



# CHAPTER 3

COMPLIANCE AND ENFORCEMENT  
ACTIVITIES

## STRUCTURE OF THIS CHAPTER

This Chapter is structured in a manner whereby, in the following three Parts, the Office's inputs, throughputs and outputs respectively are detailed.

## PART A: INPUTS

### EXTERNAL INPUTS

The Office's activities in confronting unlawful and irresponsible behaviour are driven to a substantial extent, both directly and indirectly, by inputs received from external sources. This is a function of the fact that:

- a number of parties, including liquidators, auditors, examiners and certain professional bodies, have statutory reporting obligations to the Office;
- the Office forms part of a broader statutory framework that provides for the referral of, otherwise confidential, information between regulatory and enforcement bodies where such information is considered to be relevant to those other entities' functions; and
- the Office receives a substantial number of complaints from members of the public annually.

In that context, the principal inputs received from external sources during the year were as follows:

**Table 5 Inputs from external sources**

|  | 2017         | %           | 2016         | %           |
|--|--------------|-------------|--------------|-------------|
| <i>Statutory reports</i>   |              |             |              |             |
| Liquidators' reports (initial) (s682)                              | 652          |             | 683          |             |
| Liquidators' reports (subsequent) (s682)                           | 240          |             | 261          |             |
| Total liquidators' reports (s682)                                  | 892          | 71          | 944          | 73          |
| Liquidators' reports regarding possible criminality (s723)         | 0            |             | 0            | 0           |
| Auditors' indictable offence reports (s393)                        | 82           | 6           | 69           | 5           |
| Examiners' reports (s534)  | 28           | 2           | 5            | 0.4         |
| Professional Bodies' indictable offence reports (s931)             | 0            | 0           | 5            | 0.4         |
| Professional Bodies non-indictable offence reports                 | 4            | 1           | –            | –           |
| <i>Referrals</i>   |              |             |              |             |
| Referrals from external parties                                    | 21           | 1           | 28           | 2           |
| <i>Complaints</i>  |              |             |              |             |
| Complaints from members of the public                              | 234          | 18          | 248          | 19          |
| <i>Other</i>   |              |             |              |             |
| Disclosures under the Protected Disclosures Act 2014 <sup>20</sup> | 1            | 1           | 4            | 0.3         |
| <b>Total inputs from external sources</b>                          | <b>1,262</b> | <b>100%</b> | <b>1,303</b> | <b>100%</b> |

<sup>20</sup> The information that requires to be published by the Office pursuant to section 22 of the Protected Disclosures Act 2014 is set out later in this Chapter under the heading of Outputs.

The principal external sources of inputs driving the Office's activities over the year under review are elaborated upon below.

## LIQUIDATORS' SECTION 682 REPORTS

### Introduction – overview of the liquidator reporting regime

In summary, liquidators of companies that are in insolvent<sup>21</sup> liquidation are required by law<sup>22</sup> to report to the Office on the circumstances giving rise to the company's failure and on the conduct of any person who was a director of the company during the twelve months preceding the entry of the company into liquidation. The liquidator must also proceed to apply to the High Court for the restriction<sup>23</sup> of each of the directors, unless relieved of that obligation by the Office<sup>24</sup>.

The essential aims of this statutory reporting regime are to:

- afford the public a degree of protection by ensuring that persons who have been determined by the High Court as not having acted honestly and/or responsibly in the run up to a company's entering insolvent liquidation may, in respect of the mandatory five year period of restriction, only act as directors of other companies that meet minimum capitalisation requirements; and
- ensure that persons who, in the run up to a company's entering insolvent liquidation, have been judged to have acted honestly and responsibly can continue to engage in entrepreneurial activity through the medium of limited liability companies without sanction or penalty.

In discharging its role in this regard, the Office expects liquidators to provide it with all of the information which is relevant to the making of an appropriate decision. It also encourages liquidators to make evidence-based recommendations regarding relief/no relief by reference to the results of their investigations.

The Office considers granting relief where a liquidator advances an evidence-based justification in support of a claim that a director has acted honestly and responsibly in conducting the company's affairs. In making its decisions, the Office is keen to ensure that no director needlessly bears the burden of a High Court hearing where he or she has clearly demonstrated honest and responsible behaviour in the conduct of the affairs of the failed enterprise. In practice, the Office acts as a filter to remove the need for consideration by the High Court of those cases which do not appear to warrant its attention.

It is important to note, however, that ODCE decisions of 'no relief' or 'partial relief' do not constitute a finding of dishonesty or irresponsibility in respect of the directors concerned, and it would be inappropriate for any such inference or imputation to be drawn. It is solely a matter for the High Court (having heard the submissions of the liquidator and director(s) respectively) to determine if a Restriction Declaration should be made in respect of any particular company director.

### Restriction and Disqualification Undertakings

The Act<sup>25</sup> introduced, for the first time, a statutory framework under which individuals who might otherwise face the prospect of Court proceedings can avoid having to go to Court by voluntarily agreeing to a restriction or disqualification as applicable (i.e., by providing a legally binding Undertaking to that effect).

In summary, the Act provides the ODCE with discretion as to whether to offer an Undertaking. Where an offer is made by the ODCE, it must be made on the prescribed form, the layout and content of which is stipulated by the Statutory Instrument (the offer document being referred to as a "Notice"). The Notice must set out, *inter alia*, an outline of the circumstances, facts and allegations establishing the grounds for a restriction or disqualification together with details of the legal effects of an Undertaking for the person concerned.

There is no obligation on the recipient of a Notice to accept the offer (i.e., to provide the Undertaking). However, where the recipient intends to accept the offer, they must do so within 21 days (or within such longer period as may be allowed by the ODCE). During this offer period, neither the ODCE nor any other person who is aware of the issuing of the Notice may initiate proceedings for the restriction or disqualification of the recipient of the Notice on foot of the circumstances, facts and allegations as set out in the Notice.

21 A company is insolvent when it is unable to pay its debts as they fall due

22 Section 682 Companies Act 2014

23 Where an individual is restricted under section 819 of the Companies Act 2014, s/he may only act as the director or secretary of a company for a period of five years thereafter provided that the company concerned meets certain minimum capitalisation requirements. In the case of a public limited company a minimum called up share capital of €500,000 is required. In the case of any other company, the corresponding figure is €100,000.

24 The process and scope of liquidator reporting are outlined in three main ODCE publications, Decision Notice D/2002/3 as supplemented by Decision Notice D/2003/1 and Information Notice I/2009/1. These documents are available at [www.odce.ie](http://www.odce.ie)

25 Sections 849 to 854 of the Companies Act, 2014

Where a recipient of a Notice decides to accept the offer and to return a duly signed Undertaking Acceptance Form, they will be subject to a Restriction or Disqualification Declaration/Order on the same basis as if a restriction or disqualification had been imposed by the High Court. Therefore, any subsequent breach of the terms of the restriction or disqualification will constitute a criminal offence and will be the same as a breach of a Court-imposed restriction or disqualification.

Notwithstanding that company directors or other persons may have voluntarily provided Undertakings, they can, nevertheless, still apply to the Court – at any time during the currency of the restriction or disqualification – seeking to be relieved, in whole or in part, from the terms of the restriction or disqualification, as applicable. Whilst any such applications will be considered by the ODCE on a case by case basis in the context of the particular facts and circumstances, having regard to the need to uphold the integrity of the process, it is anticipated that the ODCE will, in most instances, oppose such applications.

With reference to disqualification, the legislation provides that the maximum duration of disqualification that the ODCE can offer by way of Undertaking is five years. Therefore, in circumstances where the ODCE forms the view that a period of disqualification of in excess of five years is warranted (a determination that is made by reference to the particular facts and circumstances of each case and any relevant jurisprudence), an offer will not be made. Rather, the matter will be dealt with by way of an application to the High Court.

### Companies entering liquidation

As can be seen from the Table below:

- the total number of insolvent liquidations (i.e. creditors' and Court liquidations combined) increased by approximately 5% in 2017 but only represents 51% of the levels in 2012; and
- during 2017, the level of solvent liquidations decreased compared to 2016, accounting for 61% of all liquidations.

**Table 6 Companies entering liquidation: 2012 – 2017**

|   | 2012         | 2013         | 2014         | 2015         | 2016         | 2017         |
|---|--------------|--------------|--------------|--------------|--------------|--------------|
| Creditors' liquidations                         | 1,210        | 1,043        | 929          | 746          | 581          | 613          |
| Court liquidations                              | 107          | 76           | 78           | 70           | 61           | 63           |
| <i>Total insolvent liquidations</i>             | <i>1,317</i> | <i>1,119</i> | <i>1,007</i> | <i>816</i>   | <i>642</i>   | <i>676</i>   |
| Members' liquidations                           | 919          | 848          | 1,001        | 1,034        | 1,112        | 1,040        |
| <i>Total solvent liquidations</i> <sup>26</sup> | <i>919</i>   | <i>848</i>   | <i>1,001</i> | <i>1,034</i> | <i>1,112</i> | <i>1,040</i> |
| <b>Total liquidations</b>                       | <b>2,236</b> | <b>1,967</b> | <b>2,008</b> | <b>1,850</b> | <b>1,754</b> | <b>1,716</b> |

### Liquidators' s682 reports received – 2017

As can be seen from Table 5 on page 23, a total of 892 liquidators' s682 reports were received during the year (2016: 944), of which:

- 652 were initial reports<sup>27</sup> (2016: 683); and
- 240 were subsequent reports<sup>28</sup> (2016: 261).

<sup>26</sup> Whilst the Office has no role in solvent (i.e. members') liquidations, data in respect of same has been included in the interests of completeness.

<sup>27</sup> An initial report is the first report received from a liquidator and is required to be submitted within 6 months of his/her appointment. In the majority of cases, the decision as to whether or not to grant relief is made based on this report.

<sup>28</sup> In some cases a subsequent report is required from the liquidator when his/her investigations have progressed further. In circumstances where a subsequent report is considered to be necessary, 'relief at this time' is usually granted in respect of the initial report.

The Table below provides details of the sectoral distribution of companies in respect of which liquidators' initial reports were received during the year.

**Table 7 Sectoral analysis of liquidators' initial section 682 reports received – 2017**

| Sector                          | 2017       |             | 2016       |             |
|---------------------------------|------------|-------------|------------|-------------|
|                                 | Number     | %           | Number     | %           |
| Wholesale & retail              | 200        | 31          | 174        | 25          |
| Construction                    | 73         | 11          | 92         | 13          |
| Community, social & other       | 61         | 9           | 89         | 13          |
| Manufacturing & printing        | 34         | 5           | 82         | 12          |
| Hotels, bars & catering         | 100        | 15          | 75         | 11          |
| Marketing & promotion           | 15         | 2           | 46         | 7           |
| Real estate & renting           | 50         | 8           | 44         | 6           |
| Technology & telecommunications | 40         | 6           | 31         | 4           |
| Financial & leasing             | 40         | 6           | 17         | 2           |
| Transport & distribution        | 16         | 2           | 15         | 2           |
| Agriculture, mining & marine    | 18         | 3           | 12         | 2           |
| Recruitment & security services | 5          | 1           | 6          | 1           |
| <b>Total</b>                    | <b>652</b> | <b>100%</b> | <b>683</b> | <b>100%</b> |

### Timeliness of liquidators' reporting

Over the course of the year, the Office issued 43 (2016:106) notices to liquidators advising them that they were in default of their statutory reporting obligations. Almost all of these defaults were promptly rectified as a result of this action and at the end of the year 97% of the first reports due during the year had been received with only 6 first reports outstanding. The level of liquidators' failure to comply with their reporting obligations is low and where appropriate enforcement action, up to and including criminal prosecution, may result from such persistent breaches of statutory obligations.

### Standard of liquidators' reporting

As reported in previous years, the standard of liquidators' reports received during the year was considered to be broadly satisfactory. However, in a small number of cases, the quality of reporting was not of the required standard. Where this arises, it is dealt with through engagement with the relevant practitioners. The vast majority of persons acting as liquidators are members of Prescribed Accountancy Bodies and, as such, are under IAASA's supervisory remit (see further elaboration below).

### Qualification for appointment as a liquidator or examiner

Also of relevance in the context of the foregoing is section 633 of the Act, which introduced new rules for qualification to act as a liquidator. The Act defines five categories of individuals who are entitled to act as a liquidator. These are:

- i. members of a Prescribed Accountancy Body holding a practicing certificate;
- ii. solicitors holding a practicing certificate;
- iii. members of any other professional bodies recognised for this purpose by IAASA (none currently);
- iv. persons qualified to act as a liquidator in another EEA<sup>29</sup> state; and
- v. persons with practical experience of windings-up and knowledge of relevant law prior to the commencement of the Act who are authorised by IAASA. Before granting an authorisation of this type, IAASA has to be satisfied, having consulted the ODCE, that the person is a fit and proper person to act as a liquidator.

<sup>29</sup> European Economic Area (EU States plus Liechtenstein, Iceland and Norway)

An individual who has applied to IAASA for authorisation under (v) above may continue to act pending the determination of their application. At the end of 2017, IAASA had formally requested the views of the Director of Corporate Enforcement in respect of 10 individuals who have applied for authorisation under this provision. The views of the Director on these applications have been conveyed to IAASA.

In addition to the qualification requirements prescribed in section 633, section 634 provides that all liquidators must have in place adequate professional indemnity insurance ("PII"). IAASA has issued Regulations prescribing the required level of PII required and these Regulations are available on IAASA's website<sup>30</sup>.

A related provision, section 519 of the Act, provides that a person can only act as an examiner if they are qualified to act as a liquidator.

## SECTORAL DISTRIBUTION OF OTHER EXTERNAL INPUTS (I.E. EXTERNAL INPUTS OTHER THAN LIQUIDATORS' SECTION 682 REPORTS)

As can be seen from Table 5, in aggregate those external inputs other than liquidators' section 682 reports accounted for 29% (2016: 27%) of total external inputs received during the year. The Table below provides an analysis of the sectoral distribution of those other external inputs.

**Table 8 Sectoral distribution of external inputs other than liquidators' section 682 reports**

| Sector                          | 2017       |             | 2016       |             |
|---------------------------------|------------|-------------|------------|-------------|
|                                 | Number     | %           | Number     | %           |
| Real estate & renting           | 91         | 25          | 80         | 23          |
| Not a company                   | 30         | 8           | 55         | 15          |
| Community, social & personal    | 26         | 7           | 39         | 11          |
| Insurance health & social work  | 25         | 6           | 33         | 10          |
| Construction                    | 19         | 5           | 24         | 7           |
| Finance & leasing               | 31         | 9           | 23         | 6           |
| Manufacturing & printing        | 20         | 5           | 19         | 5           |
| Wholesale & retail              | 34         | 9           | 16         | 5           |
| Technology & telecommunications | 25         | 7           | 15         | 4           |
| Transport & distribution        | 26         | 7           | 14         | 4           |
| Hotels, bars & catering         | 13         | 4           | 14         | 4           |
| Marketing & promotion           | 10         | 3           | 12         | 3           |
| Agriculture, mining & marine    | 12         | 3           | 7          | 2           |
| Recruitment & security services | 8          | 2           | 4          | 1           |
| Other business sectors          | 0          | 0           | 0          | 0           |
| <b>Total</b>                    | <b>370</b> | <b>100%</b> | <b>355</b> | <b>100%</b> |

30 <http://iaasa.ie/getmedia/1a9c9ab1-994e-4491-8f6c-6d8a40d27f64/S-I-No-127-of-2016.pdf>

## COMPLAINTS

The Office receives substantial numbers of complaints annually from members of the public. During the year a total of 234 complaints were received (2016: 248), which accounted for 18% (2016: 19%) of all external inputs received. The Table below provides an analysis of the subject matter of complaints received.

**Table 9 Complaints received (analysed by character of primary reported default)**

|  | 2017       |             | 2016       |             |
|--|------------|-------------|------------|-------------|
|  |            | %           |            | %           |
| Annual/Extraordinary General Meeting related                                   | 28         | 12          | 33         | 14          |
| Directors' conduct (responsibilities & filing)                                 | 29         | 13          | 31         | 12          |
| Allegations of reckless/fraudulent/insolvent trading                           | 35         | 15          | 28         | 11          |
| Allegations of forgery/furnishing of false information/<br>falsified documents | 12         | 5           | 23         | 9           |
| Relating to the issue of unpaid debts  | 13         | 5           | 19         | 7           |
| Access to accounting records/minutes of meetings                               | 13         | 5           | 14         | 6           |
| Register of members related  | 10         | 4           | 12         | 5           |
| Audit/auditor related  | 16         | 7           | 10         | 4           |
| Receivership related   | 2          | 1           | 9          | 4           |
| Registered address related   | 17         | 7           | 8          | 3           |
| General shareholder rights issues  | 5          | 2           | 7          | 3           |
| Acting as a director while a bankrupt/restricted/disqualified                  | 0          | 0           | 7          | 3           |
| Companies trading whilst struck off the Register/dissolved                     | 9          | 4           | 5          | 2           |
| Relating to improper use of the word "Limited"                                 | 3          | 1           | 5          | 2           |
| Liquidation/phoenix activity   | 11         | 5           | 5          | 2           |
| Display of business particulars  | 0          | 0           | 4          | 2           |
| Issues relating to change of accounting year end                               | 11         | 5           | 2          | 1           |
| Other  | 20         | 9           | 26         | 10          |
| <b>Total</b>   | <b>234</b> | <b>100%</b> | <b>248</b> | <b>100%</b> |

## AUDITORS' INDICTABLE OFFENCE REPORTS

### Introduction – overview of the auditor reporting regime

Section 393(1) of the Act provides that, where, in the course of and by virtue of their carrying out of an audit, information comes into the possession of a company's auditors which leads them to form the opinion that there are reasonable grounds for believing that an indictable offence under the Act has been committed by the company, or an officer or agent of the company, the auditors are required to report that opinion to the Office. The Office has developed and published guidance to assist auditors in complying with their obligations in this regard<sup>31</sup>.

### Nature of suspected offences reported

During the year, a total of 82 (2016: 69) indictable offence reports were received from auditors. The Table below provides an analysis of the nature of suspected offences notified in those reports. It should be noted that the number of reports received does not accord with the number of suspected offences reported as, in a number of instances, reports included reference to more than one suspected offence.

**Table 10 Analysis of suspected indictable offences reported by auditors**

|  | 2017                   |             | 2016                   |             |
|--|------------------------|-------------|------------------------|-------------|
|  |                        | %           |                        | %           |
| Directors' loan infringements                                      | 37                     | 44          | 58                     | 79          |
| Failure to maintain proper accounting records                      | 15                     | 18          | 10                     | 14          |
| Issues relating to access to accounting records                    | 1                      | 1           | 2                      | 3           |
| Failure to prepare consolidated financial statements               | 0                      | 0           | 3                      | 2           |
| Issues relating to the directors' approval of financial statements | 2                      | 2           | 1                      | 1           |
| Provision of false statements to auditors                          | 1                      | 1           | 0                      | 0           |
| Obligation to prepare group accounts                               | 2                      | 2           | 0                      | 0           |
| Entity financial statements  | 25                     | 32          | 0                      | 0           |
| <b>Total</b>   | <b>83<sup>32</sup></b> | <b>100%</b> | <b>74<sup>32</sup></b> | <b>100%</b> |

## EXAMINERS' REPORTS

Pursuant to section 534(6) of the Act, where an examiner is appointed to a company, s/he shall, as soon as may be after it is prepared, supply a copy of his or her report to the ODCE. 28 such reports were received from examiners having been contacted and advised of their obligation to do so (2016: 5).

31 Decision Notice D/2006/2 – Revised Guidance on the Duty of Auditors to Report Suspected Indictable Offences to the Director of Corporate Enforcement. This was more recently supplemented by Information Notice I/2009/4 – Reporting Company Law Offences: Information for Auditors

32 Some auditors's reports included indications of more than one suspected offence.



## REFERRALS

As alluded to earlier in this Chapter, the Office forms part of a broader statutory framework that permits the exchange of confidential information between regulatory, enforcement and other relevant bodies, subject to safeguards and appropriate limitations. In that context, the Office receives referrals from other statutory bodies and entities from time to time. During the year under review, the Office received 21 (2016: 28) such referrals from a variety of sources.

## PROFESSIONAL BODIES' INDICTABLE OFFENCE REPORTS

### Recognised Accountancy Bodies ("RABs")<sup>33</sup>

Where a RAB's Disciplinary Committee or Tribunal has reasonable grounds for believing that an indictable offence under the Act may have been committed by a person while that person was a member of the RAB, the RAB is required to report the matter to the Office<sup>34</sup>. While 4 reports were received during the year under review these were non-indictable reports (2016: 5).

### Prescribed Professional Bodies ("PPBs")

Similarly, where the Disciplinary Committee or Tribunal of a PPB finds that a member conducting a liquidation<sup>35</sup>, examinership<sup>36</sup> or receivership<sup>37</sup> has not maintained appropriate records, or has reasonable grounds for believing that the member has committed an indictable offence under the Act during the course of a liquidation, examinership or receivership, the PPB concerned is required to report the matter to the Office.

Prescribed accountancy bodies are so deemed by virtue of IAASA's recognition of them as such as per part 15 of the Act.

'*Prescribed professional body*' in relation to sections 488, 558 and 688 refers to a disciplinary committee or a tribunal of a prescribed professional body associated with section 633 (setting qualifications for appointment of liquidators, examiners and receivers).

The PPBs are:

- Law Society of Ireland
- ACCA – Association of Chartered Certified Accountants
- AIA – Association of International Accountants
- CIMA – Chartered Institute of Management Accountants
- CIPFA – Chartered Institute of Public Finance and Accountancy
- ICAEW – Institute of Chartered Accountants in England & Wales
- ICAI – Institute of Chartered Accountants in Ireland
- ICAS – Institute of Chartered Accountants of Scotland
- ICPAI – Institute of Certified Public Accountants in Ireland
- IIPA – Institute of Incorporated Public Accountants whose members transferred to ICPAI Ireland for regulatory and service support purposes with effect from 1 September 2017

No reports of this nature were received from PPBs during the year (2016: 0).

<sup>33</sup> A RAB is an accountancy body that is permitted to authorise its members and member firms, subject to those members having satisfied certain criteria, to act as statutory auditors and audit firms respectively. There are six RABs, i.e., the:

- Association of Chartered Certified Accountants (ACCA)
- Institute of Certified Public Accountants (ICPAI)
- Institute of Chartered Accountants in England & Wales (ICAEW)
- Institute of Chartered Accountants in Ireland (ICAI)
- Institute of Chartered Accountants of Scotland (ICAS)
- Institute of Incorporated Public Accountants (IIPA)

<sup>34</sup> Section 931(4) of the Act

<sup>35</sup> Section 688 of the Act

<sup>36</sup> Section 558 of the Act

<sup>37</sup> Section 448 of the Act

## LIQUIDATORS' REPORTS REGARDING POSSIBLE CRIMINALITY

In addition to their reporting obligations under section 682 as detailed above, in accordance with section 723(5) of the Act, liquidators are required, in circumstances where it appears that any past or present officer of the company concerned has been guilty of any offence in relation to the company, to make a report to the DPP and also to refer the matter to the ODCE. This reporting obligation extends to all liquidations, solvent and insolvent (i.e. both Members' and Creditors' Voluntary liquidations and Court liquidations) alike. No such reports were received by the Office during the year (2016: 0).

## DISCLOSURES UNDER THE PROTECTED DISCLOSURES ACT 2014<sup>38</sup>

Section 22 of the Protected Disclosures Act 2014 provides that every public body shall prepare and publish, not later than 30 June each year, a report in relation to the immediately preceding year in a form which does not enable the identification of the persons involved. The abovementioned report is required to specify:

- i. the number of protected disclosures made to the public body;
- ii. the action (if any) taken in response to those protected disclosures; and
- iii. such other information relating to those protected disclosures and the action taken as may be requested by the Minister for Public Expenditure & Reform from time to time.

The Office's report under section 22 is set out at Appendix 3 to this Report.

## INTERNAL INPUTS

### INTRODUCTION

As will be evident from the earlier part of this Chapter, the volume of external inputs received is such that most case files opened within the Office are opened in response to what are termed "external inputs", e.g., auditors' reports, liquidators' reports and complaints from members of the public. Alongside those external inputs, the Office also generates what are termed "internal inputs" through a proactive approach to enforcement of the Act.

The nature and composition of internal inputs varies from year to year having regard to a number of relevant considerations, including:

- the Office's particular compliance and/or enforcement objectives in that particular year or over a particular cycle;
- thematic and/or once-off issues arising;
- available staff resources and the associated skillsets; and
- other relevant facts and circumstances.

Internal inputs can, therefore, range across a variety of enforcement headings. Illustrative examples include:

- actions focussing on particular cohorts of persons, e.g., persons who are undischarged bankrupts, restricted or disqualified;
- civil or criminal enquiries commenced on own initiative;
- actions in respect of dissolved insolvent companies; and
- actions relating to liquidator performance/behaviour.

## ACTIONS FOCUSING ON PARTICULAR COHORTS OF PERSONS, E.G., PERSONS WHO ARE UNDISCHARGED BANKRUPTS, RESTRICTED OR DISQUALIFIED

During the course of the year enquiries were initiated in a number of instances in which suspicions arose that persons who were undischarged bankrupts, disqualified or restricted may have been acting as company directors or in other specified roles (e.g., such as auditors) while not permitted to do so.

<sup>38</sup> The Protected Disclosures Act 2014 is available at <http://www.irishstatutebook.ie/eli/2014/act/14/enacted/en/pdf>

## INVESTIGATIONS COMMENCED ON OWN INITIATIVE

As indicated above, the Office initiates civil and criminal enquiries and investigations on its own initiative where this is considered necessary or otherwise appropriate having regard to the underlying facts and circumstances. The triggers for such actions can include, for example:

- issues identified internally;
- issues referred internally;
- issues identified on foot of a review of material filed with the CRO or other relevant documentation;
- issues identified through monitoring of litigation;
- issues identified through a review of press *reportage*, the internet, social media etc.

Depending upon the nature of the underlying circumstances, these enquiries and investigations may be furthered through the use of:

- the Director's civil investigative powers;
- the Director's criminal investigative powers; and/or
- the powers vested in the Gardaí seconded to the Office by virtue of those officers being members of An Garda Síochána.

## DISSOLVED INSOLVENT COMPANIES

The Office characterises as "*dissolved insolvent companies*" those companies that:

- are struck off the Register for failure to file their annual returns; and which
- at the date of strike off, had liabilities, whether actual, contingent or prospective.

It is open to the Office to apply to the High Court for the disqualification of the directors of such struck off companies<sup>39</sup>. However, company law also provides<sup>40</sup> that the Court cannot disqualify a person who demonstrates to the Court that the company had no liabilities at the time of strike off or that those liabilities had been discharged before the initiation of the disqualification application. In considering the sanction to be imposed, the Court may instead restrict<sup>41</sup> the director(s) where it adjudges that disqualification is not warranted under the particular circumstances<sup>42</sup>.

Where there is evidence to suggest that a company was insolvent at the date upon which it was struck off the Register, it is the Office's policy to consider seeking the disqualification of the company's directors. This is because, by allowing the company to be struck off the Register, the directors avoid bringing the company's existence to a conclusion in the appropriate manner, i.e., through the appointment of a liquidator. By not appointing a liquidator, the company's directors also avoid the scrutiny of their behaviour as provided for by section 682 of the Act.

Where it appears to the Office that a director is liable to be disqualified in these circumstances, it may offer the individual concerned the opportunity to voluntarily submit to a Disqualification Undertaking. In the context of the foregoing, also worthy of note is the fact that, where a company is struck off the Register, its remaining assets are vested in the Minister for Public Expenditure & Reform in accordance with the provisions of the State Property Act 1954.

During 2017 the availability of additional resources allowed the Office to undertake further investigation of directors who allowed their companies to be struck off the Companies Register while having significant outstanding liabilities. Such individuals are liable to disqualification pursuant to section 842(h) of the Act. The Office investigated a number of companies within this category and commenced a disqualification process against a number of company directors. At the end of 2017, 4 directors associated with two unrelated companies were disqualified on foot of voluntary Disqualification Undertakings given under section 851 of the Act. Such undertakings may be given as an alternative to facing High Court proceedings on foot of section 842(h). It is expected that during 2018 there will be a significant increase in the number of directors who will be disqualified in these types of cases whether by way of High Court applications under section 842(h) or by voluntarily submitting to Disqualification Undertakings under Section 851.

<sup>39</sup> Section 842(h) of the Companies Act 2014

<sup>40</sup> Section 843(3) of the Companies Act 2014

<sup>41</sup> Section 819 of the Companies Act 2014

<sup>42</sup> Section 845(3) of the Companies Act 2014

## ACTIONS RELATING TO LIQUIDATOR PERFORMANCE/BEHAVIOUR

One of the statutory functions of the Director is to:

*"...exercise, insofar as the Director considers it necessary or appropriate, a supervisory role over the activity of liquidators and receivers in the discharge of their functions under this Act"<sup>43</sup>.*

Whilst the section 682 Liquidators' report process, as outlined earlier in this Chapter, provides the Office with a means of indirectly supervising certain aspects of liquidators' work, from time to time the Office considers it appropriate or otherwise necessary to engage in more direct supervision of liquidators' work. This, more direct, supervision is effected through the exercise of the powers conferred by section 653 of the Act<sup>44</sup>.

Section 653 of the Act provides that the Director may:

- either on his own initiative or on foot of a complaint from a member, contributory or creditor of a company, request production of a liquidator's books for examination – either in relation to a particular liquidation process, or to all liquidations undertaken by the liquidator; and
- seek the liquidator's answers to any questions concerning the content of such books, and all such assistance in the matter as the liquidator is reasonably able to give.

The powers conferred upon the Director by section 653 are accompanied by certain safeguards and limitations, i.e.:

- the Office must inform the respondent liquidator of the reason(s) as to why the request is being made; and
- a request may not be made in respect of books relating to a liquidation that has concluded more than six years prior to the request.

## QUANTUM OF INTERNAL INPUTS – 2017

During the course of 2017, a total of 97<sup>45</sup> (2016: 128) internal inputs were generated.

<sup>43</sup> Section 949(1)(e) of the Companies Act 2014

<sup>44</sup> Section 446 of the Act includes a similar provision relating to receivers

<sup>45</sup> Relating to the broad categories of bankruptcy, disqualification, restriction and examinership.

## PART B: THROUGHPUTS

Generally speaking, inputs, irrespective of whether from internal or external sources, result in the opening of a case file. In the case of liquidators' section 682 reports, cases generally reach a natural conclusion when a decision has been taken as to whether or not to relieve the liquidator of the obligation to seek the company's directors' restriction and, where relief is granted, the file is usually closed.

Where relief is not granted, or only partially granted (i.e., granted in respect of some, but not all, of the directors), the Office will usually invite the relevant director(s) to provide a Restriction (or Disqualification, if applicable) Undertaking. If the offer of an Undertaking is not accepted (or if the case is not one in which, in the Office's assessment, an Undertaking offer is appropriate), a Court application will have to be made by the liquidator. The Office monitors the progress through the Courts of the relevant restriction or disqualification proceedings and the outcome is recorded once the proceedings have been determined. However, the Office also reviews cases from time to time where concerns come to its attention regarding, for example:

- credible suggestions of excessive liquidators' fees;
- apparent failures to distribute assets on a timely basis; and
- apparent failures to conclude a liquidation within a reasonable timeframe.

In the case of other inputs, such as, for example, auditors' reports, public complaints, protected disclosures, referrals etc., a file is opened and the subject matter is examined to determine, in the first instance, whether the matter is one that comes within the Office's remit. Thereafter, cases are progressed on the basis deemed most appropriate to their individual circumstances, with methods of progression including, for example:

- meeting the complainant, typically with a view to obtaining an enhanced understanding of the issues being complained of;
- meeting the directors (for example, in a case relating to directors' loans);
- exercising civil powers, such as, for example, issuing demands to:
  - companies and their directors for the production of the minutes of meetings and statutory registers;
  - companies and their directors for the production of the company's books and records;
  - liquidators for the production of their books and records, i.e., the liquidator's own books and records as distinct from those of the company in liquidation (which may, in parallel, be sought);
  - auditors requiring the provision of supplementary information regarding an indictable offence report received;
  - persons acting, or purporting to act, as auditors for the production of evidence of their qualifications;
  - bankrupts who are acting as company directors and secretaries, seeking sworn statements relating to their insolvency status; and
  - liquidators requiring that they file outstanding section 682 reports;
- exercising criminal powers, such as, for example, executing search warrants, exercising the powers of arrest and detention etc.;
- liaising with other statutory authorities potentially being in a position to assist the Office's enquiries, for example through the sharing of relevant information.

Upon completion of the Office's enquiries, a decision is made as to the most appropriate course of action to be taken. This can include, for example:

- the decision to take no further action (for example, where enquiries suggest that there has been no breach of company law or where the breach is minor in nature and enforcement action would, as a consequence, be disproportionate);
- a decision not to take enforcement action on this occasion but, rather, to issue a warning that any recurrence will precipitate enforcement action (for example, where the breach has been rectified and/or remediated and rectification/remediation has been evidenced to the ODCE's satisfaction);
- referral to other statutory authorities or professional bodies of matters relevant to their respective remits;
- the issuing of civil directions, e.g., directions to companies and/or their directors requiring the remedying of stated defaults within prescribed timeframes;
- the initiation of civil proceedings, i.e., Court applications for the purpose of seeking specified remedies;
- the initiation of summary criminal proceedings or referral of the matter to the DPP for consideration as to whether charges should be directed on indictment.

Set out in the following Tables are details of the various caseloads progressed by the Office during the year under review. Details of the outputs that flow from the processing of the Office's various caseloads are detailed in the next section of this Chapter.

**Table 11 Throughput of liquidators' section 682 reports – 2017**

|   |     |            |
|---|-----|------------|
| Section 682 reports on hand at 1 January, 2017                    |     | 425        |
| New reports received during 2017                                  | 652 |            |
| Less: Reports in respect of which determinations made during 2017 | 600 |            |
| <b>Section 682 reports on hand at 31 December, 2017</b>           |     | <b>477</b> |

Detail regarding the Office's determinations on liquidators' reports is provided later in this Chapter.

**Table 12 Throughput of other cases – 2017**

|   |     |           |
|---|-----|-----------|
| Other cases on hand at 1 January, 2017          |     | 93        |
| New cases opened during 2017                    | 467 |           |
| Less: Cases concluded during 2017               | 471 |           |
| <b>Other cases on hand at 31 December, 2017</b> |     | <b>89</b> |

## PART C: OUTPUTS

### OUTPUTS FROM THE SECTION 682 PROCESS (I.E., LIQUIDATOR REPORTING)

The Office made definitive decisions (i.e. decisions other than to grant 'Relief at this time') on 600 liquidators' reports during 2017 (2016: 736), with a further 265 decisions made to grant 'Relief at this time' (2016: 254).

Of the definitive decisions taken during 2017, a total of 501 were made in respect of initial reports (2016: 545), with a further 99 being made in respect of subsequent reports (2016: 191).

The decisions taken in respect of initial and subsequent reports respectively are analysed in the following two Tables.

**Table 13 Analysis of decisions taken in respect of initial liquidators' section 682 reports**

| Decision type                     | 2017       |             | 2016       |             |
|-----------------------------------|------------|-------------|------------|-------------|
|                                   |            | %           |            | %           |
| Full relief <sup>46</sup>         | 476        | 76          | 503        | 74          |
| No relief <sup>47</sup>           | 19         | 3           | 27         | 4           |
| Partial relief <sup>48</sup>      | 6          | 1           | 15         | 2           |
| Relief at this time <sup>49</sup> | 126        | 20          | 137        | 20          |
| <b>Total</b>                      | <b>627</b> | <b>100%</b> | <b>682</b> | <b>100%</b> |

**Table 14 Analysis of decisions taken in respect of subsequent liquidators' section 682 reports**

| Decision type                     | 2017       |             | 2016       |             |
|-----------------------------------|------------|-------------|------------|-------------|
|                                   |            | %           |            | %           |
| Full relief <sup>46</sup>         | 73         | 31          | 138        | 45          |
| No relief <sup>47</sup>           | 20         | 9           | 43         | 14          |
| Partial relief <sup>48</sup>      | 6          | 2           | 10         | 3           |
| Relief at this time <sup>49</sup> | 139        | 58          | 117        | 38          |
| <b>Total</b>                      | <b>238</b> | <b>100%</b> | <b>308</b> | <b>100%</b> |

<sup>46</sup> Full relief is granted in cases where the Office forms the opinion that, based on the information available (including the liquidator's report(s)), all of the directors of the insolvent company appear to have acted honestly and responsibly in the conduct of the company's affairs.

<sup>47</sup> No relief is granted in cases where the Office forms the opinion that, based on the information available (including the liquidator's report(s)), there is insufficient evidence to demonstrate that any of the directors of the insolvent company acted honestly and responsibly in the conduct of the company's affairs.

<sup>48</sup> Partial relief is granted in circumstances where, based on the information available (including the liquidator's report(s)), the Office forms the opinion that some, but not all, of the directors of the insolvent company appear to have acted honestly and responsibly in the conduct of the company's affairs.

<sup>49</sup> Relief at this time' is granted in cases where the Office is satisfied that the liquidator needs more time in which to progress/complete his/her investigations into the circumstances giving rise to the company's demise. Similarly, on occasion, the Office considers it necessary to postpone making a definitive decision due to the complexity of certain companies' affairs and the associated necessity for supplemental engagement with the liquidators concerned. Where 'Relief at this time' is granted, the liquidator will be required to submit a subsequent report.

## Relief decisions made on liquidators' reports

Complete lists of the directors, and associated companies, in respect of which full relief and relief at this time respectively were granted during 2017 are available at [www.odce.ie](http://www.odce.ie).

## Restriction and Disqualification Undertakings

As detailed earlier in this Chapter, following the commencement of the Act on 1 June, 2015, the Office introduced a procedure whereby those directors, in respect of whom it is determined that the liquidator should not be relieved of the obligation to apply to the High Court for their Restriction, may be invited to voluntarily submit to a Restriction (or Disqualification, if applicable) Undertaking. The Table below sets out the number of Undertaking offers issued during the year under review, together with details of the number of Undertaking offers accepted and declined respectively.

**Table 15 Undertaking offers issued, accepted and declined**

|   | 2017  |           | 2016  |           |
|---|-------|-----------|-------|-----------|
|   | Cases | Directors | Cases | Directors |
| <i>Restrictions:</i> <sup>50</sup>        |       |           |       |           |
| Number eligible for Undertaking offers    | 50    | 103       | 84    | 143       |
| Number of offers issued                   | 43    | 90        | 80    | 138       |
| Number of offers accepted                 | 42    | 83        | 60    | 93        |
| Number of offers not accepted             | 1     | 4         | 17    | 28        |
| Number of offers outstanding at year end: | 2     | 3         | 3     | 17        |
| <i>Disqualifications:</i>                 |       |           |       |           |
| Number eligible for Undertaking offers    | 3     | 4         | 5     | 8         |
| Number of offers issued                   | 3     | 4         | 5     | 8         |
| Number of offers accepted                 | 1     | 1         | 5     | 8         |
| Number of offers not accepted             | 1     | 1         | 0     | 0         |
| Number of offers outstanding at year end: | 1     | 2         | 0     | 0         |

<sup>50</sup> A number of restrictions accepted in 2017 relate to undertakings offered in 2016.



## Outcome of liquidators' Court applications

As indicated earlier in this Chapter, where not granted relief by the Office and where invitations to submit to Undertakings are not accepted, liquidators are required to apply to the High Court seeking the restriction of relevant company director(s). In certain instances, liquidators will, as a consequence of their own investigations and based on their assessment of director behaviour, opt to seek to have directors disqualified rather than restricted. The Table below sets out details of the results of liquidators' Court applications as delivered by the High Court during the year.

**Table 16 Results of liquidators' Court applications – 2017**

|                                    | 2017      |           | 2016                   |            |
|------------------------------------|-----------|-----------|------------------------|------------|
|                                    | Cases     | Directors | Cases                  | Directors  |
| Restriction Declarations granted   | 17        | 31        | 48                     | 90         |
| Disqualification Orders granted    | 6         | 9         | 7                      | 11         |
| Declarations or Orders not granted | 7         | 11        | 11                     | 23         |
| <b>Total</b>                       | <b>30</b> | <b>51</b> | <b>62<sup>51</sup></b> | <b>124</b> |

On foot of Undertakings or Court Orders, a total of 118<sup>52</sup> (2016: 183) directors were restricted and 10<sup>53</sup> (2016: 19) directors disqualified. Further analysis of the Orders made by the Court on foot of liquidators' applications and Undertakings is provided in Appendices 4 to 6 of this Report.

## Facts and circumstances considered by the High Court in making Disqualification Orders and by the ODCE in offering Disqualification Undertakings

Set out below are examples of the types of issues that were considered by the High Court in making Disqualification Orders or to which regard was had by the ODCE in offering Disqualification Undertakings (and in response to which Undertakings were accepted). The full list is set out at Appendix 5 to this Report. In all instances the Orders/Undertakings were on foot of liquidators' section 682 reports following, where necessary, the provision of additional information and clarification as sought by the ODCE:

- a company involved in the importation and reselling of high end cars went into liquidation on foot of a petition by the Revenue Commissioners for unpaid taxes approaching €2.5 million. The company had failed to maintain proper books and records and was not tax compliant for a number of years prior to liquidation. For a short period prior to liquidation the company had registered a fictitious person as a director of the company with the Companies Registration Office. The company failed to file audited accounts with the CRO for 5 years prior to liquidation and the director of the company did not adequately cooperate with the liquidator. The director accepted a Disqualification Undertaking offer for a period of 5 years.
- a company involved in general building, construction and property investment activities had substantial arrears to the Revenue Commissioners. The company engaged in the under declaration of VAT on property sales, property rentals and other works completed. Also, no VAT was declared to the Revenue Commissioners on cash receipts. The company failed to keep proper books and records for a protracted period of time. Although there were substantial transactions going through the Company's accounts little had been made available to the liquidator in terms of records. The directors failed to co-operate adequately with the Liquidator. The directors failed to collect sums due to the Company. They failed to deliver a Statement of Affairs within the appropriate deadline. They repeatedly failed to file Company Registration Office statutory annual returns by their due date.

<sup>51</sup> Total does not equate to the sum of the above due to the fact that, in five cases, some directors were restricted while others were disqualified.

<sup>52</sup> Appendix 4

<sup>53</sup> Appendix 5

- a company involved in the provision of mobile and on site security services traded while insolvent from the outset of its incorporation. The directors underpaid the Company's liability to the Revenue Commissioners in respect of PAYE/ PRSI and VAT. PAYE/PRSI deducted from staff was used to fund the Company's operations and consequently left the staff in a vulnerable position. It was the Liquidator's belief that if the Revenue Commissioners had not completed a tax audit on the company that the directors would have continue to trade, even though it was insolvent. Transactions that were put through the Company's bank accounts personally benefitted the directors and in so doing impeded payment to creditors. The directors did not engage with the Liquidator and failed to provide to him the books and records of the Company. The Directors provided an inaccurate Statement of Affairs at the creditors meeting which showed that the Company had assets that did not exist at the date of winding up.
- directors of a hair dressing salon failed to comply with Revenue obligations and duties resulting in tax liabilities of €153,770.72. The Company paid other creditors and advanced €53,875 to the company while incapable of discharging its liabilities to Revenue. The company continued to trade while insolvent, based in information from balance sheet the company was insolvent from when it began trading. The Company also breached the Companies Acts in failing to file Statutory Returns with the Companies Registration Office. When the company closed, the business was taken over by a Phoenix Company. The liquidator reported that queries to the Directors were responded to inadequately.
- the Revenue Commissioners petitioned the High Court for the winding up of this company which was engaged in manufacture of wood products. The petition was in response to tax liabilities of €2,447,616.76. The Directors allowed this company to continue to trade while insolvent and from the date of dissolution the company continued to trade without legal status. The company breached the Companies Acts in the requirement to file statutory annual returns to the Companies Registration Office and was struck off the register twice. An amount of €10,000 was taken from the Company's bank account and paid to one of the directors 3 days prior to the liquidation. The liquidator considered this to be a preferential payment and a substantial amount of the company's equipment and plant was removed in the period leading up the liquidation and despite requests from the liquidator for supporting documentation for this transaction none was provided. Also, the director failed to reply to queries raised by the liquidator during this investigation.

## OUTPUTS FROM ENFORCEMENT WORK

The Office's enforcement work takes a variety of forms, including:

- engaging with company directors and other interested parties with a view to securing the voluntary rectification/ remediation of instances of non-compliance;
- exercising the Director's powers to secure compliance and/or to progress enquiries and investigations;
- exercising the Director's functions to permit/facilitate compliance;
- seeking civil remedies in the High Court in response to indications of non-compliance;
- taking summary criminal proceedings before the District Court;
- where, having conducted an investigation and concluded on the basis of same that the indications of suspected criminality are such that trial on indictment may be warranted, referring investigation files to the DPP for consideration as to whether the matters therein warrant criminal prosecution before the Circuit Court; and
- referring indications of possible breaches of regulatory provisions other than those relating to company law to other relevant regulators (incorporating also the referral of relevant matters to professional bodies).

The principal outputs associated with the Office's enforcement activities are detailed below.

## SECURING VOLUNTARY RECTIFICATION/REMEDIATION

### Directors' loans infringements

In 37 cases (2016: 58) where suspected directors' loan infringements had been reported by auditors, or had otherwise come to attention, the Office's actions resulted in rectifications (including the repayment/reduction of loans) totalling €15.5m (2016: €17m). Such rectifications are in the interests of affected companies' members and creditors.

### Failure to comply with accounting standards

Section 291(3) of the Act requires companies to prepare their financial statements, *inter alia*, in accordance with applicable accounting standards. Section 291(9) provides that failure to comply with that requirement is a Category 2 offence on the part of the company and any officer in default. In 25 (2016: 2) instances where companies' failure to comply with accounting standards had been reported to the Office by way of indictable offence reports, warnings issued to the companies in question. Specifically, the directors of the companies in question were afforded the opportunity to address the underlying non-compliance and warned that, in the event of reoccurrence, enforcement action was the likely response.

### Persons acting as company directors while not permitted to do so

During the year, the Office undertook a review of the register of disqualified and restricted persons as maintained by the Registrar of Companies. Arising from the review, 53 names (2016: 83) appeared to be in contravention of such orders. Following ODCE intervention, the individuals' positions were regularised.

### Total cautions issued

In addition to the foregoing, cautions issued to a total of 58 companies (2016: 59) on a variety of matters.

## SECURING COMPLIANCE AND PROGRESSING ENQUIRIES AND INVESTIGATIONS THROUGH THE EXERCISE OF THE DIRECTOR'S STATUTORY POWERS

A broad range of legislative provisions were utilised during the course of the year under review in order to both secure compliance with company law and to progress enquiries and investigations respectively. Specific outputs in that regard included:

- serving 12 statutory directions to produce specified books or documents under section 778 of the Act (2016: 3);
- serving 17 statutory directions for assistance and explanations under section 784 of the Act (2016: 0), relating to books and documents required under production orders served under section 778 or 780;
- serving 7 statutory directions requiring third parties to produce books and documents under section 780 of the Act (2016: 2), relating to books and documents required under production orders served under section 778;
- serving 10 statutory requests on auditors for information under section 393 of the Act (2016:1);
- serving 5 statutory notices under section 782 of the Act – Proposed Requirement Pursuant to Section 780(1)(c) of the Companies Act 2014 concerning Books or Documents;
- serving 5 statutory requests on Companies to produce minutes of directors' meetings under section 166 of the Act (2016: 0);
- serving 2 statutory requests to produce minutes of general meetings under section 199 of the Act (2016: 0);
- serving 5 orders under Section 52 of the Criminal Justice (Theft and Fraud Offences) Act 2001 (2016: 0);
- 45 statutory directions (2016: 106), pursuant to section 797(1) of the Act, requiring liquidators to comply with their reporting obligations under section 682;
- 2 directions under section 797 of the Act in relation to Court Order Compliance (2016: 0).

## PERMITTING/FACILITATING COMPLIANCE THROUGH THE EXERCISE OF THE DIRECTOR'S STATUTORY FUNCTIONS

During the year, 11 requests (2016: 2) were received from companies seeking a direction disapplying the limitation in section 288(9) of the Act, under which, ordinarily, a company may not alter its current or previous year end date more than once in a five-year period.

## CIVIL REMEDIES SOUGHT

### High Court application

During the year an application was made to the High Court in the context of proceedings that had been initiated by a company seeking that it be wound up. The company in question was one in respect of which a criminal investigation by the Office had already been commenced. On the consent of all relevant parties, the High Court made an order directing the provisional liquidator (who the Court had, on that same day, appointed to the company) to allow the Office to forthwith take possession of certain original and copy documentation of, or relating to, the company's affairs, subject to certain specified safeguards which were put in place to vindicate the privacy entitlements of certain third parties.

### Dissolved insolvent companies

Several thousand companies are struck off the Register in any given year. However, only some of these would actually be insolvent (i.e., unable to discharge their debts as they fall due) at the date of strike off. Many more would typically never have traded or would have discharged all outstanding liabilities prior to being struck off. Against this backdrop, the Office has historically pursued a policy of seeking to identify companies where there is evidence of material unpaid debts having existed at the date of strike off. In the case of such companies, the Office's policy has historically been to consider seeking the disqualification of such companies' directors by way of applications to the High Court.

### Other civil litigation

During the year under review, the Office was also involved in miscellaneous civil proceedings, details of which are summarised in the Table below.

**Table 17 Details of civil proceedings – 2017**

*The Director of Corporate Enforcement -v- Irish Bank Resolution Corporation Limited (In Special Liquidation) – 2010 No. 323 COS*

The Director was successful in making his application to the High Court in January 2017 for an Order pursuant to Section 788(7)(a) of the Companies Act 2014, to extend 'the prescribed period' under Sections 788(6)(a) and (b) of the Companies Act 2014 by a further period of three years from the 30th January 2017 and a similar Order was granted in respect of the identified Legal Professional Privilege material – the Court also made an Order amending the title to the proceedings to reflect the change of status in the name of the company since the last application made to Court in 2015.

*DMG Hotels Ltd (In Liq) – Applicant – Darren Geoghegan*

One Relief Application (Section 822 of the Companies Act 2014) was received in 2017 namely:

Section 822 of the Companies Act 2014 provides, *inter alia*, that:

- a person who is subject to a restriction declaration, may, on giving no less than 14 days' notice in writing of his or her intention to both the Director and the Liquidator, may apply to the Court by way of Notice of Motion and Grounding Affidavit, for relief, on such terms and conditions as the Court sees fit
- once so notified by the intended applicant, the Liquidator, upon criminal penalty, is obliged, as soon as practicable after receiving such notification, to notify such Creditors and Contributories of the company as have been notified to the Liquidator or become known to the Liquidator

In May 2017, the Office was notified of an intended application for relief pursuant to Section 822 of the Companies Act 2014. The Office engaged with the Applicant's Solicitors to advise them of the information that should, in the Office's assessment, be brought to the Court's attention in the event that the application proceeded to the Court hearing. In June 2017 the application for relief was withdrawn.

*Newbridge Credit Union Ltd (In Liq) – The High Court – 2016 No. 362 COS – Jim Luby -v- Ben Donnelly + Others*

Application by the Director to be joined as a Notice Party to existing High Court proceedings initiated by the Liquidator of a Credit Union

"New" proceedings were served on the Office in September 2016. The issue concerned the winding up of a Credit Union that was taking place pursuant to Part 7 of the Central Bank and Credit Institutions (Resolutions) Act, 2011 and specifically whether the restriction provisions of the Companies Act 2014 should / would apply to that winding up. The ODCE was successful in its application (21.11.2016) to be joined to the liquidation proceedings as a Third Party, on the same day that the Credit Union Development Association (CUDA) also successfully applied to be joined to the proceedings as an *Amicus Curiae*. In the usual way, prior to the hearing, the various parties exchanged Outline Written Legal Submissions. The scheduled hearing date in March 2017 was vacated with the hearing taking place before Mr. Justice Haughton over three days from the 25th to the 27th July 2017. Judgment was reserved. A written Judgment was delivered on the 26th September 2017. A Costs' Order was made on the 11th October 2017 directing that the Costs of one of the named Respondent directors who participated in the proceedings be discharged by the Liquidator and the Director of Corporate Enforcement on a joint and several basis. No further Costs' Order was made in favour of or against any other of the participating parties.

*Console Suicide Bereavement Counselling Ltd (In Liq) – The High Court – 2016 No. 273 COS*

Returnable for the 14th December 2017, the Director issued a Notice of Motion seeking an Order of the High Court for liberty to interrogate electronic material obtained during an investigation that had been on-going since May 2016. Initially Orders of the Court were obtained in summer 2016. Some twelve separate parties were served with the Director's Motion with this now listed to be heard in April 2018.

*Window and Roofing Concepts Ltd (In Liq) – The High Court – 2017 No. 3493P – Gerard May -v- Declan Lally, Francis Traenor, Richard Joyce, Peter Coyne, Dermot Kilfeather, Ian Drennan and AIB Plc*

The Plaintiff issued a High Court Plenary Summons on the 19th April 2017. No Statement of Claim has yet been served. The Seventh-Named Defendant issued a Notice of Motion, returnable to Monday the 13th November 2017, to have the Plaintiff's proceedings Struck Out. This was adjourned on a number of occasions and is now listed before the Court on a date in April 2018. The Plaintiff's Solicitor issued a Notice of Motion to come off record with this being returnable to Monday the 18th December 2017. That Motion was adjourned to a date in 2018.

*In the Matter of Independent News and Media plc – The High Court – 2017 No. 404 COS – The Director of Corporate Enforcement -v- Leslie Buckley*

The Director issued proceedings in November 2017 seeking an Order pursuant to Section 795(4) of the Companies Act 2014 for a determination as to whether information produced by the Respondent in response to a request issued by the Director pursuant to Section 780 of the Companies Act 2014 contained privileged legal material. Affidavits were exchanged between the Parties before the year end with a further Affidavit to be filed by the Respondent in January 2018 prior to the hearing date fixed for the 22nd January 2018.

## SUMMARY CRIMINAL PROCEEDINGS

As has been set out in detail in previous Annual Reports, in recent years the Office has made a conscious policy decision to devote less resources towards pursuing criminality on the less serious end of the spectrum in favour of concentrating its resources on investigating more serious indications of wrongdoing. Consistent with that repositioning, the Office did not initiate any summary prosecutions during the year.

## INDICTABLE CRIMINAL PROCEEDINGS – CHARGES DIRECTED AND SUBSEQUENT PROSECUTIONS

Consistent with the aforementioned policy, during the year the Office had a significant level of engagement with the Office of the DPP, details of which are set out below.

### Files referred to the DPP

During 2017, the ODCE submitted 4 files to the DPP (2016: 5), details of which are set out in the Table below.

**Table 18 Files submitted to the DPP in 2017**

|   |   |  |
|---|---|--|
| 1 | A total of 81 charges recommended against 3 suspects. Charges were recommended in respect of suspected offences under: <ul style="list-style-type: none"> <li>• the Companies Acts;</li> <li>• the Criminal Justice (Theft &amp; Fraud Offences) Act 2001;</li> <li>• the Taxes Consolidation Act 1997; and</li> <li>• common law.</li> </ul> | File was under review by the DPP at year end   |
| 2 | Charges recommended were one count of section 242 of the Companies Act 1990 and one count of Section 6 (Deception) of the Criminal Justice Theft and Fraud Offences Act 2001 against a single suspect.  | Direction to prosecute issued by the DPP. That decision reversed following the death of a witness without whom it was adjudged that a prosecution could not proceed. |
| 3 | Charges recommended were one count of section 297 (Fraudulent Trading) of the Companies Act 1963 and one count of Deception contrary to Section 6 of the Criminal Justice Theft and Fraud Offences Act 2001 against a single suspect.   | Based on the available evidence, DPP directed no prosecution.  |
| 4 | Charges recommended were 13 counts of section 4 (Theft) of the Criminal Justice Theft and Fraud Offences Act 2001 and/or Section 6 (Deception) of the Criminal Justice Theft and Fraud Offences Act 2001 against a single suspect.  | Based on the available evidence, DPP directed no prosecution.  |

### Prosecutions

The 2016 Annual Report made reference to an investigation file in respect of which the DPP had directed that the suspect be charged with fraudulent trading (based on an alleged invoice discounting fraud). On 24 April 2017 the person charged with that offence entered a plea of guilty to that charge. Subsequently, on 20 March 2018 the individual concerned was sentenced to 18 months' imprisonment, with the final 6 months suspended in respect of a single count of Fraudulent Trading contrary to section 297 of the Companies Act 1963 (as amended). The individual concerned was also disqualified from being a company director for a period of 5 years. This conviction and sentence followed an investigation by the ODCE into the generation of false invoices totalling over €600,000.

Previous Annual Reports have included details of proceedings initiated by the DPP in which Mr. Seán FitzPatrick, the former Chairman and Chief Executive of Anglo Irish Bank Corporation plc, was charged with 21 alleged breaches of section 197 (i.e., false statements to auditors) and 6 alleged breaches of section 242 (i.e., furnishing false information) of the Companies Act 1990. Mr. FitzPatrick's retrial in connection with those charges began before His Honour Judge John Aylmer and a jury in the Dublin Circuit Criminal Court on 21 September 2016. On 23 May 2017, Judge John Aylmer delivered a ruling advising of his intention to direct the jury to acquit Mr. FitzPatrick on all counts on the indictment. That case is also referred to elsewhere herein.

A separate trial of Mr. William McAteer and Mr. Patrick Whelan, also former directors of Anglo Irish Bank Corporation plc, was scheduled to commence in the Dublin Circuit Criminal Court on 16 January 2017. The DPP had directed that both accused should be tried on indictment in respect of alleged breaches of section 297 of the Companies Act 1990 (i.e., fraudulent trading). On 19 December 2016, in advance of the trial date, Mr. McAteer entered a plea of guilty. On 21 December 2016, Mr Whelan entered a plea of guilty to a charge of a breach of Section 44(1) of the Companies Act 1990 (i.e., licensed bank's register of lending to directors and connected persons) in lieu of the alleged offence under section 297. In early 2017 His Honour Judge Martin Nolan sentenced Mr McAteer to imprisonment for a term of two and a half years, and fined Mr Whelan €3,000, in respect of the offences to which they had pleaded.

During the year His Honour Judge Terence O'Sullivan directed that the trial of Mr David Drumm, a former director and Chief Executive of Anglo Irish Bank Corporation plc, should commence in October 2018 for the following alleged offences with which he has been charged:

- 1 alleged contravention of Regulation 76(2) & (4) of the Transparency (Directive 2004/109/EC) Regulations 2007, as applied by section 21 of the Investment Funds, Companies and Miscellaneous Provisions Act 2006;
- 7 alleged contraventions of section 25 of the Criminal Justice (Theft and Fraud Offences) Act 2001;
- 7 alleged contraventions of section 243(1) of the Companies Act 1990 and section 240(1)(b) of the Companies Act 1990, as inserted by section 104 of the Company Law Enforcement Act 2001; and
- 16 alleged contraventions of section 60(1) & (15) of the Companies Act 1963, as amended by section 15 of the Companies (Amendment) Act 1982 and section 240(8) of the Companies Act 1990, as inserted by section 104 of the Company Law Enforcement Act 2001.

## REFERRALS TO PROFESSIONAL AND OTHER REGULATORY BODIES

Whilst there is an obligation upon the Office to keep confidential information that comes into its possession, there is statutory provision<sup>54</sup> for the disclosure of information to certain third parties (including other regulatory bodies and certain professional bodies) provided that certain prescribed criteria are satisfied.

Pursuant to the foregoing provision, 4 referrals (2016: 1) were made to the RABs during the year. Having regard to its statutory remit *vis-à-vis* the RABs, such referrals are always copied to IAASA.

Issues typically referred to RABs include:

- suspected instances of members purporting to conduct audits whilst not authorised by their professional bodies to do so or where otherwise precluded from doing so by virtue of law or professional obligations;
- non-reporting, or delayed reporting, of suspected indictable offences;
- matters relating to the nature of audit opinions provided in respect of companies limited by guarantee;
- failure to respond to queries raised by the Office subsequent to receipt of indictable offence reports.

In addition to the foregoing, the Office makes referrals to other regulatory bodies as considered necessary or otherwise appropriate.

<sup>54</sup> Section 956 of the Companies Act 2014