

ARTHUR COX

**Directors' Duties:
Part 5 of the Companies Bill**

Contents of Presentation

- 1. Part 5: Duties of directors and other officers**
- 2. Chapter 1 - application of Part 5**
- 3. Chapter 2 – general duties**
- 4. Chapter 3 – evidential Provisions concerning loans**
- 5. Chapter 4 – transactions involving directors**
- 6. Chapter 5 – disclosure of interests in shares**
- 7. Chapter 6 – officers in default**

Part 5 – Duties of Directors and Other Officers

- All law relating to the duties of directors and other officers will be codified in Part 5.
- Consists of 6 Chapters,
- Contain 53 sections of law.
- Contains recommendations of CLRG reports – including the first report, the Heads of Bill Report and the subsequent 2007 Report's provisions on loans to directors

Chapter 1 - application of Part 5

Chapter 1 contains 4 sections (ss 220 – 223):

- Definitions relevant to Part 5.
- Persons connected with directors will be defined (no major change);
- Shadow directors will be defined – note, that all of Part 5 shall apply to shadow directors;
- De facto directors will also be defined (persons who occupy the position of director although not formally appointed as such) all of Part 5 will apply to them too – as to the meaning of de facto director, see *Re Lynrowan Enterprises Limited* [2002] IEHC 90

Chapter 1 - application of Part 5

In *Re Lynrowan*, O'Neill J said of the application of s 150 CA 1990 to de facto directors:

- "1. Where there is clear evidence that that person has been either the sole person directing the affairs of the company or
- 2. Is directing the affairs of the company with others equally lacking in valid appointment or
- 3. Where there were other validly appointed directors that he was acting on an equal or more influential footing with the true directors in directing the affairs of the company.
- 4. In the absence of clear evidence of the foregoing and when there is evidence that the role of the person in question is explicable by the exercise of a role other than director, the person in question should not be made amenable to the *Section 150* restriction..."

Chapter 2 – general duties

Chapter 2 (ss 224 – 236) sets out the following matters under the heading of 'general duties'

- Director's duty to ensure compliance with the Companies Act, consent to act and acknowledgement of duties (s 224).
- Duty to have regard to employees' interests (enforceable by the company as is currently the law) (s 225).
- The directors' compliance statement – incorporating the recommendations of the CLRG in its 2005 report (s 226).
- The secretary's duties will be expressed to be such duties as are delegated by the board of directors (s 227).

Chapter 2 – general duties

Section 226 “reintroduces” the directors’ compliance statement:

- Obligation to prepare applies to private companies where both the balance sheet >€12.5m and turnover >€25m;
- Directors’ Report must confirm that the following three things have been done or if not done, specifying the reasons why not (i.e. on a comply or explain basis):
 - Drawing up a compliance policy statement setting out policies concerning compliance with relevant obligations;
 - Putting in place appropriate arrangements/ structures designed to secure material compliance with relevant obligations; and
 - Conducting a review in financial year of arrangements and structures that are in place.

Chapter 2 – general duties

- Directors' Report must include a statement that acknowledges that the directors are responsible for securing compliance with its relevant obligations (Categories 1 & 2 Companies Acts offences, a serious Prospectus offence or serious Market Abuse offence and Tax Law)
- Significantly more proportionate than 2003 model; comply or explain provides an out where it would be entirely inappropriate; however, the reintroduction may be expected to exercise clients' minds.

Chapter 2 – general duties

- Directors will be obliged to ensure that the person appointed secretary is suitable; secretaries will have to consent and acknowledge their legal duties (s 227).
- Directors' fiduciary duties will be set out in the Act and will be:
 - Owed to the company and the company alone;
 - Enforceable like any other fiduciary duty;
 - Based on common law rules and equitable principles and to be interpreted and applied in same way.
- Eight duties are set out which have been drawn, in the main, from existing common law and equitable duties.

Chapter 2 – general duties

1. Act in good faith in what the director considers to be the company's interests;
2. Act honestly and responsibly in the company's affairs
3. Act in accordance with the constitution and exercise powers only for lawful purposes
4. Not use company property for own or others' use unless approved by members or in the constitution
5. Not to fetter discretion unless permitted by constitution or entered into in the company's interests
6. Avoid conflicts of interest unless released by members;
7. Exercise care, skill and diligence (subjective test);
8. Have regard to interests of members.

Chapter 2 – general duties

- Where a director considers in good faith that it is in the interests of a company for a transaction or engagement to be entered into, the director may restrict his or her power to exercise an independent judgment in the future by agreeing to act in a particular way to achieve this (*section 229(2)*);
- A director may have regard to the interests of a particular member where the director has been appointed or nominated by that member under the constitution or shareholders' agreement: but this is subject to the overriding obligation to act in good faith in what the director considers to be the interests of the company (*section 229(3) and (4)*).

Chapter 2 – general duties

- Directors will continue to be required to disclose interests in contracts (s 232), however there is now a materiality proposed so that it does not apply in relation to an interest that cannot reasonably be regarded as likely to give rise to a conflict of interest (s 232(2))
- Provision will be made for directors to be made liable to *account* for gains and *indemnify* for losses resulting from a breach of any duty under Part 5 (s 233)
- Provision will also be made for the courts to grant relief to directors who have acted honestly and reasonably (s 234)
- The prohibition on companies indemnifying directors is maintained but recast (s 236).

Chapter 3 – evidential Provisions concerning loans

- Chapter 3 contains two sections concerning evidence of loans made to directors and by directors.
- Where a loan or quasi-loan is made **to** a director etc by a company and the terms are not in writing, there is a presumption until the contrary is shown that it is (a) repayable on demand and (b) that it bears interest (s 237(2));
- If the terms are in writing or partly in writing and there is an ambiguity as to when a loan is to be repaid, there is a rebuttable presumption it is to be repaid on demand and likewise any ambiguity as to whether it bears interest will give rise to a similar presumption that it does (s 237(3))

Chapter 3 – evidential Provisions concerning loans

- ODCE have found that often, in windings up, directors will claim to be creditors by having made often unsubstantiated loans to their companies. Section 238 proposes to address this.
- Where a loan or quasi-loan is alleged to have been made **by** a director etc to a company and the terms are not in writing it shall be presumed that it was not a loan or quasi-loan (i.e. that it is a not repayable advancement) (s 238(2))
- Where it is proved that such a loan was made, if the terms are ambiguous there will be a rebuttable presumption that the loan bears no interest, that it is not secured and that it is subordinated to all other creditors (s 238(3))

Chapter 4 – transactions involving directors

Chapter 4 contains provisions regulating certain transactions and arrangements between directors and their companies:

- Substantial property transactions (*s 239*);
- Loans, quasi-loans, credit transactions and the provision of guarantees and security in connection therewith (*s 240*), subject to certain exceptions:
 - <10% of relevant assets (*s 241*);
 - The summary approval procedure (*s 243*);
 - Inter-group transactions (*s 244*);
 - Directors' expenses (*s 245*);
 - Business transactions (*s 246*)

Chapter 4 – transactions involving directors

Other provisions in this chapter include:

- Directors' contracts of employment (*s 250*);
- Approval of compensation for loss of office (*s 252*)
- Contracts with sole members (*s 256*)

Chapter 5 – disclosure of interests in shares

Chapter 5 replaces in substance Part IV of the CA 1990:

- Directors and others are required to disclose to their companies interests they have in the company's shares or debentures.
- Completely re-written – continues to be complicated law but is certainly more intelligible.
- Main change is that *de minimis* interests (<1%) can be disregarded
- Another very useful change is that where directors are given options by a company they will not be required to tell the company that they have options in its shares! (s 266(3))

Chapter 6 – officers in default

- Offences will in some instances be committed by what are termed “any officers in default”. An officer who is in default is “any officer who authorises or who, in breach of his or her duty as such officer, permits the default mentioned in the provision” (*s 271(1)*)
- There will be a presumption that officers permitted default where there is evidence that they took no steps to prevent the default (*s 272(2)*)

For Further Information Contact

Dr Tom Courtney, Partner

tom.courtney@arthurcox.com

Direct line – 01 618 0584

Dáibhí O’Leary, Associate

daibhi.oleary@arthurcox.com

Direct line – 01 618 1120

or your usual Arthur Cox contact

This document contains a general summary of developments and is neither a complete nor definitive statement of the law. Specific legal advice should be obtained before taking action.

Thank You.

Dublin

Earlsfort Centre, Earlsfort Terrace, Dublin 2, Ireland
tel: +353 (0)1 618 0000 | **fax:** +353 (0)1 618 0618
email: dublin@arthurcox.com

London

12 Gough Square, London EC4A 3DW, England
tel: +44 (0)20 7832 0200 | **fax:** +44 (0)20 7832 0201
email: london@arthurcox.com

Belfast

Capital House, 3 Upper Queen Street, Belfast BT1 6PU, Northern Ireland
tel: +44 (0)28 9023 0007 | **fax:** +44 (0)28 9023 3464
email: belfast@arthurcox.com

New York

300 Park Avenue, 17th Floor, New York NY 10022, USA
tel: +1 (1)212 705 4288 | **fax:** +1 (1)212 572 6499
email: newyork@arthurcox.com

www.arthurcox.com