

Oifig an Stiúrthóra um
Fhorfheidhmiú Corparáideach

Office of the Director
of Corporate Enforcement

Information Book 3 **Company Secretaries**

Decision Notice D/2011/1

The Principal Duties and Powers of

Company Secretaries

under the Companies Acts 1963-2009

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1.0 Introduction

The Companies Acts 1963-2009 contain extensive provisions detailing how the affairs of companies are to be conducted. These provisions describe how the various participants in companies should discharge their duties and obligations. In addition, participants are accorded substantial rights and powers in order to enable them to assert their rights and, if necessary, defend their personal and/or corporate interests.

The Director of Corporate Enforcement is of the view that the extensive requirements of the Companies Acts make it difficult for many non-professional participants in company affairs to be well informed of their rights and obligations under the law. This has, in part, contributed to an inadequate standard of compliance with company law in the past.

Section 12(1)(b) of the Company Law Enforcement Act 2001 specifies that a function of the Director is “*to encourage compliance with the Companies Acts*”. Consistent with this remit, the Director has issued a series of information books. These Information Books were first issued in November 2001, and this edition updates those books for changes in the law up to the end of 2010. There are information books on the following topics:

Information Book 1 – Companies

Information Book 2 – Company Directors

Information Book 3 – Company Secretaries

**Information Book 4 – Members and
Shareholders**

Information Book 5 – Auditors

Information Book 6 – Creditors

**Information Book 7 – Liquidators,
Receivers &
Examiners**

In addition to information on the relevant duties and powers, each book contains information on the penalties for failure to comply with the requirements of the Companies Acts and useful addresses and contact points.

Each book has been prepared for use by a non-professional audience in order to make the main requirements of company law readily accessible and more easily understandable.

The Director of Corporate Enforcement considers it important that individuals who take the benefits and privileges of incorporation should be aware of the corresponding duties and responsibilities. These information books are designed to increase the awareness of individuals in relation to those duties and responsibilities.

The Director wishes to make clear that this guidance cannot be construed as a definitive legal interpretation of the relevant provisions. Moreover, it must be acknowledged that the law is open to different interpretations. Accordingly, readers should be aware that there are uncertainties in how the Courts will interpret the law, particularly when the law is applied to the specific circumstances of specific companies and individuals.

It is important to note that where readers have a doubt as to their legal obligations or rights, they should seek independent professional legal or accountancy advice as appropriate.

As changes are made to company law in the future, the Director intends to keep this guidance up to date. He also welcomes comment on its content, so that future editions can remain as informative as possible.

**Office of the Director of Corporate
Enforcement**

October 2011

2.0 Principal Duties and Powers of Company Secretaries

2.1 What is a Company Secretary

Every company, including a single member company, is required by law to have a company secretary, who may be one of the directors¹. The company secretary acts in accordance with the directors' instructions. A company secretary's main functions are to oversee the company's day to day administration and to ensure specifically that the company complies with the law and observes its own regulations.

Every person should, on or before appointment as a company secretary, familiarise themselves with the duties and obligations attaching to the position.

2.2 Qualifications of a Company Secretary

No qualifications are required to be the company secretary of a private company. In the case of public limited companies, the directors have a statutory duty to ensure that the company secretary is a person who appears to them to have the requisite knowledge and experience to discharge the functions of company secretary² and who either has:

- experience as a company secretary;
- is a member of a body recognised for such purposes by the Minister for Jobs, Enterprise and Innovation³, or;
- is a person who appears to be capable of discharging the functions by virtue of their memberships (of other bodies) or the positions which they have held.

There is no prohibition against a company acting as secretary to another company. An undischarged bankrupt may not however act as a secretary.

2.3 Appointment of the Company Secretary

The first secretary of the company must be named in the documents filed with the Companies Registration Office on incorporation. The subsequent appointment of a company secretary is in accordance with the articles of association of the company. Generally, the secretary is appointed by the directors for such term and with such remuneration and other conditions as they see fit.

It is possible for a company to have an assistant or deputy secretary who may act as secretary if no secretary is capable of acting or if the office of company secretary is vacant. It is also possible for a company to have more than one secretary i.e. joint secretaries.

2.4 Duties of the Company Secretary

In addition to ensuring that the company complies with the law and observes its own regulations, a company secretary may be assigned other functions in the company's articles of association or they may be delegated by the company's directors. For ease of reference, secretaries duties are classified in the sections below as:

- statutory duties;
- duty of disclosure;
- duty to exercise due care, skill and diligence, and;
- administrative duties.

¹ Section 175 Companies Act, 1963.

² Section 236 Companies Act, 1990.

³ The Institute of Chartered Secretaries and Administrators (ICSA) has been recognised by the Minister for this purpose.

2.4.1 Statutory Duties

A number of duties are imposed on the company secretary by the Companies Acts. However, few of these are the secretary's exclusive responsibility. Rather, they tend to be tasks which may (or are required to) be performed by the secretary and a director of the company. They include:

- a. signing the annual return (which is required also to be signed by a director of the company). The annual return is dealt with in detail in Information Book 1 – Companies;
- b. certifying that the financial statements attached to the annual return are true copies of the originals;
- c. making out the statement of affairs in a winding up or receivership (see Information Book 7 which deals with liquidations and receiverships);
- d. signing the relevant application form and making a statutory declaration, if applicable, on the re-registration of a company as a different type of company e.g. converting a private limited company into a public limited company;
- e. making the statutory declaration required for a public limited company before it may carry on business.

A company secretary, as an officer of the company, is under an indirect duty to comply with the company's obligations under the Companies Acts. A company secretary is in default where he or she authorises or permits a default to take place in breach of his or her duty as a secretary. Where a secretary, in purported compliance with any provision of the Companies Acts, answers a question, makes a statement, produces a document, knowing the answer, statement or document to be false, or is reckless in the conduct of his or her duties, he or she is in breach of the Companies Acts.

2.4.2 Duty of Disclosure

The secretary is obliged to disclose certain information for inclusion in the Register of Directors and Secretary and the Register of Directors' and Secretary's Interests.

The information that must be disclosed is:

- name;
- address;
- registered office address (if the secretary is itself a company);
- interests held in shares and debentures of the company i.e. number and amount, and;
- details of any shares or debentures purchased or sold in the company, its holding company, any subsidiary or any subsidiary of its holding company.

2.4.3 Duty to Exercise Due Care, Skill and Diligence

A company secretary is under a duty to exercise due care, skill and diligence in the performance of their duties. The secretary can be held liable for any loss arising as a result of their negligence. However, the secretary need not exhibit in the performance of their duties a greater degree of skill than might reasonably be expected from a person with their level of knowledge and experience.

2.4.4 Administrative Duties

In addition to the duties imposed specifically by statute, a company secretary has a number of important administrative duties, which will vary depending on the nature and size of a company. These may include, for example:

- keeping the company's minutes of board, board sub-committee (if applicable) and general meetings on behalf of the directors;

- keeping, and making available for inspection, the company's registers⁴ on behalf of the directors, including, *inter alia*, the:
 - register of members;
 - register of directors and secretaries;
 - register of directors' and secretary's interests;
 - register of debenture holders.
- ensuring that documents are filed with the Registrar of Companies within the prescribed time limits, such as the company's annual and other returns (see section 2.5);
- communicating with the company's members e.g. notifying the members of meetings of the company, details of proposed resolutions to be considered at meetings, circulating them with copies of the annual financial statements etc.;
- delivering copies of special and certain other resolutions passed by the company (see section 2.5);
- publishing statutory notices e.g. in national newspapers as required;
- administering share transfers;
- providing the directors with legal and administrative support;
- ensuring that the board's decisions are properly communicated;
- custody of the company seal. Legal documents executed by a company must generally carry the company's seal, which bears the company's name;

- ensuring that the company's obligations with regard to its name are complied with. Every company is required to paint or affix its name in a conspicuous place, in legible lettering, outside each place at which it conducts business;
- ensuring that the company's letterhead bears the appropriate details. Every company's letterhead is required to bear the names of the directors and, where they are not Irish, their nationalities.

Depending on the nature and size of the company, a company secretary may also be empowered/authorised by the directors to, for example:

- swear affidavits (legal documents);
- sign cheques;
- supervise incoming and outgoing mail;
- prepare accounts;
- maintain the company's books and records;
- interview job applicants and approve their appointments.

2.5 Further Information

The Registrar of Companies has published an information leaflet (Leaflet No. 16) entitled 'The Company Secretary'. This leaflet, which is available from the Registrar and which can be accessed at www.cro.ie, provides further detail on the duties of the company secretary, including, *inter alia*:

- a comprehensive list of returns and documents that may be required to be filed with the Registrar of Companies and the circumstances under which they are required to be filed;

⁴ The full list of registers and other information required to be maintained is set out in Information Book 1, together with details of those persons who are entitled to inspect same.

- details of the time limits for filing of each of the above returns and documents;
- a list of the most frequent errors contained in returns submitted to the Registrar, and;
- a list of resolutions in addition to special resolutions that must be filed with the Registrar.

2.6 Company Secretaries' Powers

A company secretary has authority to make contracts within his or her own sphere of competence i.e. the day to day administration of the company. Additionally, a company secretary may, under the doctrine of 'ostensible authority', bind a company, where the action is one within the secretary's usual authority even if the secretary in fact had no authority to act. Outside the usual areas of authority for a company secretary, a company secretary has no authority to make contracts unless specifically authorised to do so by the directors.

3.0 Penalties Under the Companies Acts

3.1 Penalties for Criminal Offences

Court Imposed Penalties

Under the Companies Acts, provision is made for two types of criminal offence, namely summary and indictable offences. A summary offence is generally of a less serious nature and is tried before a judge only in the District Court. Indictable offences are generally of a more serious nature. Indictable offences can, in the same way as summary offences, be tried in the District Court before a judge only. However, the distinction between a summary offence and an indictable offence is that, due to their more serious nature, indictable offences can also be tried in the Circuit Court i.e. before a judge and jury. Where this course is taken, the indictable offence is said to be prosecuted on indictment.

Where an offence is prosecuted on indictment, the penalties provided for by the law on conviction are generally considerably higher than had the offence been prosecuted summarily.

In general the maximum penalty on conviction:

- of a summary offence under the Companies Acts is €1,904 and/or 12 months imprisonment, and;
- of an indictable offence under the Companies Acts is €12,697 and/or 5 years imprisonment.

However, the Companies Acts also provide for considerably higher sanctions in respect of certain offences e.g. fraudulent trading (€63,487 and/or 7 years imprisonment on conviction on indictment) and market abuse (€10 million and/or 10 years imprisonment on conviction on indictment).

3.2 Civil Penalties

Disqualification

In addition to fines and penalties, there are also provisions for other sanctions under the Acts. Persons convicted on indictment of an indictable offence relating to a company or involving fraud or dishonesty are automatically disqualified from acting as company directors/officers (see Appendix B to Information Book 2 – Company Directors).

The Director of Corporate Enforcement can also apply to the Courts seeking the disqualification of any person:

- guilty of two or more offences of failing to maintain proper books of account, or;
- guilty of three or more defaults under the Companies Acts.

Restriction

The provisions relating to the restriction of company directors apply to insolvent companies i.e. companies that are unable to pay their debts as they fall due. Where a company which goes into liquidation or receivership⁵ is insolvent, a director of the company who fails to satisfy the High Court that he or she has acted honestly and responsibly will be restricted for a period of up to five years.

Such a restriction prevents a person from being a director or secretary or being involved in the formation or promotion of any company unless it is adequately capitalised. In the case of a private company, the capital requirement is €63,487 in allotted paid up share capital,

5 A liquidator's function is to collect and realise the assets of the company, to discharge the company's debts, to distribute any remaining surplus, investigate the company's affairs and to legally dissolve the company. The function of a receiver is to dispose of certain assets of the company in order to allow the repayment of a debt to a creditor e.g. a bank. See Information Book 7 for further information on liquidators and receivers.

and in the case of a public company, €317,435. Such a company is also subject to stricter rules in relation to capital maintenance. The topic of restriction is dealt with in detail in Appendix B to Information Book 2 – Company Directors.

Strike Off

Where a company defaults in performing certain of its legal obligations e.g. fails to file an annual return with the Registrar of Companies, the Registrar can strike the company off the register of companies.

If struck off the register, ownership of a company's assets automatically transfers to the State. Ownership will remain with the State until such time as the company is restored to the register. While struck off, the liability of every director, officer and member of the company continues and may be enforced as though the company had not been dissolved⁶.

The procedures required to have a company reinstated to the register are dealt with in Appendix A to Information Book 1 – Companies.

⁶ Section 12B(1) Companies (Amendment) Act, 1982 as amended.

4.0 Useful Addresses

Office of the Director of Corporate Enforcement

16 Parnell Square
Dublin 1
Tel: 01 858 5800
Web: www.odce.ie

Companies Registration Office

14 Parnell Square
Dublin 1
&
O'Brien Road
Carlow
Tel: 01 804 5200
Web: www.cro.ie

Department of Jobs, Enterprise & Innovation

Kildare Street
Dublin 2
Tel: 01 631 2121
Web: www.djei.ie

Company Law Review Group

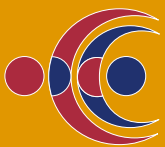
Earlsfort Centre
Hatch Street Lower
Dublin 2
Tel: 01 631 2763
Web: www.clrg.org

Basis

*Business Access to State
Information & Services*
Web: www.basis.ie

Irish Auditing & Accounting Supervisory Authority

Willow House
Millennium Park
Naas
Co. Kildare
Tel: 045 983600
Web: www.iaasa.ie



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*Tá leagan Gaeilge den leabhrán seo ar fáil
An Irish version of this booklet is available*