

The Companies Act 2014: The role of the Company Secretary

The Companies Act 2014 (**the Act**) entered into force on 1 June 2015. This article gives an overview of the role of the company secretary under the Act, highlighting the key changes in the law. Whilst many of the provisions relating to company secretaries remain the same under the new legislation, there are some interesting new provisions which have been introduced.

The company secretary – appointment

Every company is obliged to have a company secretary, who acts as the principal administrative officer of the company.

Under the Act, the new form of limited company, the private company limited by shares (also known as a “CLS” or “LTD”), may choose to have only one director. However, where a company has only one director, that person may not also hold the office of secretary of the company, meaning that such a company must have two officers, one director and one secretary. In the case of the other new form of company, known as the designated activity company (or DAC for short), and also all other company types, the company must have at least two directors, although one of the directors may also act as company secretary.

The secretary is appointed by the directors of the company. The directors can determine the period of the appointment, the secretary's remuneration and the duties to be performed. The directors can remove any secretary appointed by them. A body corporate continues to be permitted to act as a company secretary.

Undischarged bankrupts are prohibited from acting as company secretary. Notably, there is a new provision in the Act which prohibits anyone under the age of 18 years from being appointed as a company secretary (or indeed as a director).

Significantly, company secretaries will no longer be required to ensure compliance with the Companies Act. This is a welcome change from the position under the old legislation, and one which reflects the fact that secretaries do not possess the powers necessary to ensure that the company has been compliant. However, the secretary is obliged, when consenting to act as secretary, to make a declaration to the effect that he or she acknowledges that, as a secretary, he or she has legal duties and obligations imposed by the Companies Act, other statutes and at common law (a similar obligation is imposed on directors). This is already required by the Companies Registration Office (CRO) when submitting company incorporation and appointment of company secretary notification forms, and has now been put on a statutory footing.

Disclosure obligations

The company secretary will be required to disclose to his or her company, within specific timescales, details of interests he or she holds (or which are held by his or her spouse, civil partner or child) in shares or debentures of the company or a body corporate of the same group, unless the number of shares in which the interest is held is below a 1% exemption threshold. A similar obligation is imposed on directors¹.

Directors' duty regarding skills and resources of secretary of a private company

A new concept has been introduced in the Act, whereby the directors of a private company have a duty to ensure that the person appointed as secretary has the skills or resources necessary to discharge his or her statutory and other duties. This interesting requirement raises a number of questions about how directors can comply with the obligation. In contrast to the position with regard to public limited companies, which we refer to below, the Act does not elaborate on the expertise or specific qualifications which might be suitable for the role of secretary in a private company. Boards should consider documenting their discussions and their ultimate decision on the suitability of particular candidates when appointing a secretary, in order to meet this requirement at its most basic level. In addition, directors should consider whether they will need to provide training for the person to be appointed as secretary, or alternatively, outsource the secretarial function in their company.

Statutory and other duties of the company secretary

The duties of the company secretary or joint secretaries of a company are generally delegated by the board of directors of the company. Specifically, the Act provides that the directors, when appointing a company secretary, have a specific duty to ensure that the person appointed has the skills necessary to enable them to maintain the company's statutory records (other than accounting records). These include the registers of members and directors, the register of directors' and secretary's interests in shares, and the register of debenture holders of a PLC.

A key duty of the secretary is to prepare and deliver to the CRO the company's annual return. This will continue under the new Act.

In addition, the company secretary is responsible for counter-signing, usually along with a director, any documents to which the company seal is to be affixed. However, notably, there is a new section in the Act which introduces more flexibility around the company seal, providing that alternative arrangements can be included in the company's constitution, to enable such documents to be signed by a single director, or another person appointed by the directors.

¹ The provisions relating to the obligation imposed on directors and secretaries to disclose interests in shares or debentures of a company are complex. We would be happy to advise further on request.

Administrative duties of the company secretary

The company secretary has an administrative role and his or her duties include:

- Maintaining the statutory register of members, register of directors and secretaries, the register of directors' and secretary's interests and the register of debenture holders;
- Organising the AGM and other general meetings and directors' meetings, and giving notice of these to the directors and shareholders;
- Taking the minutes of the AGM and other general meetings and board meetings, and maintaining the company's minute books; and
- Safeguarding the company seal.

The company secretary is also often required to guide the board of directors on corporate governance issues that might arise. This will include ensuring that the provisions of the constitution and all shareholders' agreements are observed. In addition, the secretary is generally the point of contact for newly appointed executive and non-executive directors, and he or she will have a role in providing all the key documentation on the company to the new director. With an increasing compliance burden on directors, it will be essential for the company secretary to be aware of the duties and responsibilities of directors under the Act, to enable them to assist in the discharge of those duties (see further below).

As a matter of prudence, the secretary should be familiar with the company's constitution and the provisions of any shareholders agreements and should attend board meetings where possible.

It should also be noted that the governance provisions of "Table A" in the old Companies Act 1963 have been elevated to the status of statutory provisions, some of which are mandatory and others optional, and have been dispersed throughout the Act, making navigation and sourcing of key governance provisions more challenging than previously was the case for the company secretary.

New corporate governance provisions to be aware of

There are a number of significant changes in the Act that the secretary should be aware of, including:

- A CLS / LTD will not be required to hold an AGM in any year if all the members of the company entitled to attend and vote at that meeting sign a unanimous written resolution instead. The resolution will acknowledge that the financial statements have been received, resolve all matters that might have been resolved at the general meeting and confirm that no change to the statutory auditor has been made. Circulating the written resolution and ensuring that it has been signed by all members prior to the last date on which the AGM would have taken place are likely to therefore become new tasks for the secretary.
- AGMs and EGMs will no longer need to be held in the State. If either such meeting is held outside the State, then (unless all the members consent in writing to its being held outside the State) the company has an obligation to make all the necessary arrangements to ensure that members can participate in the meeting by technological means without leaving the State. This must be at the company's own expense. The company secretary is likely to have a role in overseeing the compliance by the company with this new provision.
- Majority written resolutions will be possible for the first time under the Act. Where a resolution in writing is described as being an ordinary resolution, and is signed by more than 50% of the members who would have had a right to attend and vote on the resolution, it will be valid and effective. Similarly, where a resolution in writing is described as being a special resolution, and is signed by 75% of those members, it will be valid and effective. Majority written resolutions may take the form of several documents in like form signed by one or more members. However, there is one limitation which has been included as a safeguard into the legislation – a majority written ordinary resolution will only be deemed to have been passed 7 days after the last member signs it, and a majority written special resolution will only be deemed to have been passed 21 days after the last member signs it. This "delayed effect" safeguard can be waived by all members entitled to vote on the resolution signing a written waiver. Majority written resolutions can't be used to remove a director or an auditor. As a result of these new provisions, the company secretary may have a number of new duties, including ensuring that the resolutions have been delivered to the company on behalf of the persons signing the majority written resolution (the Act provides that the resolutions will have no effect unless and until this is done), notifying each member that the resolution has been deemed to be passed when appropriate, and retaining the resolution as if it were minutes of a meeting.
- For the first time in Irish law, the principal fiduciary duties of directors are set out in the Act. This codification is a statement of the current common law fiduciary duties of directors, and as such there are no new requirements for directors. However, the introduction of a written overview of the law will provide a helpful guide for directors on their required conduct and responsibilities. The new statutory duties will continue to be interpreted with reference to existing common law rules and equitable principles. The company secretary can assist the directors in meeting these new statutory duties, including by arranging induction for new directors, including briefings by the company's legal advisers where necessary. They should also carefully check minute books following meetings to ensure that all decisions of the directors have been duly recorded, as this may be crucial in the case of an allegation of a breach of directors' duties.
- There are also important new corporate governance provisions for directors, which include the requirement for directors of "large" companies and public companies to produce a **compliance statement** as part of the directors' report. This requires the directors to acknowledge responsibility for securing compliance with certain company and tax law obligations under the Act, and confirming compliance or explaining non-compliance with further actions in connection with this. In addition, directors of some "large" companies will be required to establish an **audit committee**, or explain why they haven't done so. Additionally, a new statutory obligation has been introduced for directors of all companies, to include a statement in their directors' report to the effect that there is no relevant audit information that has not been disclosed to the auditors and that the directors have taken steps to make themselves and the auditors aware of any relevant audit information.

A small number of provisions of the Act including the provisions introducing the compliance statement, audit committee and audit information requirements, will only apply in respect of financial years beginning on or after 1 June 2015.

The company secretary of a public limited company

As with private companies, the Act provides that the directors of a public listed company (PLC) have a duty to ensure that the person appointed as secretary has the skills or resources necessary to discharge their statutory and other duties. However, unlike in the case of private companies, the Act provides specific criteria to support this requirement, namely, that the secretary must comply with one or more of the following three conditions:

- For at least 3 years of the 5 years immediately preceding his / her appointment as secretary, the person held the office of secretary of a company;
- The person is a member of a professional body recognised for such purposes by the Minister for Jobs, Enterprise and Innovation; and
- The individual appears to the directors of the PLC to be capable of discharging the required duties, by virtue of holding or having held another position, or membership of another body.
- This is largely a re-statement of the current position in respect of company secretaries of PLCs.

For further information, please contact Eithne FitzGerald (Partner, Corporate Department), Jack O'Farrell (Consultant, Corporate Department), Sinead Kelly (Associate, Corporate Department), Julie Murray (Associate, Corporate Department), your contact in Goodbody Secretarial Limited or one of your usual contacts at A&L Goodbody.

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Note: The above information is a summary, for information purposes only of some changes to be introduced into Irish company law affecting the secretary of a company by the current provisions of the Companies Act 2014. The bulk of the Act entered into force on 1 June 2015. Specific advice should always be sought before taking any action.

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