
Insolvency and Corporate Governance Consultation - the implications for directors and professional advisers

Published 11 October 2018

Introduction

The report of the joint BEIS and Work and Pensions Committee into recent headline-grabbing corporate failures strongly criticised the conduct of the company's directors and the company's professional advisers, and the regulators and the Government will hope that new reforms will go some way to reduce the risk of major company failures occurring in the future by reason of poor leadership and management.

Whether reforms will reduce the likelihood of future failures is unclear, but what is certain is that greater scrutiny of the conduct of directors and the company's advisers can be expected where large companies fail. In particular, how decisions were made by the board; what decisions were made; and whether professional advice was obtained by directors and, if so, whether that advice was truly impartial or whether it was tailored to what the client wanted to hear will be questioned. This is likely to result in an increase in regulatory investigations and, potentially, claims against directors and professional advisers when things go wrong.

The proposed reforms

In August, the Government published its response to the Insolvency and Corporate Governance consultation, the aim of which was to identify changes that would assist in reducing corporate failure by strengthening corporate governance and to improve the insolvency regime.

The corporate governance outcomes include:

- Improving boardroom effectiveness and strengthening directors' training and guidance;
- Strengthening transparency around group structures;
- Strengthening shareholder stewardship; and
- Strengthening the existing framework relating to dividend payments.

An area that is likely to be of particular interest is the proposal to improve training for directors and how this might impact on the role of professional advisers.

The Government has recognised the benefit of there being more training and guidance for directors, particularly newly appointed directors in large and complex businesses where, as well as having to comply with legal duties, there are regulatory regimes to be considered. As a result, the Government plans to strengthen access to training and guidance for directors which will be tailored to different sizes of company. In addition, consideration will be given to whether mandatory training ought to be introduced for directors of large companies.

The Government also intends to improve standards for independent board evaluations and will consider whether shareholders should be involved in appointing an external evaluator.

The UK Corporate Governance Code was recently reviewed (with the changes taking effect from 1 January 2019) and requires a company within its scope to undertake an annual assessment of its board's effectiveness at least once every three years. It also requires transparency around the evaluator's contact with the board and individual directors. The Government plans to build on these provisions and is inviting ICSA, the Government Institute, to convene a group to consider these matters further.

The Government believes that existing enforcement is working and the quotes the fact that over 1,200 directors were disqualified in 2017. Reference is made to draft regulations (which come into force in January 2019) that require all large companies to provide an explanation in their annual report how its directors have had regard to section 172(1) of the Companies Act 2006 (the duty to act in the best interests of the company). The Government intends to assess the effectiveness of these regulations before considering further action.

Most large well-run companies already have mandatory training for directors and those directors have a good understanding of their obligations and comply with them. The bigger issue is the less well-run businesses and how any mandatory training obligation will be policed and enforced. Further provisions in relation to training and guidance is also likely to increase the reliance by directors on the advice of professionals such as lawyers and auditors.

We have our reservations about the Government's confidence in the effectiveness of the existing enforcement process. Statistics from The Insolvency Service show little change in the number of disqualifications over the last 6 years. For each of those years, the vast majority of disqualifications results from unfair treatment of the Crown - something that is seen as relatively easy for The Insolvency Service to establish. In addition, we continue to encounter numerous cases of unscrupulous directors continuing to be engaged in the management of companies, sometimes using aliases or hiding behind nominee directors, and there appears to be little appetite to clamp down on this. No amount of mandatory training or other regulations relating to directors' duties will affect these individuals.

Overall, the Government's response is to be welcomed but, as is always the case, the devil will be in the detail and it is likely to be some time before that information is known. The Government hopes to implement measures as soon as parliamentary time permits. However, with the continuing uncertainty over Brexit, we do not expect to see significant progress any time soon.

[Return to the main page](#)

Authors



Kevin Hawthorn

Bristol

+44 (0)117 918 2221

khawthorn@dacbeachcroft.com