Report

of the

Working Group on

Company Law

Compliance and Enforcement

30 November 1998

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SUMMARY

1 The Working Group on Company Law Compliance and Enforcement was announced by Mary Harney, TD, Tánaiste and Minister for Enterprise, Trade and Employment and Noel Treacy, TD, Minister for Science, Technology and Commerce on the 7th August, 1998.

2 The Working Group's mandate was to advise on improving compliance with and enforcement of company law, and, in particular, to review the existing compliance arrangements and enforcement regimes for company law; to evaluate the legislative, organisational and resource issues affecting compliance and enforcement; to examine and identify the resources and structures necessary to achieve a more frequent updating of companies legislation; and to make appropriate recommendations to address these issues.

3 The Group wishes to stress that successful achievement of the Report's objectives, *viz.*, *better compliance and improved enforcement procedures*, is contingent upon the provision of the resources recommended in the Report. The Group would emphasise to the Government its belief that these resources should be allocated as a matter of priority.

4 The Group wishes to acknowledge that an effective compliance and enforcement regime for company law relies upon cooperation between Government Departments and agencies and professional bodies. Many of the recommendations set out in the Report are designed to strengthen this cooperation.

THE GROUP'S APPROACH TO ITS TASK

5 The approach of the Group was based on the promotion of enterprise. The priority was to focus on practical, pro-enterprise reforms which will ensure that the stated twin concerns of the Government to maintain "*the social consensus and Ireland's standing as a reputable place to do business which underlie our present economic success*", are addressed.

6 The Group did not seek to add to the substantive body of company law but rather to focus on measures which will improve compliance with the existing statutory requirements.

7 Having regard to the terms of reference, the Group concluded that there were three broad areas in respect of which recommendations were required. They are as follows:-

- Ensuring greater ***compliance*** with company law
- Ensuring greater ***enforcement*** of company law where there is non-compliance

- A formalised ***system*** of review and reform of company law.

8 As regards compliance and enforcement, the Group concluded that it would be appropriate to distinguish between compliance and enforcement with regard to:-

- day-to-day requirements of company law, such as filing returns, etc, which fall primarily within the province of the Companies Registration Office (*"registration-type cases"*), and

- the enforcement of company law in respect of more individual issues, such as fraudulent and reckless trading, false accounting and offences relating to insolvency, which are not within the province of the Companies Registration Office or which would not easily be fitted within its jurisdiction (*"non-registration type cases"*).

EXISTING COMPLIANCE AND ENFORCEMENT REGIME

9 Irish company law has been characterised by a culture of non-compliance and a failure by companies and their officers to meet their obligations in respect of the filing of annual returns on time. For example, in 1997 only 13% of companies complied with their obligations to file annual returns on time.

10 Company law is a mixture of criminal and civil liabilities and duties. There are some 280 separate criminal offences provided for in the Companies Acts 1963-1990 ranging from relatively small summary offences with a maximum fine of £25 to serious indictable offences carrying maximum sentences of 10 years or fines of £200,000.

ENFORCEMENT OF "NON-REGISTRATION" TYPE LAW

Director of Corporate Enforcement

11 An independent statutory officer - to be known as the Director of Corporate Enforcement - who would have general - but not exclusive - responsibility for the enforcement of company law should be appointed. The Director should have a similar role to that of the Director of Consumer Affairs, who has specific responsibility in law for the prosecution of offences under consumer legislation, and should be independent in the discharge of his functions.

12 The principal functions of the Director should include:-

- the prosecution of summary offences under the Companies Acts;
- assisting in the preparation of cases for the prosecution of indictable offences under the Companies Acts by the Director of Public Prosecutions;
- seeking injunctions against companies, their directors or other persons in order to secure compliance with the Companies Acts;
- applying to the court under sections 150 and 160 of the Companies Act, 1990 for the restriction of directors and the disqualification of persons who act as company directors or other officers or promoters or who discharge important roles such as auditors, examiners, liquidators or receivers of a company; and
- exercising a limited supervisory role over the activity of liquidators in the discharge of their duties under the Companies Acts.

13 The existing non-prosecuting functions of the DPP (e.g., applying for disqualification orders under section 160 of the Companies Act, 1990) should be transferred to the Director of Corporate Enforcement.

14 The Minister for Enterprise, Trade and Employment should not retain any prosecution role for company law offences. However, the Minister should retain the sole power under Part II of the Companies Act, 1990 to petition the court to appoint an inspector to examine the affairs of a company or to appoint an inspector to establish the beneficial ownership and control of shares in a company or to appoint an authorised officer to examine the books and records of a company. The Registrar of Companies should retain an enforcement role in respect of *registration-type* offences.

15 The Director of Corporate Enforcement should be required to report annually to the Minister for Enterprise, Trade and Employment. While the Minister and the Director will require from time to time to consult with one another on matters relating to the general operation of the Enforcement Office, the Director should not to be required to disclose the reasons for decisions which he or she might take in individual cases.

Enforcement Office

16 The Director's Office - the Enforcement Office - should be attached as an executive office to the Department of Enterprise, Trade and Employment.

17 The Enforcement Office should be staffed by a mix of professional, administrative and clerical staff to help evaluate and select appropriate cases for prosecution, restriction or disqualification. Initially, the Office should comprise of 20 staff members including three accountants and three lawyers with the remainder being made up of administrative and clerical staff. The Director should be appointed at Deputy Secretary level[1] in order to attract persons of a high calibre to the post.

18 In order to undertake appropriate serious criminal investigations, a team of Gardaí, ideally with experience in criminal investigations in the corporate sector, should work alongside the staff in the Enforcement Office.

19 The annual cost of the Enforcement Office is estimated at about £2 million, made up of £1 million in staffing and overhead costs with the balance covering the costs of external legal services and court costs. Because of European Court of Justice rulings, it will not be possible to recoup the costs of the Office by charging companies increased registration fees.

CHANGES RECOMMENDED IN "NON-REGISTRATION" TYPE COMPANY LAW

Powers and Responsibilities of the Director of Corporate Enforcement

20 The Director should take over the powers of the Minister for Enterprise, Trade and Employment to initiate summary proceedings for company law offences.

21 The Director should have the power to impose on-the-spot fines for breaches of summary offences.

22 The Director should have a right to apply to the High Court for an order requiring a company or an officer, promoter, receiver or liquidator to make good a default in complying with the Companies Acts.

23 The Director should have the power to require the production of a liquidator's records for examination.

24 The Director should be given *locus standi* (a) to apply for *restriction* orders under section 150 of the Companies Act, 1990 and (b) to apply under each of the grounds set out in section 160(2)(a) to (f) of the 1990 Act for *disqualification* orders, including a disqualification order arising from the findings of inspectors appointed by the Court or by the Minister under the Companies Acts.

[1] The Department of Finance was opposed to this recommendation.

25 The Director should be given *locus standi* to apply to the court for relief under a number of existing provisions, pursuant to section 251 of the Companies Act, 1990, in order to call to account company officers responsible for ceasing to trade while leaving substantial debts without putting the company into liquidation. Those companies to which Part VII, Chapter 1 applies should be widened to include a company to which section 251 of the Companies Act, 1990 applies.

26 The Director should be given the power to apply to the court for the following orders: *viz.* - for inspection of a company's books under section 243 of the 1963 Act; for examination of officers and other persons under section 245 of the 1963 Act; to require the payment or delivery of property under section 245A of the 1963 Act; for the civil arrest of contributories and directors and other officers under section 247 of the 1963 Act; for a *Mareva*-type injunction to freeze directors and other officers' assets in circumstances where the Director is pursuing a civil cause of action against the respondent; and for an order to enter upon property and seize assets belonging to a company.

27 The Director should have statutory responsibility for considering whether, in any given case, it is appropriate that application be made to have a director or other officer of an insolvent company disqualified and, if such a conclusion is reached, to bring such application.

28 Where an order is made under section 150 of the Companies Act, 1990 the minimum fully paid up equity share capital should be increased in the case of public limited companies from £100,000 to £250,000 and in the case of any other company from £20,000 to £50,000.

29 The court should have a new discretion to impose a restriction under section 150 of the Companies Act, 1990 where disqualification is not considered to be justified.

Provisions Relating to Liquidators and Receivers

30 All voluntary liquidators of insolvent companies should be required in law to report to the Director on the conduct of company directors.

31 Professional bodies should be required to report to the Director where a disciplinary tribunal finds that a member has not maintained appropriate records of a liquidation or receivership, or that a member appears to have committed an indictable offence under the Companies Acts.

32 Every liquidator of an insolvent company should be required under section 150 of the Companies Act, 1990 to apply to the High Court for a restriction order against one or more directors of the company, unless the Director relieves him of that obligation.

33 Liquidators should be required to provide a report to the Director which would indicate whether the case was an appropriate one in which to consider an application for disqualification.

34 Liquidators should be obliged to make a company law compliance report on the company being liquidated to the Director within 6 months of appointment, which would indicate, *inter alia*, whether the directors and other officers of the company have acted honestly and responsibly and whether the directors of the company should be the subject of an application for a restriction or disqualification order under sections 150 and 160(2) respectively of the Companies Act, 1990.

35 Liquidators of all insolvent companies should be obliged by statute to cooperate with the Director, make the company's books and records and other documentation available to the Director and such other assistance as the Director might require in discharging his statutory functions.

36 It should be an offence, which can be proceeded with summarily or on indictment, for liquidators not to comply with any statutory obligations which are imposed upon them pursuant to these recommendations.

37 A State funded public interest liquidation service is not recommended.

Other Legislative Proposals

38 All indictable offences under the Companies Acts should be punishable by a maximum term of imprisonment of at least 5 years.

39 The maximum fine for all summary offences under the Companies Acts should be increased to £1,500.

40 The power contained in section 247 of the Companies Act, 1963 which enables the court to order the arrest of contributories (and the seizure of their property) where there is probable cause for believing that they are about to abscond or remove any of their property for the purpose of evading payment or examination of the company should be extended to provide for the arrest of directors and other officers in addition to contributories.

41 The right to apply to the court for an asset-freezing order (known as a *Mareva* injunction) against directors and other officers should be specifically given to companies, directors, members, liquidators, receivers and creditors.

42 The court should have the power to make an order against all those against whom application is made under sections 150 and 160 for costs, remuneration and expenses of all liquidators who are obliged to make application under section 150 or who make application under section 160 of the Companies Act, 1990 and also of the Director, who should also be entitled to recover costs and expenses.

43 In addition to the above, a number of detailed changes to company law are contained in the Report.

STRENGTHENING REGISTRATION-TYPE COMPLIANCE

44 The primary function of the Companies Registration Office (CRO) is to retain and make available for public inspection corporate and related documents, e.g., the memorandum and articles of association and the company's annual return. The filing of an annual return is the key compliance act by a company as it provides a full, up-to-date, summary of the position of the company, including its accounts, and necessitates bringing a range of other compliance issues up to date such as notifications of changes in officers.

45 The CRO currently employs 112 people, of which 8 people are involved in the enforcement of the law relating to the filing of returns with the CRO.

46 There are four principal processes open to the Registrar for enforcement, *viz.*,

- strike-off of a company which is two years or more out of date in filing an annual return
- prosecution of a company for failure to file a return
- prosecution of an officer of a company for failure to file a return
- disqualification of an officer from holding office following the commission of three offences under the Companies Acts.

47 A company may be struck off the register for failure to file annual returns for 2 consecutive years. The CRO has recently embarked on a vigorous programme of enforcing the strike off remedy, initiating the strike off procedure in batches of up to 500 companies per day with the intention that all companies will be covered by mid 1999.

48 Implementation of the recommendations set out in paragraphs 49-62 below, in tandem with the recently initiated strike-off campaign, should significantly improve compliance with *registration-type* company law.

49 A clearly defined annual return reference date should be established for each company.

50 A late filing penalty should be reintroduced for companies who fail to file their annual return on time, which penalty should be substantial and progressive.

51 On-the-spot fines should be introduced as part of the overall enforcement regime by the Registrar of Companies.

52 The Companies Acts should be removed from the ambit of the Probation of Offenders Act, 1907.

53 Ideally, a District Judge with experience of company law should be designated to hear company law prosecutions.

54 Evidence in writing by the Registrar of Companies should be accepted as *prima facie* proof of the state of the register for the purposes of prosecutions for offences under the Companies Acts.

55 An *officer in default*, who is prosecuted for permitting a default or contravention of the Companies Act, should bear the onus of disproving fault on his or her part.

56 On an application to restore a company to the register, the court should be able to make such order as it sees fit concerning the personal liability of the directors and secretary of the company for all or any part of the debts or other liabilities of the company during the period when it was struck off the register.

57 The form of consent to becoming a director/secretary should be amended to contain an acknowledgement of the obligations attaching to that office and an undertaking to comply with these obligations.

58 The CRO should advance with the Consultative Committee of Accountancy Bodies - Ireland the issue of introducing an identification code for auditors.

59 The CRO should introduce guidance notes for directors and secretaries.

60 Previous late returners should be targeted with reminder notices by the CRO

61 The CRO should discuss with the relevant professional bodies and the credit referencing industry the simplification of the annual return.

62 The CRO should carry out a review of its forms.

COMPANY LAW REFORM

63 The Company Law Review Group (CLRG) was established in March of 1994 and delivered its report in December 1994. Legislation relating to two of the seven areas covered by the CLRG's first (and only) report will only be published in late 1998 or early 1999. Work on the remaining areas of recommendation are awaiting the enactment of legislation on the first two areas. The CLRG was not asked to address further issues because the Department was obliged to deal with the first report of the CLRG before seeking a further report. This stop-start approach is unacceptable.

64 There is vital urgency in ensuring that Ireland, as a potential place in which to do business and from which to do business, has a first class system of company law which places Ireland in the forefront as a contender for the location of international commerce.

65 Amending legislation to reform company law should be regarded as a constant feature on the agenda of the Department of Enterprise, Trade and Employment. A reforming Bill should be laid before the Oireachtas at least every two years.

66 A Company Law Review Group composed along similar lines to the CLRG should be established on a statutory basis as soon as possible which would develop proposals which would form the basis - but not exclusively - for this legislative programme.

67 The Company Law Review Group should, in consultation with the Minister, adopt a two yearly work programme which would coincide with the proposed biennial *Companies Bill*. An annual report of the Review Group's proceedings would be made to the Minister and be appended to the annual *Companies Report*, prepared by the Minister.

68 The composition of the Company Law Review Group should be a matter of some flexibility. The emphasis of the Minister, in constituting the Group, should be on combining expertise with a broadly representative membership.

69 To support the work of the Company Law Review Group, a budget of £50,000 should be included in the Department's 1999 allocation to cover research, consultancy and other expenses with a full year cost of £100,000 in subsequent years.

70 Some issues which the Company Law Review Group could examine which arose during the course of the review include:-

- The introduction of a simpler regime for smaller companies.
- The establishment of a statutory licensing or qualification regime for insolvency practitioners.
- The provision of proof of identity by all directors on initial appointment.

CONSOLIDATION/CODIFICATION OF COMPANY LAW

71 A programme should be undertaken to codify / consolidate company law. The object of the process would be to incorporate the provisions of the existing Companies Acts and the substantive company law now set out in regulations made under the European Communities Acts into one single comprehensible companies code.

RESOURCES FOR COMPANY LAW ENFORCEMENT AND LEGISLATIVE REFORM IN THE DEPARTMENT OF ENTERPRISE, TRADE AND EMPLOYMENT

Company Law Enforcement

72 Having regard to the present investigations, Tribunals of Inquiry and other more recent developments and the higher profile which the Minister's powers in the area have attracted in the recent past, it is recommended that six accountants and one solicitor should be provided for the purpose of company investigations. To support this work, three additional administrative staff should be provided.

Company Law Reform

73 Staffing in the Department concerned with the drafting of company legislation and associated EU matters should be increased by the provision of an additional Principal Officer, three Assistant Principals and three Higher Executive/Administrative Officers, together with appropriate clerical support. In addition, a full-time lawyer and an accountant should be provided to assist with EU negotiations and with the domestic company law reform programme.

PART I - INTRODUCTORY

ESTABLISHMENT AND TERMS OF REFERENCE

1.1 The establishment of the Working Group on Company Law Compliance and Enforcement, on foot of a decision by the Government, was announced by Mary Harney, TD, Tánaiste and Minister for Enterprise, Trade and Employment and Noel Treacy, TD, Minister for Science, Technology and Commerce on the 7th August, 1998.

1.2 In making the announcement the Tánaiste said that "***the Government decision to set up the Group was influenced by the recent emergence of strong indications of abuses of company law which pose a particular problem for the integrity of the system of company regulation. The consequential public concerns must be allayed if the social consensus and Ireland's standing as a reputable place to do business which underlies our present economic success are to be maintained in the future.***"

1.3 The Group's **Terms of Reference** were:-

- *To review the compliance arrangements and enforcement regimes for company law;*
- *To consider the respective roles for the parties responsible for compliance and enforcement, particularly the courts, the Minister for Enterprise, Trade and Employment, the Director of Public Prosecutions and the Registrar of Companies;*
- *To identify and evaluate the legislative, organisational and resource issues affecting compliance and enforcement;*
- *To make appropriate recommendations to address these issues;*
- *To examine and identify the resources and structures necessary to achieve a more frequent updating of companies legislation;*
- *To identify the cost and benefits involved in implementing its recommendations;*
- *To report to the Tánaiste and to the Minister for Science, Technology and Commerce by 30th November, 1998.*

MEMBERSHIP

1.4 The Group, chaired by Michael McDowell, SC, comprised both independent members and representatives of a number of Government Departments and agencies. The full membership of the Group is set out below:-

Mr Michael McDowell	Chairman, Senior Counsel
Ms Gráinne Clohessy	Vice-Chairman, Barrister
Mr Thomas B. Courtney	Practising Solicitor and Author
Ms Katherine Delahunt	Partner, Vincent and Beatty, Solicitors
Mr Declan McDonagh	Vice Chairman, Chartered Institute of Public Finance and Accountancy
Mr Frank Cunneen	IBEC, Chairman, Zeneca Ireland Limited
Ms Judy Fay	Institute of Chartered Accountants in Ireland
Mr Joe Mc Peake	MD, McPeake Auctioneers
Mr John Lahart	Post Primary Teacher, Ballinteer Community School
Mr Michael Halpenny	Branch Secretary, SIPTU
Mr Tony O'Dwyer	Institute of Chartered Secretaries and Administrators
Mr Paul Appleby	Department of Enterprise, Trade and Employment
Mr Vincent Madigan	Department of Enterprise, Trade and Employment
Mr Paul Farrell	Registrar of Companies
Ms Nora Rice	Legal Adviser, Companies Registration Office
Mr John Fanning	Department of Finance
Mr Donal Hannigan	Department of Finance (Mr Hannigan replaced Mr Fanning during the course of the Group's work)
Mr Roger Kenny	Office of the Attorney General
Mr Simon O'Leary	Deputy Director of Public Prosecutions
Mr Peter McCormick	Office of the DPP
Ms Muriel Hinch	Revenue Commissioners
Mr Michael Flahive	Department of Justice, Equality and Law Reform
Ms Alacoque Condon	High Court Examiner
Mr Eugene Gallagher	Garda Bureau of Fraud Investigation
Mr Philip Donegan	Secretary

SUBMISSIONS

1.5 Advertisements were placed in the national media on 20/21 August 1998, inviting submissions on matters related to the work of the Group. The Group received submissions from the following organisations / individuals:-

- The Society of the Irish Motor Industry (SIMI)
- Irish Institute of Credit Management
- Mr Michael Phelan, Dublin
- Patrick Igoe and Company
- RDC Europe Ltd
- Institute of Chartered Secretaries and Administrators
- Mr Eamonn O Flannagain, ACMA, Dublin
- Companies Registration Office
- Mr Liam Madden, Cork
- The Consultative Committee of Accountancy Bodies - Ireland (CCAB-I)
- PricewaterhouseCoopers
- Department of Enterprise, Trade and Employment
- Deloitte & Touche
- Free Legal Advice Centres
- Revenue Commissioners
- The Association of Company Registration Agents Ltd
- IFSC Funds Legislation Review Group
- Mason Hayes & Curran, Solicitors
- John O'Donnell, Barrister
- Brian Dempsey, SC
- IBEC

ACKNOWLEDGEMENTS

1.6 The Group would like to thank all those who took the time to make submissions which the Group found useful and informative. Those submissions which relate to reform of company law and which either fell outside the immediate scope of this report or which, in the opinion of the Group, required further consideration have been transmitted to the relevant section of the Dept of Enterprise, Trade and Employment.

1.7 The Group is indebted to members of the staff of the offices of the U.K. Department of Trade and Industry and the U.K. Insolvency Service, London and of the Companies House, Cardiff, who generously gave of their time and experience to members of the Group who visited them.

1.8 The Group would like to thank officials in the Department of Foreign Affairs for their assistance in gaining an insight into the approach to company law compliance and enforcement in other countries.

1.9 The Group would like to thank James Gallagher who accepted the Group's invitation to appear before the Group and to outline the experience of the Company Law Review Group.

1.10 The Group would also like to thank Gill & Macmillan for their kind permission to reproduce (see Appendix 2) the list of offences under the Companies Acts 1963-1990 contained in the *Irish Company Law Index* by Donal McGahon and published by Gill & Macmillan, 1991.

1.11 The Group is especially happy to acknowledge the unfailing diligence, efficiency and courtesy of its secretary, Philip Donegan, of the Department of Enterprise, Trade and Employment, who greatly assisted us in our inquiries and deliberations, and in meeting our demanding deadline.

THE GROUP'S APPROACH TO ITS TASK

> ***Compliance and enforcement are the means by which all legal duties, rights and protections are lifted from the dusty page and have life breathed into them, and without which such duties, rights and protections all return to dust.***

FOSTERING LEGITIMATE ENTERPRISE

1.12 Limited liability is designed to encourage and foster honest enterprise by permitting people to promote and invest in ventures and activities, and at the same time to limit the consequences of failure. Of its nature, limited liability acknowledges the inevitability of some commercial failures in an enterprising society.

1.13 The purpose of company law is neither to prevent nor to insure against - still less punish - commercial failure.

1.14 Our company law confers limited liability on the members of an artificial person to foster continuity and to encourage enterprise in the face of risk; but the law demands in return that such a privilege be confined to those who act in good faith and who abide by a minimum discipline of corporate governance and commercial probity.

1.15 Company law also requires that those who avail of the privilege of incorporation to obtain limited liability should afford to the world at large such information as will enable third parties to assess the risks of dealing with them.

1.16 Company law gives, on paper at any rate, the reasonable re-assurance that abuse of incorporation will entail both criminal and civil liability.

1.17 The approach of the Working Group is, accordingly, based on the promotion of enterprise. Our priority has been to focus on practical, pro-enterprise reforms which will ensure that the stated twin concerns of the Government to maintain "*the social consensus and Ireland's standing as a reputable place to do business which underlie our present economic success*", are addressed.

1.18 Ireland, as a successful enterprising member of the European Union, needs and deserves a system of company law which is both effective and practical. Paper obligations and paper remedies will not suffice. Those who avail of incorporation have nothing to fear from fair enforcement of the laws under which they operate: the community, by

contrast, has much to fear and to lose if the legal regulation of corporate activity exists only on paper, and has no practical effect.

SOCIAL ADVANTAGES OF ENFORCEMENT AND COMPLIANCE

1.19 Quite apart from the general desirability of compliance with, and enforcement of, the law, there are particular reasons why company law should be complied with and enforced. These include:

- **Protection of the public from fraud and commercial irresponsibility**
- **Protection of employees' interests in the viability of their employers**
- **Protection of traders and suppliers**
- **Protection of the State's revenues and of the tax-payer**
- **Protection of investors and credit institutions**
- **Protection of legitimate business from fraud-based competition**
- **Protection of Ireland's trading and financial reputation**

1.20 A compliant corporate sector should yield substantial returns in business efficiency, solvency, revenue yield, social solidarity and in terms of public and private time saved in dealing with the consequences of non-compliance.

ADVANTAGES TO THE INDIVIDUAL ENTERPRISE

1.21 In addition, compliance with the reasonable disciplines laid down in company law both in relation to governance and accounting is beneficial to the enterprise *itself.*

1.22 If a business cannot record its transactions, furnish accounts promptly, and comply with the minimal legal requirements of transparency, it is probably incapable of observing the other disciplines needed for financial survival. Conversely, any enterprise which takes compliance seriously is also likely to identify and avoid problems in good time which otherwise might threaten its viability.

A CULTURE OF COMPLIANCE

1.23 Voluntary compliance with company law should become natural, conventional behaviour for *all* involved in the corporate sector – not merely an aspiration of excellence for a conscientious minority.

1.24 Rather than introducing any new draconian regime or creating an explosion in corporate investigations, it seems better to the Group to make non-compliance more bothersome than compliance for the vast, decent majority of those who use companies to run business and hold property – and to make it easier and more convenient for the community to enforce the civil and criminal law against the recalcitrant and, hopefully, diminishing minority who will not comply voluntarily with their legal duties. The Group has not sought to add to the substantive body of company law but rather to focus on measures which will improve compliance with the existing statutory requirements.

CODIFICATION AND SIMPLIFICATION

1.25 The Group is also conscious that our company law is now to be found in a lengthening series of statutes and statutory regulations which are complex and increasingly formidable to the expert and to the lay person alike. It was not our function to simplify or codify company law – although we believe that simplification and codification should be undertaken as a matter of priority. It is our expectation that the recommendations made in Part V of this Report should provide the context and mechanism for such a comprehensive reform.

REGISTRATION AND NON-REGISTRATION TYPE CASES

1.26 Having regard to the terms of reference, the Group concluded that there were three broad areas in respect of which we were required to make recommendations. They are as follows:-

- Ensuring greater ***compliance*** with company law thereby reducing the need for enforcement
- Ensuring greater ***enforcement*** of company law where non-compliance persists
- Establishing a ***system*** of review and reform of company law.

1.27 As regards compliance and enforcement, the Group concluded that it would be appropriate to distinguish between compliance and enforcement with regard to:-

- day-to-day requirements of company law, such as filing returns, etc, which fall primarily within the province of the Companies Registration Office (*"registration-type cases"*), and

- the enforcement of company law in respect of more individual issues, such as fraudulent and reckless trading, false accounting and offences relating to insolvency, which are not within the province of the Companies Registration Office or which would not easily be fitted within its jurisdiction (*"non-registration type cases"*).

IMPLEMENTATION

1.28 The limited time frame in which the Group was required to report – from its establishment on the 7th August, 1998 to its reporting deadline of 30th November, 1998 – required a narrow and practical focus.

1.29 In discharging our task within that short period, we would express the hope that, subject to the legitimate right of others to differ with our conclusions, such of our report as is accepted would be implemented with corresponding dispatch.

1.30 The Group wishes to stress that successful implementation of this Report is contingent on the provision of the resources recommended in the Report. The Group would emphasise to the Government its belief that these resources should be allocated as a matter of priority.

1.31 The Group would also wish to acknowledge that an effective compliance and enforcement regime for company law relies upon cooperation between Government Departments and agencies and professional bodies. Provisions set out in the Report are designed to strengthen this cooperation.

PART II - REVIEW OF EXISTING COMPLIANCE AND ENFORCEMENT REGIME

INTRODUCTION

2.1 Irish company law is to be found in various statutes, chiefly the Companies Acts 1963-1990, regulations made under those Acts, regulations made under the European Communities Acts, some related statutory provisions, such as the State Property Act, 1954, and a mass of judge-made law arising from the interpretation and implementation of the foregoing provisions. The main statutory provisions of Irish company law are set out in Appendix 1.

2.2 As far as enforcement and compliance are concerned, it is necessary to view company law as a mixture of criminal and civil liabilities and duties. Apart from criminal offences created under statutory instruments and regulations mentioned above, there are some 280 separate criminal offences provided for in the Companies Acts 1963-1990. These statutory offences (which are usefully compiled together in McGahon's *Irish Company Law Index*, Gill & Macmillan, 1991, reproduced in Appendix 2) range from relatively small summary offences with a maximum fine of £25 to serious indictable offences carrying maximum sentences of 10 years or fines of £200,000.

EXISTING RESPONSIBILITY FOR ENFORCEMENT OF CRIMINAL PROVISIONS

2.3 For historical reasons of economy and scale, the Oireachtas did not provide, when enacting the Companies Act, 1963, any parallel to the functions of the Official Receiver in Britain. The function of liquidations and the enforcement of the law relating to insolvency was left in private hands, assisted by the supervisory role of the High Court's judges and officers. The result has been that there is little tradition or experience in the public enforcement by public officials of the civil or criminal law relating to serious non-registration type breaches of the Companies Acts.

2.4 The Group has found that Irish company law has been characterised by a culture of non-compliance and a failure by companies and their officers to meet their obligations in respect of the filing of annual returns on time. In 1994, only 16% of companies complied with their obligations to file annual returns on time. That figure rose to 18% in 1995, but fell back again to 17% in 1996 and 13% in 1997, as the Companies Registration Office reorganised itself. The Companies Registration Office, as will be

seen later in this Part, has now embarked on a vigorous programme of enforcing the "striking off" remedy, initiating the strike off procedure in batches of up to 500 companies per day. Now that the Companies Registration Office is organised to respond almost automatically to defaults in filing obligations, the Group expects a huge increase in compliance with annual filing requirements.

2.5 Enforcement of the law in relation to non-registration type offences is very rare and wholly unpredictable. Most statutory offences have never been the subject of prosecutions, and those which have been prosecuted have resulted in only a handful of convictions. While it is true that company insolvencies which give rise to court liquidations expose law breakers to some risk of exposure and punishment, the great majority of insolvent companies are not liquidated by the courts and the risk of prosecution of law breakers in those cases is very small indeed. Those who are tempted to make serious breaches of company law have little reason to fear detection or prosecution. As far as enforcement is concerned, the sound of the enforcer's footsteps on the beat is simply never heard.

2.6 Responsibility for enforcement of the criminal provisions of the Companies Acts is divided among the following State agencies – the Director of Public Prosecutions, the Minister for Enterprise, Trade and Employment and the Registrar of Companies.

2.7 The Director of Public Prosecutions, who functions under the Prosecution of Offences Act, 1974, has the sole right to prosecute on indictment in respect of any offences committed under the Companies Acts and may also prosecute any other offences which are summary offences under the Act.

2.8 Section 240(4) of the Companies Act, 1990 ('1990 Act') specifically provides that summary proceedings in respect of any offence under the Companies Acts may be prosecuted by the Minister for Enterprise, Trade and Employment. In relation to such summary offences, the Minister has, accordingly, a concurrent right to prosecute with the Director of Public Prosecutions.

2.9 In addition, the Registrar of Companies is specifically authorised to prosecute in respect of 34 summary offences (listed in Appendix 3) and which relate mainly to offences of omission in respect of obligations to make information available to the public, principally through the Companies Registration Office.

2.10 The Group is satisfied that, apart from prosecutions instituted by the Registrar of Companies, the great majority of the hundreds of summary offences provided for in the Acts have never been the subject of any criminal proceedings, and there has only been a handful of occasions on which the indictable offences have been prosecuted.

REPORTING OF SUSPECTED OFFENCES

2.11 In addition to the foregoing, section 92 of the Companies Act, 1990 provides that where it appears to a relevant authority of the Irish Stock Exchange (as defined by section 90 of the Companies Act, 1990) that a person has contravened the provisions of section 91 of that Act in relation to the obligation to notify certain interests to the Exchange, such authority shall report the matter to the DPP who may then consider whether or not a prosecution should be brought in respect of that report.

2.12 Section 115 of the Companies Act, 1990 makes similar provisions in relation to suspected cases of insider dealings.

2.13 Section 299 of the Companies Act, 1963, as amended, provides for the reference to the Director of Public Prosecutions by the High Court in the course of a compulsory winding up or by the liquidator in the course of a voluntary winding up of any cases in which it appears that any past or present officer or member of a company has been guilty of an offence.

2.14 In such cases, however, the Group is satisfied that the Director of Public Prosecutions has no investigative function and, accordingly, simply refers any such cases to the Gardaí for investigation. It should be emphasised that the delivery to the DPP of a very damning liquidation report does not, of itself, provide any admissible evidence for a criminal prosecution. Thus, although the Companies Acts provide for an obligation to assist the Director of Public Prosecutions, and for access for the DPP to documents and information relating to the suspected offences, the Office of the Director of Public Prosecutions can take no independent investigatory steps, and must rely exclusively on An Garda Síochána, to whom he refers such matters, to further investigate such cases.

CIVIL FUNCTIONS OF THE DIRECTOR OF PUBLIC PROSECUTIONS

2.15 The Group similarly found that although section 160 of the Companies Act, 1990, gives the Director of Public Prosecutions power to apply to the court to disqualify persons from acting as directors, auditors, officers, receivers, liquidators, examiners, or being involved directly or indirectly in the promotion, formation or management of any company, the Office of the Director of Public Prosecutions is not equipped or organised to investigate and institute civil proceedings for disqualification in the manner envisaged by the Act. The Group concluded that there was an anomaly in providing a civil role in the monitoring of company directors for the Director of Public Prosecutions in matters which may not amount to or disclose the commission of a criminal offence.

2.16 The Group was of the view that responsibility for making applications to disqualify persons was generally inconsistent with the primary functions of the Director of Public Prosecutions in prosecuting criminal offences on foot of investigations carried out by others. It would be more appropriate for these functions to be carried out by another agency.

2.17 The Group concluded that, in general, summary offences under the Companies Acts should be prosecuted either by the Registrar of Companies or by a specialist enforcement agency discharging the powers of the Minister, and that the Director of Public Prosecution's Office should prosecute indictable offences under the Companies Acts on foot of completed investigations either by the Gardaí or by such a specialist agency, or by both.

THE DEPARTMENT OF ENTERPRISE, TRADE AND EMPLOYMENT'S ROLE AND RESOURCES

COMPANY LAW ADMINISTRATION SECTION

2.18 Turning to the Department of Enterprise, Trade and Employment, it was noted that the Department's Company Law Administration Section (excluding the Companies Registration Office) had a total staff equivalent to eight full time members comprising one Principal Officer, two Assistant Principal Officers, two Higher Executive Officers/Administrative Officers, one Executive Officer, and two Clerical Officers. Two of these staff are predominantly working on matters relating to credit unions, industrial and provident societies and other forms of corporate entity.

2.19 Dividing the remaining six staff among the Company Law Section's functions, the Group found that company investigations currently absorbed about three full-time staff equivalents, i.e., 60% of the time of the Principal Officer, 75% of the time of one Assistant Principal Officer, 100% of the time of a Higher Executive Officer/Administrative Officer and 70% of the time of a Clerical Officer. In addition, three professional accountants have been taken on from other Departmental duties to assist with current companies investigations; staff in the Attorney General's Office and Chief State Solicitor's Office also provide legal support. All of these staff are working under severe pressure at present.

2.20 Other company law administration functions, including Ministerial approval for change of company names, the right to dispense with the word "limited", functions in relation to accounting bodies and their recognition for auditing purposes, the legislation relating to unit trusts and collective investment schemes, the preparation, presentation and

evaluation of the annual *Companies Report*, the *Take-over Panel Report*, the *Insider Dealing Report*, the *CREST Report*, the *Investment Limited Partnerships Report* and other reports occupy the equivalent of close to three full-time staff in the following proportions, 20% of the time of a Principal Officer, 65% of the time of an Assistant Principal Officer, 30% of the time of a Higher Executive Officer/Administrative Officer, 70% of the time of one Executive Officer and 100% of the time of one Clerical Officer.

2.21 As regards Departmental resources for the investigation and prosecution of breaches of the Companies Acts the Group was satisfied that other commitments of the Department left the manpower equivalent of about one half of one full-time staff member of the Department to discharge this vital function. In the UK, such functions are discharged by many hundreds of full-time public servants. Put shortly, demands on manpower mean that there are currently no Departmental resources allocated for enforcement of the law.

2.22 In these circumstances, the Group came to the conclusion that day to day investigation and prosecution of breaches of company law (other than Companies Registration Office offences) is close to non-existent and that within the existing resources allocated to these functions there is no realistic prospect that the Department's function of enforcement, as envisaged by the Acts, will be discharged.

2.23 In December, 1994, the Company Law Review Group made proposals for the establishment of an adequately resourced unit located within the Department of Enterprise, Trade and Employment to enforce certain aspects of company law.

2.24 The Group has concluded that each of the various roles envisaged for the Minister under the Companies Acts 1963–1990 - whether as prosecutor, policy maker, administrator, or inquisitor – requires the deployment of significant manpower resources. The existing resources allocated to these activities are not, in the opinion of the Group, in any way adequate for the proper administration and enforcement of company law.

2.25 As will be noted later, the Group also concluded that the provisions of existing law relating to the restriction of directors in the case of company insolvency depends largely upon the activism of the High Court judiciary. Relying on judges or private parties, whether liquidators, creditors, or members to enforce all of the provisions of the Companies Acts is wholly unrealistic. If the more complex provisions of the Companies Acts are to be enforced, and if serious breaches of company law are to be remedied as a matter of probability, the enforcement role envisaged by the Acts for the Minister will have to be transferred to a specialist unit with the resources and skills to enforce the law on a consistent and independent basis.

2.26 The Group considers that by strengthening the civil injunctive remedies which exist under section 371 of the 1963 Act, by which the High Court is empowered to oblige non-complying companies to comply with the Acts, and by giving standing to an independent enforcement agency to apply for such injunctions, effective non-criminal remedies would constitute a real deterrent to those who currently ignore existing criminal penalties

2.27 The Group is strongly of the view that, without an effective company law enforcement agency, there is a serious and growing risk of major damage to Ireland's reputation as a place in which to do business and, furthermore, that the existing under-enforcement of the provisions of the Companies Acts is likely to give rise to financial scandal, social disharmony, and public disenchantment unless remedied. The Group regards action to counter a culture of under-enforcement, non-enforcement and non-compliance as an urgent economic, social and legislative priority.

2.28 The Group has also concluded that the cost of additional resources required to enforce the system of company law while significant is far less than the likely cost of failing to remedy the problem. Apart from unquantifiable, but nonetheless real, economic loss arising from a damaged international trading reputation, the likely cost of inquiries under the Companies Acts tribunals, court prosecutions and the social cost of non-enforcement in terms of damage to creditors and the like, makes it essential, in the view of the Group, that the State should undertake and discharge the basic responsibility implied by the Companies Acts namely the provision of realistic and adequate resources to ensure enforcement of and compliance with the public law provisions of the Acts.

2.29 The Group has, in summary, concluded that present arrangements for enforcement of non-registration type company law are wholly inadequate and likely to give rise to serious economic and social damage, and damage compliant companies.

COMPANY LAW (EU/LEGISLATION) SECTION

2.30 The Company Law Division in the Department is divided into two sections with one being responsible for the drafting of new company law legislation and EU matters and the second being responsible for the administration of existing company law statutes. The work of the latter section has been covered under the preceding paragraphs.

2.31 The role of Company Law (EU/Legislation) section is the enactment of legislation, the negotiation of EU proposals and the transposition of EU proposals into domestic law.

2.32 The section currently comprises one Principal Officer; two Assistant Principals; one Higher Executive Officer and two Clerical staff.

2.33 The current priorities of the section are:-

- publication and enactment of a Companies (Amendment) Bill currently in drafting (see paragraph 2.34)
- helping resolve the IRNR[2] Problem
- negotiating the 13th Company Law Directive
- negotiating the European Company Statute.

2.34 The Companies (Amendment) Bill, referred to, is designed to implement a number of the recommendations in the First Report of the Company Law Review Group and, in particular:-

- to remove from certain small firms the statutory requirement that their accounts must be audited annually, and
- to refine the examinership framework for companies in financial difficulties.

2.35 The Bill will also provide for amendments to the Investment Limited Partnerships Act, 1994 and to the procedures under the Companies Acts in relation to prosecutions.

2.36 The need for an ongoing programme of legislative reform and the additional resources that should be applied to that purpose in the Department of Enterprise, Trade and Employment is considered further in Part V.

ROLE OF THE REGISTRAR OF COMPANIES

2.37 The primary function of the Registrar of Companies (and of the Companies Registration Office (CRO)) is to retain and make available for public inspection corporate and other documents as provided for under the Companies Acts 1963-1990.

2.38 The principal documents filed at the Office are:-

- the documents constituting the company, in particular the memorandum and articles of association
- the annual return, i.e. a summary of the position of the company as regards officers, shareholders and capital structure made up to 14 days after the annual general meeting
- the accounts of the company; these are required to be annexed to the annual return

[2] An Irish registered non resident company (IRNR) is a company which is incorporated in Ireland under Irish company law but is not resident here for tax purposes because the company is managed and controlled abroad. IRNRs create problems for Ireland's international image and its reputation as a well regulated jurisdiction for conducting business.

- particulars of changes in information already registered, in particular, officers of the company, the company's registered office and changes in capital
- reports by liquidators, receivers and examiners
- charges in respect of the company.

2.39 The CRO, which employed 80 staff in 1997, currently employs 112 people overall. It expects staff numbers to increase to the approved staff level of 120 shortly. Out of this total staff, 8 people are involved in the enforcement of the law relating to the filing of returns with the CRO. This latter is a doubling of the number involved in enforcement prior to 1998.

COMPLIANCE RATE IN FILING RETURNS

2.40 The filing of an annual return is the key compliance act by a company as it provides a full, up to date, summary of the position of the company, including its accounts, and necessitates bringing a range of other compliance issues up to date such as notifications of changes in officers. There is no necessity to enforce filing requirements in respect of new companies or particulars of charges as these provisions are in effect self enforcing.[3]

2.41 The compliance rate of companies filing annual returns with the CRO is very poor. As will be seen from Table 1 below, only 13% of companies in 1997 had filed returns within the due period[4] with less than 40% of companies having filed their annual return by the end of the year in question. Based on an analysis of the response to recent strike-off actions by the CRO, it is estimated that upwards of 40% of the companies on the CRO register are not trading. However, discounting 40% of companies as being non-trading still indicates an "on-time" compliance rate of only 20-30% in recent years and an "end-year" compliance rate of between 60-65%.

TABLE 1
COMPANIES' COMPLIANCE RATE

YEAR	COMPANIES DUE TO FILE	FILED ON TIME	COMPLIANCE RATE	FILED AT 31 DECEMBER	COMPLIANCE RATE
1994	121,282	19,442	**16%**	47,476	**39%**
1995	123,279	22,341	**18%**	49,061	**40%**
1996	128,663	21,261	**17%**	50,259	**39%**
1997	136,245	17,801	**13%**	49,242	**36%**

[3] A company cannot trade as such until a Certificate of Incorporation has been issued by the Registrar. A charge on a company is unenforceable unless it has been registered at the CRO within 21 days of its creation.
[4] The annual return is required to be made 14 days after the AGM and filed within 60 days of the AGM

ENFORCEMENT PROCESS

2.42 While the requirement under the legislation is to file a return within 60 days of an annual general meeting, the CRO is currently unable to enforce that provision as a general measure as it would be required to firstly prove that a general meeting had taken place. While it would be possible to prosecute a company following the filing of an annual return if it proved to be out of date, the Registrar considers that resources are better expended on those companies which have not filed returns rather than on those which have.

2.43 The enforcement process in respect of returns, therefore, relates to the general requirement to file a return in each calendar year.

2.44 There are four principal processes open to the Registrar for enforcement, *viz.*,

- **strike-off of a company** which is two years or more out of date in filing an annual return
- **prosecution of a company** for failure to file a return
- **prosecution of an officer** of a company for failure to file a return
- **disqualification of an officer** from holding office following the commission of three offences under the Companies Acts.

2.45 As a first step in improving compliance the CRO proposes to issue warning notices to approx. 35,000 companies by the end of 1998 and to all other companies early in 1999.

STRIKE-OFF PROCESS

2.46 Pursuant to section 12 of the Companies (Amendment) Act 1982, the Registrar may strike a company off the register for failure to file annual returns for 2 consecutive years. A company which has been struck off may be restored to the register by the Registrar within one year, on completing all outstanding returns, and within 20 years on application to the court.

2.47 As part of the process of striking companies off the register, two notices of strike-off are required to be issued to the registered office of the company giving the company an opportunity to reply stating they are no longer trading and agreeing to being struck off, or else to file the outstanding annual returns.

2.48 In the past the CRO has struck off companies on an irregular basis at the rate of about 8,000 per year in groups of from 500 to 5,000. The Office is now starting a system whereby the strike off process will commence in daily batches with approximately 500

companies per batch. These companies are selected at random from the database. The process will continue virtually every working day until all companies out of date for two or more years have been processed. This will take until about June 1999.

2.49 This enhanced enforcement regime is being made possible by the recent addition of extra staff to the CRO.

2.50 In the context of legislation currently being drafted, there are proposals to strengthen the provisions on strike-off in legislation which is shortly to be introduced. The effect of these proposals would be to reduce the time for striking off and to make the process less complicated. These modifications will be fully operated by the CRO, when enacted.

PROSECUTIONS

2.51 Under section 125 of the Companies Act, 1963, the Registrar may prosecute a company and every officer of the company who is in default for failure to file annual returns. The following Table sets out the number of prosecutions in recent years:-

TABLE 2
PROSECUTIONS FOR FAILURE TO FILE RETURNS 1994 - 1997

	1994	1995	1996	1997
Companies				
Number of Prosecutions	1,979	626	43	Nil
Number of Convictions	1,418	546	26	Nil
Fines Imposed	£2,024,550	£684,950	£16,475	Nil
Directors				
Number of Prosecutions	103	116	-	107
Number of Convictions	43	55	18	30
Fines Imposed	£11,700	£37,675	£8,630	£52,460

2.52 It is possible to prosecute up to 300 companies per court day. In court, a company can state that it is no longer trading. In such cases the court usually grants an adjournment to allow the company to be struck off the register. In cases where no annual returns have been filed before the court date and the company is not represented in court, fines of up to £1,000 may be imposed. The average fine imposed is in the region of £250.

PROSECUTION OF OFFICERS

2.53 There were no company prosecutions in 1997. This was because a decision was taken in 1996 to concentrate on the prosecution of directors, as this was considered to be a more effective means of enforcement.

2.54 The prosecution of directors, however, is a labour-intensive process. Before instituting a prosecution, it is necessary to examine the details of each company and check the current status of all directors before issuing any summons. This means that there can be up to ten working days preparation for every one day in court.

2.55 In addition, proceedings against directors for failure to file returns are generally much lengthier than proceedings against companies, and it is estimated that a maximum of 80 such cases per day could be dealt with.

2.56 In tandem with the recently initiated strike-off campaign, the CRO envisages using the additional powers recommended in this Report (see Part III) to substantially increase the number of personal prosecutions in coming years.

ENFORCEMENT AGAINST LIQUIDATORS

2.57 In addition to prosecuting companies and directors, four liquidators have been prosecuted to date. In 1996, for the first time, a liquidator was prosecuted for failure to file liquidator's returns under sections 272 and 306 of the Companies Act, 1963. These prosecutions were given coverage by the media and highlighted the determination of the Registrar to take action against officers of companies who have breached the Companies Acts.

2.58 Because of a lack of resources, however, only a small number of liquidators have been prosecuted to date.

2.59 In Part III following, we consider and make a number of detailed recommendations for improving compliance with the CRO reporting requirements.

ROLE OF THE COURTS

2.60 Because the courts interpret and apply the law they have a central role in the enforcement of and compliance with company law. Once the jurisdiction of the courts is invoked all the rigour of the law will attach to the enforcement of its orders[5].

2.61 A number of recent developments have served to focus attention on the role of the courts in this area. These include the approach taken by the High Court judiciary in court liquidations in applying the provisions of Part VII of the Companies Act, 1990 which relate to the restriction of directors, a number of criminal prosecutions initiated

[5] Note: In this context, order 42, Rule 32 of the Rules of the Superior Courts 1986 provides, with the leave of the court, for sequestration of corporate property or attachment against directors or other officers of the company or by order of sequestration against their property where a judgement or order against a company has been wilfully disobeyed.

by the Registrar of Companies for failure to file returns, a handful of high profile prosecutions by the Director of Pubic Prosecutions against company directors for breaches of the Companies Act, the appointment by the High Court on the application of the Minister for Enterprise, Trade and Employment of a number of inspectors pursuant to section 8 of the Companies Act, 1990, the decision of the late Mr. Justice Shanley in 1996 in *Mantruck Services Limited (in liquidation)* imposing personal liability on a director for certain liabilities of the company for failure to keep proper books and records and his subsequent decision in July 1998 in *Steamline Limited (in voluntary liquidation)* confirming the *locus standi* of a creditor to bring an application before the High Court pursuant to section 150 of the Companies Act, 1990 seeking restriction orders against directors of an insolvent company in liquidation.

2.62 Civil and criminal matters arising from the operation of the Companies Acts 1963-1990 are heard in the various court jurisdictions. Summary prosecutions under the Companies Acts are heard before the District Court. Indictable prosecutions under these Acts are heard before a judge and jury in the Circuit Criminal Court.

2.63 Almost all of the civil jurisdiction of the courts arising from the operation of the Companies Acts 1963-1990 lies with the High Court. Section 3(9) of the Companies (Amendment) Act, 1990 provides for the remission by the High Court to the Circuit Court of matters arising under that Act where the total liabilities of a company are less than £250,000 though no such orders appear to have been made under this section since the commencement of that Act

2.64 The range of company law matters which come within the civil jurisdiction of the High Court is extensive and includes, *inter alia*, the winding up of companies, the restoration of companies to the register, the appointment of examiners and inspectors and the restriction and disqualification of directors.

2.65 In addition to granting reliefs and remedies to those who invoke its jurisdiction the High Court can, on hearing certain Companies Act matters, make orders on its own motion.

RULES COMMITTEES AND SECONDARY LEGISLATION

2.66 The Rules Committees of the various jurisdictional levels of the court structure are empowered, with the concurrence of the Minister for Justice, Equality and Law Reform, to annul or alter Rules of Court and to regulate the practice procedure and pleadings generally of their respective courts.

2.67 The following Rules of the Superior Courts apply to the Companies Acts 1963-1990:-

- Rules of the Superior Courts 1986 (S.I. No. 15 of 1986)

- Rules of the Superior Courts (No. 3) 1991 (S.I. No. 147 of 1991)
- Rules of the Superior Courts (No. 4) 1991 (S.I. No. 228 of 1991)
- Rules of the Superior Courts (No. 2) 1991 (S.I. No. 265 of 1993)
- Rules of the Superior Courts (No. 1) 1994 (S.I. No. 191 of 1994)

2.68 The Companies Act, 1990 (Parts IV and VII) Regulation 1991 (S.I. No. 209 of 1991) prescribes "officers of the court" for the purposes of various sections of the Act. The Examiner and the Registrars of the High Court are prescribed for the purposes of sections 103, 150 and 153 of the 1990 Act; for the purpose of section 167 of the 1990 Act, the Registrar of the Supreme Court, the Registrar of the Court of Criminal Appeal, the Examiner and Registrars of the High Court, the Register of the Central Criminal Court, the Registrar of the Special Criminal Court, the County Registrars and the Chief Clerks of the Dublin Metropolitan District and the District Court area of Cork City and the principal Clerks of other District Courts are prescribed.

COURT APPLICATIONS/COMPANY LAW MATTERS

2.69 The lengthy recession in the 1980's and the enactment of the Companies Act, 1990 and the Companies (Amendment) Act, 1990 have resulted in a vast increase in both the volume and complexity of company law applications coming before the High Court; this relates particularly to court liquidation matters.

COURT LIQUIDATIONS/OFFICIAL LIQUIDATORS

2.70 The High Court has extensive jurisdiction to wind up companies and appoint official liquidators. The circumstances in which the court can make a winding up order are set out in section 213 of the Companies Act, 1963.

2.71 The most commonly adopted ground of application for a winding up order is where a company is unable to pay its debts and a petition is presented by a creditor.

2.72 The right to present a petition for the winding up of a company as well as being a statutory right also forms part of the more general constitutionally protected right of access to the courts and "should not be inhibited save in exceptional circumstances" per Keane J in *Truck and Machinery Sales Limited v Marubeni Kamatsu Limited* (23/2/1996).

2.73 An official liquidator is appointed by the court and as an officer of the court has an important role to play in the enforcement of and compliance with company law. While there are disqualifications in the Companies Act, 1963 as to who cannot be appointed as a liquidator there are no 'qualifications stipulated in that Act as to who may be appointed.

2.74 Order 74 of the Rules of the Superior Courts 1986 regulates the practice and procedure for the winding up of companies by the court.

2.75 The broad functions of the official liquidator are to get in and realise the assets of the company, to ascertain who are the creditors (and more rarely, the contributories and shareholders) and to distribute any balance payable after the discharge of appropriate outgoings amongst the creditors or contributories as the case may be.

2.76 In carrying out that task the official liquidator is given the express statutory powers set out in section 231 of the Companies Act, 1963. The powers set out in subsection (1) can be exercised by the official liquidator with the sanction of the court or of the Committee of Inspection. Those contained in subsection (2) can be exercised by the liquidator without such consent but he may, for his own protection, apply to the court for approval for the exercise of those powers in any particular case. Subsection (3) provides that the exercise by the liquidator in a winding up by the court of the powers conferred by that section shall be subject to the control of the court and any creditor or contributory may apply to the court in relation to any exercise or proposed exercise of any of these powers. Pursuant to subsection (4), the court may provide by any order that the liquidator may, where there is no Committee of Inspection, exercise some of the powers mentioned in subsection (1) without the sanction of court. In most cases where there are any assets at all there will be a number of applications by the official liquidator to the court for approval of the exercise of powers or directions as to how others should be exercised.

2.77 The procedure by which official liquidators report to the court is not governed by statute or regulation. It appears originally to have evolved from the concern of the court that the remuneration sought by the official liquidator was properly payable. For some years past, it has been the practice for every application for remuneration and every application for a final order in a court liquidation to be accompanied by a report of the official liquidator on a number of matters including the cause and conduct of the liquidation, the problems encountered and the time required to complete the liquidation.

2.78 In recent years, a number of practice directions have been made and changes in procedure adopted to make the processing of court liquidations more effective. These include the reporting requirement for the official liquidators already referred to, the introduction of a practice direction in 1993 by Costello J in *G&T Garvey Limited* which

provided for an automatic "Further Consideration" hearing before the judge having charge of the Examiners Court Motion List some six weeks after the making of the winding up order[6]. At this hearing, the court is required to be satisfied that the matter has proceeded promptly and correctly before the Examiner and can consider progress in the liquidation to-date and the extent to which the directors of the company are co-operating with the official liquidator. At this hearing also, the court can give directions to official liquidators such as a direction to bring a motion before the court for the restriction of the directors under Part VII of the Companies Act, 1990.

2.79 Other steps have been taken to develop case flow management at both administrative and judicial level.

2.80 The court has also introduced an "in Chambers" procedure which allows certain "routine" liquidation matters for which an application to court was previously necessary to be processed through the Examiners Office and an order made by the judge sitting in Chambers. Such changes in practice are helpful to official liquidators and avoid the expense which would otherwise be involved in a series of applications to the court.

2.81 The Rules of the Superior Courts provide for the assignment of certain matters including the hearing of petitions, applications and proceedings in relation to winding-ups under the Companies Act, 1963 to a specific judge or judges.

2.82 For some years past, a specific judge been assigned by the President of the High Court to have charge of the Examiners Court Motion List which has had the effect of bringing certainty and consistency to judicial policies and decisions in this area. Likewise, for continuity purposes a specific Assistant Examiner is assigned by the Examiner as Registrar to this list. Almost all applications to wind up and almost all applications for restriction of directors as provided for in Part VII of the Companies Act 1990 are heard by this judge[7].

2.83 All of these matters have contributed to better compliance and significantly faster turnover of court liquidation matters in recent years.

THE ROLE OF THE EXAMINER IN COMPANY MATTERS

2.84 The Examiner is a Statutory Officer of the High Court. The role of the Examiner in company matters is mainly concerned with court liquidations and arises pursuant to the provisions of order 74 of the Rues of the Superior Courts and other practice directions and orders of the court.

[6] The actual winding up order is madc in what is known as the Chancery Courts of the High Court.
[7] The history and current practice relating to the latter type of application is more fully set out in Part IV of this Report.

2.85 The functions of the official liquidator and the Examiner in court liquidations are complementary and parallel.

2.86 The Examiners Office exercises a measure of control over official liquidators in that annual accounts are required to be lodged by them as provided for in the orders appointing them and as a condition of their bond. The Examiner adjudicates on all creditor and shareholders claims in court liquidations and additionally the investment of funds and cheques drawn by official liquidators are required to be countersigned by the Examiner[8].

2.87 The workload of the Examiners Office in relation to court liquidations has greatly increased in the past fifteen years. The processing of official liquidators accounts and the monitoring by the Examiners Office of official liquidators to ensure that they enter into bonds promptly, pay premia and lodge accounts is particularly labour intensive and is inhibited by staff levels and the absence of appropriate software and network technology.

2.88 The Examiner has a more extensive administrative function than her counterpart in the United Kingdom because of a conscious decision not to replicate the Office of the Official Receiver. At least some of the functions exercised by that officeholder were given to the Examiner in Ireland.

2.89 The allocation of additional and appropriate resources to the Examiners Office would facilitate the speedier processing of official liquidators' accounts and the earlier payment of dividends to creditors and would allow the Examiner to refer more matters to court where there is delay on the part of official liquidators (e.g., in the lodgement of accounts). It would also facilitate the court by allowing it to delegate further matters "not of a judicial nature" to the Examiner.

2.90 Given the historical origins of the Examiners Office, it is clear that the role presently being exercised and the current workload of that Office were not envisaged. The whole system and framework for dealing with company matters by the courts originated in an age when the volume, complexity and range of such matters was of an altogether different nature than it is today. While it is difficult at this point to envisage precisely what effect the establishment of the Office of the Director of Corporate Enforcement (see Part IV) will have *vis-a-vis* the courts it seems inevitable to the Group that the workload of the courts will be greatly increased necessitating the appointment and allocation of additional staff and judges.

[8] Liquidation funds are not lodged in court but are required by Order 74 to be held in the joint names of the official liquidator and the Examiner.

2.91 Depending on the volume and range of court applications that will arise from the establishment of such an Office, consideration may have to be given to setting up an administrative unit to co-ordinate all court applications in company matters.

2.92 The Group notes and welcomes the fact that major improvements to the technological resources of the courts are currently under way.

2.93 The Group notes that the Working Party on a Courts Commission has examined in its reports a number of problems relating to the courts and hopes that the Courts Service Board will be able to give early attention to these matters.

PART III - STRENGTHENING REGISTRATION-TYPE COMPLIANCE

INTRODUCTION

3.1 One of the main targets of the Group is to effect a significant improvement in compliance rates in filing returns and with other statutory CRO registration obligations.

3.2 A number of proposals were received and/or considered by the Group relating to the work of the CRO. Some submissions advocated measures to encourage increased compliance with the obligation to file an annual return. Other proposals were administrative in nature and concerned potential improvements in the operation of the CRO. The balance of the submissions considered in the context of the CRO related to legal changes for enforcement of registration-type obligations.

PROPOSALS CONCERNING THE ANNUAL RETURN

ADOPTION OF AN ANNUAL RETURN REFERENCE DATE

3.3 The current position whereby the obligation of a company to file its annual return is linked to the holding of its annual general meeting ("AGM") is considered by the Group to be wholly unsatisfactory. As the Registrar of Companies is not aware of the date on which a company holds its annual general meeting, he is not alerted to the fact that a company has missed the deadline for filing its annual return.

3.4 The Group is, accordingly, in favour of the introduction of a readily ascertainable date on which a company's annual return has to be filed in each year. A clearly defined annual return reference date will allow the CRO to implement various measures to improve compliance (e.g., annual return reminders). An annual return reference date will also facilitate the enforcement process, in that prosecutions for breach of the obligation to file an annual return will be grounded upon a company's failure to adhere to its filing date.

3.5 Another concern which the Group had in this context was to ensure that the information on the company file, in particular the accounts, is as up-to-date as possible. Under the present law, a company effectively has eleven months after its year end to file accounts in the CRO (nine months for preparation plus sixty days for filing). Both the Ryan Commission and the Company Law Review Group in its First Report were in favour of

the implementation of a stricter time scale in relation to filing of accounts - both bodies recommended that companies should be required to hold their AGM within six months of the end of their financial year. The Ryan Commission further recommended that the annual return should be required to be filed within 14 days of the AGM (i.e., 6 months plus 14 days after the year end). The CLRG, however, for reasons of practicality, favoured a slightly longer timescale of 35 days from the date of the AGM (i.e., 6 months plus 35 days after the year end).

3.6 Some concern was expressed in this Group, however, about the shortening of the time scale within which accounts must be prepared and filed, given that the deadline by which accounts must be filed with the Revenue Commissioners is nine months after the end of the accounting period - it was felt that there could be costs implications for companies if two filing deadlines had to be adhered to.

3.7 The Group, while noting the views of the Ryan Commission and the Company Law Review Group in relation to the reduction in the period for filing accounts, recognises the advantage, particularly for smaller companies, of maintaining the link between the CRO's filing requirements and those of the Revenue Commissioners.

3.8 The Group recommends the establishment of an annual return reference date (ARRD) for companies on the basis of a link between the date of incorporation and the date of filing of the annual return (see Annex 3.1 at the end of this Part). While this proposal does alter the obligation to file, it does not significantly alter the existing legal obligation in relation to accounts preparation and age of accounts, given the current requirement that an AGM must be held within 18 months of incorporation, before which accounts, no more than 9 months old, must be laid (section 148 of the Companies Act, 1963).

3.9 The implementation of the Group's ARRD proposal will result in an offence occurring on the day after the filing date in any year if a return has not been filed by a company made up to its ARRD or such earlier date as the company may have selected.

3.10 The Group recognises that as a matter of practicality, companies will require to alter their ARRD on occasion, and for this reason, the proposal allows a company to bring forward its ARRD automatically, by filing a return made up to more than 14 days before the current ARRD - returns must thereafter be filed within twenty eight days of the anniversary of the date to which the most recent annual return has been made up.

3.11 Where a company wishes to extend its ARRD, our concern was to permit flexibility in the case of companies which had good commercial reason to require an extension, while seeking to avoid systematic abuse of the system by companies repeatedly applying to extend the period in order to buy more time to prepare accounts. Existing companies

will have the additional one-off option of extending their ARRD during the first year after commencement of the legislation enacting this proposal (see also Annex 3.1, paragraph 11).

3.12 The Group is aware that the adoption of the above proposal will affect other provisions of the Companies Acts and that implementation will have to be approached carefully.

SEPARATION OF THE ACCOUNTS FILING DATE FROM THE ANNUAL RETURN FILING DATE

3.13 The Group received and considered a submission that the necessity to file a company's statutory accounts at the same time as the annual return ought to be dispensed with. The Group recognises, however, that the abolition of the requirement to file accounts with the annual return would require the CRO to process two separate filings for each company in every year, and would also require the implementation of a completely new enforcement process for accounts filing. Accordingly, the Group does not recommend the adoption of this proposal.

IMPOSITION OF LATE FILING PENALTIES

3.14 This proposal was advanced on the basis that the levying of a late filing penalty would greatly encourage companies to comply with their filing obligations by the due date. At present, a nominal late filing charge of £5 is charged where an annual return is filed late. The Group considers a fee of this level to be a wholly ineffective deterrent to late filing.

3.15 The Group carefully reviewed, in the context of this proposal, the issues raised by the decisions of the European Court of Justice in the *Ponente Carni* and *Fantask* cases and requested and considered the advice of Senior Counsel. Our recommendation is that the late filing fee be reintroduced in relation to the annual return, while acknowledging that the question of its reintroduction will need to be examined by the Office of the Attorney General. The Group recommends the implementation of a substantial, progressively increasing, late filing penalty rather than a one-off, flat-rate charge as the former will provide a continuing incentive to file a return, notwithstanding the expiry of the initial filing date.

TARGETING PREVIOUS LATE RETURNERS

3.16 It was suggested to the Group that the CRO ought to target previous late returners, as a measure to improve compliance with the obligation to file an annual return. The Group agrees, and proposes that as soon as the annual return reference date proposal recommended by us been implemented, the CRO ought to implement a practice of sending out annual return reminders to companies some weeks in advance of the ARRD,

and to target for follow-up those companies which have a history of filing their returns late.

SIMPLIFICATION OF ANNUAL RETURN

3.17 We received a submission that the annual return ought to be simplified. This issue quite clearly requires extensive consideration and widespread consultation. The Group therefore recommends that the CRO discuss with the relevant professional bodies and the credit referencing industry the issue of simplification of the annual return.

SHUTTLE ANNUAL RETURNS

3.18 It was suggested to the Group by a number of parties that the CRO ought to send out to companies annually a standard form of annual return, incorporating all the data which is on the register in relation to a company, and to request the company secretary to enter any changes on the form or else to complete a declaration that there have been no changes to the data held since the previous year. Shuttle returns have been in use in the UK for a number of years.

3.19 The Group, however, is conscious of the substantial investment that would be necessary in order to develop the software required to input and manage the database and production of forms and to install and maintain the extensive hardware necessary to print the returns. It is doubtful whether this considerable expenditure would be justified by the benefits, which would equally be available to any company secretary who retained a copy of the previous return in order to extract the relevant information. Furthermore, electronic filing of annual returns is scheduled to commence over the next fifteen months, the introduction of which is designed to render the paper return exceptional. Accordingly, the Group does not recommend the adoption of this proposal.

PROPOSALS CONCERNING LEGAL CHANGES TO AID ENFORCEMENT

IMPOSITION OF ON-THE-SPOT FINES

3.20 The Group considered whether the CRO ought to be given the power to levy on-the-spot fines on defaulters under which the CRO would issue a notice to defaulters specifying the particular breach of the Acts. The CRO notice would request payment of a specified amount, together with compliance with the relevant section of the Acts, within a certain period, in default of which the company or individual concerned would face prosecution and an increased level of fine.

3.21 The Group recommends the introduction of an on-the-spot fine for a select number of offences, such as failure to file an annual return and failure to file a liquidator's return. In relation to failure to file the annual return, we recommend that the on-the spot fine form part of an overall regime, whereby during the first twelve months after the annual return filing date, the defaulter would face a late filing penalty only. Thereafter, in addition to the late filing penalty, an on-the-spot fine could be levied by the Registrar by serving a notice, followed by prosecution if this was ignored. The late filing penalty and/or on-the spot fine would be independent of the Registrar's discretion to implement the strike-off procedure against a company which is in default. The Group recognises that, initially, additional resources would have to be assigned to the CRO to deal with a greatly increased enforcement workload after commencement of this regime.

INCREASED USE OF SECTION 371 INJUNCTIONS

3.22 The Group believes that once the annual return reference date is enacted, the Registrar of Companies should be in a position to make significant use of section 371 of the Companies Act, 1963, which it is proposed to amend (see paragraphs 4.32/3), and which provides that he can serve a 14 day notice on any company or officer who is in breach of the Companies Acts and thereafter apply for an injunction in the High Court to require them to comply with the Acts. The threat of fast track High Court civil proceedings and consequent costs would, in many cases, act as a major deterrent to non-compliance, not only in relation to the companies in question, but also in relation to individual officer defendants. The Group is of the view that the Registrar of Companies could make easier use of section 371 if standard form 14 day notices and standard form court documentation in the form of originating notice of motion under order 74, Rule 5 (hh) of the Rules of the Superior Courts were devised. The extension of persons covered by s.371 as proposed below (paragraph 4.33) will facilitate the work of the Registrar in this regard.

CHANGES TO COURT PROCEDURE

3.23 To assist in prosecutions, the Group recommends that summary offences under the Companies Acts be removed from the ambit of the Probation of Offenders Act, 1907.

3.24 We consider that it would be helpful, in the interests of consistency and in order to build up a body of expertise, if a District Judge with experience of company law were to be designated to hear company law prosecutions.

3.25 A submission was also considered by the Group that evidence in writing by the Registrar of Companies ought to be *prima facie* evidence of the contents of the register of companies.

3.26 Section 370(3) of the Companies Act, 1963 provides that a copy of, or extract from, any documents kept at the Office for the registration of companies, certified to be a true copy under the hand of the Registrar, Assistant Registrar or other officer authorised by the Minster (whose official position it shall not be necessary to prove), shall in all legal proceedings be admissible in evidence as of equal validity with the original documents.

3.27 The Group believes that a certificate in writing purporting to be made by the Registrar, Assistant Registrar, or other officer authorised by the Minister (whose official position it shall not be necessary to prove) as to the state of the register and as to the date upon which any document was filed or any notification was made, and as to the last occasion (if any) on which any requirement of the Act was complied with in relation to a company should be *prima facie* evidence of the facts stated in such certificate in criminal and civil proceedings subject to rebuttal.

3.28 The Group considers that the provisions of section 283 in relation to the meaning of the term "officer in default" ought to be amended so that an officer, which term includes a director or secretary, who is prosecuted for permitting a default, refusal or contravention of the Companies Act where the officer had a duty to prevent such breach, should bear the onus of disproving fault on his or her part. We have also recommended in Part VII the text for the definition of "officer in default".

ORDER AS TO THE LIABILITIES OF THE OFFICERS OF A COMPANY DURING PERIOD WHEN THE COMPANY WAS STRUCK OFF THE REGISTER

3.29 It was submitted to the Group that the court, on an application to restore a company to the register, ought to have the power to make an order as to the liabilities of a director or secretary of the company during the period when the company was struck off, on the basis that is inequitable that the officers of such a company, which has continued to trade after being struck off, are entitled by virtue of a restoration order to the benefit of limited liability in respect of their activities while the company was struck off.

3.30 The Group agrees with this submission, and recommends an amendment to the legislation to provide that where a court is making an order under section 311 of the Companies Act, 1963, or under section 12 of the Companies (Amendment) Act, 1982, restoring a company to the register, the company shall be deemed to have continued in existence as if its name had not been struck off, save that the court may, if it thinks it proper to do so, declare that any director or secretary of the company which has been restored, shall be personally liable without any limitation of liability, for all or any part of the debts or other liabilities of the company during the period when it was struck off the register, as the court may direct.

CREATION OF OFFENCE OF TRADING AFTER HAVING BEEN STRUCK OFF THE REGISTER

3.31 The Group considered a submission that the existing offence under section 381 of the Companies Act, 1963, which prohibits the improper use of the words "limited" or "teoranta" is insufficient to cover the situation where a company trades as a limited company, after having been struck off the register, as the maximum fine is limited to £500 and is unlikely to be a sufficient deterrent. The Group, however, is not in favour of creating a new offence of trading after having been struck off. Instead the Group has separately recommended that the maximum fine for all summary offences under the Companies Acts be increased to £1,500 (see paragraph 4.26).

PROPOSALS CONCERNING ADMINISTRATIVE CHANGES IN THE OPERATION OF THE CRO

GUIDANCE NOTES FOR DIRECTORS AND FOR COMPANY SECRETARIES

3.32 It was suggested to the Group by a number of parties that the CRO ought to issue an information booklet or leaflet, setting out the principal obligations of a director under Irish company law. The Group considers this suggestion to be a useful one, as guidance notes would assist directors in complying with their obligations under the Companies Acts. The Group would also encourage professional bodies to publish similar guidelines for circulation to their members, and we recommend that the CRO liaise with the professional bodies in this matter

3.33 Furthermore, the Group recognises the role of the company secretary in relation to compliance and corporate governance matters generally, and we, therefore, recommend the issue of a separate booklet, setting out the obligations of the company secretary. We recommend that the CRO liaise with the Institute of Chartered Secretaries and Administrators and other interested parties in the compilation of these guidance notes.

3.34 The Group also considered a submission that a director or secretary ought to be required to acknowledge in writing at the time of his appointment his responsibilities under the Companies Acts 1963-1990 and to confirm his willingness to undertake and comply with those responsibilities, and that the form of consent to becoming a director ought be altered to reflect this. We are of the view that such an acknowledgement ought to be signed by every director and company secretary on appointment as such.

3.35 The Group, therefore, recommends that the form of consent to acting as a director/secretary contained in Forms A1 and B10 be amended to include an acknowledgement by the individual who is consenting to act as director or secretary that

he is aware of the responsibilities of a director/secretary, as the case may be, in relation to the management/governance of a company, respectively and of the company's obligations under the Companies Acts and that he undertakes to ensure that the company complies with these obligations. We are of the view that this acknowledgement and undertaking will highlight the responsibility attaching to the offices of director and secretary, and will render it more difficult for a individual who is subsequently prosecuted for breach of the Companies Acts to state in his defence or to plead in mitigation that he was unaware of his statutory obligations.

PROOF OF IDENTITY FROM ALL DIRECTORS

3.36 A submission was considered that proof of identification, in the form of an RSI number, ought to be required from all Directors. This would aid in the identification of restricted/disqualified directors. It would also provide a control mechanism where an individual applies in a different version of this name. It was recognised, however, that the CRO file is a matter of public record, and that for reasons of confidentiality, many people may not wish to have their RSI number readily ascertainable. A further difficulty is that some individuals do not have RSI numbers, in particular, non-resident directors. The Group has, accordingly, decided to leave the significant issues arising on foot of this proposal for consideration in greater detail by the Company Law Review Group.

VOLUNTARY STRIKE OFF PROCEDURE

3.37 A submission was received that there ought to be a standard form of strike off request. The Group, however, is not satisfied that it would be appropriate to have an automatic process for strike off which would allow companies to circumvent the winding up process. If a company is solvent, the correct form of dissolution is a members' voluntary winding up. The Group is of the view that if a process were to be put in place whereby companies could apply for a strike off on a statutory form, the liquidation process, with all its potential pitfalls for directors who have been in serious dereliction of duty, could be circumvented, leading to wholesale evasion of the obligation to liquidate. The Group therefore does not recommend any change to the present position, whereby voluntary strike-off is at the discretion of the Registrar of Companies.

IDENTIFICATION CODE FOR QUALIFIED AUDITORS

3.38 The Group considered a suggestion that suitably qualified auditors be assigned a specific identifying code, so that the CRO can check that every auditor's report received for filing is signed by a qualified auditor. The Group supports this proposal, which would provide the CRO with a speedy and effective method of checking whether an auditor's report had been signed by a qualified auditor. We note that the CRO is, in

fact, already in discussion with the Consultative Committee of Accountancy Bodies - Ireland concerning this issue. The Group, accordingly, recommends that the CRO advance this implementation of this proposal with the CCAB-I.

INTERNET ACCESS TO THE REGISTER OF COMPANIES

3.39 It has been submitted to us that the register of companies ought to made available on the Internet, on a read-only basis. The Group has been informed that this matter is already in hand by the CRO and that CRO data will be available in read-only format on an Internet site during 1999.

LEVY TO FINANCE FUND FOR COMPLETION OF LIQUIDATIONS

3.40 It was suggested to the Group that registered companies ought to be levied by the CRO in order to set up a fund for the satisfactory completion of liquidations. The Group cannot accede to this proposal, however, as such a levy would fall foul of the rulings of the European of Justice in the *Ponente Carni* and *Fantask* cases concerning EC Directive 335/1969 which prohibits, *inter alia*, indirect taxes on the raising of capital - the effect of these decisions is that the CRO is permitted to impose fees to cover its own operations but not to cover matters unrelated to the running of the CRO. Accordingly, the proposed levy would fall outside the scope of the fees which the CRO is entitled to charge.

REVIEW OF CRO FORMS

3.41 A submission was received that all existing CRO statutory forms ought to be reviewed to ensure that they are as easy to use and as consistent as possible. A related submission is that the CRO ought to produce or licence a software package incorporating the more widely used forms. The Group recommends that the CRO proceed with a review of its forms. The Group noted that the CRO is currently working with the Dublin Solicitors Bar Association on the production of a diskette which will contain all of the CRO forms in their current format, and also that when the CRO Internet site is implemented during 1999, it will be possible to download blank forms on-line, free of charge.

SINGLE FILING IN RESPECT OF MULTIPLE RETURNS

3.42 The Group considered a submission that groups of companies ought to be permitted to file one copy of the holding company's accounts with the annual returns in respect of a number of subsidiary companies, rather than having to file separate copies with each return. The Group noted that this was already in hand by the CRO in that it will be covered in new CRO regulations made under s. 248 of the Companies Act 1990, which are scheduled to be introduced in the next few months.

ANNEX 3.1 - ANNUAL RETURN REFERENCE DATE

Delivery of Annual Return to CRO

1. Every company shall deliver to the Registrar of Companies not later than 28 days after its Annual Return Reference Date (ARRD) in every year its annual return.

2. The return shall be made up to a date not later than the ARRD. A company may make its annual return up to a date earlier than the ARRD, but the return must in that case be delivered to the Registrar within 28 days of the earlier date.

Determination of Annual Return Reference Date

3. Subsequent ARRDs shall be the anniversary of the previous ARRD, unless modified per paragraphs 9, 10 or 11 hereof.

4. For companies incorporated after commencement of the legislation giving effect to this proposal, the first ARRD shall be six months after the date of the incorporation of the company, and no accounts need be attached to this return.

5. For existing companies, the initial ARRD under the new regime shall be the anniversary of the date of the most recent annual return prior to commencement of the legislation giving effect to this proposal, or six months after the date upon which the anniversary of incorporation of the company falls, if no annual return has ever been filed by the company. An existing company may avail of the option to extend its ARRD by up to six months on one occasion during the first twelve months after commencement of the legislation giving effect to this proposal, without affecting its entitlement to extend its ARRD once in every five years, which is set out at paragraph 10 hereof.

Accounts

6. The second and subsequent annual returns shall be accompanied by accounts, save as provided below.

7. In the case of companies incorporated after commencement of the legislation giving effect to this proposal, the accounts which accompany the second annual return shall cover a period commencing at the date of incorporation (unless accounts were filed with the first return, in which case the accounts which accompany the second return shall cover a period commencing on the date immediately following the date to which the previous accounts were made up), and ending not earlier than nine months prior to the date to which the annual return is made up.

8. The accounts which accompany subsequent annual returns after the first return in the case of a company incorporated after commencement of the legislation giving effect to

this proposal, and which accompany the initial return under this regime in the case of an existing company, shall cover a period commencing on the date immediately following the date to which the previous accounts were made up and ending not earlier than nine months prior to the date to which the annual return is made up.

Modification of Annual Return Reference Date

9. Where the second or any subsequent annual return is made up to a date more than 14 days prior to the current ARRD, the next ARRD shall be the anniversary of the date to which that return is made up.

10. Where a company wishes to extend its ARRD, it must file an annual return, to which accounts need not be attached, and nominate its new ARRD, which must be within six months of the current ARRD, and accounts must be filed with the return made up to the new ARRD. This option to extend the ARRD may not be availed of by a company more than once in every five years, save that where an existing company opts to extend its ARRD within 12 months of the date of commencement of the legislation enacting this proposal, such extension shall not be reckoned for purposes of the "once in every five years" rule.

11. The Group also recommends a modification to section 153 of the Companies Act, 1963, to extend its provisions to the ARRD. This section provides a Ministerial power to change accounting periods and annual return filing dates in the case of company mergers and take-overs.

PART IV - ENFORCEMENT OF NON-REGISTRATION TYPE LAW

INTRODUCTION

4.1 It is clear that the primary enforcement role for breaches of the Companies Acts resides with the Director of Public Prosecutions (DPP) and that even the Registrar of Companies has a greater range of powers than the Minister in certain areas of company law, e.g., restrictions and disqualifications. The Minister's enforcement role under company law is limited to the initiation, within a period of three years from the date of the offence, of summary proceedings for breaches of company law.

4.2 In practice, the severe time limitation of three years has meant that many offences do not come to attention until they are "out of time", thus precluding Ministerial intervention to initiate a prosecution of the offences. In addition, the successful prosecution of these more serious offences would require a significant investment in staffing resources of both an accountancy and legal character. These resources are simply not available to the Minister. In fact, the Group was dismayed to learn that not even one full-time person was deployed in the Department of Enterprise, Trade and Employment in the enforcement of company law offences for which the Minister has responsibility. Given this absence of resources, we were not surprised to learn that the limited staff time available for enforcement duties was focused on the offences which could be more successfully prosecuted in court, e.g., acting as auditor without being qualified to do so.

4.3 It is understood that recent revelations of apparent malpractice in Irish corporate affairs over a prolonged period have provoked an upsurge in similar allegations to the Department which it is simply not in a position to address properly. In pursuance of her powers under Part II of the Companies Act, 1990 ("the 1990 Act"), the present Minister has made an unprecedented number of interventions to investigate alleged malpractice within the last 18 months or so. Despite a transfer of scarce accounting expertise from other areas of the Department and despite having to deal with a variety of legal challenges to the investigations, the number of staff in the Department still involves no more than about six staff on a full-time basis.

4.4 Many of these investigations are the subject of intense public interest, and where they reveal possible breaches of the Companies Acts appropriate enforcement action will have to be taken if the framework of company law is not to be brought into disrepute. There has been limited enforcement of company law offences in the past, and in the

circumstances, the Group has considered what form of response should be forthcoming from Government to allay public concern in the area of corporate affairs.

COMPANY LAW REVIEW GROUP REPORT

4.5 At the outset, the Group took account of the First Report of the Company Law Review Group which was published in February, 1995. This made a number of specific recommendations for changes to company law. The forthcoming Companies (Amendment) Bill will be taking on board some recommendations of the Group with regard to examinership and the audit of small companies in a first phase of legislative change. However, one of the areas of change which has been postponed for later consideration is that relating to the restriction and disqualification of directors. The Group regards this form of sanction as an important protection of the public interest in preventing corporate malpractice by persons who could act as company directors or other officers or promoters or who could discharge important roles as auditors, examiners, liquidators or receivers of a company.

4.6 In this context, we have considered in detail the following recommendations of the Review Group:

> *"The disqualification provisions in section 160 of the 1990 Act should be strengthened by enabling an adequately resourced executive unit, located within the Department of Enterprise and Employment, to apply for disqualification of directors of companies in insolvent liquidation or receivership."* [Paragraph 7.14];
>
> *"The circumstances in which the executive unit could apply for disqualification would not include those involving fraud or dishonesty where the DPP would be involved but the executive unit could apply in cases of reckless trading."* [Paragraphs 7.14 and 7.15];
>
> *"Liquidators and receivers should be required to report to the executive unit in such a way as to indicate cases where applications for disqualification or restriction would be appropriate."* [Paragraph 7.17].

COMPANY LAW ENFORCEMENT OFFICE

4.7 We agree with the Company Law Review Group that there should be a dedicated agency which would apply to the High Court for restrictions and disqualifications. We believe that the agency should have a wider remit than envisaged by the Company Law

Review Group. We recommend that the agency should now take the form of an Enforcement Office attached as an executive office to the Department of Enterprise, Trade and Employment.

4.8 The Group do not consider that the proposed Office justifies the establishment of a stand-alone organisation, such as the Office of the Director of Public Prosecutions. We envisage that the Department of Enterprise, Trade and Employment will provide central services like personnel, finance and information technology. Such an arrangement is consistent with those operating for many of its other executive agencies, such as the Competition Authority and the Office of the Director of Consumer Affairs and will help to minimise the administrative running costs associated with the Office.

4.9 We recommend that an independent statutory officer, to be known as the Director of Corporate Enforcement, head the Enforcement Office. We envisage that the role of Director would be similar to that of the Director of Consumer Affairs who has specific responsibility in law for the prosecution of offences under consumer legislation and who is independent in the discharge of his functions. Ideally, the Director of Corporate Enforcement should be a person with appropriate legal qualifications and/or experience of the company law area.

4.10 The Group considered whether the enforcement staff in the Companies Registration Office (CRO) should be centralised in the proposed Enforcement Office. However, we decided against such an approach. The CRO staff are heavily involved in distinct operations, such as the current company "strike-off" programme, which is directly related to maintaining the required up-to-date filing requirements of Irish–registered companies. It is clearly appropriate, therefore, that the Registrar of Companies should continue to have such resources at his disposal to discharge his responsibilities under the Companies Acts.

4.11 While we were undertaking our work, the Government established an Implementation Group to define the scope of the proposed Single Financial Regulator in the financial services area. We have considered whether there was any merit in recommending that the supervision of companies in general should come within the remit of this proposed Regulator. However, we do not recommend such an approach for the following reasons:

- only a fraction of Irish-registered companies would be likely to operate in the financial services area and thereby come within the envisaged remit of the proposed Single Financial Regulator;

- company law development and the maintenance of a coherent and consistent regime of company regulation are integral parts of enterprise development which is the primary role of the Department of Enterprise, Trade and Employment;

- the general enforcement of company law should continue to be associated with the company law development and administration functions in the Department, in the interests of good flows of communication and an integrated company law regime;

- company law enforcement could well receive a low priority in the proposed Single Financial Regulator, which would not be conducive to ensuring company law compliance for the vast bulk of companies whose main purpose would reside outside the financial services area.

4.12 A related issue is whether Irish company law is the most appropriate vehicle to facilitate the development of specialised investment funds. This is an area to which the Implementation Group on the proposed Single Financial Regulator may give attention in the coming months.

ROLE OF THE DIRECTOR OF CORPORATE ENFORCEMENT

4.13 A detailed description of the powers which we envisage for the Director of Corporate Enforcement is contained in Annex 4.I at the end of this Part. In summary, the remit which we recommend for the Director includes the following principal features:

- the initiation of summary prosecutions in all areas in which the Minister or the Registrar of Companies is currently accorded statutory responsibility under the Companies Acts;

- assisting in the preparation of cases for the initiation of criminal proceedings on indictment under the Companies Acts by the Director of Public Prosecutions;

- the taking of injunctions against companies, their directors or other persons, in order to prevent a breach or a continuing breach of the Acts;

- applying to court under sections 150 and 160 respectively of the 1990 Act for the restriction and disqualification of persons who could act as company directors or other officers or promoters or could discharge important roles as auditors, examiners, liquidators or receivers of a company;

- exercising a limited supervisory role over the activity of liquidators in the discharge of their duties under the Companies Acts;

- applying to court, in suitable cases, for the following **ancillary orders**: for inspection of a company's books under section 243 of the 1963 Act, examination under section 245 of the 1963 Act, requiring payment or delivery of property under section 245A of the 1963 Act, civil arrest under section 247 of the 1963 Act, a *Mareva*-type injunction to freeze assets in limited circumstances and to enter upon property and seize assets belonging to a company;

- applying to court for remedial orders under section 251 of the 1990 Act and related sections in the case of any company not in liquidation which is unable to pay its debts.

RESTRICTIONS AND DISQUALIFICATIONS

4.14 The Group considers that applications for the disqualification of directors for persistent default in relation to the relevant requirements under the Companies Acts (e.g., the filing obligations as defined by section 159 of the 1990 Act) or on foot of the reports of court-appointed liquidators under section 160 of the 1990 Act should continue to be within the power of the Registrar of Companies and the High Court respectively. However, the Group recommends that the Director of Corporate Enforcement should be given *locus standi* (a) under section 150 of the 1990 Act to apply for restriction orders, and (b) under each of the grounds set out in section 160(2)(a) to (f) of the 1990 Act to apply for disqualification orders. Examples of situations when the Director might make application under these sections include:-

- following receipt of a report from a liquidator of an insolvent company, as proposed in Part VI;

- where companies are not being wound up on account of an insufficiency of assets, within the meaning of section 251 of the 1990 Act;

- on foot of a report by inspectors appointed by the High Court or by the Minister under the Companies Acts where the conduct of any person makes him unfit to be concerned in the management of a company;

- where there has been persistent default in relation to the relevant requirements under the Companies Acts (e.g., filing obligations under the Acts).

RECEIVERSHIPS/VOLUNTARY LIQUIDATIONS

4.15 At present, there is provision under sections 151 and 154 of the 1990 Act allowing both official and voluntary liquidators and receivers to report certain matters to the High Court. Notwithstanding this provision, few, if any, of these reports are made, presumably because the costs of court representation could dilute the funds available for members and creditors. Experience in England and Wales suggests that if such reports were mandatory, some 40% might reveal evidence of unfit conduct by directors. As up to 800 Irish companies go into receivership and voluntary liquidation on an annual basis, the Group is of the view that a large number of company law offences never come to light due to the absence of a compulsory reporting requirement by voluntary liquidators in particular. Clearly, such a requirement on its own could not be effective in the absence of an adequate resource, in the form of a Director of Corporate Enforcement, to evaluate such reports.

4.16 Consistent with the Company Law Review Group Report recommendation [paragraph 7.17], we, accordingly, recommend that all voluntary liquidators of insolvent companies should be required in law to report to the Enforcement Office on the conduct of company directors. We envisage that such reports be forwarded to the Director of Corporate Enforcement within six months of the appointment of the liquidator and as required thereafter.

4.17 We also recommend that every liquidator of an insolvent company be required under section 150 of the 1990 Act to apply to the High Court for a restriction order against one or more directors of the company, unless the Director of Corporate Enforcement relieves him of that obligation (see paragraph 6.42). Such relief could apply, for instance, in circumstances where the Director of Corporate Enforcement believed that the liquidator's report clearly showed that a director or directors had acted honestly and responsibly.

4.18 We also recommend that the Director of Corporate Enforcement should separately possess the required *locus standi* under section 150 of the 1990 Act to apply to have officers of a company in liquidation restricted.

CERTAIN COMPANIES NOT IN LIQUIDATION

4.19 Section 251 of the 1990 Act deals with situations where companies, although not being wound up, may not be able to pay their debts. In order to help prevent a recurrence of situations where company directors simply walk away from their liabilities, we recommend that the Director of Corporate Enforcement also have the power to apply to the High Court for a restriction order against directors or other officers in such circumstances. As the law presently stands, an application can be made pursuant to

section 160(2) of the 1990 Act to have, *inter alia*, a director disqualified even where a company is not being wound up. By giving the Director of Corporate Enforcement *locus standi* to make application under section 160(2) of the 1990 Act, this will also facilitate his making application for a disqualification order where a company, not being wound up, is unable to pay its debts.

COMPANY INVESTIGATIONS

4.20 While section 160(2)(e) recognises that company investigation reports may serve as a vehicle for applications for disqualification orders, no such orders have been sought to date by the DPP who is the relevant authority under section 160(5) of the 1990 Act. There has only been one case so far where a disqualification or restriction order was successfully obtained following a company investigation. This was in the case of the *Clonmannon* investigation where the Minister obtained the approval of the High Court to the appointment of a liquidator who subsequently successfully petitioned for the restriction of three directors associated with the *Clonmannon* group of companies.

4.21 It is clearly undesirable that such a roundabout method for seeking such orders should remain. In our view, it should be open to the Director of Corporate Enforcement to apply to the High Court for a disqualification order in consequence of a report of inspectors appointed by the court or the Minister under the Companies Acts which finds that the conduct of any person makes him unfit to be concerned in the management of a company.

PERSISTENT DEFAULT IN COMPLYING WITH THE COMPANIES ACTS

4.22 It is the view of the Group that the Director of Corporate Enforcement should be given *locus standi* under section 160 of the 1990 Act to apply for a disqualification order where a person has been persistently in default in relation to the relevant requirements under the Companies Acts (e.g., the filing obligations as defined by section 159 of the 1990 Act) and the Group recommends accordingly.

PROSECUTION OF SUMMARY OFFENCES

4.23 The Minister for Enterprise, Trade and Employment currently shares with the DPP the statutory authority to initiate summary proceedings for offences under the Companies Acts. In the new circumstances of the appointment of a Director of Corporate Enforcement, it is clearly appropriate that the Director should at least have the same powers as the Minister. We have given some consideration to the question of whether or not:

- the Minister's prosecution role should continue to exist side by side with the Director's, or

- the Minister should be in a position to choose which of his/her prosecution powers s/he should delegate to the Director, or

- the Minister should entirely lose his/her prosecution powers.

4.24 Having regard to our recommendation that the Director should be an independent statutory prosecutor with dedicated staffing resources, we see no merit in the Minister retaining any prosecution role or being in a position to withhold or recover powers of prosecution from the Director.

4.25 We are of the view that the Director of Corporate Enforcement should be given similar prosecution powers to the Registrar of Companies under the Companies Acts. If the Director is initiating summary company law prosecutions there may well be registration-type offences which the Registrar of Companies might also seek to prosecute in the same case. It would be desirable for one set of court proceedings to deal with all the offences concerned, rather than having to postpone for separate prosecution by the Registrar of Companies the registration-type offences. The Registrar will of course continue to have an independent prosecution ability in respect of registration offences under the Companies Acts.

4.26 The Group also considers that, ancillary to the proposed power to prosecute summary offences, the Director should have the power to impose on-the-spot fines for all summary offences. The offending company and/or directors would have the alternative of paying the fine and thus avoiding prosecution under the Companies Acts. In addition, the Group recommends that the maximum fine for all summary offences under the Companies Acts be increased to £1,500.

4.27 We welcome the fact that the forthcoming Companies (Amendment) Bill plans to extend the three year period specified in section 240(5) of the 1990 Act for the commencement of such proceedings from three years from the date of commission of the offence to three years from the date upon which the commission of the offence becomes known.

PROSECUTION OF INDICTABLE OFFENCES

4.28 Recent revelations have given cause for believing that criminal sanctions must be applied more often than heretofore in cases of serious breaches of the Companies Acts. Legal responsibility for prosecuting all indictable offences under the Companies Acts

rests with the DPP. We have been assured that any decision by the DPP not to commence criminal proceedings for breaches of the Companies Acts is due entirely to the quality of the evidential material available at the time of decision.

4.29 This leads us to recommend that the Director of Corporate Enforcement should play an active role in assisting the preparation of cases for possible criminal proceedings for breaches of the Companies Acts. We envisage that the Director and his staff will work closely with An Garda Síochána in identifying the indictable offences in any particular case and in supporting Garda enquiries (see paragraph 4.62). Such support would, we believe, be useful prior to the Gardaí submitting a case for possible criminal proceedings to the DPP.

4.30 The Group considers that all indictable offences under the Companies Acts should carry a maximum term of imprisonment of at least 5 years. This would make suspected offenders liable to arrest without warrant under the Criminal Law Act, 1997 and detention under the Criminal Justice Act, 1984.

4.31 We note in this context that the Government has recently established a high level study group to review the arrangements for the public prosecution system. We are firmly of the view that a more active prosecution policy is indispensable to securing greater compliance with company law, and we believe that the above recommendation to involve the specialist company law prosecutor, in the form of the Director of Corporate Enforcement, will assist in increasing the number of investigations leading to prosecution for indictable offences under the Companies Acts by the DPP in the future.

INJUNCTIONS

4.32 Section 371 of the Companies Act, 1963 gives the Registrar of Companies the right to apply to the High Court for an order requiring the company or an officer to make good a default in complying with the Companies Acts. The Group considers that a similar right should be available to the Director of Corporate Enforcement in order to prevent the occurrence of continuing breaches of the Companies Acts and we recommend accordingly.

4.33 We also recommend that those persons against whom such an injunction may be sought be expanded from "a company and any officer" to "a company, a director, shadow director, any officer, promoter, receiver or liquidator". We believe that such an extension will afford the Director of Corporate Enforcement a readily available means for seeking to compel all relevant parties to comply with company law.

SUPERVISION OF RECEIVERS AND LIQUIDATORS

4.34 We have recommended above that all liquidators should be required to report to the Director of Corporate Enforcement in cases of unfit conduct by company directors or other officers. Concern has also been expressed within the Group at the absence of statutory regulation of liquidators in particular under the Companies Acts. The practice direction of Mr Justice Murphy in 1994 (see paragraph 6.14) to court-appointed liquidators in the area of restrictions has resolved concerns in this limited area, but no effective controls exist in the case of voluntary liquidations which are far more numerous (see paragraph 2.70 *et seq* for more detailed information in relation to court liquidations). Many members of the Group were aware of cases where inadequate work was done by a liquidator without him or her being called to account.

4.35 In the case of receivers the Group believes it sufficient for receivers to notify the Director of Corporate Enforcement of their appointment and cessation to act as such. Where a receiver leaves behind an insolvent company this fact must be made known to the Director. By so doing, the Director will be able monitor the insolvent company and, if the company is not subsequently wound-up and a liquidator is not appointed, the Director will be in a position to consider applying for a disqualification order against the directors and other officers of the company or a restriction order against the directors.

4.36 As a means of addressing these concerns, we recommend that the following arrangements be put in place:

- that the Registrar of Companies should promptly notify the Director on receipt of all notices of appointment of liquidators and of receivers;

- that the Registrar of Companies should notify the Director of all persons who have been notified to the Registrar as acting as liquidator or as receiver, where the liquidation or receivership is currently ongoing according to the company's file;

- that all professional bodies whose members undertake liquidations or receiverships be required to inform the Director of Corporate Enforcement where a disciplinary tribunal of that body finds that a member has not maintained appropriate records on a liquidation or receivership or that they have committed an indictable offence under the Companies Acts.

- that the Director be given the power to require, at his discretion, the production of a liquidator's books for examination, following a complaint from a member or a creditor of the company concerned;

- that the notice to the Registrar of Companies of ceasing to act as a receiver should specify whether or not the company which the receiver has left behind is insolvent or not, and the Registrar should promptly notify same to the Director.

4.37 The Group considers that the establishment of a statutory licensing or qualification scheme for liquidators and receivers should be addressed by the proposed Company Law Review Group as part of its work.

ANCILLARY ORDERS

4.38 It is the view of the Group that the power to apply to court for certain ancillary orders is central to the success of the Director of Corporate Enforcement in enforcing company law. This would enable the Director to exercise certain powers where a company is being wound-up but where the liquidator is dilatory in the discharge of his functions. Accordingly, it the recommendation of the Group that the Director be given the power to apply to the High Court for the following orders: for inspection of a company's books under section 243 of the 1963 Act, for examination of officers and other persons under section 245 of the 1963 Act, to require the payment or delivery of property under section 245A of the 1963 Act, for the civil arrest of contributories and directors and other officers under section 247 of the 1963 Act; for a *Mareva*-type injunction to freeze directors' and other officers' assets in circumstances where the Director is pursuing a civil cause of action against the respondent; and for an order to enter upon property and seize assets belonging to a company. These powers are enumerated in Annex 4.1.

4.39 Section 247 of the Companies Act, 1963 enables the court to order the arrest of contributories (and the seizure of their books, papers and personal property) where there is probable cause for believing that they are about to quit the State or otherwise abscond or remove or conceal any of their property for the purpose of evading payment of calls in respect of their shares or of avoiding examination about the affairs of the company. Although this power is rarely exercised it provides a very useful means of preventing persons from evading justice. The Group recommends that this power be extended generally to provide for the arrest of directors and other officers and that it should not be confined to contributories.

4.40 As regards the right to seek an asset-freezing order (known as a *Mareva* injunction) the Group recommends that the right to apply to the High Court for such an order be specifically given to companies, directors, members, liquidators, receivers and creditors who have a civil cause of action against directors and other officers. This will remove any doubt which may exist as a result of the Supreme Court's decision in *Re Greendale Developments Ltd* (unrep. Supreme Court of 20 February 1997).

OTHER MATTERS

4.41 There were in addition a number of other areas of possible responsibility for the Director of Corporate Enforcement considered by the Group, and we reached the following conclusions on the role to be given to the Director in these areas.

USING SECTION 251 OF THE 1990 ACT TO COMBAT THE 'SCORCHED EARTH' SYNDROME

4.42 The Group is aware that a sizeable number of companies ceases to trade annually leaving substantial debts without ever being put into liquidation by either the court, the members or creditors. The situation where directors so deplete a company's assets as to result in there being insufficient left to even justify the winding up of the company may be referred to as the *scorched earth syndrome*. On occasions, there could be a substantial public interest in sponsoring a liquidation in such circumstances in order to gather evidence for the prosecution, restriction or disqualification of the officers concerned, notwithstanding the fact that the State was going to suffer financial loss as a result.

4.43 In the interest of calling to account company officers responsible for the *scorched earth syndrome*, the Group considered whether the Director of Corporate Enforcement should be given a role in seeking the appointment of a court-appointed liquidator in cases where he or she believes that serious breaches of company law may have taken place. On balance, the Group does not favour the creation of a State funded public interest liquidation service.

4.44 It is the Group's considered belief that the most suitable solution is to give the Director *locus standi* to apply to the court for relief under a number of existing provisions, pursuant to section 251 of the 1990 Act, and the Group recommends accordingly. This section applies to companies that are not being wound up but which nevertheless have insufficient assets to discharge their liabilities. This recommendation would allow the court, on the Director's application, to determine if any of the extensive powers set forth in sections 243, 245, 245A, 247, 295, 297, 297A and 298 of the 1963 Act and sections 139, 140, 203 and 204 of the 1990 Act should be applied to the officers of such a company or other persons.

4.45 The first effect of this recommendation being implemented would be that the Director could apply to court for orders for securing information and preserving company assets, e.g., under sections 243, 245, 245A and 247 of the 1963 Act. The second effect would be to facilitate prosecution for fraud under sections 295 and 297 of the 1963 Act and for failure to keep books of account under section 203 of the 1990 Act. The third effect would be to permit the Director to apply for a declaration that an insolvent company's

officers be made personally liable for all or any part of a company's debts, under sections 297A of the 1963 Act and 204 of the 1990 Act and/or to pay damages under section 298 of the 1963 Act, in circumstances where a company is not being wound-up because its assets are insufficient (within the meaning of section 251 of the 1990 Act). Moreover, the Director could apply for an order directing the return of assets improperly transferred or a contribution order under sections 139 and 140 of the 1990 Act, respectively. The Group also recommends that section 150 of the 1990 Acts should be a scheduled section for the purposes of section 251 of the 1990 Act (see paragraph 6.47).

4.46 An important corollary to this recommendation is that it should be no function of the Director (a) to receive (save in limited circumstances) the assets of persons whom the court might declare are personally liable for all or any part of a company's debt's liable to pay damages or (b) to distribute those assets to creditors of the company.

4.47 Section 251(4) of the 1990 Act provides that where, by virtue of section 251, proceedings are instituted under sections 139, 140 or 204 of the 1990 Act or sections 245A, 297A or 298 of the 1963 Act, then section 297A(7)(b) of the 1963 Act shall apply to any order made as a result of those proceedings. That provision empowers the court which makes a declaration that a person should be personally liable for all or any part of the debts or other liabilities of the company, to make a further order that sums recovered from such persons "... shall be paid to such person or classes of persons, for such purposes, in such amounts or proportions at such time or times and in such respective priorities among themselves as such declaration may specify".

4.48 The Group recommends that enabling legislation must clearly provide that, upon the Director being successful and obtaining any order under the *sections* listed in section 251(4) of the 1990 Act, it shall not be for his benefit (save as to costs and expenses), but that any person having a claim against the company may apply for an enforcement order against the respondent under that section within a specified period of time.

4.49 The Group believes that the most appropriate persons to bring civil proceedings are those who have been wronged by a company or its officers, e.g. its creditors (or more exceptionally in the context of private companies, its members). It is envisaged by the Group that the Director can apply (in the limited circumstances provided for in section 251 of the 1990 Act) for a declaration that a director or other person should be made personally liable on grounds of fraudulent trading, misfeasance or failure to keep proper books and records and that if the court makes such an order, it would then be open to the insolvent company's creditors to apply to the court for a direction as to their entitlement to those assets. Creditors could also invoke conventional winding up procedures and could petition for the appointment of a liquidator where complex issues arose in the context of priority to distribution or to the entitlement of persons who claim to be

creditors. The court should be empowered to award the Director his costs against the respondents.

4.50 The Group acknowledges that, to facilitate the making of a declaration that persons are personally liable for some or all of a company's debts on the application of the Director in circumstances where a company's creditors will then apply to the court for a declaration as to their entitlement, is a significant departure from traditional company law remedies in this and in other jurisdictions. Nevertheless, the Group believes that the proposed measures are a necessary safeguard to the *scorched earth syndrome*. The Group considers that the Director should only exercise his rights in this regard in limited and exceptional cases where the insolvent company's creditors cannot afford to fund such actions or are otherwise incapacitated. The Group strongly cautions against a situation developing whereby the exercise of these powers by the Director becomes a state-subsidised alternative to conventional liquidation procedures.

4.51 It is the view of the Group that the primary onus for pursuing defaulting officers of such companies rests with the creditors and contributories and the Group would strongly recommend that the Director take a hard line in rejecting the majority of requests that may be made to him to intervene in this connection. The Group feels that it should only be in the more exceptional cases, where insufficient resources were available to creditors to initiate court proceedings on their own initiative, that the Director might intervene in the public interest.

4.52 The Group was made aware that in Britain a large organisation, known as the Insolvency Service with some 1,500 staff, appoints Official Receivers in cases where insufficient assets exist to pay private insolvency practitioners to liquidate the assets of bankrupts and insolvent companies. While the Service is profit-making, the Group was reluctant to recommend the establishment of an equivalent State infrastructure in Ireland. Rather, we propose a series of more modest measures which we believe will nevertheless make an impact in dealing with the problem of companies which cease to trade without being wound up. The Group recognises, however, that the success or otherwise of these recommendations may require to be reviewed in due course by the Company Law Review Group (see paragraph 5.29 *et seq*).

CIVIL PROCEEDINGS

4.53 We have considered a suggestion that the Director of Corporate Enforcement should have the power to launch civil proceedings against a company, director or other person who may, for instance, have misappropriated company resources for his own benefit or for the benefit of others. In the normal course, we consider that it is a matter for the company or its officers or creditors to launch such proceedings, and we do not recommend that the Director be given powers to intervene in this way. The power, once

given, would, we believe, distract the Director from his key enforcement role and would leave him open to all sorts of demands from affected persons, some of whom may well have the necessary resources to launch civil proceedings themselves. In our view, it is a sufficient remedy that as recommended above, the Director be given *locus standi* under section 251 of the 1990 Act and related sections.

INVESTIGATIONS

4.54 We have also given thought to the question of whether or not the Director of Corporate Enforcement should be given the powers accorded to the Minister for Enterprise, Trade and Employment under Part II of the 1990 Act. These powers include:

- the right to petition the High Court to appoint an inspector to examine the affairs of a company (section 8);
- the right to appoint an inspector to establish the beneficial ownership and control of shares in a company (section 14); and
- the right to appoint an authorised officer to examine the books and documents of a company (section 19).

4.55 A section 19 appointment is very much a preliminary examination of a company's books to establish whether or not breaches of company law or other legislation are likely to have taken place. It is not an investigation mounted for prosecution purposes, although the result of a section 19 examination may give cause for the commencement of such an investigation in due course. We envisage that the Director, acting through An Garda Síochána, will have all the usual powers to take statements and collect evidence to support a prosecution and as such will not be at any remedial disadvantage for not having the section 19 powers. In fact, we see merit in the roles of preliminary investigation and criminal investigation being separated between the Minister and the Director respectively. We consider it helpful to the section 19 process that the Minister will lose his prosecution powers, thereby enabling the Director to look afresh at the circumstances of cases exposed by the section 19 procedure.

4.56 The section 14 power is similarly not directly related to a criminal prosecution. It is simply a means by the Minister to establish as far as possible certain facts. These facts may (or may not) give reason for a decision by the Director to launch a criminal investigation in due course. Here again, therefore, we see these powers as more relevant to the Minister's administrative role under the Companies Acts rather than to the prosecution role which we see as exclusive to the Director.

4.57 Insofar as the section 8 powers are concerned, we are mindful that this is the most wide-ranging of investigation mechanisms. A decision by the Minister to seek High Court approval for the appointment of an inspector is a serious one for both the company concerned and the State, as High Court inspectorates are usually very expensive initiatives, often running into several million pounds worth of cost. In previous section 8 applications (e.g., Siúicre Éireann cpt and others and the present National Irish Bank Ltd./National Irish Bank Financial Services Ltd. cases), there has also been a significant political dimension to the decision to make such an application to the court, and it is considered, accordingly, that this decision should continue to be the preserve of the Minister.

4.58 The issue of putting the company investigation function on a proper resource footing within the Department of Enterprise, Trade and Employment is dealt with later in this Part.

PROSPECTIVE WORKLOAD

4.59 Based on the areas of responsibility identified above for the Director of Corporate Enforcement, the Group has estimated as best as it can that the Director and his staff would have the following workload on an annual basis:

- the assessment of about 850 voluntary liquidators' and 50 receivers' reports annually which would be likely, on the basis of UK experience, to involve reports of unfit conduct by company officers in about 350 cases per annum;
- examining about six company investigation reports per annum, a number of which would be likely to disclose breaches of company law;
- a small number of, perhaps three or four, injunctions per annum;
- a substantial number of applications to court per year for remedial orders under section 251 of the 1990 Act and related sections in the case of companies which have insufficient assets but which have not been put into liquidation;
- about three or four cases per year involving the examination of a liquidator's books of account;
- between 30 and 40 summary prosecutions every year;
- between 80 and 90 restriction and disqualification orders per annum.

STAFFING OF THE ENFORCEMENT OFFICE

4.60 It is the opinion of the Group that the Enforcement Office should comprise a mix of professional, administrative and clerical staff to help evaluate and select appropriate cases for prosecution, restriction or disqualification. Having examined the staffing levels in equivalent UK institutions, we recommend that an initial staffing complement of no less than 20 staff members be recruited to the Enforcement Office with a breakdown between professional, administrative and clerical staff of about six, eight and six staff members respectively.

4.61 About three of the professional staff should be Professional Accountants at Grade I level for the purpose of evaluating in detail the reports of liquidators and receivers made to the Office relating to company accounts and for considering prosecutions in areas such as improper accounting and reckless trading. We also recommend that the balance of three professional staff should comprise three lawyers, ideally with prosecution experience. These should be recruited on a permanent basis. The Group considered the question of retaining an outside firm of solicitors to provide the necessary legal expertise but felt that this was unlikely to be as cost-effective or helpful to the generation of a committed ethic of company law enforcement throughout the Office.

4.62 The Group recognises that the Director of Corporate Enforcement will require to rely on An Garda Síochána for the purposes of preparing appropriate serious cases for prosecution on indictment. In order to provide dedicated resources for such criminal investigations, the Group recommends that a team of Gardaí, ideally with experience in criminal investigations in the corporate sector, should work alongside the staff in the Enforcement Office in the same way as Gardaí are presently employed within An Post. It is recommended that the team would be led by a member of the Force with a rank not below Detective Inspector who would be assisted by two Detective Sergeants and four Detective Gardaí. This team would report to the Director (*Chief Superintendent in charge*) of the Garda Bureau of Fraud Investigation at Garda Headquarters who would require an increase in staff in direct substitution for the team seconded to the Enforcement Office. The allocation of Garda personnel in the manner recommended in this paragraph has been approved in principle by the Garda Commissioner subject to the role of the participating Gardaí being kept within the remit now envisaged for the Enforcement Office. In time, the strength and make-up of the Garda personnel assigned to the Enforcement Office may have to be reviewed in the light of the actual workload assigned. The question of any new powers or functions which should be conferred on such Gardaí will need to be considered.

4.63 We recommend that the post of Director of Corporate Enforcement should be at Deputy Secretary level[9] in order to attract persons of a high calibre to the post.

4.64 We have outlined earlier the prospective workload for the Director and his/her Office. Some members of the Group regard this as a conservative projection of the Office's likely work, and we, accordingly, recommend that a formal review of staffing levels and competencies be undertaken after three years' operations. The object of this exercise will be to re-position Office resources to the prevailing and prospective workload at that time.

COSTS

4.65 The Group estimates that the annual cost of the Enforcement Office will comprise about £2 million, made up of £1 million in staffing and overhead costs with the balance covering the costs of external legal services and court costs.

4.66 While a portion of these costs will be recoverable from court awards of costs, etc, the Group considered whether any other mechanism should be introduced to recoup the balance. We would have liked, but were unable, to recommend increased registration fees for companies due to European Court of Justice judgements in the *Ponente Carni* and related cases. We also considered introducing a small levy on the proceeds of company liquidations for the benefit of the Enforcement Office but we encountered the same obstacle. However, at the end of the day, we saw no reason why the cost of company law enforcement should not be borne out of general taxation in the same way as applies in most other codes of law.

REPORTING

4.67 We also recommend that the Director of Corporate Enforcement be required in law to report annually to the Minister for Enterprise, Trade and Employment and that this report be laid before the Houses of the Oireachtas. We envisage that relevant extracts from this report will feature in the annual *Companies Report* produced by the Department. In addition, there should be a provision along the lines of section 9(12)(6) of the Consumer Information Act, 1978 that the Director shall furnish the Minister such information regarding the performance of his functions as the Minister may from time to time require.

[9] The Department of Finance was opposed to this recommendation which it felt could have repercussions elsewhere in the Public Service in regard to gradings and pay.

4.68 We also envisage that the Minister and the Director will require from time to time to consult with one another on matters relating to the general operation of his Office. However, we recommend that the Director ought not to be required to disclose the reasons for decisions which he or she might take in individual cases. In this context we note that any record held or created by the DPP or his Office is excluded from the provisions of the Freedom of Information Act, 1997 (other than a record concerning the general administration of the Office). We believe that similar provisions should apply in respect of the Office of the Director of Corporate Enforcement.

COMPANY LAW ENFORCEMENT IN THE DEPARTMENT OF ENTERPRISE, TRADE AND EMPLOYMENT

4.69 Having taken account of the low level of staffing resources deployed to administering the Minister's responsibilities under the Companies Acts (which are outlined in Part II above), the Group agreed that additional resources were also needed in this area. We were made aware that the Business Plan for the Company Law Administration Section of the Department which was settled less than six months ago, has already been blown off course. Achievement of the targets therein was conditional, *inter alia,* on no new company investigations being initiated. In fact, three such investigations have been initiated in the latter half of this year, and in two of these, judicial review proceedings were launched against the Minister's decision which involved a lot of extra work over the period. In addition, the considerable amount of work involved in servicing this Group has caused inevitable delays in progressing the planned work.

4.70 The Group fully accepts that the powers of the Minister under the 1990 Act to initiate company investigations are a necessary review mechanism to test the compliance standards of companies with the requirements of the Companies Acts and other legislation. These preliminary investigations may (or may not) lead in time to subsequent enforcement action by the proposed Director of Corporate Enforcement, but it is clearly essential that this preliminary step works well if complaints of alleged wrongdoing are to be identified.

ACCOUNTANCY EXPERTISE

4.71 At present, some twelve company law investigations are underway, nine of which are examinations of company books and documents being undertaken under section 19 of the 1990 Act by two designated accountants in the Department. A further two full-time accountants are also deployed in a supporting role. None of these staff are permanently assigned to company investigations.

4.72 The Group is aware that, because all of the Department's available in-house accountancy resources have been redeployed temporarily to support the company investigations area, one further section 19 investigation has had to be done by a Partner in an accountancy practice. The cost of such outsourcing of accountancy expertise is significantly higher than would be the case if dedicated resources were available to the Department in this area. Such outsourcing also runs the risk of claims of conflict of interest (whether justified or not) being made against such an appointment which can serve to frustrate the original purpose of embarking on the investigation in the first place.

4.73 Investigations undertaken via section 8 of the 1990 Act under the aegis of the High Court (two of which are underway at present) are more substantive affairs which tend to involve an expenditure of well over £1 million in each case. Again, an accountant at Partner level is usually involved from an established accountancy practice. If the resources were available, there is no reason why a person from the Department should not be capable of being appointed an inspector under section 8 at a significant saving to the State.

4.74 Having regard to the present investigations, the current Tribunals of Inquiry and other more recent developments and the higher profile which the Minister's powers in the area have attracted in the recent past, the Group believes that there is every prospect that work on company investigations will rise in the future. In the circumstances, it is clearly desirable that dedicated accountancy resources are made available to the area. Accordingly, the Group recommends that six accountants, comprising one at Partner/Principal I level, three Professional Accountants at Grade I level and two support staff at Grade III level, be recruited for this purpose. Persons of considerable skill in auditing and forensic accounting are required for this work.

LEGAL ADVICE

4.75 As company investigations proceed, the Group has been informed that issues requiring legal advice are arising on a near daily basis. It is, for instance, an increasing feature that persons being interviewed by section 19 authorised officers during the examination of company books and documents are often accompanied by their legal advisers. No such resource is available to the section 19 officers during these interviews which obviously is a handicap to the conduct of their enquiries. The Group recommends, therefore, that a full-time Principal Solicitor be recruited exclusively to assist company investigations work and be seconded from the Chief State Solicitor's Office to the Department.

ADMINISTRATIVE STAFF

4.76 The Group further recommends that a further Higher Executive Officer and two Executive Officers be provided to support the ongoing company investigations work. One example of the additional work which has arisen in the area derives from the Freedom of Information (FOI) Act, 1997. Notwithstanding the fact that the bulk of company investigations documentation is protected from disclosure under the Act, one full-time head of staff is now effectively devoted to servicing FOI requests in this area. Such work provides little of benefit to the person requesting such information as no substantial information is capable of being released in most cases, due to the commercial secrecy restrictions inserted in section 21 of the 1990 Act. Notwithstanding that a large amount of documentation must be collated, determinations made under the Act as to the basis for disclosure, partial release or non-disclosure and the recording of each decision in case of subsequent appeal. Recently, about one working person-week was spent in dealing with about 200 documents which were the subject of a single FOI request.

SUMMARY OF RESOURCES REQUIRED FOR COMPANY LAW ENFORCEMENT IN THE DEPARTMENT

4.77 In summary, the Group proposes that the following additional staff are required for the enforcement of company law in the Department:-

One Accountant at Partner/Principal I level
Three Professional Accountants at Grade I level
Two Professional Accountants at Grade III level

One Principal Solicitor

One Higher Executive Officer/Administrative Officer
Two Executive Officers

ANNEX 4.1 - PROPOSED POWERS OF DIRECTOR OF CORPORATE ENFORCEMENT

1. The Director should have standing to apply for a disqualification order under section 160(2) of the 1990 Act in respect of all of the persons against whom such an order can currently be made to include, without prejudice to the generality of section 160 (2), directors and liquidators.

2. While all liquidators of insolvent companies will be required to make application for a restriction order under section 150 of the 1990 Act the Director should be empowered to relieve such liquidators from the proposed obligation to make application under that section in a particular case where the Director considers a section 150 application to be inappropriate.

3. The Director should have standing to apply to the High Court to have a director of an insolvent company restricted under section 150 of the 1990 Act, in a winding up and where a company is not being wound up and a situation envisaged by section 251 of the 1990 Act exists.

4. The Director should have standing to apply under section 371 of the Companies Act, 1963 to the High Court for an injunction to compel a company, any officer of the company and any promoter, liquidator or receiver of a company to comply with any provision of the Companies Acts 1963-1990.

5. The Director should have power to prosecute all summary offences created by the Companies Acts 1963-1990 and any statutory instrument ancillary thereto within 3 years from the date the commission of an offence first becomes known to the Director.

6. The Director should have power to impose on-the-spot fines in respect of summary offences under the Companies Acts.

7. The Director should have the right to be given information by an official or voluntary liquidator (on the application of any person interested in a winding up or on the High Court's own motion) that any past or present officer, or any member or promoter, auditor, liquidator or receiver of a company has been guilty of an offence in relation to a company for which he is criminally liable, pursuant to section 299 of the Companies Act, 1963.

8. The Director should have standing to apply under section 243, 245, 245A, 247, 295, 297, 297A and 298 of the Companies Act, 1963, and sections 139, 140, 203 and 204 of the 1990 Act pursuant to section 251 of the 1990 Act. (The Director's right to seek a

declaration of personal liability or damages pursuant to section 251 should not extend to receiving or distributing any assets as may be recovered from persons pursuant to the relevant sections, as the Group considers this to be a matter for aggrieved creditors.)

9. The Director should have standing to apply for an order for inspection of a company's books and papers under section 243 of the Companies Act, 1963.

10. The Director should have standing to apply to court to summon persons for examination under section 245 of the Companies Act, 1963

11. The Director should have standing to apply to court for an order requiring the payment or delivery of property against a person examined under section 245 of the Companies Act, 1963 pursuant to section 245A of the Companies Act, 1963.

12. The Director should have standing to apply to the court for the arrest of an absconding contributory, director, shadow director or secretary under section 247 of the Companies Act, 1963.

13. The Director should have standing to prosecute summarily an alleged fraud by officers of companies which have gone into liquidation pursuant to section 295 of the Companies Act, 1963.

14. The Director should have power to prosecute summarily an instance of alleged fraudulent trading by a person who is knowingly a party to the carrying on of the business of a company with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose pursuant to section 297 of the Companies Act, 1963.

15. The Director should have power to apply (a power to be shared with a liquidator, receiver, creditor and member) to the High Court for an order to restrain directors and others from moving their assets from the State or reducing their assets within or without the State below a specified minimum amount: the said power to be exercisable only where (a) the applicant has a substantive civil cause of action or right to seek a declaration of personal liability/damages against the respondent and (b) where there are grounds for believing that there is a likelihood that the respondent will remove or dispose of his assets with a view to evading his obligations and frustrating any future order of the court.

16. The Director should have power to apply (a power to be shared with a liquidator) for a High Court order to permit the applicant to enter any premises owned or occupied by a person being examined under section 245 of the Companies Act, 1963 for the purpose of seizing any money, property or books and papers of a company where it appears to

the court that such person is indebted to the company or has in his possession or control any money, property or books and papers of the company.

17. The Director should have power to share information with and from the Registrar of Companies, An Garda Síochána, the Criminal Assets Bureau, the Minister, the Department of Enterprise, Trade and Employment and other agents who are represented in the enforcement of company law. Similarly, the Director should have power to share information on company law matters with his counterparts in other countries.

PART V - COMPANY LAW REFORM

INTRODUCTION

5.1 Among its other terms of reference, the Group has been asked to examine and identify the resources and structures necessary to achieve a more frequent updating of companies legislation.

5.2 The Group is very strongly of the opinion that reform of company law requires constant attention.

5.3 Apart from developments in the European Union and developments arising out of court decisions and domestic commercial circumstances, there is vital urgency in ensuring that Ireland, as a potential place in which to do business and from which to do business, has a first class system of company law which places Ireland in the forefront as a contender for the location of international commerce.

5.4 In the medium term, the international competitiveness of Ireland as a place in which to do business and from which to do business will depend upon having an attractive company law regime and on its enforcement.

5.5 In early 1998, the United Kingdom Government initiated what it terms a "root and branch" review of companies legislation, which is intended to result in proposals and a white paper by the year 2001. The UK Government's intention is to streamline and modernise the existing framework of company law in that jurisdiction.

5.6 As one of the more significant countries in Europe for attracting international investment, Ireland cannot afford to stand idly by while our competitors introduce more attractive regimes. The Group believes that over the next four years Ireland must combine modernisation and codification of its company law in a period of major company law reform.

EXAMPLES OF DIFFICULTIES

5.7 One example of an area where legislative reform is required relates to the International Financial Service Centre (IFSC). The IFSC is of huge importance to the Irish economy. The IFSC funds legislation review group (a subcommittee of the IFSC fund management group which is sponsored by An Taoiseach) has been advocating urgent changes of company law for two years. Due to lack of resources, the Department of

Enterprise, Trade and Employment has not been in a position up to now to give effect to the amendments proposed by the IFSC funds legislation review group.

5.8 The Group is of the view that the inability of the Department of Trade, Enterprise and Employment to address the company law reform agenda proposed by the IFSC funds legislation review group marks a serious deficiency in the capacity of Ireland to provide the legislative infrastructure for successful international financial and commercial activity in the country.

5.9 To take another, more domestic example, the Company and Commercial Law committee of the Law Society has for a number of years been proposing urgently needed change to Part III of the Companies Act, 1990, which deals with transactions involving directors and, in particular, to the effect of section 31 of the 1990 Act on credit institutions providing legitimate financial services to companies. The Law Society's concerns are shared by domestic credit institutions and have been the subject of considerable debate in legal and academic journals and circles.

5.10 In 1996, the Law Society's Company and Commercial Committee forwarded to the Department extensive submissions and draft legislative proposals with a view to having them enacted as soon as possible.

5.11 While it is understood that some amendments will be included in the forthcoming Companies (Amendment) Bill to be published in the next few weeks to address the concerns of the IFSC Funds Group, the Law Society's proposals will have to await another Bill.

5.12 These are two examples of the difficulties created by the inadequately resourced machinery at Departmental level to deal with the constantly changing agenda in relation to company law reform.

5.13 The Group is of the view that, as regards reform of company law, amending legislation should be regarded as a constant feature of the Department's agenda and that a reforming Bill should be laid before the Oireachtas at least every two years. If the Department were organised on the basis that a Companies Bill was, so to speak, a "legislative train" scheduled to leave the station regularly and at intervals of not more than two years, individual proposals for change could be scheduled for assessment and drafting, with a view to establishing a maximum of two years as the time frame within which the Department normally acted on sensible proposals for reform.

5.14 Of course, in the case of urgent change, an accelerated or fast track special Bill should always be available.

5.15 In order for the Department to be focused on a two year legislative cycle which would not be blown off course by the pressure of other legislation by changes in government and other external events, the Group is of the view that a publicly understood process of reform should be put in place to sustain an ongoing cycle of reforming legislation.

5.16 There are seven Acts, comprising well over 1,000 sections and 65 statutory instruments which, when combined, have a similar length. Since 1990, a variety of Acts and statutory instruments in the company law and directly related areas have been completed, the details of which are set out in Appendix 1.

5.17 While some of these have been implemented by the Company Law Administration Section of the Department, the bulk of them have been the responsibility of the Company Law (EU/Legislation) Section, which is primarily responsible for company law reform.

5.18 Each of the above Sections has also made a number of other legislative contributions not included in the Appendix. For example, the Company Law Administration Section dealt with the lengthy Credit Union Act, 1997, and associated subsidiary legislation, while the Company Law (EU/Legislation) Section was involved in the preparation of the Economic and Monetary Union Act, 1998.

COMPANY LAW REVIEW GROUP

5.19 The Company Law Review Group was established in March of 1994, and asked to make its recommendations by the 30th of November, 1994.

5.20 A number of interested bodies were asked to make nominations for appointment to the group. The Bar Council, the Consultative Committee of Accountancy Bodies – Ireland, the Incorporated Law Society, the Irish Association of Investment Managers, the Irish Bankers Federation, the Irish Business and Employers Confederation, the Irish Congress of Trade Unions, Irish Small and Medium Enterprises, the Irish Stock Exchange, the Minister for Finance, the Revenue Commissioners, and the Small Firms Association, all made nominations for appointment which were accepted by the Minster.

5.21 The CLRG was chaired by James Gallagher, FCA, and had 16 members.

5.22 Seven areas were designated for what was termed the "first phase" of the Group's work:

- The issue of examinership.
- Companies Act investigations.

- Recommendations of the Ryan Commission on financial reporting.
- Insider dealing,
- Recommendations of the Small Business Task Force for changes in company law.
- Recommendations in relation to restrictions on directors.
- The position of farmer creditors in the event of company liquidations.

5.23 The CLRG delivered its report in December, 1994, and, as noted above, legislation relating to two of the seven areas covered by the CLRG's first report is due to be published in late 1998 or early 1999.

5.24 The Group was informed that the CLRG was not asked to address further issues because the Department felt obliged to deal with the first report of the CLRG before seeking a further report.

5.25 When the Company Law Review Group reported in December, 1994 (the report was published in February, 1995), it made proposals for changes to company law in six areas. In effect, as soon as its first report was received in the Department, the resources that had previously been made available to service the Company Law Review Group were allocated to implementing its proposals.

5.26 In effect, the Company Law Review Group was put into a state of suspended animation as soon as it had delivered its report so that its report staff could work on implementation. We concluded that the sensible decision to establish a Company Law Review Group was not matched by a commitment in terms of extra Departmental resources.

5.27 The result is that a Companies (Amendment) Bill will be published in the next few weeks dealing with two of the areas covered by the Company Law Review Group. The other four areas must, to the extent necessary, await further legislation. The recommendations of this Group will amend or extend recommendations in three of the areas covered by the CLRG, *viz.*, restriction/disqualification of directors, investigations and filing of annual returns.

5.28 The Group considers such a stop-start procedure entirely unacceptable.

CLRG – A STATUTORY BASIS

5.29 The Group is of the view that a Company Law Review Group composed along similar lines to the CLRG should be established on a statutory basis as soon as possible. This, of course, need not delay its re-establishment, in interim, on a non-statutory basis.

5.30 The CLRG would, in consultation with the Minister, adopt a working programme for a two year cycle. The Minister might wish other priorities to be addressed on an interim basis.

5.31 The Group envisaged that the person who acted as secretary to the CLRG would become a primary contributor to the development of recommended legislation and to securing its passage through the Houses of the Oireachtas. Thus, each work programme undertaken by the Group is likely to see a different appointee as secretary to the Group in the interests of continuity from gestation through to enactment.

5.32 In order to ensure that the CLRG would not fall into abeyance or a state of suspended animation, the Group envisages that a minimum number of annual meetings would be provided for in legislation and that an annual report of its proceedings would be made to the Minister and require to be appended to the annual *Companies Report*, prepared by the Minister.

5.33 In this context, the Group believes that the annual *Companies Report* prepared by the Minister under existing legislation should be delivered within a more certain statutory time frame. While there has been considerable improvement in the punctuality of such reports, it is suggested that a deadline of the 31st of July of the year following the calendar year to which the report relates should be established for the making of the report by the Minister. The Group notes that the *Companies Reports* for the years 1989 – 1991, a four year period, were only presented in 1993, and that a report for the period the 1st of January, 1992 to the 30th of June, 1993, was presented in November, 1993. The report for 1996 was completed in August, 1997, and the Report for 1997 was completed in July of 1998.

5.34 It is the view of the Group that the Department's work should be so organised as to meet a firm deadline and that the various bodies or persons required to contribute to the making of a report should, themselves, operate to a timetable consistent with the publication of the entire report by the annual deadline.

5.35 The Group is of the opinion that the composition of the Company Law Review Group should be a matter of some flexibility. The emphasis of the Minister, in constituting the Group, should be on combining expertise with a broadly representative membership.

5.36 The Company Law Review Group will require staffing and financial resources to support its agreed work programme. With this in mind, we recommend that a budget of £50,000 should initially be included in the Department's 1999 allocation to cover research, consultancy and other expenses with a full year cost of £100,000 in subsequent years.

RESOURCES FOR LEGISLATIVE REFORM IN THE DEPARTMENT OF ENTERPRISE, TRADE AND EMPLOYMENT

5.37 The Group recommends that staffing in the Department of Enterprise, Trade and Employment concerned with the drafting of company legislation and associated EU matters should be increased by the allocation of an additional three Assistant Principals (AP's) and three Higher Executive Officers (HEO's) or Administrative Officers (AO's), together with appropriate clerical assistance (say, an additional three clerical staff). It is envisaged that two from the AP and HEO/AO grades, together with clerical support, will be required to be in place from early 1999 and the other two (one in each grade) and the clerical staff being appointed in the latter half of 1999.

5.38 In addition, the Group considers that the nature and expected increased volume of work in the legislation section will require the appointment of a dedicated lawyer and accountant to assist with EU negotiations and with domestic company law reform programme.

5.39 It is also suggested that a Principal Officer should be appointed to manage the enhanced company law reform programme in the Department.

SUMMARY OF RESOURCES REQUIRED

5.40 In summary, the Group proposes that staffing in the Company Law (EU/Legislation) Section in the Department be increased as follows:-

One Principal Officer
Three Assistant Principal Officers
Three Higher Executive Officers/Administrative Officers
Three Clerical Officers

One Principal Solicitor

One Professional Accountant Grade I

CONSOLIDATION/CODIFICATION OF COMPANY LAW

5.41 As has been noted in Part I the Group is conscious that our company law is now to be found in a lengthening series of statutes and statutory regulations. The Group believes that parallel with the ongoing process of company law reform and renewal, a programme should be undertaken to codify or consolidate company law. The object of the process would be to incorporate the provisions of the existing Companies Acts and the substantive company law now set out in regulations made under the European Communities Acts into one single comprehensible companies code. This code could thereafter be amended as required and published from time to time in its amended form.

SIMPLIFIED FORM OF COMPANY STRUCTURE FOR SMALLER COMPANIES

5.42 A number of parties forwarded submissions to the Group, advocating a simplified form of company law to govern smaller businesses. We are of the view that the issue of the introduction of a simpler regime for smaller companies requires very detailed consideration and that same falls outside the remit of this Group. We recommend that this issue be included in the next review by the Company Law Review Group.

PART VI - DISQUALIFICATION AND RESTRICTION OF DIRECTORS AND OTHER OFFICERS

THE PURPOSE BEHIND PART VII OF THE COMPANIES ACT, 1990

6.1 The sole purpose of section 150 of the Companies Act, 1990 ("the 1990 Act"), which enables directors of insolvent companies to be restricted in their continuing or future directorships, and one of the primary purposes of section 160 of the 1990 Act, which enables directors and other officers to be disqualified entirely from acting as a director for a stated period, is to combat the so-called *phoenix syndrome*. The *phoenix syndrome* refers to the situation whereby the directors of a company, which becomes insolvent through their fault, walk away from their failed company (and especially its debts) and immediately re-establish themselves in a new company doing the same business.

6.2 It is not only directors of companies who can abuse company law and this is recognised in existing legislation. The disqualification provisions contained in the Companies Act, 1990 have a broader purpose than merely to combat the *phoenix syndrome*. Section 160(1) of the 1990 Act provides for the *automatic disqualification* of persons convicted of certain offences from acting as an auditor, director or other officer, receiver, liquidator or examiner or from taking part in the promotion, formation or management of any company or industrial and provident society. Rather than simply preventing persons from "re-offending", this provision enables a person who has never been a director or other officer of a company to be disqualified from acting as such for a specified period. Similarly, section 160(2) of the 1990 Act which provides for *discretionary disqualification*, is not confined to addressing abuses by directors but extends to disqualifying persons from acting as an auditor, receiver, liquidator or examiner or from taking part in the promotion, formation or management of any company.

RESTRICTION OF DIRECTORS

6.3 ***The Companies (No. 2) Bill, 1987*** - Such was the concern over the *phoenix syndrome* that, as noted in the Report of the *Company Law Review Group* (at 7.2), the original Companies (No.2) Bill, 1987 provided for the automatic restriction of all directors of companies going into insolvent liquidation from becoming a director of another company without any limitation on the period of restriction unless the new company fulfilled certain specified criteria.

6.4 ***The Companies Act, 1990 - section 150*** - Chapter 1 of Part VII of the Companies Act, 1990, as enacted, did not go as far as to provide for the automatic restriction of directors of insolvent companies. The outrage over those engaged in the practice of the *phoenix syndrome* was, ultimately, tempered by the realistic recognition that it is unjust to penalise "honest" business failure. Accordingly, a person who can satisfy the court that he acted honestly and responsibly in relation to the conduct of the affairs of the company may avoid becoming the subject of a restriction order under section 150. The provisions on restriction only apply to a person who was a director or shadow director of a company at the date of, or within 12 months prior to, the commencement of its winding up.

6.5 A prerequisite to the invocation of section 150 of the 1990 Act is that the company is unable to pay its debts; this may be proved to the court on the commencement of a winding up or, at any time during the course of a winding up, if so certified by the liquidator, or otherwise proved to the court.

6.6 Section 150(1) provides that the court *shall*, unless it is satisfied as to any of the matters in sub-section (2), declare that a person to whom Chapter 1 applies shall not, for a period of *five years*, be appointed or act in any way, whether directly or indirectly, as a director or secretary or be concerned or take part in the promotion or formation of any company unless it meets the requirements set out in sub-section (3).

6.7 Those matters which the court may take into consideration and which may excuse the court in not restricting a director are set out in sub-section (2):-

(a) that the director acted honestly and responsibly in relation to the conduct of the affairs of the company and there is no reason why it is just and equitable for restrictions to apply;
(b) that subject to paragraph (a) the person was a director only by reason of his nomination by a financial institution, in connection with it granting facilities to that company provided that the institution has not obtained any guarantee of repayment of the loan to the company from the director;
(c) that subject to paragraph (a) the person was a director nominated by a venture capital company in connection with the purchase of or subscription for shares in the company.

6.8 It will be seen that (b) and (c) add nothing to the test at (a) - *ie* that the director acted *honestly and responsibly* - which applies in all cases.

6.9 ***Restriction - A Lesser Sanction than Disqualification*** - Where the court makes a declaration pursuant to section 150(1) of the 1990 Act, any company to which he or she is appointed or acts in any way, whether directly or indirectly, as a director or secretary or is concerned or takes part in its promotion or formation, must satisfy certain

requirements (section 150(3) of the 1990 Act) and is subject to certain *restrictions* (section 155 of the 1990 Act), *viz.*,

(a) the nominal value of the allotted share capital of the company shall, in the case of a public limited company, be at least £100,000 and, in the case of any other company, be at least £20,000;
(b) each allotted share to an aggregate amount not less than the amount referred to above shall be fully paid up including the whole of any premium thereon; and
(c) each such allotted share and the whole of any premium thereon shall be paid for in cash;
(d) the exceptions to the prohibition on a company providing financial assistance in connection with the purchase of its own shares, contained in section 60(2)-(11) of the Companies Act, 1963 cannot be availed of;
(e) the restrictions which apply to allotments of shares, in public limited companies, other than in cash contained in section 32 to 36 of the Companies (Amendment) Act, 1983 also apply to the company as if it were a public limited company;
(f) the exceptions to the prohibition on a company making loans, etc., to directors and others contained in section 32 and section 37 of the 1990 Act cannot be availed of.

6.10 Accordingly, restriction is a very much lesser sanction than disqualification. This said, the monetary amounts detailed in (a) above were set almost ten years ago and there is merit in increasing the minimum paid up equity share capital in the case of public limited companies from £100,000 to £250,000 and in the case of any other company from £20,000 to £50,000.

6.11 ***1991-1995: The Reason for the Absence of Applications*** - The basic problem with section 150 is that it does not specifically require any liquidator (or receiver) to make application to the court to have a director "restricted". Where liquidators chose not to make application under section 150(1) the legislation contains no penalty or sanction whatsoever.

6.12 ***The Company Law Review Group's Views*** - Chapter 7 of the Report of the Company Law Review Group (CLRG) which reviewed 'Chapter 1 of Part VII of the Companies Act, 1990 Restriction on Directors of Insolvent Companies' concluded with ten recommendations. The broad thrust of the CLRG's recommendations was that they believed that the *disqualification procedures* in section 160 of the 1990 Act provided a more appropriate basis for dealing with the *phoenix syndrome* [paragraphs 7.08 and 7.10]; that restriction should not be an option in specified cases of a more serious nature [paragraph 7.19]; but that the court should be empowered to impose restrictions in specified circumstances where the less serious nature of the case would not warrant disqualification [paragraphs 7.18 and 7.20].

6.13 At the time when the CLRG's Report was published the initial problem with section 150, noted in 6.11 above, prevailed and an inspection of the register of restricted persons in April of 1994 would have disclosed that only 11 persons had been restricted. It was reasonable to conclude then that section 150 was not working.

6.14 ***The High Court's Practice Direction*** - During 1994 Mr Justice Francis Murphy issued a practice direction to all official liquidators, the effect of which was to direct them to make application to the court under section 150(1) of the 1990 Act. In the first case in which the High Court gave a written decision on Chapter 1 of Part VII, *Business Communications Ltd v. Baxter and Parsons* (High Court of 21 July 1995) Murphy J said:

> *"A particularly surprising feature of the novel provisions is that neither the legislation nor any rules made thereto impose a duty on any party or person to bring a case before the court so that it can exercise the mandatory duty imposed upon it. In windings-up by the court this lacuna has been overcome by the court on the further consideration of the order for liquidation directing the official liquidator to bring the appropriate application on notice to persons appearing to be directors thereof."*

6.15 As a result of the practice direction to official liquidators (i.e. court appointed) many directors of insolvent companies have been "restricted" pursuant to section 150(1) of the 1990 Act. As at 31 December 1997 there were 108 persons restricted (*Companies Report, 1997* at p 41).

6.16 ***Subsequent Case Law Developments*** - A growing number of High Court decisions have been handed down which shed very useful light on the workings and interpretation of Chapter 1. Written judgements have been given which interpret the defence in section 150(2) that a director has acted "honestly and responsibly" (*Business Communications Ltd v. Baxter and Parsons*, High Court of 21 July 1995 (Murphy J), *Re Costello Doors Ltd*, High Court of 21 July 1995 (Murphy J), *Re Cavan Crystal Group Ltd*, High Court of 26 April 1996 (Murphy J), *Re Outdoor Advertising Services Ltd*, High Court of 28 January 1997 (Costello P); the criteria to be applied in deciding whether a director has acted "responsibly" (*La Moselle Clothing Ltd and another v. Soualhi*, High Court of 11 May 1998 (Shanley J); the effect of a liquidator's certificate that a company was insolvent (*Re Verit Hotel and Leisure (Ireland) Ltd; Caraway v. Attorney General*, High Court of 3 July 1996 (Carroll J). It was also recently held in the High Court by the late Mr Justice Peter Shanley, *Re Steamline Ltd*, High Court of 24 June 1998, that the creditors of a company in voluntary liquidation had *locus standi* to make an application under section 150(1) of the 1990 Act.

6.17 The Group believes that the proposed Director of Corporate Enforcement should play a prominent role in section 150 applications. In addition to having responsibility for ensuring that liquidators of insolvent companies make application under section 150, the Director should also have standing to make application under section 150 where a company is being wound up or where it is insolvent but is not being wound up on account of an insufficiency of assets. However, the primary responsibility for making application under section 150 should be placed upon the liquidators of all insolvent companies.

6.18 ***The Costs of Application*** - Although the High Court, at present, often requires the directors against whom a section 150 application is brought to pay the costs of the liquidator it is thought proper to introduce a statutory power to make an order for costs against such directors. Moreover, regard must be had to other expense of both liquidators and the Director in investigating the matter and bringing proceedings.

6.19 ***Evidence*** - It is necessary for the proper and effective implementation and enforcement of the Companies Acts 1963-1990 that the Director should have the same powers to procure evidence as is currently enjoyed by official liquidators. Without prejudice to other matters in respect of which the Director should be entitled to have statutory support in procuring evidence of wrongdoing, the Director should be permitted to adduce evidence through *examination* as currently permitted pursuant to section 245 of the 1990 Acts. The proposed powers of the Director are enumerated in Part IV of this Report.

6.20 ***Offence*** - While, in view of the already vast number of company law offences, the Group is loath to introduce a new offence, it is thought to be necessary to criminalise the failure by liquidators to comply with the proposed new obligations placed upon them.

6.21 Discrimination between directors of insolvent companies which are wound up by the court and directors of insolvent companies which are placed in creditors' voluntary winding up gives rise to an "apparent injustice". Because liquidators of insolvent companies wound up by the court are subject to supervision it is possible for the court to give them "directions" on bringing application under section 150(1) of the 1990 Act. Voluntary liquidators, on the other hand, are not so subject. As Mr Justice Murphy observed in *Business Communications Ltd v. Baxter and Parsons*, High Court of 21 July 1995 (in a passage which leads on from that quoted above):

> *"In the case of voluntary liquidations the court does not have either the responsibility or the machinery for giving comparable directions. It may be that voluntary liquidators and receivers are not sufficiently conscious of the provisions of Chapter 1 of Part VII of the 1990 Act or else they do not see it as their function to bring relevant cases before the court. Perhaps it will be*

necessary for the legislature to consider the provision of a particular sanction to ensure that the many cases which have obviously arisen since August 1991 are duly pursued. If not, there would be an apparent injustice to the directors of insolvent companies wound up by the court as against those wound up voluntarily".

6.22 Insolvency, and not the legal route by which a company is wound-up, should determine whether the directors should be the subject of sanctions.

6.23 Notwithstanding the advantages of a special requirement that all liquidators of insolvent companies make application under section 150(1) of the 1990 Act, there are some possible disadvantages. In the first place, the absence of any discretion means that application may be made in obviously inappropriate cases (*eg* worker-directors; aged relations who were persuaded to be directors; celebrity non-executive directors who accepted the office for charitable or altruistic reasons). In the second place, the Director may consider that disqualification is a more appropriate remedy to restriction and that it is expedient not to proceed with an application under section 150 but to push forward with an application for disqualification.

6.24 Rights and duties of *receivers* to bring application need to be clarified. Section 154 of the 1990 Act provides that Chapter 1 of Part VII also applies, with necessary modification, in cases where a receiver of the property of a company is appointed. It has also been established in *Re Cavan Crystal Group Ltd (in receivership)*, High Court of 26 April 1996 (Murphy J) that a receiver had *locus standi* to bring application under section 150(1) and that it was not necessary that a company was being wound up, merely that it was insolvent. It is thought unnecessary to oblige receivers to bring an application under section 150 and sufficient to require receivers to notify the Director of their appointment and, where they leave behind an insolvent company, the end of the receivership. This will enable the Director to monitor such companies and, if a liquidator is not subsequently appointed to the insolvent company, to apply himself to have the directors restricted and/or take such other action as he may be entitled to take.

DISQUALIFICATION OF DIRECTORS AND OTHER OFFICERS

6.25 Compared with the restriction of a director of an insolvent company, an order that a person be disqualified from acting as an auditor, director or other officer, receiver, liquidator or examiner or from taking part in the promotion, formation or management of any company is a very serious sanction and one which should not be imposed lightly. Whereas a director who is restricted may form a new private company (albeit one capitalised up front, in cash, in the amount of £20,000), a person who is disqualified *shall not be appointed or act as* an auditor, director or other officer, receiver, liquidator

or examiner *or be in any* way, whether directly or indirectly, *concerned or take part in* the promotion, formation or management of any company or any society registered under the Industrial and Provident Societies Acts, 1893 to 1978.

6.26 ***Disqualification - An Unenforced Sanction*** - As with applications for restrictions on directors of insolvent companies before the High Court's practice direction in 1994, the basic problem is that there is, at present, little incentive for anyone to go to the cost and trouble of bringing an application under section 160(2) of the 1990 Act. This, coupled with the fact that nobody has a statutory duty or obligation to make application, is the reason why, as at 31 December 1997, only one person was recorded as having been made the subject of a disqualification order (*Companies Report, 1997*).

6.27 ***Automatic Disqualification of Directors*** - Section 160(1) of the 1990 Act makes provision for *automatic disqualification* of any person who is convicted on indictment of any indictable offence in relation to a company or involving fraud or dishonesty. Without anyone making application for a disqualification order, such a person is automatically deemed to be so subject for a period of five years from the date of conviction. The only discretionary aspect to this provision is that the court may increase or decrease the five year period "having regard to all the circumstances of the case".

6.28 ***Discretionary Disqualification*** - Section 160(2) of the 1990 Act makes provision for *discretionary disqualification*. This provision empowers the court, whether during the course of proceedings or upon application being made, to disqualify a person for a period to be decided by the court. It is important to recognise that section 160(2) is not confined to directors and extends to other persons, such as liquidators.

6.29 Before making a disqualification order under this provision, the court must be satisfied that -

(a) a person has been guilty, while a promoter, officer, auditor, receiver, liquidator or examiner of a company, of any fraud in relation to the company, its members or creditors; or
(b) a person has been guilty, while a promoter, officer, auditor, receiver, liquidator or examiner or a company, of any breach of his duty as such promoter, officer, auditor, receiver, liquidator or examiner; or
(c) a declaration has been granted under section 297A of the 1963 Act (civil liability for fraudulent or reckless trading) in respect of a person;
(d) the conduct of any person as promoter, officer, auditor, receiver, liquidator or examiner of a company, makes him unfit to be concerned in the management of a company; or

(e) in consequence of a report of inspectors appointed by the court or the Minister under the Companies Acts the conduct of any person makes him unfit to be concerned in the management of a company; or

(f) a person has been persistently in default in relation to the relevant requirements (e.g., filing obligations under the Companies Acts).

6.30 The court may of its own motion in any proceedings disqualify on grounds (a) to (f). Applications under grounds (a) to (d) inclusive may be made by the Director of Public Prosecutions or, in certain circumstances, by any member, contributory, officer, employee, receiver, liquidator, examiner or creditor of the company. Application under (e) may only be brought by the Director of Public Prosecutions and application under (f) may only be brought by Director of Public Prosecutions or the Registrar of Companies.

6.31 The Group considers that the best way of ensuring that applications are brought under section 160(2) of the 1990 Act is by vesting primary responsibility for bringing such applications in a public official with overall responsibility for enforcement and compliance with company law, *i.e.,* the Director of Corporate Enforcement.

6.32 ***The Company Law Review Group's Views*** - As noted above, the CLRG favoured disqualification pursuant to section 160(2) of the 1990 Act over restriction as the most appropriate means for combating the *phoenix syndrome*. At paragraph 7.10 they said:

> *"We believe that most such cases would be covered by one or more of the circumstances outlined in that section. We also consider that disqualification is a more appropriate consequence of such serious activities than restriction. The disqualification provisions in Irish company law are, in our view, primarily methods of providing protection for those involved in the commercial environment."*

6.33 The CLRG recommended no change to the provisions on *automatic disqualification* pursuant to section 160(1), disqualification on grounds of fraud pursuant to section 160(2)(a) or disqualification on the grounds of fraudulent trading within the meaning of section 297A(1)(b) of the 1963 Act, pursuant to section 160(2)(c). As for grounds 160(2)(b), the remainder of (c), *i.e.,* reckless trading, and (d) to (f), the CLRG recommended that application on these grounds should be brought by an adequately resourced executive unit within the Department of Enterprise, Trade and Employment.

6.34 The CLRG also recommended that liquidators and receivers should have to make a report to the executive unit within six months of their appointment on whether they have reason to believe that circumstances set out in section 160 of the 1990 Act or section 297A(1)(a) of the 1963 Act exist so far as the directors are concerned. The Group recommends that all liquidators should be obliged to make an report in the terms set out

below (see paragraph 6.46) but does not consider that the same should apply to receivers, who are essentially the agents of creditors. Receivers should, however, be obliged to notify the Director when a receivership is concluded to enable the Director monitor whether a liquidator is subsequently appointed and, if not, to take such action as the Director thinks appropriate.

6.35 The Group believes that the Director should have the following powers and options: (1) to allow the liquidator to bring a section 150 application; (2) to relieve the liquidator from the new statutory duty to make application under section 150 where a company is insolvent; (3) to bring a section 150 application where a company is insolvent and being wound-up or where it is not being wound up on account of insufficient assets; (4) to bring a section 160 application for disqualification.

RECOMMENDATIONS OF THE WORKING GROUP

6.36 The Director of Corporate Enforcement should be given *locus standi* to make application for discretionary disqualification orders under section 160(2) of the Companies Act, 1990.

6.37 Because of the greatly expanded role which it is proposed the Director will play, compared with the role envisaged for the executive unit, the Group recommends that the Director be given standing to make application for a disqualification order *on any of the grounds* set out in section 160(2)(a)-(f), including those concerning fraud.

6.38 The CLRG recommended that an adequately resourced executive unit within the Department of Enterprise, Trade and Employment be empowered to apply for disqualification of directors of companies in insolvent liquidation remains valid. In keeping with the establishment of the Office of Director of Corporate Enforcement, the Group recommends that the Director should have statutory responsibility for considering whether, in any given case, it is appropriate that application be made to have a director or other officer of an insolvent company disqualified and, if such a conclusion is reached, to bring such application.

6.39 Liquidators should be required to provide a report to the Director, which would indicate whether the case was an appropriate one in which to consider an application for disqualification. It is not recommended that the reporting requirement be extended to receivers because public policy only requires scrutiny of the actions of directors and other officers of companies which are insolvent. Where a company is insolvent a liquidator can be appointed. If a liquidator is not appointed because there are insufficient funds to wind up a company, the Director can himself initiate application for disqualification (see paragraph 6.36) or restriction (see paragraph 6.47). The Registrar

of Companies should promptly notify the Director of receipt of notices of appointment of and of ceasing to act as a receiver.

6.40 Restriction should be an option open to a court where the application was commenced against a director or such other person for a disqualification order under section 160. The court should have a discretion to impose a restriction under section 150 where disqualification is not considered to be justified.

6.41 It is recommended that the law should provide that the liquidators of all insolvent companies (whether compulsory or creditors' voluntary) should be required to bring an application under section 150(1) of the 1990 Act. Solvency or insolvency should determine whether any liquidator is obliged to make application under section 150.

6.42 It is recommended that all liquidators of insolvent companies, otherwise obliged to make application under section 150 of the 1990 Act, may be relieved of this obligation by the Director.

6.43 In accordance with recommendations 6.41 and 6.42 the liquidators of all insolvent companies will be obliged to make application under section 150(1) unless the Director relieves them of this obligation. It is recommended that strict time limits should apply to liquidators: a liquidator should be obliged to make a report to the Director within 6 months of the date of notification of his appointment as liquidator of an insolvent company; if, within 3 months following the submission of his Report, he has not been notified by the Director that the Director has relieved him of the obligation to make application under section 150, he must immediately make application under that section. This recommendation will give the Director a discretion which will facilitate common sense whilst ensuring that primary responsibility for making application continues to rest with the liquidators of insolvent companies.

6.44 It is thought sufficient for a receiver to have standing to bring application under section 150 and that it would be unnecessary to *oblige* a receiver to make application under that section. If a company is insolvent a liquidator will usually be appointed and it would not be expedient to require a receiver to initiate proceedings under section 150 only to have a liquidator take over those proceedings.

6.45 Where an order is made under section 150 of the 1990 Act the minimum fully paid up equity share capital should be increased in the case of public limited companies from £100,000 to £250,000 and in the case of any other company from £20,000 to £50,000.

6.46 The contents of the proposed *Liquidator's Report on Company Law Compliance* should, by statute, require liquidators of all insolvent companies to state, *inter alia*:

(a) Whether there are grounds for believing that the directors and other officers of the company to which he has been appointed have acted honestly and responsibly in relation to the affairs of the company;

(b) Whether the liquidator believes that the directors of the company should be the subject of an application for a restriction order under section 150 of the 1990 Act;

(c) Whether the liquidator believes that the directors of the company or any other person should be the subject of an application for a disqualification order under section 160(2) of the 1990 Act;

(d) Whether the liquidator believes that the directors and/or other officers may have been guilty of, have colluded with, or are responsible for a breach of section 297 or 298 of the Companies Act, 1963 or section 204 of the Companies Act, 1990;

(e) Whether, in the liquidator's opinion, there is *prima facie* evidence that the company and/or any directors or other officers thereof may be found by a court to have been in breach of any provision of the Companies Acts 1963-1990; and, in particular, section 60 of the Companies Act, 1963 and sections 29, 31 and 139 of the Companies Act, 1990.

6.47 The Director should have standing to apply for a restriction order in circumstances where a company is being wound up. Moreover, the courts should be empowered to make a restriction order (and Director should have the standing to make application under section 150) in cases where companies are insolvent but were the company is not being wound up on account of insufficient funds. To bridge the existing gap in legislation the Director should have *locus standi* to bring application under section 251 of the 1990 Act and those companies to which Part VII, Chapter 1 applies should be widened to include a company to which section 251 of the Companies Act, 1990 applies.

6.48 The court should have the power to make an order against all those against whom application is made under sections 150 and 160 for costs, remuneration and expenses of all liquidators who are obliged to make application under section 150 or who make application under section 160 of the 1990 Act and also of the Director, who should also be entitled to recover costs and expenses.

6.49 Liquidators of all insolvent companies should be obliged by statute to cooperate with the Director, to make the company's books and records and other documentation available to the Director and to render such other assistance as the Director might require in discharging his statutory functions.

6.50 It should be an offence, which can be proceeded with summarily or on indictment, for liquidators not to comply with any statutory obligations which are imposed upon them pursuant to these recommendations.

6.51 Every liquidator appointed to an insolvent company should be obliged to inform the Director of the fact of his appointment within fourteen days thereof, section 278 of the Companies Act, 1963 should be amended to extend to all liquidators of insolvent companies and such liquidators should deliver notice to the Director in the same form as the existing form used to notify the appointment of a voluntary liquidator to the Registrar of Companies.

PART VII - FURTHER PROPOSALS FOR STATUTORY CHANGE

7.1 In earlier Parts of this Report we have made a number of substantive recommendations for statutory change, including providing for the establishment of the Office of the Director of Corporate Enforcement and setting out the powers that should be available to the Director (Part IV), amending the provisions in relation to the disqualification and restriction of directors and other company officers (Part VI) and proposals for strengthening registration-type compliance measures (Part III).

7.2 In this Part, arising from our examination of the existing approach to compliance and enforcement and issues identified in the many submissions made to the Group, we set out a number of additional legislative changes which we believe should be introduced.

AMENDMENTS TO THE PROVISIONS FOR COMPANY INVESTIGATIONS

7.3 The Group examined the investigation provisions under Companies Act, 1990. These provisions have already been reviewed in some detail by the Company Law Review Group (CLRG) which made a number of proposals for legislative change. Having regard to the recommendations of the CLRG, we recommend the following legislative changes to the Companies Act, 1990:-

7.4 **Sections 10(1) and 10(2):** In line with recommendation of the CLRG Report [paragraph 3.27], we recommend that these subsections be amended to provide, as in section 19(3) of the 1990 Act, the protection of a lien on company books or documents.

7.5 **Sections 10(5) and 10(6):** We support the recommendation of the CLRG Report [paragraph 3.16] that these subsections be restated to give effect to the determination of the Supreme Court in 1992 that certain elements therein were unconstitutional.

7.6 **Sections 13 and 14:** We support the recommendation of the CLRG Report [paragraph 3.21] that an amendment be made so as to provide that the costs of a section 14 investigation may be recouped, by order of the High Court, from the parties specified in section 13(2). We believe that it is anomalous that such a provision is included in section 13 relating to section 7 or 8 investigations and that no similar provision is included for a section 14 investigation.

7.7 Where the **section 8 or 14** investigations are of public limited companies and to the extent that the costs of the investigation cannot be fully recouped from the parties specified in section 13(2), we recommend that the court should have jurisdiction to require the public limited company involved to repay the balance of the investigation costs, including any costs that may have been incurred on a preliminary examination of books and documents under section 19.

7.8 **Section 16(2):** Section 16 allows the Minister for Enterprise, Trade and Employment to issue a direction imposing restrictions on shares or debentures where there is a difficulty in connection with an enquiry under section 14 or 15. These restrictions may prevent the transfer of shares and debentures, the exercise of voting rights and the making of payment of any sums due from the company on those shares of debentures. The CLRG Report [paragraph 3.25] pointed out that the restriction on the making of payments of sums due from the company does not, however, apply in the case of liquidations. The Group accepts that the thrust of this section could be overcome by simply putting the company into liquidation. Accordingly, we recommend, in line with the CLRG's recommendation, that the potential for such abuse be removed by closing this loophole.

7.9 **Section 16(6):** The CLRG Report [paragraph 3.26] accepted that this subsection could be widened to include the situation that the shares of a company which is subject to a restriction order may be sold where the relevant facts in relation to those shares have been disclosed to the inspector and reported to the Minister. The Group feels that in certain circumstances there may not be need to require their disclosure to the company concerned and an amendment consistent with the CLRG's recommendation is, accordingly, recommended.

7.10 **Section 19:** Essentially, section 19 restricts the examination of an authorised officer to the books and documents of the company to which he has been appointed. Information relevant to his examination of the company's books and documents may be available from other parties with which the body has or has had a commercial relationship. However, the section does not allow the authorised officer to make demands of such parties, unless they are or were either officers or employees of the company in question. Accordingly, we recommend that this section be widened to allow an authorised officer to examine any documents relating to the company to which he has been appointed but which may be in possession of other corporate entities or individuals.

7.11 Additionally, we recommend that **section 19** should include power for the Minister on his own initiative or acting on request from an authorised officer to approach the High Court for an order which would assist the authorised officer in his/her examination of a company's books and documents. By way of example, the Minister may wish to seek the assistance of courts in foreign jurisdictions to obtain access to information outside Ireland which may be relevant to the examination of company books and documents.

7.12 **Section 19(4):** This subsection seeks to clarify the basis on which a company or other person may be required to explain the company's books or documents. We recommend, in the first place, that it be confirmed that the term "employed" in paragraph (a)(ii) includes employment in a professional, consultancy or any other capacity. Secondly, the requirement to provide an explanation of documents produced should make clear that the term *explanation* covered general as well as specific explanations, including explanations of any omissions therefrom. Thirdly, paragraph (b) limits the remit of an authorised officer, in cases where books or documents are not produced, to requiring the person concerned to state, to the best of his/her knowledge and belief, where the books or documents are. We recommend that the officer should be permitted, notwithstanding the absence of a document, to require explanations of his role and duties in the company, the role and duties of other persons associated with the company and of the company's general activity.

7.13 **Section 21:** Where a company whose books and documents are being examined does not agree that information in the possession of an authorised officer can be made available to third parties, severe restrictions on disclosure apply in this subsection. The preconditions for such release, set out in subsection (1), include for the purposes of criminal or other court proceedings. We recommend that these circumstances should be widened to contemplate applications for restrictions/disqualifications by the Director of Corporate Enforcement or other parties, the sharing of information with recognised company law authorities in other jurisdictions and with other recognised professional bodies in the State. As a result, the list of persons in subsection (3) should be broadened to include such parties by name. In particular, we recommend that the Revenue Commissioners should be named explicitly in section 21(3). We believe that it might also be useful to confirm that "any court of competent jurisdiction" includes any such court outside the State. Similarly, we recommend that a "catch-all" provision be added to subsection (3) to allow the Minister to extend the list by regulation.

7.14 **Section 23(2)** allows the Minister or an authorised officer to obtain banking documents in certain restricted circumstances, i.e., where the bank is being examined or where the customer of the bank is subject to a requirement under section 19. We recommend an amendment which would allow the Minister or the authorised officer to obtain all banking documents relating to the company whose books and documents are being examined, including cases where the company or its officers or employees may not actually be customers of the bank concerned.

7.15 **Reciprocal Assistance:** In line with the recommendation in the CLRG Report [paragraph 3.23], we recommend that statutory arrangements to facilitate reciprocal assistance from foreign jurisdictions in investigations should be included in this area. This would include the right of the Minister under sections 14, 15 and 19 to act on foot

of a request made from a recognised company law authority in a foreign jurisdiction to assist with investigations being undertaken. Such assistance should relate not only directly to the company being investigated in the foreign jurisdiction which may have traded in Ireland but any other company with which it may have had a commercial relationship in the State. It is also considered that section 8 should permit the Minister to seek in the High Court the appointment of an inspector on the application of a recognised company law authority in a foreign jurisdiction. It should also be legally possible for the Minister at his discretion to seek the recovery of such costs arising from the recognised company law authority concerned.

MISCELLANEOUS LEGISLATIVE AMENDMENTS

7.16 In addition to the above amendments in relation to investigations under the Companies Acts we believe that there are a number of other amendments which came to our attention during the course of our review which we could be carried through to good effect. These are as follows:-

7.17 **Section 21, 1963 Act:** It is recommended that the initial decision to register a company name should be made by the Registrar, not the Minister, and an appropriate amendment to this effect should be made.

7.18 **Section 24, 1963 Act:** This provides that certain non profit-making companies may be registered with limited liability but without the addition of the word "limited" or "teoranta" on receipt of a licence from the Minister for Enterprise, Trade and Employment. Such licences are issued on foot of the Minister being satisfied that the company is or will be complying with the conditions specified in the section. We believe that the Departmental resources deployed on considering such applications could more usefully be deployed on other tasks, and it is recommended therefore that the UK approach adopted in section 30 of its Companies Act, 1985 be introduced in Ireland. This essentially provides that a statutory declaration presented by a prescribed party (e.g., a solicitor or director) to the CRO indicating compliance with the applicable conditions will be sufficient to allow a company to qualify to omit the word "limited" or "teoranta" from its name. We also recommend that it should be made an offence for any party to provide an incorrect statutory declaration.

7.19 **Section 145, 1963 Act:** This requires every company to keep a minute book. The Group has been informed that the Department of Enterprise, Trade and Employment has been involved in investigating cases where it appears that a director of a company acted as its auditor, contrary to section 187 of the 1990 Act. Such an allegation could be more readily substantiated if the auditor's appointment is recorded in the minute book. Accordingly, we recommend the inclusion of a provision to require the production of

the company's minute book on foot of a direction by the Minister or a provision that gives statutory powers under the Companies Acts to the Gardaí and/or to the Director of Corporate Enforcement to obtain a search warrant with a view to impounding the minute books.

7.20 **Section 381, 1963 Act:** This provides for the prosecution of a company using the word "limited" in its title without having been properly incorporated. When investigating apparent breaches of section 381, the Minister has no powers of search and entry in order to gather the necessary proofs for a prosecution. We recommend that the necessary powers be given to the Gardaí and/or to the Director of Corporate Enforcement to aid enforcement with such provisions.

7.21 **Sections 92, 115 and 118, 1990 Act:** This provides, *inter alia,* that a Stock Exchange is required to report share interest irregularities and suspected insider dealing offences to the DPP. We recommend that this be extended to reporting such matters and any other suspected Companies Acts offences to the Commissioner of An Garda Síochána, who would be empowered to share information with the Director of Corporate Enforcement. At present, the confidentiality obligation in section 118 of the 1990 Act precludes the Stock Exchange from passing such information to the appropriate authorities.

7.22 **Section 187, 1990 Act:** This provides for the qualification of auditors. Prosecutions in this area require the attendance before a court of authorised representatives of each recognised body to state that the respondent is not a member of their body. As three of the bodies concerned are established in the UK, this involves significant and unnecessary travel costs, particularly if the defendant simply pleads guilty at the court proceedings. We recommend that the legislation be amended to provide for the taking of evidence by way of certificate in uncontested cases at least. This might, for example, require the provision to the defendant, say, 21 days in advance, of a certificate by each body as sufficient evidence for the court of non-membership. Where the person concerned contests the validity of one or more certificates, he will be required to give prior notice of, say, 14 days, so as to allow the attendance of a person from the recognised body concerned.

7.23 **Section 187, 1990 Act:** We recommend that, in order to simplify prosecutions against auditors who are not properly qualified, an official from the Office of the Director of Corporate Enforcement could demand production of the auditor's qualifications with the auditor being obliged to produce to the official evidence of his qualification within a given period. In the event of failure, a presumption would arise that the auditor was not properly qualified and the onus would shift to the defendant to establish proof of his qualification in the event of a prosecution (similar to provisions under Road Traffic Acts re driving licence and insurance).

7.24 **Section 187(1)(a)(iii), 1990 Act:** This provides that a person is qualified to act as an auditor if he was on 31 December, 1990 a member of a recognised body of accountants. The Group believes that it should also specify that the person must hold a valid practising certificate from the body concerned for appointment as auditor. Such a provision was inserted in the Companies Act, 1990 (Auditors) Regulations, 1992 (S.I. No. 259 of 1992), but arising out of a recent case, the Group understands that the attempt to resolve this matter by way of S.I. may be unsafe. Accordingly, we recommend that a revised provision be included in amending legislation in the interests of better enforcement.

7.25 **Section 192, 1990 Act:** We recommend that a legal onus be placed on recognised accounting bodies to notify the Director of Corporate Enforcement of any Companies Acts offences punishable on indictment on the part of auditors as an outcome of a disciplinary tribunal. This will give legal standing to the existing procedure whereby the bodies report such offences to the Department of Enterprise, Trade and Employment.

7.26 **Section 194, 1990 Act:** This provision requires an auditor to report to the Registrar of Companies any case where he believes proper books of account are not being kept. We believe that the Registrar should bring any such notices to the attention of the Director of Corporate Enforcement. We recommend that an auditor be required to notify the Director of Corporate Enforcement of any other suspected commission of an indictable offence under the Companies Acts by the company or its officers. We also recommend (as recommended by the CLRG [paragraph 4.30]) that the auditor should also be required to report incidents of fraud or suspected fraud to An Garda Síochána. These provisions would give legal effect to the existing professional requirements on auditors.

7.27 **Section 202(9), 1990 Act:** This subsection currently provides for company books of account to be retained for a minimum period of six years. No similar provision applies to the documents of solicitors and others who may have professional dealings with companies. Notwithstanding the fact that the CLRG [paragraph 3.17] declined to recommend any alteration of this provision some years ago, we recommend that consideration be given to extending the six year period to at least ten years and that the provision be extended to cover other parties who may have a professional relationship with the company concerned. The reason for such an extension is the practical one that many company investigations now underway are covering periods of greater than the six years specified in the Act. As it may be many years after the events in question before matters come to light warranting a company investigation, extension of this period would assist in the discovery of Companies Acts breaches. The Group believes that this is an issue that should be urgently examined by the reconvened Company Law Review Group.

7.28 **Section 242(2), 1990 Act:** The Group believes that the present wording of section 242(2) is suspect and would give rise to substantial difficulties in the case of prosecution on indictment. The section should be redrafted so as to clarify its meaning and to provide clearly what constitutes the indictable offence for which the sentence prescribed is a maximum term of imprisonment of 7 years or a fine not exceeding £10,000 or both.

7.29 ***Creditors:*** At present the rules in relation to the appointment of a liquidator in a creditors' voluntary winding-up work very much in favour of the directors. To overturn the company's nominee, a majority of creditors by number and value is required. This can be open to manipulation by directors who secure proxies from a number of creditors with very small debts. We recommend that the rules be amended to provide for the determination of a liquidator by reference only to a majority of creditors by value. In addition, we recommend that the reconvened Company Law Review Group should examine the whole question of the timing and provision of adequate information to creditors to ensure a fair and orderly liquidation process.

7.30 **Section 383, 1963 Act:** This section should be amended to provide that, for the purposes of any provision of the Companies Acts 1963-1990 which provides that an officer of a company who is in default shall be liable to a fine or penalty, the term *officer in default* shall mean any officer who authorises or, in breach of his or her duty as such officer, permits the default, refusal or contravention mentioned in the provision, and an officer shall be presumed to have permitted any default, refusal or contravention by the company unless the officer shows that he or she took all reasonable steps to prevent the default, refusal or contravention concerned, or by reason of circumstances beyond his or her control was unable to do so. For the avoidance of doubt, it shall be the duty of each individual director and of the company secretary to ensure that the requirements of the Companies Acts 1963-1990 are complied with by the company.

7.31 ***Registration Of Business Names Act, 1963:*** The Group was also made aware that work on the amendment of this Act is underway in the Company Law Administration Section of the Department of Enterprise, Trade and Employment in order to improve the enforceability of the existing business names provisions.

PART VIII - TIMETABLE FOR IMPLEMENTATION

8.1 We have earlier noted that the limited time frame within which the Group was required to report required a narrow and practical focus to our work and we expressed the hope that such of our recommendations, as are accepted, would be implemented with corresponding dispatch.

8.2 Not all of our proposals require primary legislation. Many of the proposals - particularly those set out in Part III relating to the work of the Companies Registration Office - can and will be implemented on an ongoing basis. However, until our substantive proposals are *first*, enacted and *second*, given effect, one can anticipate little change in the corporate compliance culture.

8.3 The Group believes that the following is a realistic - if demanding - timetable for the implementation of our proposals ***if the resources which we have elsewhere indicated are necessary are made available at an early date***. Preparation of the various legislative items listed within the timeframe proposed will require that drafting will be nominated for priority treatment by the Government.

FIRST HALF OF 1999

8.4 Government approval sought for implementation of the proposals contained in the Group's report. Following approval by Government, commence preparation of draft Bill to give effect to the recommendations of the Group.

8.5 Re-establishment of the Company Law Review Group (initially on a non-statutory basis), settlement of its work programme for the period to end-2000 and commencement of work.

8.6 Enactment of the Companies (Amendment) Bill (currently in drafting) dealing, *inter alia,* with examinership, the small business audit, Irish-registered non-resident companies and certain proposals from the IFSC Funds Group.

8.7 Service negotiations on EU company law matters, e.g., the European Company Statute, the 13th Draft Directive on Takeovers and other EU proposals in the company law domain.

SECOND HALF OF 1999

8.8 Enactment of Bill to give effect to the Group's recommendations.

8.9 Commence drafting of other *existing* planned legislative changes (e.g., other recommendations of the 1995 Company Law Review Group Report on Corporate Governance, Insider Dealing, facilitate the operation of the European Company Law Statute and the Takeovers Directive).

8.10 Commencement of the Companies Acts Consolidation Project (first phase - transposition of all secondary legislation into primary legislation).

YEAR 2000

8.11 Establishment of the Office of Director of Corporate Enforcement, appointment of staff, etc.

8.12 Publication and Enactment of the Bill dealing, *inter alia*, with the 1995 CLRG recommendations.

8.13 First Report of the re-established Company Law Review Group of proposals for legislative change/changes to company law regime.

8.14 Commencement by the Company Law Review Group of its second programme of work.

8.15 Commence drafting of Bill to give effect to proposals of the re-established Company Law Review Group.

8.16 Continuation of the Companies Acts Consolidation Project.

8.17 Continue to service negotiations on EU company law matters and preparation of legislation to give effect to adopted EU measures.

YEAR 2001

8.18 Enactment of Bill dealing with the recommendations of the re-established Company Law Review Group.

8.19 Completion of first phase of the Companies Acts Consolidation Project. Commencement of second phase: consolidation of all company law.

8.20 Company Law Review Group continues its second programme of work.

8.21 Continue to service negotiations on EU company law matters and preparation of legislation to give effect to adopted EU measures.

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APPENDIX 1

MAIN STATUTORY PROVISIONS OF IRISH COMPANY LAW

APPENDIX 1

MAIN STATUTORY PROVISIONS OF IRISH COMPANY LAW

The following lists the primary and secondary legislation relevant to company law.

COMPANIES ACTS, 1963 - 1990

Companies Act, 1963	(No. 33 of 1963)
Companies (Amendment) Act, 1977	(No. 31 of 1977)
Companies (Amendment) Act, 1982	(No. 10 of 1982)
Companies (Amendment) Act, 1983	(No. 13 of 1983)
Companies (Amendment) Act, 1986	(No. 25 of 1986)
Companies (Amendment) Act, 1990	(No. 27 of 1990)
Companies Act, 1990	(No. 33 of 1990)

COMPANIES ACTS, 1963 TO 1990 - ORDERS AND REGULATIONS

Companies Act, 1963 (Commencement) Order, 1964	(S.I. No. 41 of 1964)
Companies (Recognition of Countries) Order, 1964	(S.I. No. 42 of 1964)
Companies (Stock Exchange) Order, 1964	(S.I. No. 43 of 1964)
Companies (Fees) Order, 1964	(S.I. No. 44 of 1964)
Companies (Forms) Order, 1964	(S.I. No. 45 of 1964)
Companies (Stock Exchange) Order, 1975	(S.I. No. 198 of 1975)
Companies (Fees) Order, 1976	(S.I. No. 64 of 1976)
Companies (Amendment) Act, 1977 (Commencement) Order, 1978	(S.I. No. 95 of 1978)
Companies (Amendment) Act, 1977 (Designation of Stock Exchange Nominee) Regulations, 1979	(S.I. No. 122 of 1979)
Companies (Fees) Order, 1980	(S.I. No. 400 of 1980)
Companies (Amendment) Act, 1982 (Commencement) Order, 1982	(S.I. No. 255 of 1982)
Companies (Forms) Order, 1982	(S.I. No. 256 of 1982)
Companies (Fees) Order, 1983	(S.I. No. 259 of 1983)
Companies (Amendment) Act, 1983 (Commencement) Order, 1983	(S.I. No. 288 of 1983)
Companies (Forms) Order, 1983	(S.I. No. 289 of 1983)
Companies (Amendment) Act, 1986 (Commencement) Order, 1986	(S.I. No. 257 of 1986)
Companies (Fees) Order, 1987	(S.I. No. 99 of 1987)
Companies (Forms) Order, 1987	(S.I. No. 147 of 1987)
Companies (Fees) Order, 1988	(S.I. No. 237 of 1988)
Companies (Forms) Order, 1990	(S.I. No. 224 of 1990)
Companies Act, 1990 (Commencement) Order, 1990	(S.I. No. 336 of 1990)
Companies (Stock Exchange) Regulations, 1990	(S.I. No. 337 of 1990)
Companies Act, 1990 (Commencement) Order, 1991	(S.I. No. 10 of 1991)
Companies Act, 1990 (Commencement) (No. 2) Order, 1991	(S.I. No. 117 of 1991)
Companies Act, 1990 (Insider Dealing) Regulations, 1991	(S.I. No. 151 of 1991)
Companies (Forms) Order, 1991	(S.I. No. 161 of 1991)
Companies (Forms) Regulations, 1991	(S.I. No. 162 of 1991)
Companies (Fees) Order, 1991	(S.I. No. 163 of 1991)
Companies (Fees) Regulations, 1991	(S.I No. 164 of 1991)
Companies Act, 1990 (Parts IV and VII) Regulations, 1991	(S.I. No. 209 of 1991)
Companies (Fees) Order, 1992	(S.I. No. 95 of 1992)
Companies Act, 1990 (Insider Dealing) Regulations, 1992	(S.I. No. 131 of 1992)

Companies Act, 1990 (Commencement) Order, 1992	(S.I. No. 258 of 1992)
Companies Act, 1990 (Auditors) Regulations, 1992	(S.I. No. 259 of 1992)
Companies (Fees) Order, 1993	(S.I. No. 142 of 1993)
Companies (Fees) (No. 2) Order, 1993	(S.I. No. 241 of 1993)
Companies (Forms) Order, 1994	(S.I. No. 100 of 1994)
Companies (Stock Exchange) Regulations, 1995	(S.I. No. 310 of 1995)
Companies Act, 1990 (Uncertificated Securities) Regulations, 1996	(S.I. No. 68 of 1996)
Companies (Fees) Order, 1997,	(S.I. No. 358 of 1997)

REGISTRATION OF BUSINESS NAMES ACT, 1963 (NO. 30 OF 1963)

The following Orders and Regulations were made pursuant to the above Act:

Registration of Business Names Act, 1963 (Commencement) Order 1964	(S.I. No 46 of 1964)
Business Names Regulations, 1964	(S.I. No. 47 of 1964)
Business Names Regulations, 1976	(S.I. No. 63 of 1976)
Business Names Regulations, 1980	(S.I. No. 399 of 1980)
Business Names Regulations, 1983	(S.I. No. 260 of 1983)
Business Names Regulations, 1987	(S.I. No. 100 of 1987)
Business Names Regulations, 1993	(S.I. No. 138 of 1993)
Business Names Regulations, 1997	(S.I. No. 357 of 1997)

OTHER LEGISLATION AFFECTING THE OPERATION OF COMPANIES

Designated Investment Funds Act, 1985, (No. 16 of 1985).
Safety, Health and Welfare at Work Act, 1989 (No. 7 of 1989)
Investment Limited Partnerships Act, 1994 (No. 24 of 1994)
Investment Intermediaries Act, 1995 (No. 11 of 1995)
Take-Over Panel Act, 1997 (No. 5 Of 1997)
Electoral Act, 1997
District Court Rules, 1997
State Property Act, 1954

REGULATIONS TO THE EUROPEAN COMMUNITIES ACTS, 1972 AND 1973

European Communities (Companies) Regulations, 1973 (S.I. No. 163 of 1973) to give effect to the Council Directive of the European Communities of 9 March, 1968 (68/151/EEC).

European Communities (Stock Exchange) Regulations, 1984 (S.I. No. 282 of 1984) to give effect to Council Directives 79/297/EEC, 80/390/EEC and 82/121/EEC.

European Communities (Mergers and Divisions of Companies) Regulations, 1987 (S.I. No. 137 of 1987) to give effect to Council Directives 78/855/EEC and 82/891/EEC.

European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations, 1989 (S.I. No. 78 of 1989) to give effect to Council Directive No. 85/611/EEC of 20 December 1985, as amended by Council Directive No. 88/220/EEC of 22 March 1988.

European Communities (European Economic Interest Groupings) Regulations, 1989 (S.I. No. 191 of 1989) to give effect to the provisions of Council Regulation (EEC) No. 2137/85 of 25 July 1985.

European Communities (Stock Exchange) (Amendment) Regulations, 1991 (S.I. No. 18 of 1991) to give effect to Council Directive No. 87/345/EEC of 22 June 1987.

European Communities (Companies: Group Accounts) Regulations, 1992 (S.I. No. 201 of 1992) to give effect to Council Directive No. 83/349/EEC of 13 June 1983.

European Communities (Transferable Securities and Stock Exchange) Regulations, 1992 (S.I. No. 202 of 1992) to give effect to Council Directive No. 89/298/EEC of 17 April 1989 and Council Directive No. 90/211/EEC of 23 April 1990.

European Communities (Branch Disclosures) Regulations, 1993 (S.I. No. 395 of 1993) to give effect to Council Directive No. 89/666/EEC of 21 December, 1989.

European Communities (Accounts) Regulations, 1993 (S.I. No. 396 of 1993) to give effect to Council Directives 90/604/EEC and 90/605/EEC of 8 November, 1990.

European Communities (Stock Exchange) (Amendment) Regulations, 1994 (S.I. No. 234 of 1994) to give effect to Council Directive 94/18/EC of 30 May, 1994.

European Communities (Single Member Private LTD. Companies) Regulations, 1994 (S.I. No. 275 of 1994).

European Communities (Single Member Private LTD. Companies) (Forms) Regulations, 1994 (S.I. No. 306 of 1994).

European Communities (Accounts) (Forms) Regulations, 1995 (S.I. No. 178 of 1995).

European Communities (Stock Exchange)(Amendment) Regulations, 1995 (S.I. No. 311 of 1995).

European Communities (Undertakings for Collective Investment in Transferable Securities (Amendment) Regulations, 1996, (S.I. No. 357 of 1996)

European Communities (Public LTD. Companies Subsidiaries) Regulations, 1997 (S.I. No. 67 of 1997)

RULES OF COURT

The following Rules of the Superior Courts apply to the Companies Act, 1963-1990:

Rules of the Superior Courts,	(S.I. No. 15 of 1986).
Rules of the Superior Courts (No. 3), 1991	(S.I. No. 147 of 1991).
Rules of the Superior Courts (No. 4), 1991	(S.I. No. 278 of 1991).
Rules of the Superior Courts (No. 2), 1993	(S.I. No. 265 of 1993).
Rules of the Superior Courts (No. 1), 1994	(S.I. No. 101 of 1994).

APPENDIX 2

LIST OF OFFENCES UNDER THE COMPANIES ACTS: 1963 - 1990

Taken from: "Irish Company Law Index" by Donal McGahon and published by Gill and Macmillan (1991)

OFFENCE	SECTION	MODE OF TRIAL	MAXIMUM FINE	MAXIMUM PRISON TERM	DAILY DEFAULT FINE	MAX-IMUM DDF
MEMORANDUM OF ASSOCIATION Failure to deliver to the registrar within thirty-six days of amendment a printed copy of the altered memorandum of association; or to give notice of an application to the court in relation to such alteration or to file copy of court order in relation thereto.	63/10(9)	Summary	£250	-	-	-
UNLIMITED COMPANY, INCREASE IN MEMBERS Failure by unlimited company or company limited by guarantee to deliver to the registrar notice of the increase within fifteen days of increase.	63/12(3)	Summary	£250	-	-	-
NAME, CHANGE OF Failure to comply with direction of the Minister to change the company's name.	63/23(2)	Summary	£500	-	-	-
CHAMBER OF COMMERCE Failure to change name in compliance with revocation of licence granted by Minister to use the words "chamber of commerce".	63/24(8)	Summary	£500	-	-	-
MEMORANDUM OF ASSOCIATION Failure to supply copy to any member who requires it.	63/29(1)	Summary	£25	-	-	-
ARTICLES OF ASSOCIATION Failure to supply copy to any member who requires it.	63/29(1)	Summary	£25	-	-	-
MEMORANDUM OF ASSOCIATION Failure to ensure all issued copies contain alterations made to date.	63/30(2)	Summary	£125	-	-	-
PRIVATE COMPANY, CEASING TO BE A Failure to re-register a private company as a public limited company under section 9 of the Companies (Amendment) Act, 1983.	63/35(2)-AM 83/1	Summary	£500	-	-	-
PROSPECTUS, STATEMENT IN LIEU Delivering a statement in lieu of a prospectus to the registrar containing any untrue statement	3/35(3) -AM 83/1	Summary Indictment	£500 £2,500	6 months, or both 2 years, or both	- -	- -

OFFENCE	SECTION	MODE OF TRIAL	MAXIMUM FINE	MAXIMUM PRISON TERM	DAILY DEFAULT FINE	MAX-IMUM DDF
PROSPECTUS Failure to comply with the Third Schedule to the Companies Act, 1963 or to issue a form of application for shares except with a prospectus which complies with that Schedule.	63/44	Summary	£500	-	-	-
Issuing a prospectus without obtaining expert's consent to the issue of expert's report with the prospectus or failing to include a statement that consent has been given and not withdrawn.	63/46(1)	Summary	£500	-	-	-
Failure to deliver endorsed copy to the registrar before issue.	63/47(1)	Summary	£500	-	-	-
Inclusion of any untrue statement in issued prospectus.	63/50	Summary	£500	6 months, or both	-	-
PROSPECTUS, STATEMENT IN LIEU OF Failure to deliver to registrar at least three days before the first allotment a statement in lieu of prospectus which complies with the Fourth Schedule to the Companies Act, 1963.	63/53(1)	Summary	£500	-	-	-
Delivery to registrar of statement in lieu of prospectus containing false statement.	63/54(5)	Summary Indictment	£500 £2,500	6 months, or both 2 years, or both	-	-
PROSPECTUS Allotment of shares before the fourth day after which the prospectus is issued or a later date if specified in the prospectus.	63/56 (1 & 2)	Summary	£500	-	-	-
PROSPECTUS, ALLOTMENT OF SHARES Failure to retain subscription moneys in separate bank account pending permission for shares to be dealt with on stock exchange.	63/57(1)	Summary	£500	-	-	-
ALLOTMENT OF SHARES Failure to file return of allotments with registrar within one month after allotment.	63/58	Summary	£500	-	-	-

OFFENCE	SECTION	MODE OF TRIAL	MAXIMUM FINE	MAXIMUM PRISON TERM	DAILY DEFAULT FINE	MAX-IMUM DDF
ALLOTMENT OF SHARES, COMMISSIONS Failure to file with registrar in prescribed form details of authorised commissions paid in connection with the allotment of shares.	63/59	Summary	£500	-	-	-
PURCHASE OF OWN SHARES, FINANCIAL ASSISTANCE Making of statutory declaration by director without reasonable grounds for the opinion as to the company's solvency.	63/60(5)	Summary	£500	6 months, or both	-	-
Giving financial assistance for the purchase of a company's own shares without observing the requirements of section 60 of the Companies Act, 1963.	63/60(15)	Summary Indictment	£500 £2,500	6 months, or both 2 years or both	-	-
CAPITAL, ALTERATIONS IN Failure to notify registrar within one month of consolidation, division, conversion, subdivision, redemption or cancellation of shares.	63/69(1)	Summary	£250	-	-	-
CAPITAL, INCREASE IN Failure to notify registrar within 15 days of increase in authorised or nominal capital.	63/70(1)	Summary	£250	-	-	-
CAPITAL, REDUCTION OF Wilful concealment by officer of name of creditor entitled to object to reduction of capital or wilful mis-representation of nature or amount of debt or claim by creditor.	63/77	Summary	£500	-	-	-
SHAREHOLDERS' RIGHTS, VARIATION Failure to forward to registrar within twenty-one days copy of court order on application by shareholders to have variation of shareholders' rights cancelled.	63/78(5)	Summary	£250	-	-	-
SHARE TRANSFER Failure to send to transferee, within two months of lodgement of transfer, notice of refusal to register transfer of shares.	63/84(1)	Summary	£250	-	-	-

OFFENCE	SECTION	MODE OF TRIAL	MAXIMUM FINE	MAXIMUM PRISON TERM	DAILY DEFAULT FINE	MAX-IMUM DDF
SHARE CERTIFICATES Failure to provide share-stock certificates within two months of allotment or lodgement of share transfer	63/86(1)	Summary	£100	-	-	-
SHAREHOLDER, PERSONATION OF False and deceitful personation of owner of share/interest in company/share warrant/coupon and obtaining or endeavouring to obtain rights thereto.	63/90	Summary Indictment	£500 £2,500	6 months, or both 2 years, or both	-	-
DEBENTURES, REGISTER OF Failure to keep and maintain register of debenture holders.	63/91 (1 & 2)	Summary	£250	-	-	-
Failure to advise registrar of place where register of debenture holders is kept and any change in that place.	63/91(3)	Summary	£250	-	-	-
Refusal to permit inspection of register of debenture holders or to supply a copy of it.	63/92 (1 & 2)	Summary	£125	-	-	-
CHARGES, REGISTER OF Failure to register charges with registrar within twenty-one days after the date of creation.	63/100(1)	Summary	£500	-	-	-
CHARGES ON PROPERTY ACQUIRED Failure to register with registrar registerable charges existing on property acquired within twenty-one days of completion of acquisition.	63/101(1)	Summary	£500	-	-	-
JUDGEMENT MORTGAGES Failure by judgement creditor to obtain and deliver two certified copies of the affidavit to the company within twenty-one days of registration of the judgement as a mortgage.	63/102(1)	Summary	£500	-	-	-
Failure by company to deliver one copy to the registrar within three days of receipt.	63/102(1)	Summary	£500	-	-	-

OFFENCE	SECTION	MODE OF TRIAL	MAXIMUM FINE	MAXIMUM PRISON TERM	DAILY DEFAULT FINE	MAX-IMUM DDF
RECEIVER Failure to give notice of appointment within seven days by a) publication in "Iris Oifigiuil" b) publication in at least one daily newspaper c) delivery of notice in prescribed form to registrar.	63/107(1)	Summary	£500	-	-	-
Failure to deliver notice to registrar on ceasing to act as Receiver.	63/107(2)	Summary	£500	-	-	-
CHARGES Failure to permit inspection at registered office of instruments creating charges.	63/110(1)	Summary	£500	-	-	-
Failure to register with registrar within six months charges etc. Created before the operative date (1 April 1964)	63/112(1)	Summary	£500	-	-	-
REGISTERED OFFICE Failure to have a registered office in the State.	63/113(1) -AM 82/4	Summary	£500	-	-	-
Failure to file with registrar within fourteen days notice of change in the situation of the registered office	63/113(3) -AM 82/4	Summary	£500	-	-	-
NAME Failure to paint or affix name of company outside every office or place in which its business is carried on.	63/114 (1)(a)	Summary	£125	-	-	-
Use of seal which does not bear name of company. Issue of business letter, publication, bill of exchange, promissory note, endorsement, cheque, order for money or goods, invoice, receipt or letter of credit which does not bear the company's name.	63/114 (1)(b) & (c), (4)	Summary	£250	-	-	-
COMMENCEMENT Commencement of any business or exercise of any borrowing powers by a company which has issued a prospectus to the public to subscribe for its shares which has not observed the necessary conditions in section 115 of the Companies Act, 1963.	63/115	Summary	£500	-	-	-

OFFENCE	SECTION	MODE OF TRIAL	MAXIMUM FINE	MAXIMUM PRISON TERM	DAILY DEFAULT FINE	MAX-IMUM DDF
MEMBERS, REGISTER OF Failure to maintain a register of members in accordance with section 116 of the Companies Act, 1993.	63/116 (1-6)	Summary	£500	-	-	-
Failure to notify registrar within fourteen days of the place where the register is kept and any change in that place.	63/116(7)	Summary	£500	-	-	-
MEMBERS, INDEX OF Failure to index register of members (where more than fifty) unless it is in a form which in itself constitutes an index.	63/117(1)	Summary	£250	-	-	-
MEMBERS, REGISTER OF, INSPECTION OF Failure to permit inspection of register of members or to provide a copy of it.	63/119 (1 & 2)	Summary	£250	-	-	-
ANNUAL RETURN Failure to file annual return made up to fourteen days of the annual general meeting to the registrar within sixty days of the annual general meeting.	63/125(1) 63/126(1) 63/127(1) AM 90B/ 244	Summary	£1,000	-	-	-
ANNUAL RETURN, DOCUMENTS ANNEXED Failure to annex to the annual return certified copy of every balance sheet and report of auditors.	63/128(1) AM 90B/ 244	Summary	£1,000	-	-	-
ANNUAL GENERAL MEETING Failure to hold annual general meeting or to hold meeting in accordance with a direction of the Minister.	63/131 (1 & 3)	Summary	£500	-	-	-
Failure to file copy of resolution to treat a meeting as being the annual general meeting for a previous year with the registrar within fifteen days of its passings.	63/131(5)	Summary	£100	-	-	-
PROXY Failure to include in notice of general meeting statement that a member may appoint a proxy to attend, speak and vote in his/her stead and that the proxy need not be a member.	63/136(3)	Summary	£250	-	-	-

OFFENCE	SECTION	MODE OF TRIAL	MAXIMUM FINE	MAXIMUM PRISON TERM	DAILY DEFAULT FINE	MAX-IMUM DDF
Issue of invitations to appoint as proxy a specified person or persons to some of the members only.	63/136(5)	Summary	£250	-	-	-
RESOLUTIONS Failure to file with registrar copy of resolutions etc. within fifteen days of the passing thereof.	63/143(2)	Summary	£250	-	-	-
Failure to embody or issue resolution with every copy of the articles issued after passing the resolution.	63/143(2)	Summary	£250	-	-	-
Failure to supply a copy to a member who requests it.	63/143	Summary	£5	-	-	-
MINUTES Failure to prepare minutes of general meetings and directors meetings as soon as possible and to enter in books kept for that purpose.	63/145(1)	Summary	£500	-	-	-
MINUTE BOOKS Failure to permit inspection of general meeting minute books by members or to supply a copy thereof.	63/146 (1 & 2)	Summary	£125	-	-	-
ACCOUNTS, BOOKS OF Failure by directors to ensure proper books of account are maintained.	63/147(1) REP 90B/202	Summary Indictment	£1,000 £10,000	6 months, or both 3 years, or both	-	-
ACCOUNTS Failure by director to ensure laying of accounts before annual general meeting.	63/148(1)	Summary	£500	6 months or both	-	-
Failure by director to secure compliance with contents and form requirements.	63/149(7)	Summary	£500	6 months or both	-	-
ACCOUNTS, GROUP Failure to lay group accounts before annual general meeting of holding company where required.	63/150(1)	Summary	£500	6 months or both	-	-
ACCOUNTS, SUBSIDIARY Failure to supply copy of subsidiary accounts when these are not included in the group accounts to any member requesting them within fourteen days of the request.	63/150(3)	Summary	£500	-	-	-

OFFENCE	SECTION	MODE OF TRIAL	MAXIMUM FINE	MAXIMUM PRISON TERM	DAILY DEFAULT FINE	MAX-IMUM DDF
Failure by a private company to supply copy of subsidiary accounts to member of company who requests them within fourteen days of the request.	63/154(2)	Summary	£500	-	-	-
FINANCIAL YEAR Failure to ensure that financial year of holding company and its subsidiaries coincide.	63/153(1)	Summary	£250	-	-	-
ACCOUNTS, SIGNING OF Issue, circulation or publication of balance sheet and profit and loss account which has not been signed by two of the directors (in the case of a banking company by its secretary and three of the directors).	63/156(3)	Summary	£500	-	-	-
BALANCE SHEET, DOCUMENTS ANNEXED Issue, circulation or publication of balance sheet without profit and loss account and auditor's report etc. annexed.	63/157(1)	Summary	£500	-	-	-
DIRECTORS' REPORT Failure to prepare and annex to the balance sheet the directors' report dealing with matters required by the Act.	63/158(1)	Summary	£500	6 months or both	-	-
ACCOUNTS Failure to send not less than twenty one days before the annual general meeting to members and debenture holders copies of the balance sheet and annexed documents required to be laid before the annual general meeting.	63/159(1)	Summary	£250	-	-	-
AUDITORS Failure to give notice within one week to the Minister that his power under 63/160(4) has become exercisable.	63/160 -IN 90B/183	Summary	£1,000	-	-	-
Failure to give to the registrar notice within fourteen days of removal of an auditor.	63/160 -IN 90B/183	Summary	£1,000	-	-	-
Acting as an auditor of public auditor when disqualified under section 162.	63/162(8) -AM 82/6	Summary	£500	-	-	-

OFFENCE	SECTION	MODE OF TRIAL	MAXIMUM FINE	MAXIMUM PRISON TERM	DAILY DEFAULT FINE	MAX-IMUM DDF
INVESTIGATION						
Failure to produce to Inspectors any book or document or refusing	63/168(3) -AM 82/7	Summary	£500	6 months, or both	-	-
to answer any question with respect to the affairs of the company.		Indictment	£5,000	3 years, or both	-	-
DIRECTOR, ADVERTISEMENT OF						
Delivery to registrar of list of persons consenting to be directors of a company which is the subject of a prospectus or statement in lieu of a prospectus where it contains the name of a person who has not consented.	63/179	Summary	£250	-	-	-
DIRECTORS, SHARE QUALIFICATION	63/180(1)	Summary	£500	-	-	-
Acting as a director of a company without acquiring a share qualification if required to do so by its articles within two weeks of appointment or such shorter time fixed by the articles.						
BANKRUPT						
Undischarged bankrupt acting as officer, liquidator or examiner or	63/183 -IN	Summary	£1,000	12 months, or both	-	-
directly or indirectly being involved in the promotion, formation or management of any company without court approval.	90B/169	Indictment	£10,000	3 years, or both	-	-
DIRECTORS, PROHIBITION						
Person acting as a director of a company in contravention of a	63/184(5)	Summary	£500	6 months, or both	-	-
court order.		Indictment	£2,500	2 years, or both	-	-
DIRECTORS, DISCLOSURE OF PAYMENTS	63/188(1)	Summary	£125	-	-	-
Failure by director to disclose to members payments made to him/her in connection with transfer of shares in company.						
DIRECTORS, REGISTER OF SHAREHOLDINGS	63/190(1)	Summary	£500	-	-	-
Failure to maintain register of directors and secretary's shareholdings in the company and its subsidiary or its parent.	REP 90B/60					
Failure to produce register at commencement of annual general meeting.	63/190(7) REP 90B/60	Summary	£250	-	-	-

OFFENCE	SECTION	MODE OF TRIAL	MAXIMUM FINE	MAXIMUM PRISON TERM	DAILY DEFAULT FINE	MAX-IMUM DDF
Failure to supply copy to member or debenture holder.	63/190(8) REP 90B/60	Summary	£500	-	-	-
DIRECTORS, DISCLOSURE Failure by director or secretary to give notice in writing of shareholdings.	63/193(1)	Summary	£500	-	-	-
Failure by director to give notice in writing relating to salaries, payments and loans.	63/193(2)	Summary	£500	-	-	-
Failure by director to make declaration disclosing interest in contracts made by the company.	63/194(6)	Summary	£500	-	-	-
Failure to enter interest in contracts into special book.	63/194(5)	Summary	£500	-	-	-
REGISTER OF DIRECTORS AND SECRETARIES Failure to maintain register of directors and secretaries with required details.	63/195 -IN 90B/51	Summary	£1,000	-	£50	-
Failure to notify registrar within fourteen days of change in directors and secretaries or in their particulars.	63/195 -IN 90B/51	Summary	£1,000	-	£50	-
Failure to supply to registrar signed consent of new direetor or secretary.	63/195 -IN 90B/51	Summary	£1,000	-	£50	-
Refusal to permit inspection of register	63/195 -IN 90B/51	Summary	£1,000	-	£50	-
Failure by director or secretary to give written notice to company of information required for register.	63/195 -IN 90B/51	Summary Indictment	£1,000 £10,00	- -	- -	- -
BUSINESS LETTERS Failure to publish details of directors in all business letters, unless exempted.	63/196	Summary	£125	-	-	-
DIRECTORS WITH UNLIMITED LIABILITY Failure by promoters, directors or secretary to state and to give notice to a director that his/her liability is to be unlimited.	63/197	Summary	£500	-	-	-

OFFENCE	SECTION	MODE OF TRIAL	MAXIMUM FINE	MAXIMUM PRISON TERM	DAILY DEFAULT FINE	MAX-IMUM DDF
RECONSTRUCTION Failure to deliver to registrar copy of court order for compromise or arrangement with creditors.	63/201	Summary	£100	-	-	-
Failure to attach court order for compromise or arrangement with creditors to copies of memorandum of association issued after its making.	63/201	Summary	£100	-	-	-
CREDITORS, MEETING OF Failure to supply with notice of meeting of creditors the information required by section 202 of the Companies Act, 1963.	63/202	Summary	£500	-	-	-
Failure of director to give company notice of any matters necessary for such a meeting.	63/202(6)	Summary	£250	-	-	-
Failure to deliver copy of court order for compromise or arrangement with creditors to registrar within twenty one days of its making.	63/203(3)	Summary	£125	-	-	-
OPPRESSION Failure to deliver copy of court order made under section 205 in remedy of oppression to the registrar within twenty one days of its making.	63/205(5)	Summary	£125	-	-	-
WINDING-UP (COURT, BY) Failure to deliver copy of winding-up order to registrar.	63/221(1)	Summary	£125	-	-	-
Failure to file with the court within twenty one days from the date of the appointment of the liquidator or the making of the winding up order a statement of affairs verified by affidavit.	63/224(3)	Summary	£500	-	-	-
WINDING-UP (COURT BY), PUBLICATION Failure by liquidator to publish notice of appointment in "Irish Oifigiul" within twenty-one days of appointment.	63/227(1)	Summary	£250	-	-	-
WINDING-UP (COURT BY), ANNULMENT OR STAY Failure to file with registrar copy of court order for the annulment or staying of a winding-up.	63/234(4)	Summary	£125	-	-	-

OFFENCE	SECTION	MODE OF TRIAL	MAXIMUM FINE	MAXIMUM PRISON TERM	DAILY DEFAULT FINE	MAX-IMUM DDF
WINDING-UP (COURT BY), Failure by liquidator to file with registrar within twenty one days of its making a copy of court order for dissolution of the company.	63/249(2)	Summary	£250	-	-	-
WINDING-UP, VOLUNTARY (BOTH KINDS) Failure to publish within fourteen days in "Iris Oifigiuil" notice of resolution by company for voluntary winding-up.	63/252(1)	Summary	£125	-	-	-
WINDING-UP (COURT, BY) Failure by liquidator to deliver to registrar within twenty one days office copy of order applying provisions in relation to voluntary winding-up to the winding-up.	63/256 -IN 90B/128	Summary	£1,000	-	-	-
WINDING-UP, VOLUNTARY CREDITORS Failure by liquidator to call meeting of creditors when he forms opinion company will be unable to pay its debts.	63/261 -IN 90B/129	Summary Indictment	£1,000 £10,000	-	-	-
WINDING-UP, VOLUNTARY (BOTH KINDS) Failure by liquidator to summon a general meeting at the end of the first year from the commencement of the winding-up and of each succeeding year to lay before it an account of his/her acts and dealings and of the conduct of the winding-up and to send a copy of the account to the registrar within seven days of the meeting	63/262(1) AM 90B/145	Summary Indictment	£1,000 £10,000	- -	£50 £250	- -
Failure by liquidator to hold final general meeting to lay before it an account.	63/263(7)	Summary	£250	-	-	-
Failure by liquidator to send to registrar copy of final account and report of final meeting within seven days of the meeting	63/263(3)	Summary	£500	-	-	-
Failure by applicant to file with registrar within fourteen days of its making copy of court order deferring the date of dissolution of the company.	63/263(6)	Summary	£25	-	-	-

OFFENCE	SECTION	MODE OF TRIAL	MAXIMUM FINE	MAXIMUM PRISON TERM	DAILY DEFAULT FINE	MAX-IMUM DDF
WINDING-UP, VOLUNTARY CREDITORS Failure to summon meeting of creditors in accordance with section 266 of the Companies Act, 1963.	63/266(6)	Summary	£5,000	-	-	-
Failure by liquidator to summon a general meeting at the end of the first year form the commencement of the winding-up and of each succeeding year to lay before it an account of his/her acts and dealings and of the conduct of the winding-up and to send a copy of the account to the registrar within seven days of the meeting.	63/272(1) AM 90B/145	Summary Indictment	£1,000 £10,000	- -	£50 £250	- -
Failure by liquidator to hold final general meeting and meeting of creditors to lay before it an account.	63/273(7)	Summary	£250	-	-	-
Failure by liquidator to send to registrar copy of final account and report of final meetings within seven days of the meetings.	63/273(3)	Summary	£500	-	-	-
Failure by applicant to file with registrar within fourteen days of its making copy of court order deferring the date of dissolution of the company.	63/273(6)	Summary	£250	-	-	-
LIQUIDATOR, APPOINTMENT OF (ALL MODES) Failure by liquidator to file notice of appointment with registrar within fourteen days of appointment.	63/278(3)	Summary	£250	-	-	-
WINDING-UP, VOLUNTARY CREDITORS Failure of chairman to notify liquidator in writing or appointment unless liquidator or duly authorised representative is present at meeting making appointment.	63/276A-IN 90B/133	Summary	£1,000	-	-	-
WINDING UP, VOLUNTARY (BOTH KINDS) Failure to file with registrar forthwith copy of court order annulling or staying the winding-up.	63/280(3)	Summary	£125	-	-	-

OFFENCE	SECTION	MODE OF TRIAL	MAXIMUM FINE	MAXIMUM PRISON TERM	DAILY DEFAULT FINE	MAX-IMUM DDF
WINDING-UP, OFFENCES BY OFFICERS (ALL MODES)						
Offences listed in section 293(1) subsections (a) to (l) and (p) of the Companies Act, 1963.	63/293(1)	Summary	£500	6 months, or both	-	-
		Indictment	£2,500	2 years, or both		
Offences listed in section 293(1) subsections (m), (n) and (o) of the Companies Act, 1963.	63/293(1)	Indictment	*5 years penal servitude/2 years imprisonment; or both fine and imprisonment	*	-	-
WINDING UP, ALTERATION OF BOOKS (ALL MODES)						
Destruction, mutilation, alteration, or falsification of books, papers or securities of a company or complicity therein by any officer or contributory of a company.	63/294	Summary	£500	6 months, or both	-	-
		Indictment	£2,500	2 years, or both	-	-
WINDING-UP, FRAUD BY OFFICERS (ALL MODES)						
Fraud by an officer of a company which is ordered to be wound-up or which passes a resolution for voluntary winding-up.	63/295	Summary	£500	6 months, or both	-	-
		Indictment	£2,500	2 years, or both	-	-
Failure to keep proper books of account in a company which is subsequently wound-up.	63/296(1) REP 90B/6 /N 90B/203	Summary	£1,000	6 months, or both	-	-
		Indictment	£10,000	2 years or both		
FRAUDULENT TRADING						
Knowingly, or being a party to, carrying on the business of the company with intent to defraud creditors or for any fraudulent purpose.	63/297 -IN 90B/137	Summary	£1,000	12 months, or both	-	-
		Indictment	£50,000	7 years, or both	-	-
WINDING-UP, BODY CORPORATE AS LIQUIDATOR (ALL MODES)						
Body corporate acting as liquidator of a company.	63/300	Summary	£500	-	-	-
LIQUIDATOR, DISQUALIFIED PERSON						
Disqualified person acting as liquidator.	63/300A IN 90B/146	Summary	£1,000	-	£50	-
		Indictment	£10,000	-	£250	-
WINDING-UP, LIQUIDATOR, CORRUPT INDUCEMENT (ALL MODES)						
Giving, offering or agreeing any valuable consideration as inducement for appointment or nomination of self or some other person as liquidator.	63/301	Summary	£500	-	-	-

OFFENCE	SECTION	MODE OF TRIAL	MAXIMUM FINE	MAXIMUM PRISON TERM	DAILY DEFAULT FINE	MAX-IMUM DDF
CREDITORS' MEETING Failure by creditors' representative to disclose to chairman of creditors meeting connection with proposed liquidator.	63/301A -IN 90B/147	Summary	£1,000	-	-	-
Voting by creditors' representative for himself or for a person with whom he has a connection under 63/301A.	63/301A -IN 90B/147	Summary	£1,000	-	-	-
WINDING UP, NOTICE (ALL MODES) Failure to include statement that company is in liquidation on invoices, orders for goods, or business letters.	63/303(1)	Summary	£250	-	-	-
RECEIVERSHIP, NOTICE Failure to include statement that company is in receivership on invoices, orders for goods, or business letters.	63/317	Summary	£100	-	-	-
WINDING-UP, DISPOSAL OF BOOKS (ALL MODES) Failure of liquidator to dispose of books in accordance with • court order • resolution of members in voluntary winding-up • direction of committee of inspection in creditors' winding-up	63/305(1)	Summary	£500	-	-	-
WINDING-UP, INFORMATION (ALL MODES) Failure by liquidator where liquidation is not concluded within two years, to send to the registrar particulars about the progress of the liquidation.	63/306(1) AM 90B/145	Summary Indictment	£1,000 £10,000	- -	£50 £250	- -
WINDING-UP, DISSOLUTION VOIDED (ALL MODES) Failure of applicant to file with registrar within fourteen days of its making copy of court order declaring dissolution of company void.	63/310(2)	Summary	£25	-	-	-
RECEIVER, BODY CORPORATE Body corporate acting as receiver.	63/314	Summary	£500	-	-	-

OFFENCE	SECTION	MODE OF TRIAL	MAXIMUM FINE	MAXIMUM PRISON TERM	DAILY DEFAULT FINE	MAX-IMUM DDF
RECEIVER Acting as receiver when disqualified by being an undischarged bankrupt; officer of company within twelve months; parent, spouse, brother, sister, or child thereof; partner or employee of officer or servant of company; auditor of company.	63/315 -IN 90B/170	Summary Indictment	£1,000 £5,000	-	£500 £250	-
RECEIVER, NOTIFICATION Failure by receiver to • send notice of appointment to company forthwith • send to registrar within two months of receiving it a statement of affairs prepared in accordance with section 320 of the Companies Act, 1963.	63/319 (1)	Summary	£500	-	-	-
Failure by receiver to send abstract of receipts and payments to the registrar every six months	63/319(2) AM 90B/145	Summary Indictment	£1,000 £10,000	- -	£50 £250	- -
RECEIVER, STATEMENT OF AFFAIRS Failure by officers of the company, promoters, employees to prepare and submit the statement of affairs to the receiver within fourteen days of receipt of the notice of the appointment of the receiver.	63/320	Summary	£500	-	-	-
RECEIVER Failure to submit statement of affairs within two months of appointment.	63/320A -IN 90B/173	Summary Indictment	£1,000 £5,000	6 months, or both 3 years, or both	- -	- -
RECEIVER, ABSTRACTS Failure by receiver to deliver to registrar within one month abstract of receipts and payments made up every six months.	63/321(1) AM 90B/145	Summary Indictment	£1,000 £10,000	- -	£50 £250	- -
Failure by receiver to give one month's notice of resignation to holders of floating and fixed charges over the company, the company and the liquidator if any.	63/322C -IN 90B/177	Summary	£1,000	-	-	-
FOREIGN COMPANIES Failure to comply with registration requirements in Part XI of Companies Act, 1963.	63/358	Summary	£500	-	-	-

OFFENCE	SECTION	MODE OF TRIAL	MAXIMUM FINE	MAXIMUM PRISON TERM	DAILY DEFAULT FINE	MAX-IMUM DDF
FOREIGN COMPANIES, PROSPECTUS						
Issue, circulation or distribution of prospectus of a foreign company	63/365	Summary	£500	6 months, or both	-	-
knowingly in contravention of sections 361 to 364 of Companies Act, 1963.		Indictment	£2,500	2 years, or both	-	-
UNREGISTERED COMPANIES Failure of existing unregistered company to deliver documents to the registrar by 1 October, 1964.	63/377(5)	Summary	£500	-	-	-
Failure of new unregistered company to deliver documents within three months of coming into existence.	63/377(6)	Summary	£500	-	-	-
REGISTERS Failure to keep registers in the required manner.	63/378 -Am 77/4	Summary	£250	-	-	-
FALSE STATEMENT Knowingly making false	63/380	Summary	£500	6 months, or both	-	-
statements in any return, report, certificate, balance sheet or other document required by the Act and specified in the Tenth Schedule.		Indictment	£2,500	3 years, or both	-	-
"LIMITED", IMPROPER USE Improper use of "limited" or "teoranta" by person or persons not incorporated with limited liability.	63/381	Summary	£500	-	-	-
WINDING-UP BEFORE OPERATIVE DATE Failure to deliver to registrar forthwith copy of court order staying proceedings in a winding-up commenced before 1 April, 1964.	63/398(2)	Summary	£125	-	-	-
PUBLIC LIMITED COMPANY Commencement of business or exercise of borrowing powers prior to issue of certificate of compliance by registrar.	83/6	Summary	£500	-	-	-
PUBLIC LIMITED COMPANY, OLD Failure by old public limited company to re-register not later than 11 January 1985.	83/13(1)	Summary	£250	-	£25	£500

OFFENCE	SECTION	MODE OF TRIAL	MAXIMUM FINE	MAXIMUM PRISON TERM	DAILY DEFAULT FINE	MAX-IMUM DDF
PRIVATE COMPANY, RE-REGISTRATION AS Failure to give notice to registrar of application to court for cancellation of special resolution for re-registration of a public limited company as a private company	83/15 (5)(a)	Summary	£250	-	£25	£500
Failure to deliver to registrar copy of court order cancelling or confirming special resolution to re-register as private company.	83/15 (5)(b)	Summary	£250	-	£25	£500
OLD PUBLIC LIMITED COMPANY, FAILURE TO RE-REGISTER Failure by old public limited company (which has applied to re-register as another form of company and has not met the requirements) to: (a) meet the requirements; (b) re-register in a form other than that applied for, or (c) wind up voluntarily.	83/16(1)	Summary	£250	-	£25	£500
ALLOTMENT, AUTHORITY REQUIRED Allotment by directors of shares without authority from the company in general meeting or the articles of association.	83/201(1)	Summary Indictment	£500 £2,500	- -	- -	- -
SHARES/DEBENTURES, OFFER TO PUBLIC Offering to public any shares in or debentures of a private company or allotting shares or debentures with such an intention.	83/21(1)	Summary	£500	-	-	-
SHARES, PRE-EMPTION RIGHTS Knowingly or recklessly permitting inclusion of any matter which is misleading, false or deceptive in a material particular in a director's statement circulated with a special resolution to propose the allotment of shares without applying pre-emption rights.	83/24(6)	Summary Indictment	£500 £2,500	6 months, or both 2 years, or both	-	-

OFFENCE	SECTION	MODE OF TRIAL	MAXIMUM FINE	MAXIMUM PRISON TERM	DAILY DEFAULT FINE	MAX-IMUM DDF
NON-CASH CONSIDERATION, EXPERTS' REPORTS Knowingly or recklessly making a misleading, false or deceptive statement to any expert carrying out a valuation or making a report in respect of non-cash consideration before the allotment of shares.	83/319(3)	Summary Indictment	£500 £2,500	6 months, or both 2 years, or both	-	-
NON-CASH CONSIDERATION, SUBSCRIBERS Failure by public limited company to file with registrar copy of ordinary resolution and report required by section 32, Companies (Amendment) Act, 1983 within fifteen days of the passing of the resolution.	83/33(2)	Summary	£250	-	£25	£500
CONSIDERATION Failure to observe the requirements of sections 26 to 30, 32 and 35 of the Companies (Amendment) Act, 1983. 26. Subscription of share capital 27. Prohibition on allotment of shares at a discount 28. Payment for allotted shares 29. Payment of non-cash consideration 30. Experts' reports on non-cash consideration before allotment of shares. 32. Experts' reports on non-cash assets acquired from subscribers, etc. 35. Special provisions as to issue of shares to subscribers.	83/36(1)	Summary Indictment	£500 £2,500	- -	- -	- -
SHARES WITH SPECIAL RIGHTS Failure to deliver to registrar within one month of allotment of shares with rights not stated in memorandum or articles of association a statement containing particulars of those rights.	83/39(1)	Summary	£250	-	£25	£500
Failure to deliver within one month of allotment statement containing particulars of the variation.	83/39(3)	Summary	£250	-	£25	£500
Failure to deliver notice to the registrar within one month of assignment of name or designation to any class of shares.	83/39(4)	Summary	£250	-	£25	£500

OFFENCE	SECTION	MODE OF TRIAL	MAXIMUM FINE	MAXIMUM PRISON TERM	DAILY DEFAULT FINE	MAX-IMUM DDF
CAPITAL, MAINTENANCE OF Failure by directors to convene extraordinary general meeting to be held not later than eighty-four days of becoming aware that the net assets of the company are half or less of the amount of the company's called-up share capital.	83/40(1)	Summary Indictment	£500 £2,500	6 months, or both 2 years, or both	- -	- -
PUBLIC LIMITED COMPANY Failure to cancel its own shares acquired by itself or to apply for re-registration as another form of company as required.	83/43(4)	Summary	£250	-	£25	£500
INVESTMENT COMPANY Failure to include expression "investment company" on business letters and order forms.	83/47(9)	Summary	£250	-	-	-
PUBLIC LIMITED COMPANY, MISLEADING NAME Carrying on a trade etc. under name including "public limited company " or "cuideachta phoibli theoranta" or abbreviations of those words when not registered as such.	83/57(1)	Summary	£500	-	£50	£1,000
Public limited company carrying on a trade, etc. under a name giving the impression it is a company other than a public limited company.	83/57(2)	Summary	£500	-	£50	£1,000
ACCOUNTING POLICIES Failure to maintain the accounting principles in section 5 of the Companies (Amendment) Act, 1986, subject to section 6.	86/22	Summary	£1,000	-	-	-
ACCOUNTING PRINCIPLES, DEPARTURE FROM Failure to state in a note to the accounts any departure form the accounting principles set out in section 5 of the Companies (Amendment) Act, 1986.	86/22	Summary	£1,000	-	-	-
ANNUAL RETURN, ANNEXED DOCUMENTS Failure to annex to the annual return the documents required by section 7 of the Companies (Amendment) Act, 1986.	86/22	Summary	£1,000	-	-	-

OFFENCE	SECTION	MODE OF TRIAL	MAXIMUM FINE	MAXIMUM PRISON TERM	DAILY DEFAULT FINE	MAX-IMUM DDF
ACCOUNTS, MODIFIED Failure to draw up modified accounts for small and medium companies in accordance with sections 10 and 11 of the Companies (Amendment) Act, 1986.	86/22	Summary	£1,000	-	-	-
SUBSIDIARY/ASSOCIATED COMPANIES Failure to provide information about subsidiary and associated companies as required by section 16 of Companies (Amendment) Act, 1986.	86/22	Summary	£1,000	-	-	-
ANNUAL RETURN, ACCOUNTS ANNEXED TO Failure to have accounts annexed to annual return signed in accordance with section 18 of Companies (Amendment) Act, 1986.	86/22	Summary	£1,000	-	-	-
ACCOUNTS, PUBLICATION OF FULL OR ABBREVIATED Failure to publish with full or abbreviated accounts the information required by Section 19 of Companies (Amendment) Act, 1986.	86/22	Summary	£1,000	-	-	-
ACCOUNTS COMPLIANCE Failure by director to take all steps to ensure that accounts comply with sections 3, 4, 13 and 14 and the Schedule of Companies (Amendment) Act, 1986.	86/22	Summary	£1,000	6 months, or both	-	-
ACCOUNTS, FALSE STATEMENT Knowingly and wilfully making a statement false in any material particular in any return, report, certificate, balance sheet or other document required or for the purposes of the Companies (Amendment) Act, 1986.	86/22	Summary Indictment	£1,000 £2,500	6 months, or both 3 years, or both	- -	- -
COURT PROTECTION Failure by examiner, without reasonable excuse, to deliver within seven days to the registrar an office copy of order permitting disposal of charged property etc.	90/11(7)	Summary	£1,000	-	-	-

OFFENCE	SECTION	MODE OF TRIAL	MAXIMUM FINE	MAXIMUM PRISON TERM	DAILY DEFAULT FINE	MAX-IMUM DDF
Failure by petitioner to deliver notice of petition to registrar within three days of its presentation.	90/12(5)	Summary Indictment	£1,000 £10,000	- -	- -	- -
Failure by examiner to publish notice of his appointment within twenty one days in "Iris Oifigiuil".	90/12(5)	Summary Indictment	£1,000 £10,000	- -	- -	- -
Failure by examiner to publish notice of his appointment within three days in at least two daily newspapers.	90/12(5)	Summary Indictment	£1,000 £10,000	- -	- -	- -
Failure by examiner to deliver notice of appointment within three days to the registrar.	90/12(5)	Summary Indictment	£1,000 £10,000	- -	- -	- -
Failure to publish statement "under the protection of the court" on invoices, orders or business letters	90/12(5)	Summary Indictment	£1,000 £10,000	- -	- -	- -
Failure by directors to make, verify by affidavit and submit to examiner within seven days of his appointment statement as to the affairs of the company	90/14(3)	Summary Indictment	£1,000 £10,000	- -	- -	- -
Person acting as examiner who is not qualified to act as liquidator of the company.	90/28(2)	Summary Indictment	£1,000 £10,000	- -	- -	- -
Failure by examiner, or person directed by the court, to publish notice in "Iris Oifigiuil" within fourteen days of delivery to registrar of copy of court order made under 90/17 or 90/24 or of proposal confirmed under 90/24.	90/30(2)	Summary	£1,000	-	-	-
FRAUDULENT TRADING Knowingly or being a party to, carrying on the business of the company with intent to defraud creditors or for any fraudulent purpose.	90/34(1) REP 90B/180	Summary Indictment	£1,000 £50,000	12 months, or both 7 years or both	- -	- -
INVESTIGATION Failure to give information required or knowingly making statement false in a material particular or recklessly making a statement false in a material particular in relation to the ownership of shares in or debentures of a company	90B/15	Summary Indictment	£1,000 £10,000	12 months, or both 3 years, or both	- -	- -

OFFENCE	SECTION	MODE OF TRIAL	MAXIMUM FINE	MAXIMUM PRISON TERM	DAILY DEFAULT FINE	MAX-IMUM DDF
Where Ministerial notice has been given to restrict shares under 90B/16, exercising or purporting to exercise any right to dispose of such shares; or option thereon; or voting in respect of such shares; failing to notify restriction to person entitled to vote in respect of such shares; entering into agreement to sell shares or attached rights.	90B/16	Summary	£1,000	12 months, or both	-	-
		Indictment	£10,000	3 years, or both	-	-
Issuing shares in contravention of restrictions	90B/16	Summary	£1,000	12 months, or both	-	-
		Indictment	£10,000	3 years, or both	-	-
Failure to comply with Ministerial direction to produce books or documents or provide an explanation or make a statement.	90B/19	Summary	£1,000	12 months, or both	-	-
		Indictment	£10,000	3 years, or both	-	-
Obstruction of exercise of right of entry or search under warrant or right to take possession of any books or documents.	90B/20	Summary	£1,000	12 months, or both	-	-
			£10,000	3 years or both	-	-
Unauthorised publication of any information, book or document.	90B/21	Summary	£1,000	12 months, or both	-	-
		Indictment	£10,000	3 years, or both	-	-
DIRECTORS Dealing in right to call for or to make delivery at specified price, time, and number of relevant shares or debentures.	90B/28	Summary	£1,000	12 months or both	-	-
		Indictment	£10,000	3 years, or both	-	-
Failure by director to repay surplus business expenses advance within six months of expenditure.	90B/36	Summary	£1,000	12 months, or both	-	-
		Indictment	£10,000	3 years or both	-	-
Making a prohibited loan to a director or connected person.	90B/40	Summary	£1,000	12 months, or both	-	-
			£10,000	3 years or both	-	-
Procuring a company to make a prohibited loan to a director or connected person	90B/40	Summary	£1,000	12 months, or both	-	-
		Indictment	£10,000	3 years or both	-	-
Failure by licensed bank to maintain register of substantial contracts with directors which are excluded form publication by 90B/41(6).	90B/44	Summary	£1,000	12 months, or both	-	-
		Indictment	£10,000	3 years or both	-	-

OFFENCE	SECTION	MODE OF TRIAL	MAXIMUM FINE	MAXIMUM PRISON TERM	DAILY DEFAULT FINE	MAX-IMUM DDF
Failure by licensed bank to permit inspection of register of substantial contracts with directors.	90B/44	Summary	£1,000	12 months, or both	-	-
		Indictment	£10,000	3 years or both	-	-
DIRECTORS' SERVICE CONTRACTS Failure to keep copies of directors' service contracts at an appropriate place.	90B/50	Summary	£1,000	-	£50	-
DISCLOSURE OF INTERESTS IN SHARES Failure by director, shadow director or secretary to notify company in writing within the proper period of interests in shares and debentures of the company.	90B/53	Summary	£1,000	12 months, or both	-	-
		Indictment	£10,000	3 years, or both	-	-
Failure by director, shadow director, or secretary, without reasonable excuse, to ensure notification by agent of acquisitions or disposals of shares or debentures in the company.	90B/58	Summary	£1,000	12 months, or both	-	-
		Indictment	£10,000	3 years, or both	-	-
Failure to maintain register of directors' interests in shares and debentures.	90B/60	Summary	£1,000	-	-	-
Failure to permit inspection of register of directors' interests.	90B/60	Summary	£1,000	-	-	-
Failure to produce register of directors; interests in shares and debentures at annual general meeting.	90B/60	Summary	£1,000	-	-	-
Failure to maintain register in chronological order	90B/60	Summary	£1,000	-	-	-
Failure to record information within three days of receipt or grant of right.	90B/60	Summary	£1,000	-	-	-
Failure to maintain register with index or in index form.	90B/60	Summary	£1,000	-	-	-
Failure to amend index following removal of register entry.	90B/61	Summary	£1,000	-	-	-
		Indictment	£10,000			
Improper deletion of register entry.	90B/62	Summary	£1,000	-	-	-
		Indictment	£10,000			

OFFENCE	SECTION	MODE OF TRIAL	MAXIMUM FINE	MAXIMUM PRISON TERM	DAILY DEFAULT FINE	MAX-IMUM DDF
Failure to restore improper deletion.	90B/62	Summary Indictment	£1,000 £10,000	- -	- -	- -
Failure by director, shadow director or secretary to notify company in writing of grant of right to subscribe for shares or debentures of the company to spouse or minor child or the exercise of such right.	90B/64	Summary Indictment	£1,000 £10,000	12 months, or both 3 years, or both	- -	 - -
Failure by company whose shares are dealt in on recognised stock exchange to notify that stock exchange of acquisitions and disposals by director, shadow director, secretary or spouse or minor child thereof.	90B/65	Summary Indictment	£1,000 £10,000	12 months, or both 3 years, or both	- -	- -
ACQUISITION OF PLC SHARES Failure to make disclosure within proper period of acquisition of relevant share capital equal to or exceeding the notifiable level (5 per cent)	90B/79	Summary Indictment	£1,000 £10,000	12 months, or both 3 years, or both	- -	- -
Failure of persons acting together to acquire interests in pubic limited company ("concert party") to keep each other informed	90B/79	Summary Indictment	£1,000 £10,000	12 months, or both 3 years, or both	- -	- -
Failure of purchaser to ensure immediate notification to purchaser by his agent of acquisitions or disposals	90B/79	Summary Indictment	£1,000 £10,000	12 months, or both 3 years or both	- -	- -
REGISTER OF INTERESTS IN SHARES Failure to maintain register of interests in shares	90B/80	Summary	£1,000	-	£50	-
INVESTIGATION OF INTERESTS ACQUIRED Failure to prepare report of investigation requisitioned by members to investigate purported acquisition of interests in shares in the company and to make the report available at the company's registered office; (and where the investigation is not completed within three months, an interim report); and notifying the requistionists within three days of the report becoming available.	90B/84	Summary Indictment	£1,000 £10,000	- -	- -	- -

OFFENCE	SECTION	MODE OF TRIAL	MAXIMUM FINE	MAXIMUM PRISON TERM	DAILY DEFAULT FINE	MAX-IMUM DDF
Failure to comply with court order obtained by company against person failing to give information required in connection with acquisition or disposal of interests in shares in the company which restricts shares under 90B/16	90B/85	Summary	£1,000	12 months, or both	-	-
		Indictment	£10,000	3 years or both	-	-
REGISTER OF INTERESTS IN SHARES Failure to notify within fifteen days person notified by third party as having interests in the shares of the company.	90B/86	Summary	£1,000	-	-	-
		Indictment	£10,000	-	-	-
Failure to make within fourteen days any necessary alterations in any associated index of any removal from the register.	90B/86	Summary	£1,000	-	-	-
		Indictment	£10,000	-	-	-
Making unauthorised deletion from register.	90B/87	Summary	£1,000	-	-	-
		Indictment	£10,000	-	-	-
Failure to restore unauthorised deletion.	90B/87	Summary	£1,000	-	-	-
		Indictment	£10,000	-	-	-
Refusal to permit inspection of register or report made under 90B/84 or to supply a copy thereof.	90B/88	Summary	£1,000	-	-	-
		Indictment	£10,000	-	-	-
INSIDER DEALING Unlawfully dealing in securities in contravention of 90B/108	90B/111	Summary	£1,000	12 months, or both	-	-
		Indictment	£200,000	10 years, or both	-	-
Dealing within twelve months of conviction by person convicted of insider dealing.	90B/112	Summary	£1,000	12 months, or both	-	-
		Indictment	£200,000	10 years, or both	-	-
Dealing on behalf of another person with reasonable cause to believe deal would be unlawful under 90B/108	90B/113	Summary	£1,000	12 months, or both	-	-
		Indictment	£200,000	10 years or both	-	-
Failure to observe professional secrecy.	90B/118	Summary	£1,000	12 months, or both	-	-
		Indictment	£10,000	3 years or both	-	-
WINDING UP, VOLUNTARY CREDITORS Failure by liquidator to comply with 90B/131	90B/131	Summary	£1,000	12 months, or both	-	-
		Indictment	£10,000	3 years or both	-	-

OFFENCE	SECTION	MODE OF TRIAL	MAXIMUM FINE	MAXIMUM PRISON TERM	DAILY DEFAULT FINE	MAX-IMUM DDF
WINDING UP, REPORT OF OFFENCES Failure by liquidator or receiver to include in periodic returns a report relating to any past or present officer or member of the company who is the subject of a disqualification order or who has been made personally responsible for debts of a company.	90B/144	Summary Indictment	£1,000 £10,000	- -	- -	- -
WINDING-UP, PERIODIC RETURNS Failure by liquidator or receiver to make any returns required by the Companies Acts,	90B/145	Summary Indictment	£1,000 £10,000	- -	£50 £250	- -
DIRECTORS OF INSOLVENT COMPANIES Failure by liquidator within seven days of the relevant date to notify every director that they are persons to whom 90B/149-158 applies and to notify the registrar of the name of every such person	90B/151	Summary Indictment	£1,000 £10,000	- -	£50 £250	- -
Failure of liquidator to notify court of his opinion that the interests of any other company or its creditors may be placed in jeopardy because a director of the insolvent company is acting as a director or is involved in the promotion or formation of such other company.	90B/151	Summary Indictment	£1,000 £10,000	- -	£50 £250	- -
Failure by liquidator to notify creditors and contributors of receipt of notice of intention of director of insolvent company to apply to court for relief from 90B/150.	90B/152	Summary Indictment	£1,000 £10,000	- -	- -	- -
DISQUALIFIED DIRECTOR Person acting in contravention of disqualification order.	90B/161	Summary Indictment	£1,000 £10,000	12 months, or both 3 years, or both	- -	- -
Failure by liquidator to report to court where disqualified person is or becomes a director of a company which commences to be wound up (and is unable to pay it debts) within five years of the date of commencement of the winding-up of the company whose insolvency caused his disqualification.	90B/161	Summary	£1,000	-	-	-

OFFENCE	SECTION	MODE OF TRIAL	MAXIMUM FINE	MAXIMUM PRISON TERM	DAILY DEFAULT FINE	MAX-IMUM DDF
Director or other officer or member of committee of management or trustee of any company knowingly acting in accordance with the directions or instructions of a disqualified person.	90B/164	Summary	£1,000	12 months, or both	-	-
		Indictment	£10,000	3 years or both	-	-
Failure by director or shadow director charged with alleged fraud or dishonesty to give written advance notice to the court of required particulars of directorships.	90B/166	Summary	£1,000	12 months, or both	-	-
		Indictment	£10,000	3 years or both	-	-
AUDITORS Failure by auditor to notify registrar of companies within fourteen days of service of notice of resignation on company.	90B/185	Summary	£1,000	12 months, or both	-	-
		Indictment	£10,000	3 years or both	-	-
Failure by auditor to include required material in notice of resignation.	90B/185	Summary	£1,000	12 months, or both	-	-
		Indictment	£10,000	3 years, or both	-	-
Failure to give, within fourteen days, notice to persons entitled to receive documents under 63/159(1) of an auditor's written notice of intention to resign in which are set out the circumstances connected with the resignation which should be brought to the notice of the members or creditors of the company.	90B/185	Summary	£1,000	12 months, or both	-	-
		Indictment	£10,00	3 years, or both	-	-
Failure to convene a general meeting within fourteen days of service of notice by auditor for the purpose of receiving and considering an account and explanation of the circumstances connected with the auditor's resignation.	90B/186	Summary	£1,000	12 months, or both	-	-
		Indictment	£10,000	3 years or both	-	-
Failure to send to persons entitled to receive documents under 63/159(I) and to the registrar a copy of any further statement by auditor to members.	90B/186	Summary	£1,000	12 months, or both	-	-
		Indictment	£10,000	3 years, or both	-	-
Failure to send to the auditor notices of the meeting and all other documents relating thereto and to permit him to attend and be heard on any part of the business which concerns him as former auditor.	90B/186	Summary	£1,000	12 months, or both	-	-
		Indictment	£10,000	3 years, or both	-	-

OFFENCE	SECTION	MODE OF TRIAL	MAXIMUM FINE	MAXIMUM PRISON TERM	DAILY DEFAULT FINE	MAX-IMUM DDF
Disqualified person acting as auditor or public auditor.	90B/187	Summary Indictment	£1,000 £5,000	- -	£50 £100	- -
Failure to vacate office as auditor or public auditor on becoming disqualified and to give written notice of this to the company, society or friendly society.	90B/187	Summary Indictment	£1,000 £5,000	- -	£50 £100	- -
Failure by auditor to serve notice on company and to notify registrar within seven days of such notice of his opinion that company is contravening or has contravened requirement to maintain proper books of account.	90B/194	Summary Indictment	£1,000 £10,000	12 months, or both 3 years, or both	- -	- -
Person who is subject of disqualification order becoming or remaining partner in firm of auditors; giving directions or instructions in relation to conduct of audit; working in any capacity in conduct of audit of accounts of a company.	90B/195	Summary Indictment	£1,000 £10,000	12 months, or both 3 years, or both	- -	- -
Failure by subsidiary company or its auditor to give to the auditors of the holding company such information and explanations as may be required.	90B/196	Summary Indictment	£1,000 £10,000	12 months, or both 3 years, or both	- -	- -
Failure of holding company to obtain from its subsidiary information needed for purposes of audit.	90B/196	Summary Indictment	£1,000 £10,000	12 months, or both 3 years, or both	- -	- -
Knowingly or recklessly making a statement to the auditor, when an officer or employee of the company, which is misleading or false or deceptive in a material particular.	90B/197	Summary Indictment	£1,000 £10,000	12 months, or both 3 years, or both	- -	- -
Failure to provide to auditor within two days of requisition any information or explanations required.	90B/197	Summary Indictment	£1,000 £10,000	12 months, or both 3 years, or both	- -	- -
Failure by recognised body of accountants to deliver within one month of renewal/recognition to the registrar of companies list of members qualified for appointment as auditors.	90B/199	Summary Indictment	£1,000 £10,000	12 months, or both 3 years, or both	- -	- -

OFFENCE	SECTION	MODE OF TRIAL	MAXIMUM FINE	MAXIMUM PRISON TERM	DAILY DEFAULT FINE	MAX-IMUM DDF
Failure by recognised body of accountants to deliver within one month of their qualification list of members qualified for appointment as auditors.	90B/200	Summary	£1,000	12 months, or both	-	-
		Indictment	£10,000	3 years, or both	-	-
Failure by recognised body of accountants to deliver within one month of their qualification list of members qualified for appointment as auditors.	90B/200	Summary	£1,000	12 months, or both	-	-
		Indictment	£10,000	3 years, or both	-	-
BOOKS OF ACCOUNT Failure to keep, on a continuous and consistent basis, proper books of account.	90B/202	Summary	£1,000	12 months, or both	-	-
		Indictment	£10,000	3 years, or both	-	-
Failure to keep proper books of account being considered to have contributed to a company's insolvency.	90B/203	Summary	£1,000	6 months, or both	-	-
		Indictment	£10,000	5 years, or both	-	-
PURCHASE OF OWN SHARES Failure to retain and permit inspection of contracts for purchases of own shares.	90B/222	Summary	£1,000	12 months, or both	-	-
		Indictment	£10,000	3 years, or both	-	-
Failure to deliver to registrar within twenty-eight days return relating to purchase of own shares.	90B/226	Summary	£1,000	12 months, or both	-	-
		Indictment	£10,000	3 years, or both	-	-
Failure to comply with Ministerial regulations relating to purchase of own shares.	90B/228	Summary	£1,000	12 months, or both	-	-
		Indictment	£10,000	3 years, or both	-	-
Failure by quoted company to notify recognised stock exchange.	90B/229	Summary	£1,000	12 months, or both	-	-
		Indictment	£10,000	3 years, or both	-	-
Contravention of procedures set out in 90B/208/211, 218, 222-224.	90B/234	Summary	£1,000	12 months, or both	-	-
		Indictment	£10,000	3 years, or both	-	-
FALSE INFORMATION Furnishing false information in purported compliance of the Companies Acts.	90B/242	Summary	£1,000	12 months, or both	-	-
		Indictment	£10,000	3 years, or both	-	-
(In certain circumstances prison term may be increased)				(7 years)		

OFFENCE	SECTION	MODE OF TRIAL	MAXIMUM FINE	MAXIMUM PRISON TERM	DAILY DEFAULT FINE	MAX-IMUM DDF
DOCUMENTS Destroying, mutilating or falsifying any book or document or being privy thereto.	90B/243	Summary	£1,000	12 months, or both	-	-
		Indictment	£10,000	3 years, or both	-	-
Fraudulently parting with, altering or making an omission in any book or document or being privy thereto.	90B/243	Summary	£1,000	12 months, or both	-	-
		Indictment	£10,000	3 years, or both	-	-
CLASSIFICATION Failing to comply with any system of classification required by Ministerial regulation for documents to be filed with the registrar.	90B/247	Summary	£1,000	-	-	-
		Indictment	£10,000	-	-	-
UCITS Contravention of 90B/252-261; any regulation made thereon; or any condition laid down under 90B/257 by Central Bank of Ireland	90B/262	Summary	£1,000	12 months or both	-	-
		Indictment	£10,000	3 years, or both		

APPENDIX 3

LIST OF OFFENCES UNDER THE COMPANIES ACTS WHICH MAY BE PROSECUTED BY THE REGISTRAR OF COMPANIES

APPENDIX 3

LIST OF OFFENCES UNDER THE COMPANIES ACTS WHICH MAY BE PROSECUTED BY THE REGISTRAR OF COMPANIES

Companies Act, 1963

Section	
100(3)	Default in forwarding to Registrar for registration particulars of charge created by the company
113(5)	Default re Registered office
125(2)	Default re making Annual Return to the CRO for companies with share capital
126(4)	Default re making Annual Return to the CRO for companies without share capital
127(2)	Default re time for completion of Annual Returns
128(3)	Default re documents to be sent with the Annual Returns
227(2)	Default of liquidator re publishing notice in Iris Oifigiuil
234(5)	Default re delivery of an annulling order to the CRO regarding winding up
249(3)	Default re forwarding an order for dissolution to the CRO
252(2)	Default re delivery of resolution regarding voluntary wind up to CRO
262(2)	Failure of liquidator to call an AGM at the end of each year
263(3)	Failure of liquidator to deliver to the CRO a copy of the accounts and return re holding of meeting
272(2)	Failure to call general meeting each year and forward results to CRO
273(3)	Failure to send to the CRO notification of a final meeting and date
273(6)	Failure to deliver to the CRO the notice of the High Court order delaying a dissolution
273(7)	Failure to call general meeting of the company or creditors as required
278(2)	Failure of liquidator to notify the CRO of his appointment
280(4)	Failure to deliver to the CRO copy of a Court order annulling or staying a winding up

306(2)	Failure to meet requirements re sending information to CRO where winding up is not concluded within 2 years
319(7)	Default of receiver re information to be given on appointment
320(5)	Default re contents of affidavit statement of affairs to be submitted to receiver
320(5)	Default re periodic report to CRO by receiver
321(2)	Receiver make report to CRO after 6 months and periodically thereafter

Companies (Amendment) Act, 1983

Section	
47(10)	"*Investment Company*" on letters and forms
55(3)	Company publish deposit of documents with CRO

Companies (Amendment) Act, 1986

Section	
7	Documents annexed to the annual returns
10	Exemption for small companies
11	Exemption for small and medium sized businesses
16	Publication of information on subsidiary or associated companies
18	Information on documents for delivery to CRO

Companies (Amendment) Act, 1990

Section	
11	Forwarding of High Court orders on disposal of property
12(5)	Forward of notice of appointment to CRO
30(2)	Forwarding of order of court to CRO

Companies Act, 1990

Section	
226(4)	Forward to CRO returns of shares purchased

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