

CORPORATE LAWS & GOVERNANCE

PROFESSIONAL 1 EXAMINATION - AUGUST 2019

NOTES:

Two envelopes must be used to enclose answers:

- Enclose answers to questions in **Section A in one envelope**, and
- Enclose answers to questions in **Section B in a second envelope**.

Mark clearly on each envelope the Section to which the answers relate.

Section A:

You are required to answer **three** questions from this section, (Questions 1, 2 and **either** 3 or 4). However, should you provide answers to **both** Questions 3 and 4, you must draw a clearly distinguishable line through the answer not to be marked. Otherwise, only the first answer to hand for each of these two questions will be marked.

Section B:

You are required to answer **one** question from this section. However, should you provide answers to each question in this section, you must draw a clearly distinguishable line through the answer not to be marked. Otherwise, only the first answer to hand for each of these two questions will be marked.

TIME ALLOWED:

3 hours, plus 10 minutes to read the paper.

INSTRUCTIONS:

During the reading time you may write notes on the examination paper, but you may not commence writing in your answer book.

Marks for each question are shown. The pass mark required is 50% in total over the whole paper.

Start your answer to each question on a new page.

You are reminded to pay particular attention to your communication skills, and care must be taken regarding the format and literacy of your solutions. The marking system will take into account the content of your answers and the extent to which answers are supported with relevant legislation, case law or examples, where appropriate.

List on the cover of each answer booklet, in the space provided, the number of each question attempted.

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Time allowed: 3 hours plus 10 minutes to read the paper.

Section A: You are required to answer **three** questions from this section.

Section B: You are required to answer **one** question from this section.

SECTION A

Answer both Questions 1 and 2 and either Question 3 or 4.

1. Himperial Holdings Ltd. is a parent company. There are twelve companies in this group, whose main activities revolve around the hospitality sector. Recently, a number of issues have arisen, as follows:

- (1) One of the companies, Merrion Country Cottages Ltd., has experienced liquidity issues arising from the loss of a corporate client, whose headquarters was relocated overseas. To overcome these liquidity issues, the company is considering making a rights issue of shares, at a discount of €0.20 on the shares €1 nominal value.
- (2) Another company in the group, Balmoral Wines Ltd., has been carrying a trading loss on its balance sheet for the past three years, arising from a grape harvest that had to be destroyed because of a parasite infestation. Although profits have been healthy for the last two years, the company is not in a position to pay a dividend until it has covered this particular loss, and can show profits available for distribution. The shareholders of Balmoral Wines Ltd. have grown impatient as a consequence of a lack of dividends. To boost shareholder confidence in the company, the directors have decided to reduce its issued capital in order to write off the trading loss, and facilitate the distribution of dividends in the future.

The directors of Himperial Holdings Ltd. are unsure of the legality of these proposed actions and they have contacted you for advice.

REQUIREMENT:

- (a) Outline the nature of a rights issue of shares (often referred to as a pre-emption right), commenting specifically on any THREE rules regarding a rights issue or restrictions thereof. (4 marks)
- (b) Explain the meaning of the terms share and nominal value, and discuss the rule regarding issuing shares at a discount, commenting on the consequences for breach of those rules. Based on this discussion, state whether the proposed action of Merrion Country Cottages Ltd. is in accordance with the provisions of the Companies Act 2014. Justify your answer. (6 marks)
- (c) Critically examine the procedure to be adopted to effect a reduction of capital by the summary approval procedure, and advise Himperial Holdings Ltd. as to the legality of reducing capital to write-off a trading loss. (5 marks)
- (d) Define the term 'dividend' and critically review the main rules regarding the payment of dividends. Based on this review, advise Balmoral Wines Ltd. as to whether it is legally required to pay the company's shareholders a dividend. (5 marks)
- (e) In order to effect the summary approval procedure, Balmoral Wines Ltd. will require shareholder approval through voting. Explain the TWO main methods by which voting can take place at a company meeting, commenting specifically on the advantages and disadvantages of each method. (Note: A discussion of resolutions is not required). (5 marks)

[Total: 25 marks]

- 2.** Walcott is a qualified accountant, with in excess of ten years' experience as a financial analyst. Three years ago, he was invited to become a non-executive director of Marsden Bio-Medics Plc. This company has been performing well in recent years and has launched a variety of new products onto the market, most of which have been very successful. Recently, the directors of Marsden Bio-Medics Plc decided that as part of its proposed expansion of the company into North America and Asia, that it would apply for an Ethical Business award from the Department of Business, Enterprise and Innovation. In preparation for this application and the business audit that would follow, it hired Macklemore Consultants to undertake a thorough review of the business and its practices. Macklemore Consultants uncovered a number of ethical breaches within the company. In particular, it discovered that Duffy, the company's Chief Financial Officer and an executive director, had been withdrawing monies from the company's pension fund before a new product was about to be launched onto the market, and replacing these monies a month after launch. Further investigation revealed that Duffy then utilised these funds to purchase shares in Marsden Bio-Medics Plc, which were then sold at a profit after a new product launch. Evidence suggests that Duffy has done this five times in the last two years. Furthermore, Macklemore Consultants audit also revealed that the company was sourcing silicone hydrogel from Strawbridge Chemicals Ltd., a company wholly owned by Barber, the brother of Hamish, one of Marsden Bio-Medics Plc's directors. Hamish also holds the position of Purchasing Manager with Marsden Bio-Medics Plc.

The board of Marsden Bio-Medics Plc is appalled by these findings and in particular, is concerned that Walcott, an experienced financial analyst with full access to the company's accounts, failed to highlight the irregular behaviour of Duffy in moving monies in and out of the company's pension fund. The board believes that he, too, may have acted in breach of his duties to the company.

You have been contacted by the board for advice.

REQUIREMENT:

- (a) Critically review the law in relation to insider dealing in Ireland. This review should encompass a definition of inside information and insider dealing, and include a discussion of the various forms that it may take. In light of this review, determine the likelihood, of Duffy being found guilty of this offence. (8 marks)
- (b) With reference to the Companies Act 2014, evaluate the statutory obligations and duties imposed upon directors where they have an interest in company contracts. Advise Marsden Bio-Medics Plc as to whether the actions of Hamish amount to a breach of his statutory duty. (6 marks)
- (c) In relation to Walcott:
- (i) Assess the role of non-executive directors of a company, commenting specifically on their liability. (3 marks)
- (ii) Critically analyse the duty of care and skill owed by a director to a company and, based on this analysis, determine whether or not Walcott has acted in breach of his duties. (6 marks)
- (d) If Duffy, Hamish and Walcott are found to be acting in breach of their duties, Marsden Bio-Medics Plc plans to propose a resolution to effect their removal. Outline any TWO rights of these directors in relation to any such proposed removals. (2 marks)

[Total: 25 marks]

- 3.** Baker and Fennick are graphic design artists. They have both worked in industry since graduating from University, but have recently decided to leave their respective jobs and establish a graphic design company together. They have contacted a business advisor, who informed them that their best option is to establish a private limited company. She has advised that they can either establish a private company limited by shares, or a designated activity company (DAC). Whichever option they choose, they plan to trade under the business name Baker Fennick Studios. Their business advisor has explained that they need to register the business name, as well as the constitutional document(s), and that they cannot commence trading until they receive a Certificate of Incorporation.

Baker and Fennick know nothing about company law, and have contacted you for advice.

REQUIREMENT:

- (a) Draw a comparative table, advising Baker and Fennick on any FOUR of the main differences between the characteristics of a private company limited by shares (Ltd.) and a designated activity company (DAC). (8 marks)
- (b) On the assumption that Baker and Fennick decide to establish a DAC, critically review any FOUR of the clauses required for inclusion in its Memorandum of Association. (4 marks)
- (c) Discuss any TWO declarations or statements that must be included in the application for registration of a DAC. (2 marks)
- (d) Advise Baker and Fennick regarding any THREE of the main restrictions imposed upon the choice of a business name, pursuant to the terms of the Registration of Business Names Act, 1963. (3 marks)
- (e) Set out the content of a Certificate of Incorporation, and state the consequences for Baker and Fennick if they allow their company to enter contracts before receipt of this Certificate. (3 marks)

[Total: 20 marks]

- 4.** Makepeace Animation Studios Ltd. has been in financial difficulty for the past year, as a consequence of losing a contract with a major Hollywood studio that went bankrupt. In the last three months, the company has tendered to undertake animation projects with two American studios, one Japanese studio, and a French production company. Should the company win any of these tenders, this will significantly boost its solvency, but will not improve liquidity in the short term. However, such an outcome has the potential to significantly improve the financial position in the long-term. In the short-term, the company has been advised by its accountant to consider placing itself into examinership, as the only other option is to place the company into liquidation.

Makepeace Animation Studios Ltd. has contacted you for advice.

REQUIREMENT:

- (a) Critically examine the purpose of examinership and the prerequisite conditions for a Court to grant a petition for examinership. (5 marks)
- (b) Assess any TWO effects of the appointment of an Examiner. (2 marks)
- (c) Describe any FOUR functions of an Examiner. (4 marks)
- (d) Should Makepeace Animation Studios Ltd. fail at examinership and be placed into liquidation, critically review any SIX of the main powers and duties of a company liquidator. (6 marks)
- (e) Identify any FOUR persons deemed ineligible to accept appointment as a company liquidator, and discuss the consequences of acting in contravention of these eligibility rules. (3 marks)

[Total: 20 marks]

SECTION B
Answer either Question 5 or 6.

- 5.** *“A company’s culture should promote integrity and openness, value diversity and be responsive to the views of shareholders and wider stakeholders” - Corporate Governance Code 2018, Financial Reporting Council.*

REQUIREMENT:

- (a)** Discuss the composition, role and responsibilities of the nomination committee in promoting diversity, integrity and openness. (18 marks)
- (b)** Evaluate the role and responsibilities of the Chairman in communicating with, and responding to, shareholder and wider stakeholder needs. (12 marks)

[Total: 30 marks]

OR

- 6.** You have recently been admitted to membership of CPA Ireland and assumed the role of financial accountant in a medium-sized food manufacturing company. The management team is unclear on the application of the Corporate Governance Code to its business.

REQUIREMENT:

- (a)** The chairman has requested a memo in which you critically assess a corporate governance approach based on a principles based, as opposed to a rules based approach and the use of ‘comply or explain’ . (18 marks)
- (b)** Evaluate the role and function of the Companies Registration Office (C.R.O) in Ireland. (12 marks)

[Total: 30 marks]

END OF PAPER

SUGGESTED SOLUTIONS

THE INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS IN IRELAND

CORPORATE LAWS & GOVERNANCE

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SOLUTION 1 (Compulsory Question):

(a) **Rights Issue:** A rights issue is the right to purchase shares on a pre-emption basis (0-1 mark). In effect, this means that: (1) as per Section 69(6) CA 2014 where a company is allotting new shares it must first offer them to existing shareholders in the same proportion as their existing holding, before offering them to a third party. (2) A shareholder must be given notice in writing of his pre-emption rights, and this offer must be irrevocable for a period of 14 days. No allotment may be made until the offer has expired, or every offer made has been accepted or refused. (3) A shareholder will be entitled to compensation for failure by the company to offer pre-emption and may be liable to bring a Section 31 action. (4) A member must exercise the rights issue in totality – in that he either accepts the offer in full or rejects the offer. (5) The right of pre-emption specifically does not apply to (Section 69(12)) shares allotted: (a) as part of an employee share schemes, (b) for non-cash consideration, or (c) shares subscribed for prior to the incorporation of the company. (6) In relation to a Plc it is important to note that pre-emption only applies in respect of ordinary shares (Section 1022) and that this right may be waived (Section 1021), and (7) as part of a rights issue, shares can be discounted on market value, but not on nominal value. (any 3 = 0-3 marks)

(b) **Share and Nominal Value:** the concept of a share was defined in the case of *Borland's Trustee v Steel Bros & Co Ltd* (1901) as “[an] the interest of the shareholder in the company, measured, for the purposes of liability and dividend by a sum of money” – in effect, a share represents an investment in a company (0-1 mark) – the nominal value of a share is the base value of the share set upon the incorporation of the company and stated in the company's Constitution – it is the minimum value for which the share can be sold. (0-1 mark)

Shares at a Discount: (1) The general rule is that companies may not allot shares at a discount on their nominal value (as per *Ooregum Gold Mining Co of India v Roper* (1892) and Section 71(2) CA 2014), (2) Section 71(3) provides that where a company issues shares in contravention of this rule then the person receiving these shares will be held liable to repay the company an amount equal to the amount of the discount and interest thereon at the appropriate rate, and (3) company officers who issue shares in breach of this rule may also be sanctioned, as contravention is classed as a Category 3 offence. (3 = 0-3 marks)

Conclusion: The proposed action by Merrion Country Cottages Ltd is in contravention of the provisions of the Companies Act 2014, as it relates to none of the exceptions to the general rule (namely: (1) mergers, (2) group reconstructions, (3) the acquisition of shares of a body corporate, where the company whose shares are acquired becomes a wholly-owned subsidiary of the acquirer (Sections 72-75 CA 2014), (4) to finance a bonus issue of shares (Section 83(1)(e) CA 2014), or (5) to pay/repay a premium due on the acquisition of own shares (Section 105(3))). (0-1 mark)

(c) **Reduction of Capital by Summary Approval Procedure:** In order to effect the reduction of capital by adopting the summary approval procedure Sections 202-208 CA 2014 require that the following steps are taken: (1) a declaration of solvency must be made by the directors of the company, (2) a special resolution of the shareholders at a general meeting must be passed within 12 months of effecting the reduction, (3) a report of an independent person qualified to act as a statutory auditor must confirm that the declaration of solvency is not unreasonable, and (4) a copy of the declarations and resolutions must be forwarded to the Registrar of Companies (CRO). (0-4 marks)

Conclusion: Merrion Country Cottages Ltd can reduce their issued capital to write-off a trading loss, as this action is permitted by Section 84(2) CA 2014. (0-1 mark)

(d) **Dividends:** A dividend can be defined as the periodic payment of money that represents the company's profits. Essentially, it is that part of the company's profits that are distributed to its shareholders in proportion to their prospective shareholdings (0-1 mark). The rules regarding the payment of dividends are as follows: (1) dividends are payable from profits available for distribution (Section 117) – this relates to profits for current and past years, insofar as they have not already been distributed, over losses for those years, and insofar as they have not already been written off, (2) they may be a fixed annual percentage, as in the case of preference shares, or it may be variable depending upon the distributable profits of the company during a particular period, (3) they are generally declared by an ordinary resolution at a general meeting of the company – although interim dividends may be

declared (subject to Section 117) by a company, (4) the declaration of the dividend and the amount paid is at discretion of the directors, (5) no distribution can exceed the amount recommended by the directors, (6) members can sue for non-payment, where the dividend has been declared and after the date for payment has elapsed, (7) dividends are payable on paid-up amounts of shares only, (8) although dividends are generally paid in cash, Section 125(1) provides that they can also be paid other than in cash, (9) the directors may deduct from any dividend payable to any member, all sums of money (if any) immediately payable by him or her to the company on account of calls or otherwise in relation to the shares of the company, and (10) no dividend will bear interest against the company (Section 125(6)). (any 3 = 0-3 marks)

Conclusion: Balmoral Wines Ltd is not legally required to pay their shareholders a dividend, unless it is stated otherwise in their Constitution. (0-1 mark)

- (e) **Voting at Meetings:** Voting is governed by a company's Constitution – the general rule is that: (1) it takes place first by a show of hands, wherein every member gets one vote and a result is declared by the chairperson of the meeting. This declaration is deemed conclusive. The main advantage of this method is speed, whereas the disadvantages include a lack of accuracy, privacy, pressure voting, and that it does not reflect proxy voting or actual shareholding (0-2.5 marks) . After a show of hands the chairperson or 3 shareholders (present in person or by proxy) or 10% of the voting shareholders present in person or by proxy, can demand for poll (secret ballot). The results of the poll take precedence over show of hands. Poll voting depends upon the number of shares held by the shareholder. The right to conduct a poll cannot generally be excluded by the Constitution. The main disadvantage of this method is that it is administratively burdensome and time consuming, whereas the advantages include accuracy, privacy, and the fact that it reflects proxy voting and actual shareholding. (0-2.5 marks)

SOLUTION 2 (Compulsory Question):

- (a) **Insider dealing:** This offence occurs when a person or parties have price sensitive information about a company's performance and engage in prohibited actions in relation to company securities in order to make a profit (0-1 mark). For the purpose of insider dealing, as per the Article 7 of the EU (Market Abuse) Regulations 2016, inside information can be defined as confidential information – and (1) information that is of a precise nature, (2) that has not yet been made public, (3) that relates to the issuer of the securities or the securities themselves, and (4) that is price sensitive, in that if it is disclosed it is likely to materially affect the price of the securities being traded (any 3 = 0-3 marks). In accordance with Regulation 5(1)-(6) of the MADR 2016 insider dealing can take many forms and includes situations where: (1) the insider engages or attempts to engage in insider dealing, and makes use of information which is not generally available, or (2) where the insider makes his knowledge known to an outsider who uses this knowledge to deal with shares, where the outsider should have known or ought to have known that the insider was precluded from dealing with the shares because of his access to the sensitive information, or (3) where the insider induces the outsider to use or disclose this price sensitive information, or (4) inciting, aiding or abetting another person to engage in insider dealing is now also classified as a criminal offence. (any 3 = 0-3 marks)

Conclusion: The likelihood of Duffy being found guilty of this offence is high – as she was an insider as a consequence of her employment, she was aware that the information about product launches was price sensitive and precise enough to enable her to draw a conclusion as to its impact on the value of the respective shares of the company. (0-1 mark)

- (b) **Statutory Obligation to Disclose Interests in Contracts:** The actions of Devon are in breach of Section 231 of the Companies Act 2014, which requires a director to disclose any direct or indirect interest in contracts or proposed contracts with the company at a meeting of the directors of the company. The director must make a declaration of interest, disclosing the nature of their interest and this must be made to the Board at the meeting at which the question of entering into the contract is first proposed or at the next meeting of the directors held after the director becomes interested. This disclosure must be made to a duly convened full board meeting (as per Guinness plc v Saunders and Ward (1988)). Section 231(6) requires that every disclosure must be entered into the records kept by the company, and open for inspection by any officer or member of the company. (0-5 marks)

Conclusion: Hamish's non-disclosure is likely to be viewed as a breach of his statutory duty under Section 231 CA 2014. (0-1 mark)

- (c) **(1) Non-Executive Director:** The characteristics of a non-executive are as follows: (1) these are directors appointed to manage the business on a transient basis – they are not employees of the company but more akin to consultants, (2) they are involved in the strategic management of the company at board level and are not involved in the operational running of the business, (3) they are appointed due to their expert knowledge, experience, attainment or skills, (4) their role is to act as monitors of the executive directors (by ensuring that they are acting within their powers and the company's objectives) and (5) to provide the board of directors with additional expertise and an objective view point. (any 3 = 0-3 marks)

(2) Duty of Care and Skill: In accordance with Section 228 CA 2014 directors are required to exercise reasonable skill, care and diligence in the performance of their duties. This requires them to act with the knowledge and expertise that may reasonably be expected of a person in the same position as the director, and the same knowledge and experience as the director. In addition to the legislation, the guidelines in relation to exercising this duty were also laid out in Re City Equitable Ltd (1925). These require: (1) the directors must exercise the duty to a standard reasonably expected from a person of his knowledge and experience, (2) the director is not bound to give continuous attention to the affairs of the company and need only attend meetings when he can reasonably do so or at least regularly, and (3) the director can delegate the duties of the company to the management provided it is normal business practice and there are no suspicious circumstances, although the director still has a duty to supervise the discharge of the delegated function, as per Re Barings Plc (No5) (2000). The test to determine liability is a subjective standard test and the court will examine what is reasonable for that particular director – the more qualified the director, the higher the standard will be expected from him, as established in Dorchester Finance Co Ltd v Stebbing (1977). (0-5 marks)

Conclusion: It is likely that Walcott has acted in breach of this duty, as a qualified CPA with in excess of ten years experience as a financial analyst should have been concerned about any withdrawal of funds from the pension account and reported this to the Board. (0-1 mark)

- (d) **Rights of a Director:** In effecting a removal all directors are entitled to: (1) be sent notice of this meeting, (2) attend this meeting and (3) make representations to the shareholders as to why they believe that they should not be removed. In Glover v BLN Limited (1973) the Court held that the removal of a director while failing to provide reasons for that removal was a breach of natural justice, and the Court awarded him damages for a breach of fair procedures/natural justice – this right to compensation/damages is now encompassed in Section 147 CA 2014. (any 2 = 0-2 marks)

SOLUTION 3 (Optional Question):

(a) Distinction between an Ltd and DAC: (any 4 x 2 = 0-8 marks)

Factors	Private Company Limited by Shares	Designated Activity Company
(1) Incorporation	Through registration of a single document Constitution	Through registration of a Memorandum and Articles of Association
(2) Directors	Minimum 1	Minimum 2
(3) Capacity to Contract	There is no limitation on its business activities	It is required to have an objects clause – stating the purpose for which the company was established
(4) Name	The name of the company must end in Ltd or its equivalents	The name of the company must end in DAC or its equivalents
(5) Company Secretary	It must have a separate company secretary where it has only one director	The company secretary can be one of the directors of the company
(6) Annual General Meetings	It does not need to hold an AGM and can have written procedures for passing resolutions instead	It is required to hold an AGM if the company has two or more members
(7) Liability	It has limited liability and may or may not have a share capital	It has limited liability and has a share capital

(b) Memorandum of Association of a DAC: This document regulates the external activities of the company and contains the following clauses (Section 967 CA 2014): (1) name clause – this clause indicates the company name, (2) company type clause – this clause states that it is a Designated Activity Company registered under the Companies Act 2014, and that it is either (a) a private company limited by shares, or (b) a private company limited by guarantee, and having a share capital, (3) the objects clause – this clause indicates the objectives for which the company was established and the powers of the company to achieve these objectives, (4) the liability clause – this clause indicates that the liability of company members is limited, (5) the capital clause – this clause indicates the amount of share capital with which the DAC proposes to be registered and the division thereof into shares of a fixed amount, or if it is a guarantee company that each member undertakes that, if the company is wound up while he or she is a member, or within one year after the date on which he or she ceases to be a member, he or she will contribute to the assets of the company a prescribed amount, and (6) the association/subscription clause – this clause indicates the original shareholders of the company – and how many shares they subscribed for upon incorporation and whether they were also acting as company officers (any 4 = 0-4 marks)

(c) Declarations/Statements: The following declarations/statements must accompany an application for registration of a DAC: (1) the name and registered office of the company, (2) particulars of the directors including their signatures, (3) a statement of the company's issued capital, and (4) a statutory declaration that all the terms of the Companies Act 2014 have been complied with – which must be made by a company director, secretary or the company solicitor. (any 2 = 0-2 marks)

(d) Restrictions on Business Names: The main restriction imposed by the Registration of Business Names Act 1963 upon the choice of business name is that a name is automatically disallowed if it is considered undesirable by the Registrar (Section 26(5)) – a name will be considered undesirable if: (1) it is an offensive or blasphemous name, (2) it suggests or implies a connection with any government department, local authority or State agency (where no such connection exists), (3) if it uses “bank, society, co-operative or insurance” in its name, unless it has obtained the appropriate permission from the Minister, (4) it includes a registered trademark, without production of the consent of its owner, or (5) it is regarded as being misleading (Section 27(4)), or (6) it is the name of an existing company. (any 3 = 0-3 marks)

(e) Certificate of Incorporation: The Certificate contains the following information: (1) the name of the company, (2) the date of incorporation, and (3) the company's registered number – it also contains details of (4) whether the company is limited by shares or guarantee, and whether the company is private, designated activity or public. (5) The signature of the Registrar and official seal of the company are also contained therein (any 2 = 0-2 marks). On receiving this Certificate, a private company (both an LTD and a DAC) is entitled to trade and operate as a company – any contracts created before the date of incorporation will be binding on Baker and Fennick (and they will be personally liable for these contracts) but not on the company, unless the company ratifies these contracts after incorporation. (0-1 mark)

SOLUTION 4 (Optional Question):

- (a) **Examinership:** The main purpose of examinership, which was developed under the Companies (Amendment) Act 1990, was to provide a period of protection (70 days) to companies in financial difficulty, but who are not yet insolvent. The purpose of the protection is to give the company some breathing space, free from the risk of liquidation or other legal proceedings, in order to allow the examiner to investigate the company's affairs and to report to the Court on its prospects for survival. Justice Fennelly in *Gallium Limited and the Companies Amendment Act 1990* (2009) stated that: "... [t]he entire purpose of Examinership is to make it possible to rescue companies in difficulties. The protection period is there to facilitate examination of the prospects of the rescue. However, the protection may prejudice the interests of some creditors. The court will weigh the existence and degree of any such prejudice in the balance". In effect, the purpose of examinership is to endeavour to save companies where there is a reasonable prospect of survival. (0-3 marks)

Prerequisite Conditions: In order for the Court to grant a petition for examinership the following conditions must be satisfied: (1) no resolution to liquidate the company has been passed, (2) no order for liquidation must be made, and (3) the Court must believe that the company has a reasonable prospect of survival as a going concern. (any 2 = 0-2 marks)

- (b) **Effect of the Appointment of an Examiner:** The main effect is that the company is immune from legal proceedings – this immunisation manifests itself in the following ways, as per Section 520(4) CA 2014. The effects include: (1) Receivers: If a Receiver has been appointed to the company for less than 3 days and the company is successfully placed under examinership – the Receiver's position is usurped and the Receiver will be powerless during the period of examinership. No application for receivership can be made when the company is in examinership. (Section 520(4)(b)), (2) Liquidation: The liquidation process cannot be initiated during examinership (Section 520(4)(a)), (3) No legal action may be initiated against the company once an examiner has been appointed (including actions relating to company property (such as attachment, sequestration, distress or execution (Section 520(4)(c)) charges, minority protection, guarantees etc ...) (Section 5(2)(c)-(g)), and (4) No recovery of goods held under a retention of title clause or hire purchase/consumer credit agreement can take place. (any 2 = 0-2 marks)

- (c) **Functions of an Examiner:** As per Sections 524-544 CA 2014 the main functions of an Examiner include the following: (1) to examine the affairs of the company and report to the Court as to whether the company has a reasonable prospect of survival as a going concern, (2) to formulate proposals for a compromise or scheme of arrangement, (3) to call meetings with the creditors and members of the company to report on these proposals and in order to get them to agree to these proposals, (4) to supply a copy of his report to the company, the ODCE and to any interested party, and (5) to report back to the Court as to whether he has obtained agreement to these proposals and whether these proposals are a better alternative than placing the company into liquidation. (any 4 = 0-4 marks)

- (d) **Powers and Duties of a Liquidator:** The main powers and duties of a Liquidator are contained in Sections 624-633 of the Companies Act 2014, and include the following: (1) to take possession of the company's assets, including debtors for the purpose of sale, (2) to execute all necessary documents on the company's behalf, including bills of exchange, promissory notes or mortgages on the company's assets, (3) to arrange a list of creditors and contributors and seek monies due (the liquidator can also institute legal proceedings to recover monies due, where necessary), (4) to resolve all disputed claims and where necessary request the Court to adjudicate on them, (5) to bring or defend an action in the company's name, (6) to provide security for costs in the name of the company, (7) to apply the proceeds of the sale of company assets to the payment of the company's debts and liabilities in accordance with the rules governing the priority of payments, (8) where the asset realisation creates a shortfall the liquidator may make any compromise or arrangement with creditors, (9) if there is a surplus after asset realisation, the liquidator must distribute any surplus amongst the shareholders in accordance with the provisions of the Companies Act 2014, and the company's Constitution, (10) to appoint agents to do such work that the liquidator himself is unable to do, (11) he must call a meeting of creditors and company at the end of first year of liquidation, and on each successive year, within three months of the end of the year – to accounts for his actions – and he must send a copy of the accounts to the CRO – in effect the liquidator is obliged to do all things necessary for the orderly wind-up of the company – (12) following liquidation the liquidator must fulfill the various filing and notification requirements under the Companies Acts, including notification to the CRO to strike the company off the Register – (13) to report to the ODCE within 6 months of his appointment, or as required, regarding insolvent companies (Section 682 CA 2014), (14) to apply for the Restriction of Directors (Section 683 CA 2014) unless excused by the ODCE. (any 6 = 0-6 marks)

- (e) **Liquidator Ineligibility:** As stated in Section 635 CA 2014, the following persons are ineligible to act as a company liquidator: (1) a person who is, or who has within 24 months of the commencement of the winding up been, an officer or servant of the company, (2) except with the leave of the court, a parent, spouse, civil partner, brother, sister or child of an officer of the company, (3) a person who is a partner or in the employment of an officer or servant of the

company, (4) a person who is an un-discharged bankrupt, (5) a person who is not qualified for appointment as a liquidator of any other body corporate which is that company's subsidiary or holding company or a subsidiary of that company's holding company, or would be so disqualified if the body corporate were a company, (6) a person subject to a Disqualification Order, or (7) a person who does not hold adequate Professional Indemnity Insurance (the terms and level of which may be prescribed from time to time by IAASA). (any 4 = 0-2 marks)

Contravention: Contravention of eligibility requirements is classed as a Category 3 offence, that can result in a Class A fine and a term of imprisonment not exceeding 12 months. (0-1 mark)

SOLUTION 5

- (a) Role/ responsibilities/ membership of nomination committee. (6 marks)
- Selection process/ characteristics (6 marks)
- Disclosure. (6 marks)
- Other comments

The nomination committee will develop a process for appointment. The majority of the committee should be independent non-executive directors.

By ensuring an objective and impartial appointment process the appointment committee can ensure that executives and non-executives appointed are suitable candidates who are open and independent in their operations. By appointing a diverse board the benefits to the business should be enhance its operations as its members will host a range of knowledge and experiences.

The appointment of at least half of the board as non-executive directors should improve the culture and the transparency of decision making.

Disclosure of the process in relation to appointment, the policy on diversity and inclusion, its objectives and linkage to company strategy and the gender balance of those in senior management should be in the annual report

(18 marks)

- (b) Chairman. (6 marks)
- Communication. (6 marks)

Formal communication as a statutory requirement, in the annual general meeting and through the publications issued by the business.

The chair should additionally seek regular engagement with major shareholders to understand their views and concerns. It is important that the board as a whole is made aware, by the chair of the concerns of shareholders.

The board should consider the views of key stakeholders and detail in the annual report how these matters have been considered in board discussions and decision making.

(12 marks)

[Total: 30 marks]

SOLUTION 6

(a)

Principle based/benefits/risks	(9 marks)
Rules based	(3 marks)
Comply and explain	(6 marks)

The Code is a guide to a number of key components of effective board practice and has in-built flexibility for companies to adapt their practices to take into account their particular circumstances. The Code is not a rigid set of rules. It consists of principles (main and supporting) and provisions. They should not be evaluated in a mechanistic way and departures from the Code should not be automatically that supports the “comply or explain” process and bearing in mind the purpose good corporate governance

Post Enron, the US authorities passed the Sarbanes-Oxley Act which established a rules based approach to corporate governance. The act made substantial changes to the financial reporting process.

The “comply or explain” approach is the trademark of corporate governance in the UK. It has been in operation since the Code’s beginnings and is the foundation of its flexibility. It is recognised that an alternative to following a provision may be justified in particular circumstances if good governance can be achieved by other means. A condition of doing so is that the reasons for it should be explained clearly and carefully to shareholders. Where deviation from a particular provision is intended to be limited in time, the explanation should indicate when the company expects to conform with the provision.

(18 marks)

(b)

Purpose	(2 marks)
Functions	(10 marks)

The companies’ registration office in Ireland, under the Companies Act 2014, is the central repository of public statutory information on Irish companies and business names.

The companies’ registration office has a number of functions including:

1. The incorporation of companies and the registration of business names
 - Registering new companies and registers business addresses.
 - Register of friendly societies.
2. The receipt and registration of corporation documents.
 - file certain documents with the companies registration office
 - details of the registered office and any changes,
 - Changes to the company officers and changes which affect the company.
 - File annual returns imposed on companies.
3. The enforceability of the companies act
 - Take measures against companies who failed to file the annual returns including prosecution of the company or its directors or removing the company from the register.
4. Making information available to the public
 - Some information such as the company name and registered office address can be accessed by the public free of charge.
 - A small fee may be payable for other information held by the companies registration office.
 - publication of information on an online gazette

(12 marks)