Electronic Assignment Cover sheet

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Student (s) Number as per your student card:

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Course Title: LLB Law Part-time

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Over 90% of Irish companies are small private companies (commonly referred to as SMEs). For the first time in Irish company law this is the type of company that is given primary recognition and treatment in the Companies Act 2014.
Discuss the ways in which the Act specifically targets the needs of small companies.
Your essay should be well supported by relevant statute and case law.

Although functional, the state of Irish company law legislation had been lacklustre in its organisation and its approachability. Prior to the enactment of the Companies Act 2014, the system incorporated seventeen legal instruments, which were reflective of judicial development across a period of over half a century. As such, there was a desire for change, for reform, which was encouraged by multitudes of Irish organisations, these included; inter alia, The Law Society, Institute of Directors, Irish Bankers Federation, Irish Stock Exchange, ICTU Institute of Chartered Secretaries and Administrators, IBEC, Bar Council, Irish Small & Medium Enterprise, Small Firms Association, and Irish Funds Industry Association. Although this collective drive was successful in optimising, updating, and effectively clarifying this farrago of company procedures, one must question whether this act achieved its desired objectives. This essay will discuss the epochalization of company law in Ireland, and will focus on whether the reforms introduced were efficacious in targeting the needs of small and medium companies (SME's), whether this act truly, "sets out our law in a coherent fashion and introduces many welcome improvements"[1]. In determining the success of the Companies Act 2014, hereafter to be referred to as the '2014 Act', this essay will focus on the reforms introduced in relation to company types, mergers and liquidations, and the duties of directors.

The 2014 Act came into effect on the 1st of June 2015[2]. To understand the extent to which the 2014 Act attempted to codify the law in Ireland, one must first recognise that this required the amalgamation of over thirty pieces of legislation into a solitary body. The 2014 Act aimed to clarify the law, to make it more user-friendly, and to make the wording of the legislation more precise in its expression. The Company Law Reform Group (CLRG) presented this with the goal of achieving "Efficient world-class company law infrastructure. To that end, the Review Group seeks to promote enterprise, facilitate commerce, and encourage commercial probity"[3]. Although the 2014 Act deals with company law in its entirety, there were significant changes made in relation to SME's. The below table clearly identifies the requisite characteristics of an SME.

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[1] Paul Keane, Neil Keenan, 'Mammoth Task' Law Society Gazette March 2015 p. 33.
[2] Dr. Noel McGrath BL, 'Company Liquidators' Duties Removal of a Liquidator', Commercial Law Practitioner 2016, 23(10), 265-266 p. 265.
[3] Company Law Review Group, mission statement.

Company category	Staff headcount	Turnover	Or	Balance sheet total
Medium-sized	< 250	≤ €50million		≤ €43million
Small	< 50	≤ €10million		≤ €10million
Micro	< 10	≤ €2million		≤ €2million

(As adapted from European Commission Report on EU SMEs.)

The logic behind this SME focused approach to the law was effectively threefold. First, the majority of companies within Ireland are considered SME's[4], with over 237,753[5] SME's employing over 919,985[6] individuals. This density of the market highlights the need to clarify the position of SME's in Irish company law. Secondly, it was held that the simplification of company law legislation would greatly benefit SME's, because many had neither the means nor the expertise to interpret the maze of legislation that had existed, which had resulted in countless cases involving genuine mistakes by company directors. Thirdly, there existed several areas of company law which unnecessarily restricted the formation or functioning of SME's, which the 2014 Act aimed to rectify.

In discussing the reforms made by the 2014 Act, one must recognise that this essay cannot attempt to investigate each individual reform which has affected SMEs in Ireland. Although the 2014 Act has consolidated much of the law, it remains a legal instrument encompassing over 1,170 pages. As this essay is limited in its length, some significant reforms must be overlooked. Many of these reforms are of significant importance to Irish company law, especially in relation to SMEs. Such reforms include, inter alia; certain proceedings of directors being outlined, such as Director's Compliance Statements[7], director's duties being outlined (as was proposed previously, '"the fiduciary duties of the directors of companies should be clearly set out in the Companies Acts"[8]), the ability to conduct AGMs over the phone; secretaries duties being expanded upon[9]; the priority of charges, and registering charges[10] procedures; courts can now award compensation for the act of oppression[11] (s.212)[12]; the winding up of indebtedness minimum has been increased from €1,269 to €10,000; the concept of division; membership thresholds have been outlined as being usually 99 members; age limits for company officers have been introduced; there is now a

[4] European Commission, 2015 SBA Fact Sheet Ireland, p.1.
[5] Central Statistics Office (CSO) 'SMEs Ireland'.
[6] Irish Small and Medium Enterprises Association Ireland, 'Irish SMEs Demographic Pictograph'.
[7] Laura Heuston, John Curry, John O'Shea, 'New directors' compliance statement - is your company ready?', Accountancy Irl., (2016, 48(4), 64-65), p. 64.
[8] Sinead Mcgrath, *Essential Law Texts, Company Law*, (Roundhall 2003) p. 22.
[9] Christopher Doyle, *The Company Secretary*, (2edn, Roundhall 2002), p. 58.
[10] Profs William Murphy, Raymond J. Friel, 'Personal Property as Security: A Comparative Perspective for Reform', Commercial Law Practitioner (2016 23(10), 247-254), p. 249.
[11] Mark Heslin, 'Shareholder Oppression-Rights, Interests, Expectations and Equity', Commercial Law Practitioner (2016, 23(11), 271-286), p. 275.
[12] Companies Act 2014- (Part 4 Corporate Governance, Chapter 8, 'Protection for minorities', S.212, "Remedy in case of oppression").

single constitution; size exemptions have been introduced for SMEs, under S352[13]; size exemptions have equally been increased for audit[14] exemptions under S.333[15].
One major aspect of the 2014 Act which must be recognised is its aim to remove the looming input of the courts on the daily running of SMEs[16], resulting in the 2014 Act introducing the Summary Approval Procedure, (SAP). The SAP allows companies to accomplish certain transactions, which had previously been restricted by requiring permission through reference to the High Court. The transactions covered by the SAP include;

- The financial assistance for the acquisition of shares (section 82),
- Reduction in company capital (section 84),
- Variation of company capital on re-organisations (section 91),
- Prohibition on pre-acquisition profits or losses being treated in holding company's financial statements as profits available for distribution (section 118),
- Prohibition of loans to directors and connected persons (section 239),
- Domestic merger (section 464),
- Members voluntary winding up (section 579)[17].

The SAP itself derives, in essence, from s.60(2)-(11) of the Companies Act 1963[18] and s.34 of the Companies Act 1990[19], as inserted by section 78 of the Company Law Enforcement Act 2001[20]. To complete this procedure, the directors of a given company are granted authority by way of a special resolution, which then requires the deliverance of a declaration containing the information relating to the restricted activity to the Companies Registration Office (CRO) within 21 days. The SAP has been heralded as a 'simplified written approval process'[21], which will positively benefit the interests of SMEs.

The first major reform which was brought about by the 2014 Act was the creation and clarification of the different possible company types in Ireland. The fundamental changes affected the most prominent type of company in Ireland, the private company which is limited by shares, with the CLRG stating, 'For the first time in Irish company law, the most common company type, the private company limited by shares, is placed at the core of the legislation as the default company'[22]. This had previously been viewed as a single entity, but the new approach has ultimately bifurcated this private company into the private

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[13] Companies Act 2014
[14] Grainne Callanan, *An introduction to Irish Company Law*, (4th edn, Dublin Gill 2015), p. 243.
[15] Companies Act 2014
[16] Charlie Taylor, 'Companies Act is long overdue, but puts small firms at the centre', (The Irish Times Mon, Mar 9, 2015), para.7.
[17] Companies Act 2014
[18] Companies Act 1963
[19] Companies Act 1990
[20] Company Law Enforcement Act 2001.
[21] Company Law Review Group, *Annual Report*, (March 2015), p. 16.
[22] Company Law Review Group, *Annual Report*, (March 2015), p. 14.

company limited by shares (LTD) and the designated activity company (DAC)[23]. This new distinction affected all private companies retrospectively, and as such, all were given an 18 month period in which they could elect to convert to a DAC, or remain as an LTD. Any companies which did not resolve to become either, were designated as an LTD, and this focus on the private company limited by shares is reminiscent of the original stance taken by the CLRG over a decade previously, 'The private company limited by shares should be the primary focus of simplification'[24]. The creation of the DAC was revolutionary to the sector, as a DAC has facilitated the removal of the objects clause within the constitution of a given company[25]. As the DAC represents a company with a defined purpose, the LTD is now empowered to have a less confined purpose. Courtney discusses the construction of the DAC,

> "*…The key distinctions between DACs and LTDs are that DACs will have an objects clause, a distinct memorandum of association and articles of association…"*[26].

This is an ultimate step forward in the sector of company law, as it removes the restrictive element of a company acting *'ultra vires'*. This legal principle stated that a company was not entitled to act outside the remit of its designated functions, not to act "contrary to or beyond the company's objects or capacity"[27], as outlined in its articles of association[28]. This concept, although still applicable to governmental bodies, was considered archaic and unfair in the context of a corporate body. It was often used as a means of avoiding or escaping a contractual agreement, and thus, "the third party, unable to enforce the contract, often lost out"[29]. The company in question had the power to accept any contract or engagement it wished, and could then pivot in its position, and choose to refuse to carry through with its agreement, thus undermining the certainty of financial transactions. This was often counteracted with such acts of estoppel or ratification by shareholders, or the Duomatic Principle observed in England. Although the law adapted to attempt to rectify this lacuna, the 2014 Act has proven to be the most drastic challenge to this antiquated viewpoint. In the new regime, the DAC is limited in its actions by its Constitution, and the ultra vires provision has ultimately been disposed of through the implementation of s. 973 (1)[30]. This point was eloquently elaborated upon by Kathy Smith;

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[23] Dr Thomas B Courtney, *Bloomsbury Professional's Guide to the Companies Act 2014,* "Companies Act 2014: Anatomy of the Act", (Bloomsbury Professional, 2015) Chapter 1, p. 9. [1.013].
[24] CLRG Report, (2001) para. 3.2.3.
[25] Gordon Wade, 'Case law update: English high court considers the application and limitations of the re duomatic principle', *Irish Law Times* (2017, 35(2), 25-27), p. 25.
[26] Dr Thomas B Courtney, *Bloomsbury Professional's Guide to the Companies Act 2014,* "Companies Act 2014: Anatomy of the Act", (Bloomsbury Professional, 2015) Chapter 1, p. 9. [1.013]. *"The rationale for providing for the DAC as a distinct type of company is primarily to provide an option for existing private companies limited by shares which do not want, or are not permitted, to become LTDs.The key distinctions between DACs and LTDs are that DACs will have an objects clause, a distinct memorandum of association and articles of association, can list debt securities, and, subject to compliance with the Central Bank requirements, may operate as credit institutions or insurance undertakings"*
[27] Michael Forde, Hugh Kennedy, *Company Law*, (4th edn, Roundhall 2007), p. 244.
[28] Blacks Legal Dictionary.
[29] Anthony Thuillier, *Company Law in Ireland,* (2nd edn, Clarus Press 2015) p. 34.
[30] Companies Act 2014.

'This provides that the validity of any act on the part of a DAC shall not be called into question on the ground of a lack of capacity by reason of anything contained in the DAC's objects…'[31].

While an LTD, although having discarded the concept of an objects clause, will now be held accountable for any binding agreements made by any member of the company with the capacity to make any such binding agreements. This renouncement of the ultra vires doctrine is crucial to the running of SME's, because this simplification of the powers of companies will not only affect SME's, but it will protect SME's in their dealings with other companies, as well as policing SME's actions. As Irene Fannon remarks, 'the Companies Act 2014 has been remarkably effective in improving compliance standards'[32]. As such, the 2014 Act does, in fact, accommodate and safeguard both the interests, and the behaviour, of SME's in Ireland.

Although much of the 2014 Act dealt with reforming, with consolidating, or with simply clarifying, it also introduced completely new procedures into company law. Such advancements were seen in relation to mergers, dissolutions and the instalment of liquidators, with 'procedures by mergers, rather than hiving assets between group companies by way of business transfer, offering a number of efficiencies and benefits'[33]. Part 9 of the 2014 Act[34] deals with the ways in which Irish companies may be reorganised, and has been seen to have 'tidied up the provisions in this area'[35]. Mergers, under this section, function within the 2008 Cross Border Merger Regulations framework,[36] and the act specifies that mergers may be accomplished through an order of the court, or through use of the SAP, bypassing the necessity for any reliance upon the court, thus effecting a diminished cost, "The approval of the merger by summary approval procedure has the same effect as if the merger had been confirmed by court order"[37]. However, it should be recognised that, for the use of the summary approval procedure for mergers, there is a requirement of a unanimous resolution to provide the directors with the appropriate authority[38].
In relation to the winding up of a company, or an SME, the 2014 Act at Part 11 sought to curtail the overall input of the court during formal liquidations[39]. It

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[31] Cathy Smith, 'Companies Act 2014', (The Bar Review 2015, 20(2), 22-26) p. 23. *'This provides that the validity of any act on the part of a DAC shall not be called into question on the ground of a lack of capacity by reason of anything contained in the DAC's objects. Sections 973(3) and (4) place the onus on directors to observe limitations on their powers flowing from the DAC's objects and the right to seek ratification of the DAC's activities by special resolution. However third parties are protected in their dealings with a DAC by the provisions of s. 973(5) which relieves them from any requirement to make enquiries as to whether the DAC is acting within its powers'*
[32] Irene Lynch Fannon, 'Reckless Trading: Good and Bad Risk-taking in Irish Companies', (Commercial Law Practitioner 2017, 24(1), 7-13), p. 12.
[33] Seanna Mulrean, 'New Merger Regime', (Accountancy Ireland August 2016 Vol.48 No.4.), p. 67.
[34] Companies Act 2014, (Part 9, Reorganisations, Acquisitions, Mergers and Divisions).
[35] G. Brian Hutchinson, 'The challenges of making preferential creditors of consumers who have prepaid', (Commercial Law Practitioner 2016, 23(9), 226-227), p. 226.
[36] S.I. No. 157/2008 - European Communities (Cross-Border Mergers) Regulations 2008 (Chapter 2 Approval in State of Cross-Border Mergers Court scrutiny of cross-border merger) 14. (1).
[37] Lorcan Tiernan, David O'Mahony, 'Shuffling the Deck', (Law Society Gazette April 2015), p. 32.
[38] Companies Act 2014.
[39] Companies Act 2014.

further attempts to elevate the consistency 'between members' voluntary, creditors' voluntary and official liquidations'[40]. To build upon this further, there is now the novel requirement that the liquidators appointed be officially qualified individuals. There now exists the prerequisite that such individuals be a member of an accredited accountancy body, 'other professional body recognised by IAASA, a solicitor, a person qualified in another EEA state, or a person with 2 years' experience in the area and approved by a relevant body'[41]. Equally, another provision has been established, which allows for the prescribed winding up of a company when to do so has been considered, by the courts, to be in the interest of the public. Such a power is vested within the Director of Corporate Enforcement, although it may be prodded to investigate through the referrals from outside bodies, such as the Central Bank. This liquidation process has been made more familiar and accessible, which is fundamental for SME's, who would previously have been unsure of their duties and their rights under such circumstances in the past. For instance, we see in part 11 chapter 16 of the 2014 Act[42], the desire for ease of interpretation is reflected through the amalgamation of officers' offences which have a tendency to occur during the winding up of a company, which includes s.720[43], governing the disposal of the record books of a company. Nolan refers to this improved interpretation standards, 'It is possible to readily locate the relevant provisions in one place without the need to cross refer into other source materials'[44].

To fully appreciate the need for this clarification of the roles, the responsibilities, and the duties, of a company director, a tangible example of the consternation, which emerges through an uncertainty of this position, can be seen in the relatively recent case of Re Tralee Beef and Lamb[45]. Although this case would go on to the Irish Supreme Court, where a single appellant would have his decision overturned, this case nonetheless highlights how restrictions and complications in the company law legislation lead to a breakdown of the proper functioning of a company and its directors. As mentioned previously, the LTD has the benefit, over both the previous private company limited by shares, as well as the DAC, which entitles it to be formed on the basis of having simply one director[46], and one member. Had this applied in the Tralee Beef and Lamb case, then it is likely that Mrs. Patricia Delaney would not have become embroiled within the proceedings. This is a common feature of both Irish company practice, and Irish company law precedence, where a family member becomes entangled within a family business, not out of interest, but out of necessity deriving from an ignorant piece of legislation. This issue stems from the fact that before the LTD company, there was a requirement to have more than one director. Although these director roles were often filled in by family members or friends, simply to satisfy procedure, there remained the complex issue that although these

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[40] Cathy Smith, 'Companies Act 2014', (The Bar Review 2015, 20(2), 22-26) p. 26.
[41] Ibid.
[42] Companies Act 2014.
[43] Companies Act 2014 (Part 11 "Winding Up", 'Offences by officers of companies in liquidation, offences of fraudulent trading and certain other offences, referrals to D.P.P., etc.'. S.720).
[44] Sean Nolan, 'Making a Statement', (Law Society Gazette May 2015), p. 40.
[45] *Tom Kavanagh v. John Delaney, Patricia Delaney, Terry Dunne, Simon Coyle;* (High Court Unreported 284/04), (20th of July, 2004).
[46] Grainne Callanan, *An introduction to Irish Company Law*, (4th edn, Dublin Gill 2015), p. 8.

directors were such in name, more so than in respect to input, their actions had authority, and their interest, or lack there of, in the company did not separate them from their roles as directors. As was seen in many cases, such as *Salomon v Salomon*[47], the courts had a tendency to regard wives[48] or family members as genuine directors, yet, this had the equal corollary of binding clearly uninvolved directors into these mandatory duties. In the Tralee Beef and Lamb case[49], a wife had been invited into her husband's small company, ultimately, for the purposes of fulfilling the role as being his second director. This role, although menial in practice, made her a complete director in theory, and in the eyes of the court, when she had allowed the company to be poorly managed under her guidance, without seeking help from competent directors, she was liable for this irresponsible action, and thus, she was restrained in her capacity as a director. Justice Finlay-Geoghegan reasoned;

> *"Even as a non-executive director, without any special business expertise…she cannot be considered to have acted responsibly…"*[50].

This was viewed as being a major flaw in the law, a lacuna almost, where an arbitrary need for a second director created this issue of uninvolved directors, who were thus punished for their inability to take part in the business. This was notably perceived in SME's, where there was often a familial connection between directors, with 75% of SMEs being considered 'family-owned' companies[51]. The amendment to the law has ensured that an LTD has the right to be established with a sole director, and furthermore, although there is equally a requirement for a company secretary, the requirements for this role were expanded upon.

The case of Tralee Beef and Lamb is a crucial example not only for the previous inadequacies of the company law legislation, but more so, it reflects one of the most incommensurate elements of the present state of company law legislation. This was seen through the Supreme Court appeal to the Tralee Beef and Lamb case[52], this appellant being Simon Coyle. This appeal centred around a crucial issue discussed in the original High Court case; the OCDE is forced to pursue a case of restriction of a director, despite their consideration that such task is a

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[47] *Salomon v. Salomon & Co.* [1897] A.C. 22 (H.L.).

[48] Paul Appleby, (Director Of Corporate Enforcement), The Irish Centre For Commercial Law Studies, 'Seminar On Recent Developments In Insolvency Law', "Ensuring Best Corporate Business Practices For Solvent Companies The Responsibilities Of Company Directors The Role Of The Office Of The Director Of Corporate Enforcement", (University College Dublin 5 December 2002), p. 2.

[49] *Tom Kavanagh v. John Delaney, Patricia Delaney, Terry Dunne, Simon Coyle;* (High Court Unreported 284/04), (20th of July, 2004).

[50] *Tom Kavanagh v. John Delaney, Patricia Delaney, Terry Dunne, Simon Coyle;* (High Court Unreported 284/04), (20th of July, 2004). *"Even as a non-executive director, without any special business expertise, unremunerated and an agreed limited role it appears to me at minimum, that having become aware of the difficult financial situation and as she must have been aware of the fact that there were two other non-executive directors of the Company, both of whom had relevant skills and experience, that she cannot be considered to have acted responsibly in failing to take any step to bring that information to the attention of her fellow two non-executive directors or to insist that a board meeting of the Company be held".*

[51] Kieran McCarthy, 'Family Business or SME?', (ACCA Global, AB Magazine 01 March 2015).

[52] *In the Matter of Tralee Beef and Lamb Ltd (in Liquidation) and in the matter of Section 150 of the Companies Act 1990 and Section 56 of the Company Law Enforcement Act 2001: Tom Kavanagh v John Delaney, Patricia Delaney, Terry Dunne and Simon Coyle 2004 No.382,* ([2008] 2 I.L.R.M. 420).

fruitless one, unless the ODCE 'relieves the liquidator of that obligation'[53]. This issue was not only raised by Justice Hardiman, but it was equally argued by Tom Kavanagh, the official liquidator in the case, who had "not been relieved of his obligation to bring this application"[54]. Hardiman J. was pivotal in highlighting this flawed area of the legislation;

> *"Mr Coyle was the respondent to a motion brought unwillingly and only because not to have done so would have involved him (the liquidator) in the commission of a criminal offence"[55].*

This issue was equally raised by Gerard Nicholas Murphy, 'A person may only give an undertaking having been invited to do so by the ODCE. The operation of this process is entirely at the discretion of the ODCE. There is no stated provision allowing a person to make an approach to the ODCE'[56]. Murphy went on to acknowledge the possible conflict which could arise due to the new stature granted to the ODCE, a quasi-judicial empowerment[57].
The futility of such an exercise, the frivolity of this confined approach to directors, was raised in this case, and although the companies act 2014 has indeed benefitted the sector to an immeasurable degree, this lacuna is a glaring shortcoming of the legislation.

In conclusion, the 2014 Act has been marvelled for its ability to truly simplify and consolidate the legislation in relation to Irish company law. It has undoubtedly benefited and protected the interests of SMEs in Ireland, and it has been recognised that although there have been numerous legislative instruments introduced into company law over the preceding decades, "all of these developments will be put in the shadows"[58] by the effects of this act. Although the 2014 Act has a considerable breath of sections, the language and the structure was instrumental in creating a more approachable and interpretable piece of legislation. When the CLRG commenced their campaign to codify company law, their ambition was to create legislation which was approachable, concise and succinct. Although the act is, unsurprisingly, not imperfect, the protections afforded to companies in Ireland, notably SMEs, are a testament to

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[53] Gerard Nicholas Murphy, 'Restriction and Disqualification of Company Directors', (Accountancy Irl. 2016, 48(6), 68-69), p. 68.
[54] *Tom Kavanagh v. John Delaney, Patricia Delaney, Terry Dunne, Simon Coyle;* (High Court Unreported 284/04), (20th of July, 2004).
[55] *In the Matter of Tralee Beef and Lamb Ltd (in Liquidation) and in the matter of Section 150 of the Companies Act 1990 and Section 56 of the Company Law Enforcement Act 2001: Tom Kavanagh v John Delaney, Patricia Delaney, Terry Dunne and Simon Coyle 2004 No.382.* [2008] 2 I.L.R.M. 420. *"Mr Coyle was the respondent to a motion brought against him by the official liquidator, Mr Delaney, which, as we have seen, he brought unwillingly and only because not to have done so would have involved him (the liquidator) in the commission of a criminal offence".*
[56] Gerard Nicholas Murphy, 'Restriction and Disqualification of Company Directors under the Companies Act 2014', (Commercial Law Practitioner 2016, 23(9), 228-232), p. 229.
[57] Gerard Nicholas Murphy, 'Restriction and Disqualification of Company Directors under the Companies Act 2014', (Commercial Law Practitioner 2016, 23(9), 228-232), p. 230. *'It may not be desirable for an investigative/supervisory role to be combined with a quasi-adjudicative role, whereby the same public body will decide, at least on a prima facie basis, whether, having investigated the conduct of a person, restriction or disqualification is warranted'.*
[58] Thomas B. Courtney, *The Law of Companies*, (3rd end, Bloomsbury Professional), Preface.

the furtherance of law enshrined within this act, and it is my contention that the CLRG were successful in their contributions.

> - *"…We never lost sight of our original vision for Irish company law of consolidation, simplification and accessibility"*[59].

[59] Company Law Review Group, Annual Report, '*Chairperson's Letter to the Minister for Jobs, Enterprise and Innovation*', (March 2014), p. 3. -*"When the Review Group was established, however, there were just 10 Companies Acts to review. Since then, there have been 7 more. While the Review Group played its part in the development of various pieces of legislation over that period of more than a decade, we never lost sight of our original vision for Irish company law of consolidation, simplification and accessibility".*

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