairs declaring a dividend/ approving auditors' remuneration (unless constitution provides otherwise); fixing directors' remuneration; electing/re-electing directors; appointing auditors unless exempt (s 187)

Chapter 6 – General Meetings & Resolutions

- Act makes provision for chairing, adjourning, voting at meetings (s 188)
- Voting is subject to constitution – on a show of hands and on a poll detailed (s 189)
- Demanding a poll (s 190)
- Voting on a poll (s 191)
- Ordinary and special resolutions are defined (s 192)
- Resolutions passed at adjourned meetings are treated as being passed on that date, not the earlier date (s 193)
- Unanimous written resolutions are permitted as the default (no need for constitution to allow) (s 194)

Chapter 6 – General Meetings & Resolutions

- Majority written resolutions are permitted which can be ordinary or special with the safeguard that an ordinary resolution does not take effect until 7 days and a special resolution does not take effect until 21 days after they have been signed unless all voting members waive the hardening period (s 195)
- Written resolution – whether majority (s 196) or unanimous (s 194) – does not apply to the removal of a director or an auditor.

Chapter 6 – General Meetings & Resolutions

- Single member companies need not hold meetings and all powers exercisable thus can be exercised by the sole member taking a written decision (s 197)
- The provisions of Part 4 concerning meetings apply also to class meetings (s 198)
- Copies of certain resolutions must be filed with the CRO (s 199)
- Minutes of meetings must be kept and members have inspection rights (s 200)

Chapter 7 – Summary Approval Procedure

- Section 201 sets out relevant definitions, including the types of “restricted activities” which are permitted if done on foot of the SAP:
 - s 83 (financial assistance for share acquisition);
 - s 85 (reduction in company capital);
 - s 92 (variation of capital on reorganisation);
 - S 119 (treatment of pre-acquisition profits as distributable);
 - s 240 (prohibition of loans etc to directors etc);
 - s 465 (merger);
 - s 580 (voluntary winding up).

Chapter 7 – Summary Approval Procedure

- Summary approval procedure is defined in s 203 as a procedure where certain conditions are met:
 - A special resolution is passed;
 - The directors make the required declaration;
 - The declaration is delivered to CRO not later than 7 days before the activity is carried out.
- The requirements for the declaration's contents will depend upon nature of the restricted activity (see ss 204 – 210).
- Where a declaration is made without having reasonable grounds for the opinion therein, a director may be declared personally responsible for its liabilities (s 211)
- A moratorium exists on effecting mergers by the SAP (s 212)

Chapter 8 – Protection of minorities

- Members have a remedy where the affairs of the company are conducted or powers of the directors exercised in a manner oppressive to them or in disregard of their interests (s 213)
- The jurisdiction to make an order to end the oppression/disregard now includes an order for compensation.

Chapter 9 – Registers, Indices & Minute Books

- Registers, indices and minutes books can be in physical books or recorded in any other manner (s 214)
- Registers can be kept on computers and rules are provided for in that respect (s 215)

Chapter 10 – Inspection of registers etc

- Definitions of the registers in respect of which there is a right of inspection are set out (s 216)
- The location of registers is specified and the rights of inspection of various persons e.g. Members and the public generally (s 217)
- Fees may be prescribed for copies of registers and inspections (s 218)
- The services of notices (including by electronic means) is provided for in the case of service on members (s 219)

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