



Tonga

# COMPANIES ACT 1995

Act 14 of 1995





## COMPANIES ACT 1995

### Arrangement of Sections

#### Section

<b>PART I - PRELIMINARY</b>	<b>21</b>
1 Short title and commencement.....	21
2 Interpretation.....	21
3 Public notice. ....	26
4 Meaning of “solvency test”.....	26
5 Meaning of “Holding company” and “subsidiary”.....	27
6 Extended meaning of “subsidiary”. ....	28
7 “Control” defined.....	28
8 Certain matters to be disregarded .....	29
9 Meaning of “balance date”.....	29
10 Meaning of “financial statements”.....	30
11 Meaning of “group financial statements”. ....	31
12 Act binds the Crown .....	31
<b>PART II - INCORPORATION</b>	<b>31</b>
ESSENTIAL REQUIREMENTS.....	31
13 Essential requirements. ....	31
14 Adequate liquidity.....	32
METHOD OF INCORPORATION.....	33
15 Right to apply for registration.....	33
16 Application for registration.....	33
17 Registration.....	34

18	Certificate of Incorporation.....	35
----	-----------------------------------	----

<b>SEPARATE LEGAL PERSONALITY.....</b>		<b>35</b>
--	--	-----------

19	Separate legal personality.....	35
----	---------------------------------	----

### **PART III - CAPACITY, POWERS AND VALIDITY OF ACTIONS 35**

20	Capacity and powers. ....	35
----	---------------------------	----

<b>VALIDITY OF ACTIONS.....</b>		<b>35</b>
---------------------------------	--	-----------

21	Validity of actions. ....	35
----	---------------------------	----

22	Dealings between company and other persons.....	36
----	---	----

23	No constructive notice.....	37
----	-----------------------------	----

### **PART IV - COMPANY NAMES 37**

24	Name to be reserved. ....	37
----	---------------------------	----

25	Name of company if liability of shareholders limited.....	37
----	---	----

26	Application for reservation of name.....	37
----	--	----

27	Change of name.....	38
----	---------------------	----

28	Direction to change name.....	39
----	-------------------------------	----

29	Use of company name. ....	39
----	---------------------------	----

### **PART V - COMPANY CONSTITUTION 40**

30	Every company to have constitution. ....	40
----	--	----

31	Relationship between Act and constitution. ....	40
----	---	----

32	Standard constitution. ....	40
----	-----------------------------	----

33	Form of constitution. ....	41
----	----------------------------	----

34	Contents of constitution. ....	41
----	--------------------------------	----

35	Effect of constitution. ....	41
----	------------------------------	----

36	Alteration of constitution. ....	41
----	----------------------------------	----

37	Consolidated constitution.....	42
----	--------------------------------	----

38	Court may alter constitution. ....	43
----	------------------------------------	----

### **PART VI - SHARES 43**

39	Legal nature of shares. ....	43
----	------------------------------	----

40	Rights and powers attaching to shares. ....	43
----	---	----

41	Types of shares.....	44
----	----------------------	----

42	No nominal value. ....	44
----	------------------------	----

43	Transferability of shares.....	44
----	--------------------------------	----

44	Contracts for issue of Shares.....	44
----	------------------------------------	----

<b>ISSUE OF SHARES.....</b>		<b>44</b>
-----------------------------	--	-----------

45	Issue of shares on registration and amalgamation.....	44
----	---	----

46	Issue of other shares. ....	45
----	-----------------------------	----

47	Notice of share issue. ....	45
----	-----------------------------	----

48	Shareholder approval for issue of shares. ....	45
49	Pre-emptive rights. ....	46
50	Consideration for issue of shares. ....	46
51	Consideration to be decided by Board. ....	46
52	Exceptions to section 51. ....	48
53	Consideration in relation to issue of options and convertible securities. ....	48
54	Consent to issue of shares. ....	49
55	Time of issue of shares. ....	50
<b>DISTRIBUTIONS TO SHAREHOLDERS</b> .....		<b>50</b>
56	Board may authorise distributions. ....	50
57	Dividends. ....	51
58	Shares in lieu of dividends. ....	51
59	Shareholder Discounts .....	51
60	Recovery of distributions .....	52
61	Reduction of shareholder's liability to treated as a distribution .....	53
<b>COMPANY MAY ACQUIRE ITS OWN SHARES</b> .....		<b>54</b>
62	Company may acquire its own shares. ....	54
63	Acquisition of company's own shares. ....	54
64	Board may make offer to acquire shares. ....	55
65	Special offers to acquire shares. ....	56
66	Disclosure document. ....	57
67	Cancellation of shares repurchased. ....	57
68	Enforceability of contract to repurchase shares. ....	58
<b>REDEMPTION OF SHARES</b> .....		<b>58</b>
69	Meaning of "redeemable". ....	58
70	Redemption at option of company. ....	58
71	Company shall satisfy solvency test. ....	59
72	Special redemption of shares. ....	60
73	Disclosure document. ....	61
74	Cancellation of shares redeemed. ....	61
75	Redemption as option of shareholder. ....	61
76	Redemption on fixed date. ....	62
<b>ASSISTANCE BY A COMPANY IN THE PURCHASE OF ITS OWN SHARES</b> .....		<b>62</b>
77	Financial assistance. ....	62
78	Company shall satisfy solvency test .....	63
79	Special financial assistance. ....	64
80	Disclosure document. ....	65
81	Financial assistance not exceeding five percent of shareholders' funds. ....	65
82	Enforceability of transactions. ....	66
<b>CROSS-HOLDINGS</b> .....		<b>66</b>

83	Subsidiary may not hold shares in holding company.....	66
<b>STATEMENT OF SHAREHOLDER RIGHTS.....</b>		<b>67</b>
84	Statement of rights to be given to shareholders. ....	67
<b>TRANSFER OF SHARES .....</b>		<b>68</b>
85	Transfer of shares.....	68
86	Transfer of shares by operation of law.....	69
<b>SHARE REGISTER.....</b>		<b>69</b>
87	Company to maintain share register.....	69
88	Place of share register. ....	70
89	Share register as evidence of legal title. ....	70
90	Directors' and company secretaries' duty to supervise share register.....	71
91	Power of Court to rectify share register. ....	71
92	Trusts not to be entered in register .....	72
93	Personal representative may be registered. ....	72
94	Trustee of bankrupt may be registered. ....	72
<b>SHARE CERTIFICATES .....</b>		<b>72</b>
95	Share certificates. ....	72
<b>PART VII - SHAREHOLDERS AND THEIR RIGHTS AND OBLIGATIONS</b>		<b>73</b>
96	Meaning of "shareholder". ....	73
<b>LIABILITY OF SHAREHOLDERS .....</b>		<b>74</b>
97	Liability of shareholders.....	74
98	Liability of former shareholders.....	74
99	Additional provisions relating to liability of shareholders and former shareholders.....	75
100	Liability for calls. ....	76
101	Shareholders not required to acquire shares by alteration to constitution.....	77
102	Liability of personal representative.....	77
103	Liability of trustee of bankrupt.....	77
<b>POWERS OF SHAREHOLDERS.....</b>		<b>77</b>
104	Exercise of powers reserved to shareholders. ....	77
105	Exercise of powers by ordinary resolution.....	78
106	Powers exercised by special resolution.....	78
107	Unanimous assent to certain types of action. ....	78
108	Company to satisfy solvency test. ....	79
109	Management review by shareholders. ....	80
<b>MINORITY BUY-OUT RIGHTS .....</b>		<b>80</b>

110	Shareholder may require company to purchase shares. ....	80
111	Notice requiring purchase .....	81
112	Purchase by company .....	81
113	Purchase of shares by third party. ....	82
114	Court may grant exemption. ....	82
115	Court may grant exemption if company insolvent. ....	83
<b>INTEREST GROUPS .....</b>		<b>84</b>
116	Meaning of “class” and “interest group” .....	84
117	Alteration of shareholder rights. ....	84
118	Shareholder may require company to purchase shares. ....	85
119	Actions not invalid. ....	85
<b>MEETINGS OF SHAREHOLDERS .....</b>		<b>86</b>
120	Annual meeting of shareholders. ....	86
121	Special meetings of shareholders. ....	86
122	Resolution in lieu of meeting. ....	86
123	Court may call meeting of shareholders. ....	87
<b>ASCERTAINING SHAREHOLDERS .....</b>		<b>87</b>
124	Shareholders entitled to receive distribution, attend meetings and exercise rights. ....	87
 <b>PART VIII - DIRECTORS AND COMPANY SECRETARIES, AND THEIR POWERS AND DUTIES</b>		 <b>88</b>
125	Meaning of “director” .....	88
126	Meaning of “board” and “board of directors” .....	89
<b>POWERS OF MANAGEMENT .....</b>		<b>90</b>
127	Management of company .....	90
128	Major Transactions .....	90
129	Delegation of powers .....	91
<b>DIRECTORS’ AND COMPANY SECRETARIES, DUTIES .....</b>		<b>91</b>
130	Duty of directors and company secretaries to act in good faith and in best interests of company. ....	91
131	Exercise of powers in relation to employees. ....	92
132	Powers to be exercised for proper purpose. ....	92
133	Directors and company secretaries to comply with Act and constitution. ....	92
134	Reckless Trading .....	92
135	Duty in relation to obligations. ....	92
136	Director’s and company secretary’s duty of care. ....	93
137	Use of information and advice. ....	93

TRANSACTIONS INVOLVING SELF-INTEREST .....	94
138 Meaning of “interested” .....	94
139 Disclosure of interest.....	94
140 Avoidance of transactions .....	95
141 Effect on third parties.....	96
142 Application of sections 139 and 140 in certain cases.....	96
143 Interested director or company secretary may attend meeting.....	96
144 Use of company information.....	97
145 Meaning of “relevant interest” .....	98
146 Relevant interests to be disregarded in certain cases.....	99
147 Disclosure of share dealing by directors and company secretaries. ....	100
148 Restrictions on share dealing by directors and company secretaries.....	101
APPOINTMENT AND REMOVAL OF DIRECTORS .....	101
149 Number of directors .....	101
150 Qualifications of directors .....	101
151 Director’s consent required .....	102
152 Appointment of first and subsequent directors.....	102
153 Court may appoint directors .....	102
154 Appointment of directors to be voted on individually.....	103
155 Removal of directors .....	103
156 Director ceasing to hold office.....	103
157 Validity of director’s acts .....	104
158 Notice of change of directors .....	104
MISCELLANEOUS PROVISIONS RELATING TO DIRECTORS .....	105
159 Remuneration and other benefits.....	105
160 Indemnity and insurance .....	106
COMPANY SECRETARIES .....	108
161 Duties of company secretaries.....	108
162 Number of company secretaries.....	108
163 Qualifications of company secretaries.....	108
164 Company secretary’s consent required.....	109
165 Appointment of first and subsequent company secretaries.....	109
166 Court may appoint company secretary.....	110
167 Removal of company secretary.....	110
168 Company secretary ceasing to hold office .....	110
169 Validity of company secretary’s acts.....	111
170 Notice of change of company secretary.....	111
171 Remuneration and other benefits.....	112
<b>PART IX - ENFORCEMENT</b> .....	<b>113</b>
172 Interpretation .....	113



INJUNCTIONS .....	113
173 Injunctions .....	113
DERIVATIVE ACTIONS .....	114
174 Derivative actions. ....	114
175 Costs of derivative action to be met by company .....	115
176 Powers of Court where leave granted .....	115
177 Compromise, settlement or withdrawal of derivative action .....	115
PERSONAL ACTIONS BY SHAREHOLDERS .....	116
178 Personal actions by shareholders against directors and company secretaries.....	116
179 Actions by shareholders to require director or company secretary to act ...	116
180 Personal actions by shareholders against company. ....	117
181 Actions by shareholders to require company to act. ....	117
182 Representative actions. ....	117
183 Prejudiced shareholders. ....	117
184 Certain conduct deemed prejudicial.....	118
185 Alteration to constitution .....	119
RATIFICATION.....	119
186 Ratification of certain actions of directors or company secretary.....	119
INSPECTION OF RECORDS.....	120
187 Information for shareholders.....	120
188 Investigation of records.....	121
<b>PART X - ADMINISTRATION OF COMPANIES</b> .....	<b>122</b>
AUTHORITY TO BIND COMPANY .....	122
189 Method of contracting.....	122
190 Attorneys.....	123
PRE-INCORPORATION CONTRACTS .....	123
191 Pre-incorporation contracts may be ratified.....	123
192 Warranties implied in pre-incorporation contracts .....	123
193 Failure to ratify. ....	124
194 Breach of pre-incorporation contract. ....	124
REGISTERED OFFICE .....	125
195 Registered office. ....	125
196 Change of Registered Office.....	125
197 Requirement to change registered office. ....	125
COMPANY RECORDS .....	126

198	Company records.....	126
199	Form of records.....	127
200	Inspection of records by directors and company secretaries.....	127

## ADDRESS FOR SERVICE ..... 128

201	Address for service.....	128
202	Change of address for service.....	128

## **PART XI - ACCOUNTING RECORDS AND AUDIT** ..... 129

### ACCOUNTING RECORDS ..... 129

203	Accounting records to be kept.....	129
204	Place accounting records to be kept.....	130

### AUDITORS..... 130

205	Appointment of auditors.....	130
206	Auditor's fees and expenses.....	132
207	Appointment of partnership as auditor.....	132
208	Qualifications of auditors.....	132
209	Automatic reappointment.....	133
210	Appointment of first auditor.....	133
211	Replacement of auditor.....	134
212	Auditor not seeking reappointment.....	134
213	Auditor to avoid conflict of interest.....	134
214	Auditor's report.....	134
215	Access to information.....	135
216	Auditor's attendance at shareholders' meeting.....	135

## **PART XII - DISCLOSURE BY COMPANIES** ..... 136

### DISCLOSURE TO SHAREHOLDERS ..... 136

217	Obligation to prepare annual report.....	136
218	Sending of annual report to shareholders.....	136
219	Sending of financial statements to shareholders who elect not to receive annual report.....	136
220	Contents of annual report.....	137
221	Shareholders may elect not to receive documents.....	138
222	Failure to disclose.....	138
223	Annual return.....	139

### INSPECTION OF COMPANY RECORDS ..... 140

224	Public inspection of company records.....	140
225	Inspection of company records by shareholders.....	140
226	Manner of inspection.....	141
227	Copies of documents.....	141

---

**PART XIII - AMALGAMATIONS** **141**


---

228	Amalgamations .....	141
229	Amalgamation proposal .....	142
230	Approval of amalgamation proposal .....	143
231	Short form amalgamation. ....	144
232	Registration of amalgamation proposal. ....	145
233	Certificate of amalgamation.....	146
234	Effect of certificate of amalgamation. ....	146
235	Powers of Court in other cases.....	147

**PART XIV - COMPROMISES WITH CREDITORS** **147**


---

236	Interpretation.....	147
237	Compromise proposal .....	148
238	Notice of proposed compromise. ....	148
239	Approval and Effect of compromise.....	149
240	Variation of compromise. ....	150
241	Powers of Court .....	150
242	Effect of compromise in liquidation of company. ....	151
243	Costs of compromise. ....	151

**PART XV - APPROVAL OF ARRANGEMENTS,  
AMALGAMATIONS AND COMPROMISES BY COURT** **152**


---

244	Interpretation.....	152
245	Court Approval of arrangements, amalgamations and compromises. ....	152
246	Court may make additional orders.....	153
247	Parts XIII and XIV not affected.....	154
248	Application of section 242.....	154

**PART XVI - LIQUIDATIONS** **154**


---

**THE PROCESS OF LIQUIDATION** ..... 154

249	Interpretation.....	154
250	Commencement of liquidation.....	155
251	Liquidators to act jointly unless otherwise stated. ....	156
252	Liquidator to summon meeting of creditors.....	156
253	Liquidator to summon meeting of creditors in other cases.....	157
254	Liquidator may dispense with meetings of creditors. ....	157
255	Interim liquidator. ....	158
256	Power to stay or restrain certain proceedings against company. ....	158
257	Effect of commencement of liquidation.....	159
258	Completion of liquidation.....	159
259	Court may terminate liquidation .....	160

**PROVISIONS RELATING TO PRIOR EXECUTION PROCESS** ..... 160

260	Restriction on, rights of, creditors to complete execution, distraint or attachment. ....	160
261	Duties of officer in execution process. ....	161
<b>DUTIES, RIGHTS AND POWERS OF LIQUIDATORS</b> .....		<b>162</b>
262	Principal duty of liquidator. ....	162
263	Liquidator not required to act in certain cases. ....	163
264	Other duties of liquidator. ....	163
265	Duties in relation to accounts. ....	164
266	Duties in relation to final report and accounts. ....	165
267	Duty to have regard to views of creditors and shareholders. ....	166
268	Documents to state company in liquidation. ....	167
269	Powers of Liquidator. ....	167
270	Power to obtain documents and information. ....	167
271	Documents in possession of receiver. ....	168
272	Restriction on enforcement of lien over documents. ....	169
273	Delivery of document creating charge over property. ....	169
274	Examination by liquidator. ....	169
275	Powers of Court. ....	169
276	Self-incrimination. ....	170
277	Power of liquidator to enforce liability of shareholders and former shareholders. ....	170
278	Power to disclaim onerous property. ....	170
279	Liquidator may be required to elect whether to disclaim onerous property. ....	171
280	Pooling of assets of related companies. ....	171
281	Guidelines for orders. ....	172
282	Certain conduct prohibited. ....	173
283	Duty to identify and deliver property. ....	173
284	Refusal to supply essential services prohibited. ....	173
285	Remuneration of liquidators. ....	174
286	Rates of remuneration. ....	175
287	Expenses and remuneration payable out of assets of company. ....	175
288	Liquidator shall cease to hold office on completion of liquidation. ....	175
<b>QUALIFICATIONS AND SUPERVISION OF LIQUIDATORS</b> .....		<b>175</b>
289	Qualifications of liquidators. ....	175
290	Validity of acts of liquidators. ....	176
291	Consent to appointment. ....	176
292	Vacancies in office of liquidator. ....	176
293	Court supervision of liquidation. ....	177
294	Meaning of "failure to comply". ....	178
295	Orders to enforce liquidator's duties. ....	178
<b>COMPANY UNABLE TO PAY ITS DEBTS</b> .....		<b>180</b>

296	Meaning of “inability to pay debts”.....	180
297	Evidence and other matters.....	180
298	Statutory demand.....	181
299	Court may set aside statutory demand.....	181
300	Additional powers of Court on application to set aside statutory demand.....	182
<b>VOIDABLE TRANSACTIONS .....</b>		<b>183</b>
301	Transactions having preferential effect.....	183
302	Voidable charges.....	184
303	Procedure for setting aside voidable transactions and charges.....	186
304	Other orders.....	186
305	Additional provisions relating to setting aside transactions and charge.....	187
<b>RECOVERY IN OTHER CASES .....</b>		<b>187</b>
306	Transactions at undervalue.....	187
307	Transactions for inadequate or excessive consideration with directors, company secretaries and certain other persons.....	189
308	Court may set aside certain securities and charges.....	190
309	Liability if proper accounting records not kept.....	191
310	Power of Court to require persons to repay money or return property.....	192
<b>CREDITORS CLAIMS .....</b>		<b>193</b>
311	Application of bankruptcy rules to liquidation of insolvent companies.....	193
312	Admissible claims.....	193
313	Claims by unsecured creditors.....	193
314	Rights and duties of secured creditors.....	194
315	Ascertainment of amount of claim.....	196
316	Claim not of a certain amount.....	196
317	Fines and penalties.....	196
318	Claims relating to debts payable after commencement of liquidations.....	197
319	Mutual credit and set-off.....	197
320	Interest on claims.....	199
321	Preferential claims.....	199
322	Claims of other creditors and distribution of surplus assets.....	199
<b>LIQUIDATION COMMITTEES.....</b>		<b>200</b>
323	Meetings of creditors or shareholders.....	200
324	Liquidation committees.....	201
<b>LIQUIDATION SURPLUS ACCOUNT .....</b>		<b>201</b>
325	Establishment of Liquidation Surplus Account.....	201
<b>PART XVII - REMOVAL FROM THE TONGAN REGISTER</b>		<b>202</b>
326	Removal from register.....	202

327	Grounds for removal from register.....	203
328	Notice of intention to remove under section 327(1)(b).....	204
329	Notice of intention to remove in other cases. ....	205
330	Objection to removal from register. ....	205
331	Duties of Registrar if objection received.....	206
332	Powers of Court.....	207
333	Property of company removed from register. ....	208
334	Disclaimer of property by the Crown.....	209
335	Liability of directors, company secretaries, shareholders and others to continue. ....	209
336	Liquidation of company removed from Tongan register. ....	210
337	Registrar may restore company to Tongan register.....	210
338	Court may restore company to Tongan register. ....	211
339	Restoration to register. ....	212
340	Vesting of property in company on restoration to register.....	212

## **PART XVIII - OVERSEAS COMPANIES** **212**

341	Meaning of “carrying on business”.....	212
342	Name to be reserved before carrying on business.....	213
343	Overseas companies to register under this Act. ....	214
344	Validity of transactions not affected. ....	215
345	Application for registration. ....	215
346	Registration of overseas company.....	215
347	Use of name by overseas company. ....	216
348	Alteration of constitution. ....	216
349	Annual return of overseas company.....	216
350	Overseas company ceasing to carry on business in Tonga.....	217
351	Liquidation of assets in Tonga. ....	217
352	Attorneys of overseas companies. ....	218

## **PART XIX - TRANSFER OF REGISTRATION** **219**

### **REGISTRATION OF OVERSEAS COMPANIES AS COMPANIES UNDER THIS ACT** **219**

353	Overseas companies may be registered as companies under Act.....	219
354	Application for registration. ....	219
355	Overseas companies shall be authorised to register. ....	219
356	Overseas companies that cannot be registered. ....	220
357	Registration. ....	220
358	Effect of registration.....	220

### **TRANSFER OF REGISTRATION OF COMPANIES TO OTHER JURISDICTIONS** **221**

359	Companies may transfer incorporation. ....	221
360	Application to transfer incorporation. ....	221

361	Approval of shareholders.....	221
362	Company to give public notice. ....	221
363	Companies that cannot transfer Incorporation. ....	222
364	Removal from register. ....	222
365	Effect of removal from register.....	223

## **PART XX - REGISTRAR OF COMPANIES** **223**

366	Registrar, Deputy and Assistant Registrars of Companies. ....	223
367	Registers.....	223
368	Registration of documents. ....	224
369	Inspection and evidence of registers. ....	225
370	Notice by Registrar. ....	226
371	Registrar's powers of inspection.....	227
372	Disclosure of information and reports. ....	228
373	Inspector's report admissible in liquidation proceedings. ....	229
374	Appeals from Registrar's decisions. ....	229
375	Exercise of powers under section 371 not affected by appeal. ....	230
376	Fees. ....	230

## **PART XXI - OFFENCES AND PENALTIES** **231**

377	Penalty for failure to comply with Act. ....	231
378	Penalties that may be imposed on directors or company secretaries in cases of failure by board or company to comply with Act. ....	234
379	Proceedings for offences.....	236
380	Defences.....	236
381	False statements. ....	237
382	Fraudulent use or destruction of property. ....	237
383	Falsification of records. ....	238
384	Carrying on business fraudulently. ....	238
385	Improper use of "Limited".....	239
386	Persons prohibited from managing companies. ....	239
387	Court may disqualify directors and company secretaries. ....	240
388	Liability for contravening section 386 and 387. ....	241
389	Registrar may prohibit persons from managing companies.....	241
390	Liability for contravening section 389.....	243

## **PART XXII - MISCELLANEOUS** **244**

391	Service of documents on companies in legal proceedings.....	244
392	Service of other documents on companies.....	244
393	Service of documents on overseas companies in legal proceedings. ....	244
394	Service of other documents on overseas companies. ....	245
395	Service of documents on shareholders and creditors. ....	245
396	Additional provisions relating to service. ....	246
397	Privileged communications.....	247

398	Directors' certificates.....	248
399	Regulations.....	248
400	Repeal of the Companies Act 1912 (Cap. 27).....	248

## **FIRST SCHEDULE** **250**

### STANDARD CONSTITUTION ARRANGEMENT OF CLAUSES .....250

#### PART I - CONSEQUENCES OF INCORPORATION .....250

1	Name.....	250
2	Effect of constitution.....	250
3	Separate legal personality.....	250
4	Capacity and powers.....	251
5	Adequate liquidity.....	251

#### PART II - SHARES .....251

6	Rights and powers attaching to shares.....	251
7	Types of shares.....	251
8	Transferability of shares.....	252
9	Issues of shares on registration.....	252
10	Issue of other shares.....	252
11	Notice of share issue.....	252
12	Pre-emptive rights.....	252
13	Consideration for issue of shares.....	252
14	Issue of options and convertible securities.....	253
15	Consent to issue of shares.....	253
16	Time of issue of shares.....	253
17	Board may authorise distributions.....	253
18	Dividends.....	253
19	Shares in lieu of dividends.....	253
20	Shareholder discounts.....	253
21	Reduction of shareholder a distribution.....	254
22	Company may acquire its own shares.....	254
23	Redemption of shares.....	254
24	Assistance by the company in the purchase of its own shares.....	254
25	Statement of rights to be given to shareholders.....	254
26	Transfer of shares.....	255
27	Transfer of shares by operation of law.....	255
28	Company to maintain share register.....	255
29	Place of share register.....	256
30	Share register as evidence of legal title.....	256
31	Directors' and company secretaries' duty to supervise share register.....	256
32	Trusts not to be entered on register.....	256
33	Personal representative may be registered.....	257



34	Trustee of bankrupt may be registered.....	257
35	Share certificates.....	257
<b>PART III - SHAREHOLDERS.....</b>		<b>258</b>
36	Meaning of “shareholder”.....	258
37	Liability of shareholders.....	258
38	Additional provisions relating to liability of shareholders and former shareholders.....	259
39	Exercise of powers reserved to shareholders.....	259
40	Exercise of powers by ordinary resolution.....	259
41	Powers exercised by special resolution.....	259
42	Unanimous assent to certain types of action.....	259
43	Management review by shareholders.....	260
44	Shareholder may require company to purchase shares.....	260
45	Alteration of shareholder rights.....	261
<b>PART IV - MEETINGS OF SHAREHOLDERS.....</b>		<b>261</b>
46	Annual meeting of shareholders.....	261
47	Special meetings of shareholders.....	261
48	Resolution in lieu of meeting.....	261
49	Shareholders entitled to receive distributions, attend meetings and exercise rights.....	262
50	Chairperson.....	262
51	Notice of meetings.....	262
52	Methods of holding meetings.....	263
53	Quorum.....	263
54	Voting.....	264
55	Proxies.....	265
56	Postal votes.....	265
57	Minutes.....	266
58	Shareholder proposals.....	266
59	Corporations may act by representative.....	267
60	Votes of joint holders.....	267
61	Loss of voting right if calls unpaid.....	267
62	Other proceedings.....	268
<b>PART V - DIRECTORS AND COMPANY SECRETARIES.....</b>		<b>268</b>
63	Management of company.....	268
64	Major transactions.....	268
65	Delegation of powers.....	269
66	Duty of directors and company secretaries to act in good faith and in best interest of company.....	269
67	Powers to be exercised for proper purpose.....	269
68	Directors and company secretaries to comply with Act and constitution.....	269

69	Reckless trading. ....	269
70	Duty in relation to obligations.....	270
71	Director's and company secretary's duty of care. ....	270
72	Use of information and advice .....	270
73	Meaning of "interested". ....	271
74	Disclosure of interest.....	271
75	Avoidance of transactions. ....	272
76	Interested director or company secretary may attend meeting.....	272
77	Use of company Information.....	273
78	Disclosure of share dealing by directors and company secretaries. ....	273
79	Restrictions on share dealing by directors and company secretaries.....	274
80	Number of directors. ....	274
81	Qualifications of directors. ....	274
82	Director's consent required. ....	275
83	Appointment of first and subsequent director. ....	275
84	Appointment of directors to be voted on individually.....	275
85	Removal of Directors. ....	275
86	Director ceasing to hold office. ....	276
87	Notice of change of directors. ....	276
88	Remuneration and other benefits.....	277
89	Indemnity and insurance. ....	277
90	Duties of company secretaries.....	277
91	Number of company secretaries. ....	277
92	Qualifications of company secretaries. ....	277
93	Company secretary's consent required.....	278
94	Appointment of first and subsequent company secretaries. ....	278
95	Removal of the company secretary. ....	278
96	Company secretary ceasing to hold office. ....	278
97	Notice of change of company secretary. ....	279
<b>PART VI - PROCEEDINGS OF THE BOARD.....</b>		<b>279</b>
98	Chairperson. ....	280
99	Notice of meeting. ....	280
100	Methods of holding meetings. ....	280
101	Quorum. ....	280
102	Voting.....	281
103	Minutes.....	281
104	Unanimous resolution. ....	281
105	Other proceedings. ....	281
<b>PART VII - ADMINISTRATION, ACCOUNTING, AUDIT AND REPORTING .....</b>		<b>281</b>
106	Method of contracting. ....	281
107	Attorneys. ....	282
108	Registered office. ....	282

109	Company records. ....	282
110	Address for service. ....	283
111	Accounting records. ....	283
112	Appointment of Auditor.....	283
113	Access to information by auditor.....	283
114	Auditor's attendance at shareholders' meeting.....	283
115	Annual report. ....	284
116	Annual return. ....	284
117	Inspection of company records. ....	284
118	Service of documents on shareholders and creditors.....	284
119	Alteration of constitution. ....	284
120	Winding Up.....	285
121	Interpretation.....	285

---

## **SECOND SCHEDULE** **286**

SECTIONS THAT CONFER POWERS ON DIRECTORS THAT CANNOT BE DELEGATED.....	286
--	-----

---

## **THIRD SCHEDULE** **287**

INFORMATION TO BE CONTAINED IN ANNUAL RETURN .....	287
--	-----

---

## **FOURTH SCHEDULE** **290**

PROCEEDINGS AT MEETINGS OF CREDITORS .....	290
--	-----

1	Method of holding meetings. ....	290
2	Notice of meeting.....	290
3	Chairperson. ....	291
4	Quorum. ....	291
5	Voting. ....	292
6	Proxies. ....	292
7	Postal votes. ....	292
8	Minutes. ....	293
9	Corporations may act by representatives. ....	294
10	Other proceedings.....	294

---

## **FIFTH SCHEDULE** **295**

POWERS OF LIQUIDATORS .....	295
-----------------------------	-----

---

## **SIXTH SCHEDULE** **297**

PREFERENTIAL CLAIMS.....	297
--------------------------	-----

**SEVENTH SCHEDULE** **300****PROCEEDINGS AT MEETINGS OF LIQUIDATION COMMITTEE: .....300**

1	Frequency of meetings. ....	300
2	Majorities. ....	300
3	Resignation.....	300
4	Office becoming vacant. ....	300
5	Removal of a member. ....	300
6	Vacancy filled. ....	301
7	Committee with vacancy may act. ....	301

**EIGHTH SCHEDULE** **302****LIQUIDATION OF ASSETS OF OVERSEAS COMPANIES .....302**

1	Modified application of Part XVI. ....	302
2	Rights of action not affected. ....	302

**NINTH SCHEDULE** **304****FINANCIAL REPORTING REQUIREMENTS .....304**

1	Interpretation. ....	304
2	Obligation to prepare financial statements. ....	304
3	Content of financial statements of companies.....	305
4	Obligation to prepare group financial statements.....	305
5	Content of group financial statements.....	306
6	Auditors report on companies. ....	307
7	Overseas companies and certain other companies to register financial statements. ....	307
8	Offences by directors and company secretaries of companies.....	308
9	Offences by directors and company secretaries of overseas companies and subsidiaries of overseas companies .....	309
10	Defences.....	309
11	False statements.....	309

**TENTH SCHEDULE** **311****REREGISTRATION OF EXISTING COMPANIES .....311**

1	Interpretation. ....	311
2	Existing companies to reregister. ....	311
3	Reregistration. ....	312
4	Effect of reregistration. ....	312
5	Companies that do not register.....	313



# COMPANIES ACT 1995

Act 14 of 1995

## AN ACT TO REFORM THE LAW RELATING TO COMPANIES

I assent,  
TAUFA'AHAU TUPOU IV,  
28<sup>th</sup> August, 1998

[26<sup>th</sup> October, 1995]

**BE IT ENACTED** by the King and Legislative Assembly of Tonga in the Legislature of the Kingdom as follows:

### PART I - PRELIMINARY

#### 1 Short title and commencement.

- (1) This Act may be cited as the Companies Act 1995.
- (2) This Act shall come into force on a day proclaimed by His Majesty in Council and different sections of this Act may be brought into force on different dates.

#### 2 Interpretation.

- (1) In this Act, unless the context otherwise requires —

“**accounting period**”, in relation to a company, means a year ending on a balance date of the company and, if as a result of the date of the registration of the company or a change of the balance date of the company, the period ending on that date is longer or shorter than a year, that longer or shorter period is an accounting period;

“**address for service**” in relation to a company, means the company’s address for service adopted in accordance with section 201;

“**adequate liquidity**” has the meaning set out in section 14;

“**annual meeting**” means a meeting required to be held by section 120;

“**balance date**” has the meaning set out in section 9;

“**board**” and “**board of directors**” have the meaning set out in section 126;

“**charge**” includes a right or interest in relation to property owned by a company, by virtue of which a creditor of the company is entitled to claim payment in priority to creditors entitled to be paid under section 322; but does not include a charge under a charging order issued by a court in favour of a judgment creditor;

“**laws**” has the meaning set out in section 116;

“**company**” means —

- (a) a company registered under Part II;
- (b) a company reregistered under this Act in accordance with the Tenth Schedule;

“**constitution**” means a document referred to in section 33;

“**Court**” means the Supreme Court of Tonga;

“**director**” has the meaning set out in section 125;

“**distribution**”, in relation to a distribution by a company to a shareholder, means —

- (a) the direct or indirect transfer of money or property, other than the company’s own shares, to or for the benefit of the shareholder; or
- (b) the incurring of a debt to or for the benefit of the shareholder —

in relation to shares held by that shareholder, and whether by means of a purchase of property, the redemption or other acquisition of shares, a distribution of indebtedness, or by some other means;

“**dividend**” has the meaning set out in section 57;

“**document**” means a document in any form; and includes —

- (a) any writing on any material;

- (b) information recorded or stored by means of a tape-recorder, computer or other device; and material subsequently derived from information so recorded or stored;
- (c) a book, graph or drawing; and
- (d) a photograph, film, negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of equipment) of being reproduced;

“**entitled person**”, in relation to a company, means —

- (a) a shareholder; and
- (b) a person upon whom the constitution confers any of the rights and powers of a shareholder;

“**existing company**” means a body corporate registered or deemed to be registered under Part I or Part V of the Companies Act of 1912 (Cap. 27);

“**financial statements**” has the meaning set out in section 10;

“**group financial statements**” has the meaning set out in section 11;

“**group of companies**” means a group comprising a company and its subsidiaries;

“**holding company**” has the meaning set out in section 5;

“**interested**”, in relation to a director, has the meaning set out in section 138;

“**interest group**” has the meaning set out in section 116;

“**interests register**” means the register kept under section 198(1)(c);

“**law practitioner**” means a person qualified under section 3 of the Law Practitioners Act 1989 to act as such;

“**major transaction**” has the meaning set out in section 128(2);

“**Minister**” means the Minister for Labour, Commerce, Industries;

“**ordinary resolution**” has the meaning set out in section 105(2);

“**overseas company**” means a body corporate that is incorporated outside Tonga;

“**overseas register**” means the register of bodies corporate that are incorporated outside Tonga kept pursuant to section 367(1)(b);

“**personal representative**”, in relation to an individual, means the executor, administrator or trustee of the estate of that individual;

“**pre-emptive rights**” means the rights conferred on shareholders under section 49;

“**prescribed form**” means a form prescribed by regulations made under this Act that contains, or has attached to it, such information or documents as those regulations may require;

“**property**” means property of every kind whether tangible or intangible, real or personal, corporeal or incorporeal, and includes rights, interests and claims of every kind in relation to property however they arise;

“**records**” means the documents required to be kept by a company under section 198(1);

“**redeemable**” has the meaning set out in section 69;

“**registered office**” has the meaning set out in section 195;

“**registrar**” means the Registrar of Companies appointed in accordance with section 366(1);

“**related company**” has the meaning set out in subsection (3);

“**relative**”, in relation to any person means —

- (a) any parent or spouse or child or brother or sister of that person;
- (b) any parent or child or brother or sister of a spouse of that person; or
- (c) a nominee or trustee for any of those persons;

“**relevant interest**” has the meaning set out in section 145;

“**secured creditor**”, in relation to a company, means a person entitled to a charge on or over property owned by that company;

“**security**” means any interest or right to participate in any capital, assets, earnings, royalties or other property of any person; and includes —

- (a) any interest in or right to be paid money that is, or is to be, deposited with, lent to, or otherwise owing by, any person (whether or not the interest or right is secured by a charge over any property); and
- (b) any renewal or variation of the terms or conditions of any existing security;

“**share**” has the meaning set out in section 39;

“**shareholder**” has the meaning set out in section 96;

“**share register**” means the share register required to be kept under section 87;

“**solvency test**” has the meaning set out in section 4;

“**special meeting**” means a meeting called in accordance with section 121;



“**special resolution**” means a resolution approved by a majority of 75 percent or if a higher majority is required by the constitution, that higher majority, of the votes of those shareholders entitled to vote and voting on the question;

“**spouse**”, in relation to a person, means a person to whom that person is married;

“**Standard constitution**” has the meaning set out in section 32;

“**subsidiary**” has the meaning set out in section 5;

“**surplus assets**” means the assets of a company remaining after the payment of creditors claims and available for distribution in accordance with section 322 prior to its removal from the Tongan register;

“**Tongan register**” means the register of companies incorporated in Tonga kept pursuant to section 367(1)(a);

“**working day**” means a day of the week other than —

- (a) Saturday and Sunday;
  - (b) a public holiday as specified in section 2 of the Public Holidays Act (Cap. 51); and
  - (c) a day in the period commencing with Christmas Day in any year and ending with New Year’s Day in the following year.
- (2) Where a provision of this Act refers —
- (a) to a Part by a number, the reference shall, unless the context otherwise requires, be construed as reference to the Part, designated by that number, of this Act;
  - (b) to a paragraph, subclause or clause by a number, the reference shall, unless the context otherwise requires, be construed as a reference to —
    - (i) the paragraph, designated by that number, of the section, subsection, interpretation, clause, subclause or schedule in which the reference occurs;
    - (ii) the subclause, designated by that number, of the clause in which the reference occurs;
    - (iii) the clause, designated by that number, of the schedule in which the reference occurs.

The provisions of this subsection are in addition to, and not in derogation of, the definitions of “**section**”, “**schedule**” and “**subsection**” contained in section 2(1) of the Interpretation Act (Cap. 1).

- (3) In this Act, a company is related to another company if —
- (a) the other company is its holding company or subsidiary;

- (b) more than half of the issued shares of the company, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital is held by the other company and companies related to that other company (whether directly or indirectly, but other than in a fiduciary capacity);
  - (c) more than half of the issued shares, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital, of each of them is held by members of the other (whether directly or indirectly, but other than in a fiduciary capacity);
  - (d) the businesses of the companies have been so carried on that the separate business of each company, or a substantial part of it, is not readily identifiable; or
  - (e) there is another company to which both companies are related; and “**related company**” has a corresponding meaning.
- (4) For the purposes of subsection (3), a company within the meaning of section 2 of the Companies Act 1912 (Cap. 27) is related to another company if, were it a company within the meaning of subsection (1), it would be related to that other company.
- (5) A reference in this Act to an address means —
- (a) in relation to an individual, the full address of the place where that person usually lives;
  - (b) in relation to a body corporate, its registered office or, if it does not have a registered office, its principal place of business.

### 3 Public notice.

Where, pursuant to this Act, public notice must be given of any matter affecting a company or an overseas company, that notice must be given by publishing notice of the matter —

- (a) in at least one issue of the Gazette, and
- (b) in at least one issue of the Tonga Chronicle or any other weekly newspaper or over the radio.

### 4 Meaning of “solvency test”.

- (1) For the purpose of this Act, a company satisfies the solvency test if —
- (a) the company is able to pay its debts as they become due in the normal course of business; and
  - (b) the value of the company’s assets is greater than the value of its liabilities, including contingent liabilities.

- (2) Without limiting section 56 and 59(3), in determining for the purposes of this Act (other than sections 230 and 231 which relate to amalgamations) whether the value of a company's assets is greater than the value of its liabilities, including contingent liabilities, the directors —
- (a) shall have regard to —
    - (i) the most recent financial statements of the company that comply with clause 3 of the Ninth Schedule; and
    - (ii) all other circumstances that the directors know or ought to know affect, or may affect, the value of the company's assets and the value of the company's liabilities, including its contingent liabilities;
  - (b) may rely on valuations of assets or estimates of liabilities that are reasonable in the circumstances.
- (3) Without limiting sections 230 and 231, in determining for the purposes of those sections whether the value of the amalgamated company's assets will be greater than the value of its liabilities, including contingent liabilities, the directors of each amalgamating company —
- (a) shall have regard to —
    - (i) financial statements that comply with clause 3 of the Ninth Schedule and that are prepared as if the amalgamation had become effective; and
    - (ii) all other circumstances that the directors know or ought to know would affect, or may affect, the value of the amalgamated company's assets and the value of its liabilities, including contingent liabilities;
  - (b) may rely on valuations of assets or estimates of liabilities that are reasonable in the circumstances.
- (4) In determining, for the purposes of this section, the value of a contingent liability, account may be taken of —
- (a) the likelihood of the contingency occurring; and
  - (b) any claim the company is entitled to make and can reasonably expect to be met to reduce or extinguish the contingent liability.

## 5 Meaning of “Holding company” and “subsidiary”.

- (1) For the purposes of this Act, a company is a subsidiary of another company only if —
- (a) that other company —
    - (i) controls the composition of the board of the company;

- (ii) is in a position to exercise, or control the exercise of, more than one-half the maximum number of votes that can be exercised at a meeting of the company;
  - (iii) holds more than one-half of the issued shares of the company, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital; or
  - (iv) is entitled to receive more than one-half of every dividend paid on shares issued by the company, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital; or
- (b) the company is a subsidiary of a company that is that other company's subsidiary
- (2) For the purposes of this Act, a company is another company's holding company only if that other company is its subsidiary.
- (3) In this section and sections 7 and 8, the expression "company" includes a body corporate.

## **6 Extended meaning of "subsidiary".**

For the purposes of this Act, a company within the meaning of section 2 of the Companies Act 1912 (Cap. 27) is a subsidiary of another company if, were it a company within the meaning of section 2 of this Act, it would be a subsidiary of that other company.

## **7 "Control" defined.**

For the purposes of section 5, without limiting the circumstances in which the composition of a company's board is to be taken to be controlled by another company, the composition of the board is to be taken to be so controlled if the other company, by exercising a power exercisable by it, (whether with or without the consent or concurrence of any other person), can appoint or remove all the directors of the company, or such number of directors as together hold a majority of the voting rights at meetings of the board of the company, and for this purpose, the other company shall be taken as having power to make such an appointment if —

- (a) a person can not be appointed as a director of the company without the exercise by the other company of such a power in the person's favour; or
- (b) a person's appointment as a director of the company follows necessarily from the person being a director or other officer of the other company.

## 8 Certain matters to be disregarded

In determining whether a company is a subsidiary of another company —

- (a) shares held or a power exercisable by that other company in a fiduciary capacity are not to be treated as held or exercisable by it;
- (b) subject to paragraphs (c) and (d) shares held or a power exercisable —
  - (i) by a person as a nominee for that other company, except where that other company is concerned only in a fiduciary capacity; or
  - (ii) by, or by a nominee for, a subsidiary of that other company, not being a subsidiary which is concerned only in a fiduciary capacity —  
are to be treated as held or exercisable by that other company;
- (c) shares held or a power exercisable by a person under the provisions of debentures of the company or of a trust deed for securing an issue of debentures shall be disregarded;
- (d) shares held or a power exercisable by, or by a nominee for, that other company or its subsidiary (not being held or exercisable in the manner described in paragraph (c)) are not to be treated as held or exercisable by that other company if —
  - (i) the ordinary business of that other company or its subsidiary, as the case may be, includes the lending of money; and
  - (ii) the shares are held or the power is exercisable by way of security only for the purposes of a transaction entered into in the ordinary course of that business.

## 9 Meaning of “balance date”.

- (1) In this Act, the term “balance date” in relation to a company, means the close of the 30<sup>th</sup> day of June or of such other date as the directors of the company adopt as the company’s balance date.
- (2) Subject to subsections (3) and (4), a company shall have a balance date in each calendar year.
- (3) A company need not have a balance date in the calendar year in which it is incorporated if its first balance date is in the following calendar year and is not later than 15 month after the date of its incorporation.
- (4) If a company changes its balance date, it need not have a balance date in the calendar year if —
  - (a) the period between any 2 balance dates does not exceed 15 months; and

- (b) the Registrar approves the change of balance date before it is made.
- (5) The Registrar may approve a change of balance date with or without conditions.
- (6) If a company changes its balance date the period between any 2 balance dates shall not exceed 15 months.
- (7) The board of a company shall ensure that, unless in the board's opinion there are good reasons against it, the balance date of each subsidiary of the company is the same as the balance date of the company.
- (8) If the balance date of a subsidiary of a company is not the same as that of the company, the balance date of the subsidiary for the purposes of any particular group financial statements shall be that preceding the balance date of the company.

## 10 Meaning of “financial statements”.

- (1) In this Act, the term “financial statements”, in relation to any company and a balance date, means —
  - (a) a balance sheet for the company as at the balance date;
  - (b) in the case of —
    - (i) any company trading for profit, a profit and loss statement for the company in relation to the accounting period ending at the balance date; and
    - (ii) any company not trading for profit, an income and expenditure statement for the company in relation to the accounting period ending at the balance date; and
  - (c) if an approved financial reporting standard (as defined in clause 1 of the Ninth Schedule) requires a statement of cash flow for the company, a statement of cash flow for the company in relation to the accounting period ending on the balance date —

together with any notes or documents giving information relating to the balance sheet, statements or account.

- (2) In this Act, the term “**financial statements**”, in relation to an overseas company, includes financial statements referred to in subsection (1) for its Tongan business.
- (3) Where the Registrar notifies an overseas company that he is satisfied that the financial statements of the overseas company comply with subsection (1), those financial statements shall be taken to comply with subsection (2).

## 11 Meaning of “group financial statements”.

- (1) In this Act, the term “**group financial statements**” in relation to a group and a balance date, means —
- (a) a consolidated balance sheet for the group as at that balance date;
  - (b) where a member of the group trades for profit, a consolidated profit and loss statement for the group in relation to the accounting period ending on that balance date;
  - (c) where no member of the group trades for profit, a consolidated income and expenditure statement for the group in relation to the accounting period ending on that balance date; and
  - (d) if an approved financial reporting standard requires a consolidated statement of cash flows for the group, a consolidated statement of cash flows for the group in relation to the accounting period ending on that balance date —

together with any notes or documents giving information relating to the balance sheet or statement.

- (2) In this Act, the term “**financial statements**”, in relation to a group that comprises an overseas company and its subsidiaries, includes financial statements referred to in subsection (1) for the group’s Tongan business.
- (3) Where the Registrar notifies an overseas company that he is satisfied that the financial statements of the group comply with subsection (1) those financial statements shall be taken to comply with subsection (2).

## 12 Act binds the Crown

This Act binds the Crown.

# PART II - INCORPORATION

## ESSENTIAL REQUIREMENTS

## 13 Essential requirements.

A company shall have —

- (a) a name;
- (b) a constitution;
- (c) one or more shares;
- (d) one or more shareholders, having limited or unlimited liability for the obligations of the company;

- (e) one or more directors;
- (f) one or more company secretaries; and
- (g) adequate liquidity.

## 14 Adequate liquidity.

- (1) In this section, unless the context otherwise requires —

“**adequate liquidity**” means surplus liquid funds of not less than \$1,000 or such other amount as may be prescribed by the Minister from time to time by notice in the Gazette;

“**current assets**” means assets reasonably expected to be realised within 12 months in the ordinary course of business;

“**exclusions**” means —

- (a) securities, promissory notes and bills of exchange which do not have a ready market;
- (b) amounts owing to the company, the recovery of which is doubtful, or which are not capable of realisation within 12 months;
- (c) loans or advances made to —
  - (i) directors, company secretaries or employees of the company or to their immediate families, family companies or trusts;
  - (ii) directors, company secretaries or employees of a related company or to their immediate families, family companies or trusts; and
  - (iii.) any trust in respect of which the company, a related company, or directors of the company or a related company may exercise any form of power or control —

which are not secured adequately to the satisfaction of the Registrar;

- (d) future income tax benefits arising from the use of tax-effect accounting;
- (e) funds available on demand by way of a letter of guarantee;
- (f) other current assets which are not capable of realization within 12 months;
- (g) any asset which may be regarded on the basis of generally, accepted accounting practice as being intangible; and
- (h) any right to be indemnified out of the assets of any trust;

“**inclusions**” means securities, promissory notes and bills of exchange classified in the accounts of the company other than as current assets and which have a ready market;



“**liquid assets**” means the total value of current assets plus inclusions less exclusions, subject to subsection (2) and (3);

“**surplus liquid funds**” means liquid assets less total liabilities;

“**total liabilities**” means the total value of all of the liabilities of the company other than in respect of the shareholders funds.

- (2) For the purpose of the calculation of liquid assets, a loan or advance which would otherwise be an exclusion shall not be treated as an inclusion simply because it is secured by way of a charge over real property or by way of a guarantee or any indemnity from another company.
- (3) For the purpose of valuing liquid assets —
  - (a) all securities, promissory notes and bills of exchange having a ready market shall be valued at a fair value but not in excess of market value; and
  - (b) all other assets shall be valued at the lower of cost or net realisable value
- (4) For the purpose of subsection (1), a loan or advance shall be deemed to be secured adequately if it is secured by way of a charge of a recognised nature over security for which there exists a ready market, providing that the market value of the security is always equal to not less than 105 percent of the amount of the loan or advance.
- (5) A company shall at all times maintain adequate liquidity.
- (6) If a company fails to comply with subsection (5), every director or company secretary of the company commits an offence and is liable on conviction to the penalty set out in section 378(2).

## METHOD OF INCORPORATION

### 15 Right to apply for registration.

Any person may, either alone or together with another person, apply for registration of a company under this Act.

### 16 Application for registration.

- (1) An application for registration of a company under this Act shall be sent or delivered to the Registrar, and shall be —
  - (a) in the prescribed form;
  - (b) signed by each applicant;
  - (c) accompanied by a document in the prescribed form signed by every person named as a director, containing his consent to be a director

- and a certificate that he is not disqualified from being appointed or holding office as a director of a company;
- (d) accompanied by a document in the prescribed form signed by every person named as a company secretary, containing his consent to be a company secretary and a certificate that he is qualified to be appointed and hold office as a company secretary;
  - (e) accompanied by —
    - (i) a document in the prescribed form signed by every person named as a shareholder, or by an agent of that person authorised in writing, containing his consent to being a shareholder and to taking the class and number of shares specified in the document; and
    - (ii) if the document has been signed by an agent, the instrument authorising the agent to sign it;
  - (f) accompanied by a notice reserving a name for the proposed company;
  - (g) accompanied by a document certified by at least one applicant as the company's constitution; and
  - (h) accompanied by a certificate in the prescribed form signed by at least one applicant that on registration the company will have adequate liquidity.
- (2) Without limiting subsection (1), the application shall state —
- (a) the full name and address of each applicant;
  - (b) the full name and residential address of every director of the proposed company;
  - (c) the full name and residential address of every company secretary of the proposed company;
  - (d) the full name and residential address of every shareholder of the proposed company, and the number of shares to be issued to every shareholder;
  - (e) the registered office of the proposed company; and
  - (f) the address for service of the proposed company.

## 17 Registration.

As soon as the Registrar receives a properly completed application for registration of a company, the Registrar shall —

- (a) register the application; and
- (b) issue a certificate of incorporation.

**18 Certificate of Incorporation.**

A certificate of incorporation of a company issued under section 17 is conclusive evidence that —

- (a) all the requirements of this Act as to registration have been complied with; and
- (b) on and from the date of incorporation stated in the certificate, the company is incorporated under this Act.

**SEPARATE LEGAL PERSONALITY****19 Separate legal personality.**

A company is a legal entity in its own right separate from its shareholders and continues in existence until it is removed from the Tongan register.

**PART III - CAPACITY, POWERS AND VALIDITY OF ACTIONS****20 Capacity and powers.**

- (1) Subject to this Act, any other enactment and the general law, a company has, both within and outside Tonga —
  - (a) full capacity to carry on or undertake any business or activity, do any act, or enter into any transaction; and
  - (b) for the purposes of paragraph (a), full rights, powers and privileges.
- (2) The constitution of a company may contain a provision relating to the capacity, rights, powers or privileges of the company only if the provision restricts the capacity of the company or those rights, powers and privileges.

**VALIDITY OF ACTIONS****21 Validity of actions.**

- (1) No act of a company and no transfer of property to or by a company is invalid merely because the company did not have the capacity, the right or the power to do the act or to transfer or take a transfer of the property.
- (2) Subsection (1) does not limit —
  - (a) section 173 (which relates to injunctions to restrain conduct by a company that would contravene its constitution);

- (b) section 174 (which relates to derivative actions by directors and shareholders);
  - (c) section 178 (which relates to actions by shareholders of a company against the directors and company secretaries); or
  - (d) section 179 (which relates to actions by shareholders to require the directors or company secretaries of a company to take action under the constitution or this Act).
- (3) The fact that an act is not, or would not be, in the best interests of a company does not affect the capacity of the company to do the act.

## **22 Dealings between company and other persons.**

- (1) A company or a guarantor of an obligation of a company may not assert against a person dealing with the company or with a person who has acquired property, rights or interests from the company that —
- (a) this Act or the constitution of the company has not been complied with;
  - (b) a person named as a director or company secretary of the company in the most recent notice received by the Registrar under section 158 —
    - (i) is not a director or company secretary of a company;
    - (ii) has not been duly appointed; or
    - (iii) does not have authority to exercise a power which a director or company secretary of a company carrying on business of the kind carried on by the company customarily has authority to exercise;
  - (c) a person held out by the company as a director, company secretary, employee or agent of the company —
    - (i) has not been duly appointed; or
    - (ii) does not have authority to exercise a power which a director or company secretary of a company carrying on business of the kind carried on by the company customarily has authority to exercise;
  - (d) a person held out by the company as a director, company secretary, employee or agent of the company with authority to exercise a power which a director, company secretary, employee or agent of a company carrying on business of the kind carried on by the company customarily have authority to exercise, does not have authority to exercise that power;

- (e) a document issued on behalf of a company by a director, company secretary, employee or agent of the company with actual or usual authority to issue the document is not valid or not genuine —

Unless the person has, or ought to have, by virtue of his position with or relationship to the company, knowledge of the matters referred to in any of paragraphs (a) to (e), as the case may be.

- (2) Subsection (1) applies even though a person of the kind referred to in paragraphs (b) to (e) of that subsection acts fraudulently or forges a document that appears to have been signed on behalf of the company, unless the person dealing with the company or with a person who has acquired property, rights or interests from the company has actual knowledge of the fraud or forgery.

### **23 No constructive notice.**

A person is not affected by, or deemed to have notice or knowledge of the contents of, the constitution of, or any other document relating to, a company merely because —

- (a) the constitution or document is registered on the Tongan register; or  
(b) it is available for inspection at an office of the company.

## **PART IV - COMPANY NAMES**

### **24 Name to be reserved.**

The Registrar shall not register a company under a name or register a change of the name of a company unless the name has been reserved.

### **25 Name of company if liability of shareholders limited.**

The registered name of a company shall end with the word “Limited” or the word “Limiteti” if the liability of the shareholders of the company is limited.

### **26 Application for reservation of name.**

- (1) An application for reservation of the name of a company shall be sent or delivered to the Registrar, and shall be in the prescribed form.
- (2) The Registrar shall not reserve a name —
- (a) the use of which would contravene an enactment;

- (b) that is identical or almost identical to the name of another company or another company under the Companies Act 1912 (Cap. 27);
  - (c) that is identical or almost identical to a name that the Registrar has already reserved under this Act and that is still available for registration; or
  - (d) that, in the opinion of the Registrar, is offensive.
- (3) The Registrar shall advise the applicant by notice in writing —
- (a) whether or not the Registrar has reserved the name; and
  - (b) if the name has been reserved, that the name is available for registration of a company with that name or on a change of name for 20 working days after the date stated in the notice.

## **27 Change of name.**

- (1) An application to change, the name of a company shall —
- (a) be in the prescribed form;
  - (b) be accompanied by a notice reserving the name; and
  - (c) subject to the constitution, of the company, be made by a director or company secretary of the company with the approval of its board.
- (2) Subject to its constitution, an application to change the name of a company is not an alteration of the constitution of the company for the purposes of this Act.
- (3) As soon as the Registrar receives a properly completed application, the Registrar shall —
- (a) enter the new name of the company on the Tongan register; and
  - (b) issue a certificate of incorporation for the company recording the change of name of the company.
- (4) A change of name of a company —
- (a) takes effect from the date of the certificate issued under subsection (3); and
  - (b) does not affect rights or obligations of the company, or legal proceedings by or against the company, and legal proceedings that might have been continued or commenced against the company under its former name may be continued or commenced against it under its new name.

**28 Direction to change name.**

- (1) If the Registrar believes on reasonable grounds that the name under which a company is registered should not have been reserved, the Registrar may serve written notice on the company to change its name by a date specified in the notice, being a date not less than 20 working days after the date on which the notice is served.
- (2) If the company does not change its name within the period specified in the notice, the Registrar may enter on the Tongan register a new name for the company selected by the Registrar, being a name under which the company may be registered under this Part.
- (3) If the Registrar registers a new name under subsection (2), the Registrar shall issue a certificate of incorporation for the company recording the new name of the company, and section 27(4) applies in relation to the registration of the new name as if the name of the company had been changed under that section.

**29 Use of company name.**

- (1) A company shall ensure that its name is dearly slated in —
  - (a) every written communication sent by, or on behalf of, the company; and
  - (b) every document issued or signed by, or on behalf of, the company that evidences or creates a legal obligation of the company.
- (2) Where —
  - (a) a document that evidences or creates a legal obligation of a company is issued or signed by or on behalf of the company; and
  - (b) the name of the company is incorrectly stated in the document —  
every person who issued or signed the document is liable to the same extent as the company if the company fails to discharge the obligation unless —
    - (c) the person who issued or signed the document proves that the person in whose favour the obligation was incurred was aware at the time the document was issued or signed that the obligation was incurred by the company; or
    - (d) the Court is satisfied that it would not be just and equitable for the person who issued or signed the document to be so liable.
- (3) For the purposes of subsections (1) and (2) and of section 189 (which relates to the manner in which a company may enter into contracts and other obligations), a company may use a generally recognised

abbreviation of a word or words in its name if it is not misleading to do so.

- (4) If, within the period of 12 months immediately preceding the giving by a company of any public notice, the name of the company was changed, the company shall ensure that the notice states —
- (a) that the name of the company was changed in that period; and
  - (b) the former name or names of the company.
- (5) If a company fails to comply with subsection (1) or subsection (4) —
- (a) the company commits an offence and is liable on conviction to the penalty set out in section 377(1); and
  - (b) every director and company secretary of the company commits an offence and is liable on conviction to the penalty set out in section 378(1).

## **PART V - COMPANY CONSTITUTION**

### **30 Every company to have constitution.**

Every company shall have a constitution.

### **31 Relationship between Act and constitution.**

The company, the board, each director, company secretary and shareholder of the company have the rights, powers, duties and obligations set out in this Act except to the extent that they are negated or modified, in accordance with this Act, by the constitution of the company.

### **32 Standard constitution.**

- (1) In this Act, unless the context otherwise requires, “standard constitution” means the document forming the First Schedule.
- (2) A company may adopt all or any of the provisions of the standard constitution as the constitution of the company.
- (3) Except in so far as the provisions of the standard constitution are excluded or modified by, or are otherwise inconsistent with, the provisions of the constitution of the company under section 33, the provisions of the standard constitution are deemed to be included in the constitution of the company.



**33 Form of constitution.**

The constitution of a company is —

- (a) in the case of a company registered under Part II, the document accompanying the application for registration certified by at least one applicant as the company's constitution;
- (b) in the case of an existing company, that is reregistered under this Act in accordance with the Tenth Schedule, the document accompanying the application for reregistration certified by at least one director or company secretary of the company as the company's constitution;
- (c) a document that is adopted by the company as its new constitution under section 36;
- (d) a document described in section 37; or
- (e) a document described in paragraph (a), (b), (c) or (d) as altered by the company under section 36 or by the Court under section 38 —  
subject to section 32(3).

**34 Contents of constitution**

Subject to section 20(2), the constitution of a company may contain —

- (a) matters contemplated by this Act for inclusion in the constitution of a company; and
- (b) such other matters as the company wishes to include in its constitution.

**35 Effect of constitution.**

- (1) The constitution of a company has no effect to the extent that it contravenes, or is inconsistent with, this Act.
- (2) Subject to this Act, the constitution of a company is binding as between —
  - (a) the company and each shareholder; and
  - (b) each shareholder —in accordance with its terms.

**36 Alteration of constitution.**

- (1) Without limiting section 117 (which relates to an alteration of shareholders' rights) and section 183 (which relates to the right of a

shareholder to apply to the Court for relief in cases of prejudice), but subject to section 61 (which relates to the reduction of shareholders' liability), the shareholders of a company may, by special resolution —

- (a) revoke its previous constitution and adopt a new constitution for the company;
  - (b) alter the constitution of the company.
- (2) Within 10 working days of the adoption of a new constitution by a company or the alteration of the constitution of a company, as the case may be, the board shall ensure that a notice in the prescribed form of the adoption of the new constitution or of the alteration of the constitution is delivered to the Registrar for registration.
- (3) If the board of a company fails to comply with subsection (2), every director and company secretary of the company commits an offence and is liable, on conviction, to the penalty set out in section 378(2).
- (4) In this Act, unless the context otherwise requires, a reference to alteration of a company's constitution includes the adoption of a new constitution under subsection (1)(a).

### **37 Consolidated constitution.**

- (1) A company may, from time to time, deliver to the Registrar a single document that incorporates the provisions of a document referred to in section 33(a), (b), (c), (d) or (e), together with all alterations to it.
- (2) The Registrar may, if the Registrar considers that by reason of the number of alterations to a company's constitution it would be desirable for the constitution to be contained in a single document, by notice in writing, require a company to deliver to the Registrar a single document that incorporates the provisions of a document referred to in section 33(a), (b), (c) or (d), together with all alterations to it.
- (3) Within 20 working days of receipt by a company of a notice under subsection (2), the board shall ensure that the document required by that subsection is received by the Registrar for registration.
- (4) The board shall ensure that a document delivered to the Registrar under this section is accompanied by a certificate signed by a person authorised by the board that the document complies with subsection (1) or subsection (2), as the case may be.
- (5) As soon as the Registrar receives a document certified in accordance with subsection (4), the Registrar shall register the document.
- (6) If the board of a company fails to comply with subsection (3) or subsection (4), every director and company secretary of the company

commits an offence and is liable on conviction to the penalty set out in section 378(2).

### **38 Court may alter constitution.**

- (1) The Court may, on the application of a director or shareholder of a company, if it is satisfied that it is not practicable to alter the constitution of the company using the procedure set out in this Act or in the constitution itself, make an order altering the constitution of a company on such terms and conditions that it thinks fit.
- (2) The applicant for the order shall ensure that a copy of an order made under subsection (1), together with a copy of the constitution as altered, is delivered to the Registrar for registration within 10 working days.
- (3) A person who fails to comply with subsection (2) commits an offence and is liable on conviction to the penalty set out in section 377(2).

## **PART VI - SHARES**

### **39 Legal nature of shares.**

A share in a company is personal property.

### **40 Rights and powers attaching to shares.**

- (1) Subject to subsection (2), a share in a company confers on the holder —
  - (a) the right to one vote on a poll at a meeting of the company on any resolution, including any resolution to —
    - (i) appoint or remove a director, company secretary, or auditor;
    - (ii) alter the company's constitution;
    - (iii) approve a major transaction;
    - (iv) approve an amalgamation of the company under section 230;
    - (v) put the company into liquidation;
  - (b) the right to an equal share in dividends authorised by the board;
  - (c) the right to an equal share in the distribution of the surplus assets of the company.
- (2) Subject to section 57, the rights specified in subsection (1) may be negated, altered, or added to by the constitution of the company or in accordance with the terms on which the share is issued under section 46.

**41 Types of shares.**

- (1) Subject to the constitution of the company, different classes of shares may be issued in a company.
- (2) Without limiting subsection (1), shares in a company may —
  - (a) be redeemable;
  - (b) confer preferential rights to distributions of capital or income;
  - (c) confer special, limited or conditional voting rights; or
  - (d) not confer voting rights.

**42 No nominal value.**

- (1) A share shall not have a nominal or par value.
- (2) Nothing in subsection (1) prevents the issue by a company of a redeemable share.

**43 Transferability of shares.**

- (1) Subject to any limitation or restriction on the transfer of shares in the constitution, a share in a company is transferable.
- (2) A share is transferred by entry in the share register in accordance with section 85.
- (3) The personal representative of a deceased shareholder may transfer a share even though the personal representative is not a shareholder at the time of transfer.

**44 Contracts for issue of Shares.**

A contract or deed under which a company is or may be required to issue shares whether on the exercise of an option or on the conversion of securities or otherwise is an illegal contract and void and of no effect, unless the board —

- (a) is entitled to issue the shares; and
- (b) has complied with section 51 or section 53.

**ISSUE OF SHARES****45 Issue of shares on registration and amalgamation.**

A Company shall —

- (a) forthwith after the registration of the company, issue to any person or persons named in the application for registration as a shareholder or shareholders, the number of shares specified in the application as being the number of shares to be issued to that person or those persons;
- (b) in the case of an amalgamated company, forthwith after the amalgamation is effective, issue to any person entitled to a share or shares under the amalgamation proposal, the share or shares to which that person is entitled.

#### **46 Issue of other shares.**

Subject to this Act and the constitution of the company, the Board of a company may issue shares at any time, to any person, and in any number it thinks fit.

#### **47 Notice of share issue.**

- (1) The Board of a company shall deliver to the Registrar for registration, within 10 working days of the issue of shares under section 45(b) or section 46, a notice in the prescribed form of the issue of the shares by the company.
- (2) If the board of a company fails to comply with subsection (1), every director and company secretary of the company commits an offence and is liable on conviction to the penalty set out in section 378(2).

#### **48 Shareholder approval for issue of shares.**

- (1) Notwithstanding section 46, if shares cannot be issued by reason of any limitation or restriction in the company's constitution, the board may issue shares if the Board obtains the approval for the issue in the same manner as approval is required for an alteration to the constitution that would permit such an issue.
- (2) Subject to the terms of the approval, the shares may be issued at any time, to any person, and in any number the board thinks fit.
- (3) Within 10 working days of approval being given under subsection (1), the board shall ensure that notice of that approval in the prescribed form is delivered to the Registrar for registration.
- (4) Nothing in this section affects the need to obtain the approval of an interest group in accordance with section 117 (which relates to the alteration of shareholders' rights) if the issue of shares affects the rights of that interest group.

- (5) A failure to comply with this section does not affect the validity of an issue of shares.
- (6) If the board of a company fails to comply with subsection (3), every director and company secretary of the company commits an offence and is liable on conviction to the penalty set out in section 378(2).

#### **49 Pre-emptive rights.**

- (1) Shares issued or proposed to be issued by a company that rank or would rank as to voting or distribution rights, or both, equally with or prior to shares already issued by the company shall be offered for acquisition to the holders of the shares already issued in a manner and on terms that would, if accepted, maintain the existing voting or distribution rights, or both, of those holders.
- (2) An offer under subsection (1) shall remain open for acceptance for a reasonable time.
- (3) The constitution of a company may negate, limit or modify the requirements of this section.

#### **50 Consideration for issue of shares.**

The consideration for which a share is issued may take any form and may be cash, promissory notes, contracts for future services, real or personal property, or other securities of the company.

#### **51 Consideration to be decided by Board.**

- (1) Before the board of a company issues shares under section 46 or section 48, the board shall —
  - (a) decide the consideration for which the shares will be issued and the terms on which they will be issued;
  - (b) if the shares are to be issued other than for cash, determine the reasonable present cash value of the consideration for the issue;
  - (c) resolve that, in its opinion, the consideration for and terms of the issue are fair and reasonable to the company and to all existing shareholders; and
  - (d) if the shares are to be issued other than for cash, resolve that, in its opinion, the present cash value of the consideration to be provided for the issue of the shares is not less than the amount to be credited for the issue of the shares.

- (2) The directors who vote in favour of a resolution required by subsection (1) shall sign a certificate —
  - (a) stating the consideration for, and the terms of, the issue;
  - (b) describing the consideration in sufficient detail to identify it;
  - (c) where a present cash value has been determined in accordance with subsection (1)(b), stating that value and the basis for assessing it;
  - (d) stating that, in their opinion, the consideration for and terms of issue are fair and reasonable to the company and to all existing shareholders; and
  - (e) if the shares are to be issued other than for cash stating that, in their opinion, the present cash value of the consideration to be provided for the issue of the shares is not less than the amount to be credited for the issue of the shares.
- (3) Before shares that have already been issued are credited as fully or partly paid up other than for cash, the board shall —
  - (a) determine the reasonable present cash value of the consideration; and
  - (b) resolve that, in its opinion the present cash value of the consideration is —
    - (i) fair and reasonable to the company and to all existing shareholders; and
    - (ii) not less than the amount to be credited in respect of the shares.
- (4) The directors who vote in favour of a resolution under subsection (3) shall sign a certificate —
  - (a) describing the consideration in sufficient detail to identify it; and
  - (b) stating —
    - (i) the present cash value of the consideration and the basis for assessing it;
    - (ii) that the present cash value of the consideration is fair and reasonable to the company and to all existing shareholders; and
    - (iii) that the present cash value of the consideration is not less than the amount to be credited in respect of the shares.
- (5) The Board shall deliver a copy of a certificate that complies with subsection (2) or subsection (4) to the Registrar for registration within 10 working days after it is given.
- (6) For the purposes of this section, shares that are or are to be credited as paid up, whether wholly or partly, as part of an arrangement that involves

the transfer of property or the provision of services and an exchange of cash or cheques or other negotiable instruments, whether simultaneously or not, shall be treated as paid up other than in cash to the value of the property or services.

- (7) A director who fails to comply with subsection (2) or subsection (4) commits an offence and is liable on conviction to the penalty set out in section 377(1).
- (8) Nothing in this section applies to the issue of shares in a company on —
  - (a) the conversion of any convertible securities; or
  - (b) the exercise of any option to acquire shares in the company.
- (9) If the board of a company fails to comply with subsection (5), every director and company secretary of the company commits an offence and is liable, on, conviction, to the penalty set out in section 378(2).

## **52 Exceptions to section 51.**

Section 51 does not apply to —

- (a) the issue of shares that are fully paid up from the reserves of the company to all shareholders of the same class in proportion to the number of shares held by each shareholder;
- (b) the consolidation and division of the shares or any class of shares in the company in proportion to those shares or the shares in that class; or
- (c) the subdivision of the shares or any class of shares in the company in proportion to those shares or the shares in that class.

## **53 Consideration in relation to issue of options and convertible securities.**

- (1) Before the board of a company issues any securities that are convertible into shares in the company or any options to acquire, shares in the company, the board shall —
  - (a) decide the consideration for which the convertible securities or options, and, in either case, the shares will be issued and the terms on which they will be issued;
  - (b) if the shares are to be issued other than for cash, determine the reasonable present cash value of the consideration for the issue;
  - (c) resolve that, in its opinion, the consideration for and terms of the issue of the convertible securities or options, and, in either case, the



- shares are fair and reasonable to the company and to all existing shareholders; and
- (d) if the shares are to be issued other than for cash, resolve that, in its opinion, the present cash value of the consideration to be provided is not less than the amount to be credited for the issue of the shares.
- (2) The directors who vote in favour of a resolution required by subsection (1) shall sign a certificate —
- (a) stating the consideration for, and the terms of, the issue of the convertible securities or options, and, in either case, the shares;
  - (b) describing the consideration in sufficient detail to identify it;
  - (c) where a present cash value has been determined in accordance with subsection (1)(b), stating that value and the basis for assessing it;
  - (d) stating that, in their opinion, the consideration for and terms of issue of the convertible securities or options, and, in either case, the shares are fair and reasonable to the company and to all existing shareholders; and
  - (e) if the shares are to be issued other than for cash, stating that, in their opinion, the present cash value of the consideration to be provided is not less than the amount to be credited for the issue of the shares.
- (3) The Board shall deliver a copy of a certificate that complies with subsection (2) to the Registrar for registration within 10 working days after it is given.
- (4) For the purposes of this section, shares that are to be credited as paid up, whether wholly or partly, as part of an arrangement that involves the transfer of property or the provision of services and an exchange of cash or cheques or other negotiable instruments, whether simultaneously or not, shall be treated as paid up other than in cash to the value of the property or services.
- (5) A director who fails to comply with subsection (2) commits an offence and is liable on conviction to the penalty set out in section 377(1).
- (6) If the Board of a company fails to comply with subsection (3), every director and company secretary of the company commits an offence and is liable on conviction to the penalty set out in section 378(2).

#### **54 Consent to issue of shares.**

The issue by a company of a share that —

- (a) increases a liability of a person to the company; or
- (b) imposes a new liability on a person to the company - is void if that person or an agent of that person authorised in writing does not

consent in writing to becoming the holder of the share before it is issued.

## 55 Time of issue of shares.

A share is issued when the name of the holder is entered on the share register.

## DISTRIBUTIONS TO SHAREHOLDERS

## 56 Board may authorise distributions.

- (1) The board of a company that is satisfied on reasonable grounds that the company will, immediately after the distribution, satisfy the solvency test may, subject to section 57 and the constitution of the company, authorise a distribution by the company at a time, and of an amount, and to any shareholders it thinks fit.
- (2) The directors who vote in favour of a distribution shall sign a certificate stating that, in their opinion, the company will, immediately, after the distribution, satisfy the solvency test and the grounds for that opinion.
- (3) If, after a distribution is authorised and before it is made, the board ceases to be satisfied on reasonable grounds that the company will, immediately after the distribution is made, satisfy the solvency test, any distribution made by the company is deemed not to have been authorised.
- (4) In applying the solvency test for the purposes of this section and section 60 —
  - (a) “debts” includes fixed preferential returns on shares ranking ahead of those in respect of which a distribution is made (except where that fixed preferential return is expressed in the constitution as being subject to the power of the directors to make distributions), but does not include debts arising by reason of the authorisation; and
  - (b) “liabilities” includes the amount that would be required, if, the company were to be removed from the Tongan register after the distribution, to repay all fixed preferential amounts payable by the company to shareholders, at the time, or on earlier redemption (except where such fixed preferential amounts are expressed in the constitution as being subject to the power of directors to make distributions), but, subject to paragraph (a), does not include dividends payable in the future.
- (5) Every director who fails to comply with subsection (2) commits an offence and is liable on conviction to the penalty set out in section 377(1).

**57 Dividends.**

- (1) A dividend is a distribution other than a distribution to which section 63 or section 77 applies.
- (2) The board of a company shall not authorise a dividend —
  - (a) in respect of some but not all the shares in a class; or
  - (b) that is of a greater value per share in respect of some shares of a class than it is in respect of other shares of that class —unless the amount of the dividend in respect of a share of that class is in proportion to the amount paid to the company in satisfaction of the liability of the shareholder under the constitution of the company or under the terms of issue of the share.
- (3) Notwithstanding subsection (2), a shareholder may waive his entitlement to receive a dividend by notice in writing to the company signed by or on behalf of the shareholder.

**58 Shares in lieu of dividends.**

Subject to the constitution of the company, the board of a company may issue shares to any shareholders who have agreed to accept the issue of shares, wholly or partly, in lieu of a proposed dividend or proposed future dividends if —

- (a) the right to receive shares, wholly or partly, in lieu of the proposed dividend or proposed future dividends has been offered to all shareholders of the same class on the same terms;
- (b) if all shareholders elected to receive the shares in lieu of the proposed dividend, relative voting or distribution rights, or both, would be maintained;
- (c) the shareholders to whom the right is offered are afforded a reasonable opportunity of accepting it;
- (d) the shares issued to each shareholder are issued on the same terms and subject to the same rights as the shares issued to all shareholders in that class who agree to receive the shares; and
- (e) the provisions of section 51 are complied with by the board.

**59 Shareholder Discounts**

- (1) The board of a company may resolve that the company offer shareholders discounts in respect of some or all of the goods sold or services provided by the company.
- (2) The board may approve a discount scheme under subsection (1) only if it has previously resolved that the proposed discounts are —

- (a) fair and reasonable to the company and to all shareholders; and
  - (b) to be available to all shareholders or all shareholders of the same class on the same terms.
- (3) A discount scheme may not be approved or continued by the board unless it is satisfied on reasonable grounds that the company satisfies the solvency test.
- (4) Subject to subsection (5), a discount accepted by a shareholder under a discount scheme approved under this section is not a distribution for the purposes of this Act.
- (5) Where —
- (a) a discount is accepted by a shareholder under a scheme approved or continued by the board; and
  - (b) at the time the scheme was approved or the discount was offered, the board ceased to be satisfied on reasonable grounds that the company would satisfy the solvency test —

the provisions of section 60 shall apply in relation to the discount with such modifications as may be necessary as if the discount were a distribution that is deemed not to have been authorised.

## 60 Recovery of distributions

- (1) A distribution made to a shareholder at a time when the company did not, immediately after the distribution, satisfy the solvency test may be recovered by the company from the shareholder unless —
- (a) the shareholder received the distribution in good faith and without knowledge of the company's failure to satisfy the solvency test;
  - (b) the shareholder has altered the shareholder's position in reliance on the validity of the distribution; and
  - (c) it would be unfair to require repayment in full or at all.
- (2) If, in relation to a distribution made to shareholders —
- (a) the procedure set out in sections 56, 71 or 78, as the case may be, has not been followed; or
  - (b) reasonable grounds for believing that the company would satisfy the solvency test in accordance with sections 56, 71 or 78, as the case may be, did not exist at the time the certificate was signed —
- a director who —
- (c) failed to take reasonable steps to ensure the procedure was followed; or
  - (d) signed the certificate, as the case may be —

is personally liable to the company to repay to the company so much of the distribution as is not able to be recovered from shareholders.

- (3) If, by virtue of sections 56(3), 71(3) or 78(3), as the case may be, a distribution is deemed not to have been authorised, a director who —
- (a) ceased after authorisation but before the making of the distribution to be satisfied on reasonable grounds for believing that the company would satisfy the solvency test immediately after the distribution is made; and
  - (b) failed to take reasonable steps to prevent the distribution being made —

is personally liable to the company to repay to the company so much of the distribution as is not able to be recovered from shareholders.

- (4) If, by virtue of section 59 (5), a distribution is deemed not to have been authorised, a director who failed to take reasonable steps to prevent the distribution being made is personally liable to the company to repay to the company so much of the distribution as is notable to be recovered from shareholders.
- (5) If, in an action brought against a director or shareholder under this section, the Court is satisfied that the company could, by making a distribution of a lesser amount, have satisfied the solvency test, the Court may —
- (a) permit the shareholder to retain; or
  - (b) relieve the director from liability in respect of —

an amount equal to the value of any distribution that could properly have been made.

## **61 Reduction of shareholder's liability to treated as a distribution**

- (1) If a company proposes to alter its constitution, or to acquire shares issued by it, or redeem shares under section 70, as the case may be, in a manner which would cancel or reduce the liability of a shareholder to the company in relation to a share held prior to that alteration, acquisition or redemption, the proposed cancellation or reduction of liability is to be treated —
- (a) for the purposes of section 56, as if it were a distribution; and
  - (b) for the purposes of sections 57(2), and 57(3), as if it were a dividend.
- (2) If a company has altered its constitution; or acquired shares, or redeemed shares under section 70, as the case may be, in a manner which cancels or reduces the liability of a shareholder to the company in relation to a share held prior to that alteration, acquisition or redemption, that cancellation or

reduction of liability is to be treated for the purposes of section 60 as a distribution of the amount by which that liability was reduced.

- (3) If the liability of a shareholder of an amalgamating company to that company in relation to a share held before the amalgamation is —
- (a) greater than the liability of that shareholder to the amalgamated company in relation to a share or shares into which that share is converted; or
  - (b) cancelled by the cancellation of that share in the amalgamation —

the reduction of liability effected by the amalgamation is to be treated for the purposes of section 60(1) and (5) as a distribution by the amalgamated company to that shareholder, whether or not that shareholder becomes a shareholder of the amalgamated company of the amount by which that liability was reduced.

## COMPANY MAY ACQUIRE ITS OWN SHARES

### 62 Company may acquire its own shares.

- (1) A company may, in accordance with section 63 to 67, section 107 and sections 110 to 112, but not otherwise, acquire its own shares.
- (2) Shares acquired by a company otherwise than in accordance with sections 63 to 67, section 107 and 110 to 112 are deemed to be cancelled on acquisition.
- (3) Within 10 working days of the purchase or acquisition of the shares, the board of the company shall ensure that notice in the prescribed form of the purchase or acquisition is delivered to the Registrar for registration.
- (4) If the board of a company fails to comply with subsection (3), every director and company secretary of the company commits an offence and is liable on conviction to the penalty set out in section 378(2).

### 63 Acquisition of company's own shares.

- (1) Subject to section 56, a company may purchase or otherwise acquire its own shares if it is expressly permitted to do so by its constitution.
- (2) The purchase or acquisition of the shares shall be made in accordance with section 64.
- (3) Nothing in this section or in sections 64 to 68 limits or affects —
  - (a) an order of the Court that requires a company to purchase or acquire its own shares; or

- (b) section 110 (which relates to the right of a shareholder to require a company to purchase shares).

#### **64 Board may make offer to acquire shares.**

- (1) The board of a company may make an offer to acquire shares issued by the company if the offer is —
  - (a) an offer to all shareholders to acquire a proportion of their shares, that —
    - (i) would, if accepted, leave unaffected relative voting and distribution rights; and
    - (ii) affords a reasonable opportunity to accept the offer; or
  - (b) an offer to one or more shareholders to acquire shares —
    - (i) to which all shareholders have consented in writing; or
    - (ii) that is expressly permitted by the constitution, and is made in accordance with the procedure set out in section 65.
- (2) Where an offer is made in accordance with subsection (1)(a) —
  - (a) the offer may also permit the company to acquire additional shares from a shareholder to the extent that another shareholder does not accept the offer or accepts the offer only in part; and
  - (b) if the number of additional shares exceeds the number of shares that the company is entitled to acquire, the number of additional shares shall be reduced pro rata.
- (3) The board may make an offer under subsection (1) only if it has previously resolved —
  - (a) that the acquisition in question is in the best interests of the company; and
  - (b) that the terms of the offer and the consideration offered for the shares are fair and reasonable to the company; and
  - (c) that it is not aware of any information that will not be disclosed to shareholders —
    - (i) which is material to an assessment of the value of the shares; and
    - (ii) as a result of which, the terms of the offer and consideration offered for the shares are unfair to shareholders accepting the offer.
- (4) The resolution shall set out in full the reasons for the director's conclusions.

- (5) The directors who vote in favour of a resolution required by subsection (3) shall sign a certificate as to the matters set out in that subsection, and may combine it with the certificate required by section 56 and any certificate required under section 65.
- (6) The board of a company shall not make an offer under subsection (1) if, after the passing of a resolution under subsection (3) and before the making of the offer to acquire the shares —
  - (a) the board ceases to be satisfied that the acquisition in question is in the best interests of the company;
  - (b) the board ceases to be satisfied that the terms of the offer and the consideration offered for the shares are fair and reasonable to the company; or
  - (c) the board becomes aware of any information that will not be disclosed to shareholders —
    - (i) which is material to an assessment of the value of the shares; or
    - (ii) as a result of which the terms of the offer and consideration offered for the shares would be unfair to shareholders, accepting the offer.
- (7) Every director who fails to comply with subsection (5) commits an offence and is liable on conviction to the penalty set out in section 377(1).

## **65 Special offers to acquire shares.**

- (1) The board may make an offer under section 64(1)(b)(ii) only if it has previously resolved —
  - (a) that the acquisition is of benefit to the remaining shareholders; and
  - (b) that the terms of the offer and the consideration offered for the shares are fair and reasonable to the remaining shareholders.
- (2) The resolution shall set out in full the reasons for the directors' conclusions.
- (3) The directors who vote in favour of a resolution required by subsection (1) shall sign a certificate as to the matters set out in that subsection.
- (4) A board shall not make an offer under section 64(1)(b)(ii) if, after the passing of a resolution under subsection (1) and before the making of the offer to acquire the shares, the board ceases to be satisfied that —
  - (a) the acquisition is of benefit to the remaining shareholders; or
  - (b) the terms of the offer and the consideration offered for the shares are fair and reasonable to the remaining shareholders.



- (5) Before an offer is made pursuant to a resolution under subsection (1), the company shall send to each shareholder a disclosure document that complies with section 66.
- (6) The offer shall be made not less than 10 working days and not more than 12 months after the disclosure document has been sent to each shareholder.
- (7) A shareholder or the company may apply to the Court for an order restraining the proposed acquisition on the grounds that —
  - (a) it is not in the best interests of the company and of benefit to remaining shareholders; or
  - (b) the terms of the offer and the consideration offered for the shares are not fair and reasonable to the company and remaining shareholders.
- (8) Every director who fails to comply with subsection (3) commits an offence and is liable on conviction to the penalty set out in section 377(1)
- (9) If a company fails to comply with subsection (5) —
  - (a) the company commits an offence and is liable on conviction to the penalty set out in section 377(1); and
  - (b) every director and company secretary of the company commits an offence and is liable on conviction to the penalty set out in section 378(1).

## **66 Disclosure document.**

For the purposes of section 65, a disclosure document is a document that sets out —

- (a) the nature and terms of the offer and, if made to specified shareholders, to whom it will be made;
- (b) the nature and extent of any relevant interest of any director of the company in any shares the subject of the offer; and
- (c) the text of the resolution required by section 65, together with such further information and explanation as may be necessary to enable a reasonable shareholder to understand the nature and implications for the company and its shareholders of the proposed, acquisition.

## **67 Cancellation of shares repurchased.**

- (1) Shares that are acquired by a company pursuant to section 63 or section 112 are deemed to be cancelled immediately on acquisition.

- (2) Shares are acquired for the purposes of subsection (1) on the date on which the company would, apart from this section, become entitled to exercise the rights attached to the shares.
- (3) On the cancellation of a share under this section, the rights and privileges attached to that share expire; but the share may be reissued in accordance with this Part.

## **68 Enforceability of contract to repurchase shares.**

- (1) A contract with a company providing for the acquisition by the company of its shares is specifically enforceable against the company except to the extent that the company would, by performance, be unable to satisfy the solvency test in accordance with section 56.
- (2) The company has the burden of proving that performance of the contract would result in the company being unable to satisfy the solvency test in accordance with section 56.
- (3) Until the company has fully performed a contract referred to in subsection (1), the other party to the contract retains the status of a claimant entitled to be paid as soon as the company is lawfully able to do so or, prior, to the removal of the company from the Tongan register, to be ranked subordinate to the rights of creditors but in priority to the other shareholders.

## **REDEMPTION OF SHARES**

## **69 Meaning of “redeemable”.**

For the purposes of this Act, a share is redeemable if the constitution of the company makes provision for the redemption of that share by the company —

- (a) at the option of the company;
- (b) at the option of the holder of the share;
- (c) on a date specified in the constitution —  
for a consideration that is —
  - (d) specified;
  - (e) to be calculated by reference to a formula; or
  - (f) required to be fixed by a suitably qualified person who is not associated with or interested in the company.

## **70 Redemption at option of company.**

- (1) A company shall not exercise an option to redeem shares unless —

- (a) the option is exercised in relation to all shareholders of the same class and in a manner that will leave unaffected relative voting and distribution rights; or
  - (b) the option is exercised in relation to one or more shareholders and —
    - (i) all shareholders have consented in writing; or
    - (ii) the option is expressly permitted by the constitution and is exercised in accordance with the procedure set out in section 72.
- (2) A company shall not exercise an option to redeem shares unless, before the exercise of the option, the board of the company has resolved —
- (a) that the redemption of the shares is in the best interests of the company; and
  - (b) the consideration for the redemption of the shares is fair and reasonable to the company.
- (3) The resolution shall set out in full the grounds for the directors' conclusions.
- (4) The directors who vote in favour of a resolution required by subsection (2) shall sign a certificate as to the matters set out in that subsection and may combine it with the certificate required by section 71 and any certificate required by section 72.
- (5) A company shall not exercise an option to redeem shares under subsection (1) if, after the passing of a resolution under that subsection and before the exercise of the option to redeem the shares, the board ceases to be satisfied that —
- (a) the redemption of the shares is in the best interests of the company; or
  - (b) the consideration for the exercise of the option is fair and reasonable to the company.
- (6) Every director who fails to comply with subsection (4) commits an offence and is liable on conviction to the penalty set out in section 377(1).

## **71 Company shall satisfy solvency test.**

- (1) A company shall not exercise an option to redeem a share unless the board of the company is satisfied on reasonable grounds that the company will, immediately after the share is redeemed, satisfy the solvency test in accordance with section 56.
- (2) The directors who vote in favour of exercising the option shall sign a certificate stating that, in their opinion, the company will, immediately

after the share is redeemed, satisfy the solvency test and the grounds for that opinion.

- (3) If, after a resolution is passed under subsection (1) and before the option is exercised, the board ceases to be satisfied on reasonable grounds that the company will, immediately after the share is redeemed, satisfy the solvency test in accordance with section 56, any redemption of the share is deemed not to have been authorised for the purpose of that section.
- (4) Every director who fails, to comply with subsection (2) commits an offence and is liable on conviction to the penalty set out in section 377(1).
- (5) The provisions of section 60 apply in relation to the redemption of a share at the option of the company with such modifications as may be necessary.

## **72 Special redemption of shares.**

- (1) A company may exercise an option to redeem shares under section 70(1)(b)(ii) only if the board has previously resolved —
  - (a) that the redemption of the shares is of benefit to the remaining shareholders; and
  - (b) that the consideration for the redemption of the shares is fair and reasonable to the remaining shareholders.
- (2) The resolution shall set out in full the grounds for the directors' conclusions.
- (3) The directors who vote in favour of a resolution required by subsection (1) shall sign a certificate as to the matters set out in that subsection.
- (4) A company shall not exercise an option to redeem shares under section 70(1)(b)(ii) if, after the passing of a resolution under subsection (1) and before the option is exercised, the board ceases to be satisfied that —
  - (a) the redemption of the shares is of benefit to the remaining shareholders; or
  - (b) the consideration for the redemption of the shares is fair and reasonable to the remaining shareholders.
- (5) Before the option is exercised pursuant to a resolution under subsection (1), the company shall send to each shareholder a disclosure document that complies with section 73.
- (6) The option shall be exercised not less than 10 and not more than 30 working days after the disclosure document has been sent to each shareholder.

- (7) A shareholder or the company may apply to the Court for an order restraining the proposed exercise of the option on the grounds that —
  - (a) it is not in the best interests of the company or of benefit to remaining shareholders; or
  - (b) the consideration for the redemption is not fair or reasonable to the company or remaining shareholders.
- (8) Every director who fails to comply with subsection (3) commits an offence and is liable on conviction to the penalty set out in section 377(1).
- (9) If a company fails to comply with subsection (5) —
  - (a) the company commits an offence and is liable on conviction to the penalty set out in section 377(1); and
  - (b) every director and company secretary of the company commits, an offence and is liable on conviction to the penalty set out in section 378(1).

### **73 Disclosure document.**

For the purposes of section 72, a disclosure document is a document that sets out —

- (a) the nature and terms of the redemption of the shares and, if the option to redeem the shares is to be exercised in relation to specified shareholders, the names of those shareholders; and
- (b) the text of the resolution required by section 72, together with such further information and explanation as may be necessary to enable a reasonable shareholder to understand the nature and implications for the company and its shareholders of the proposed redemption.

### **74 Cancellation of shares redeemed.**

- (1) Shares that are redeemed by a company pursuant to section 70 are deemed to be cancelled immediately on redemption.
- (2) On the cancellation of a share under this section the rights and privileges attached to that share expire; but the share may be reissued in accordance with this Part.

### **75 Redemption as option of shareholder.**

- (1) Subject to this section, if a share is redeemable at the option of the holder of the share, and the holder gives proper notice to the company requiring the company to redeem the share —

- (a) the company shall redeem the share on the date specified in the notice or, if no date is specified, on the date of receipt of the notice;
  - (b) the share is deemed to be cancelled on the date of redemption; and
  - (c) from the date of redemption the former shareholder ranks as an unsecured creditor of the company for the sum payable on redemption.
- (2) A redemption under this section is not a distribution for the purposes of section 56 and 57; but is deemed to be a distribution for the purposes of sections 60(1) and 60(5).

## **76 Redemption on fixed date.**

- (1) Subject to this section, if a share is redeemable on a specified date —
- (a) the company shall redeem the share on that date;
  - (b) the share is deemed to be cancelled on that date; and
  - (c) from that date the former shareholder ranks as an unsecured creditor of the company for the sum payable on redemption.
- (2) A redemption under this section is not a distribution for the purposes of section 56, and 57; but is deemed to be a distribution for the purposes of sections 60(1) and 60(5).

## **ASSISTANCE BY A COMPANY IN THE PURCHASE OF ITS OWN SHARES**

## **77 Financial assistance.**

- (1) A company may give financial assistance to a person for the purpose of, or in connection with, the purchase of a share issued or to be issued by the company or by its holding company, whether directly or indirectly, only if the financial assistance is given in accordance with subsection (2); and —
- (a) all shareholders have consented in writing to the giving of the assistance;
  - (b) the procedure set out in section 79 is followed; or
  - (c) the financial assistance is given in accordance with section 81.
- (2) A company may give financial assistance under subsection (1) if the board has previously resolved that —
- (a) the company should provide the assistance;
  - (b) giving the assistance is in the best interests of the company; and
  - (c) the terms and conditions under which the assistance is given are fair and reasonable to the company.

- (3) The resolution shall set out in full the grounds for the directors' conclusions.
- (4) The directors who vote in favour of a resolution under subsection (2) shall sign a certificate as to the matters set out in that subsection and may combine that certificate with the certificate required under section 78 and any certificate required under section 79.
- (5) A company shall not give financial assistance under subsection (1) if, after the passing of a resolution under subsection (2) and before the assistance is given, the board ceases to be satisfied that —
  - (a) the giving of the assistance is in the best interests of the company; or
  - (b) the terms and conditions under which the assistance is proposed are fair and reasonable to the company.
- (6) For the purposes of this section “financial assistance” includes a loan, a guarantee and the provision of a security.
- (7) Every director who fails to comply with subsection (4) commits an offence and is liable on conviction to the penalty set out in section 377(1).

## **78 Company shall satisfy solvency test**

- (1) A company shall not give any financial assistance under section 77 unless the board of the company is satisfied on reasonable grounds that the company will, immediately after the giving of the financial assistance, satisfy the solvency test.
- (2) The directors who vote in favour of the giving of the financial assistance shall sign a certificate stating that, in their opinion, the company will, immediately after the financial assistance is given, satisfy the solvency test and the grounds for that opinion.
- (3) If, after a resolution is passed under subsection (1) and before the financial assistance is given, the board ceases to be satisfied on reasonable grounds that the company will, immediately after the financial assistance is given, satisfy the solvency test; any financial assistance given by the company is deemed not to have been authorised.
- (4) Every director of a company who fails to comply with subsection (2) commits an offence and is liable to the penalty set out in section 377(1).
- (5) The provisions of section 60 apply in relation to the giving of financial assistance by a company with such modifications as may be necessary.
- (6) In applying the solvency test for the purposes of this section —

“**assets**” excludes all amounts of financial assistance given by the company at any time in the form of loans; and

“**liabilities**” includes the face value of all outstanding liabilities, whether contingent or otherwise, incurred by the company at any time in connection with the giving of financial assistance.

## **79 Special financial assistance.**

- (1) Financial assistance may be given under section 77(1)(b) only if the Board has previously resolved that —
  - (a) giving the financial assistance is of benefit to those shareholders not receiving the assistance; and
  - (b) the terms and conditions under which the assistance is given are fair and reasonable to those shareholders not receiving the assistance.
- (2) The resolution shall set out in full the reasons for the directors’ conclusions.
- (3) The directors who vote in favour of a resolution required by subsection (1) shall sign a certificate as to the matters set out in that subsection.
- (4) A company shall not give financial assistance under section 77(1)(b) if, after the passing of a resolution under subsection (1) and before the financial assistance is given, the board ceases to be satisfied that —
  - (a) giving the financial assistance is of benefit to those shareholders not receiving the assistance; or
  - (b) the terms and conditions under which the assistance is given are fair and reasonable to those shareholders not receiving the assistance.
- (5) Before the financial assistance is given under section 77(1)(b), the company shall send to each shareholder a disclosure document that complies with section 80.
- (6) The assistance may be given not less than 10 working days and not more than 12 months after the disclosure document has been sent to each shareholder.
- (7) A shareholder or the company may apply to the Court for an order restraining the proposed financial assistance being given on the ground that —
  - (a) it is not in the best interests of the company and not of benefit to those shareholders not receiving the assistance; or
  - (b) the terms and conditions under which the assistance is to be given are not fair and reasonable to the company or to those shareholders not receiving the assistance.



- (8) Every director who fails to comply with subsection (3) commits an offence and is liable on conviction to the penalty set out in section 377(1).
- (9) If a company fails to comply with subsection (5) —
  - (a) the company commits an offence and is liable on conviction to the penalty set out in section. 377(1); and
  - (b) every director and company secretary of the company commits an offence and is liable on conviction to, the penalty set out in section 378(1).

## **80 Disclosure document.**

For the purposes of section 79, a disclosure document is a document that sets out —

- (a) the nature and terms of the financial assistance to be given and to whom it will be given;
- (b) if the financial assistance is to be given to a nominee for another person, the name of that other person; and
- (c) the text of the resolution required by section 79(1), together with such further information and explanation as may be necessary to enable a reasonable shareholder to understand the nature and implications for the company and its shareholders of the proposed transaction.

## **81 Financial assistance not exceeding five percent of shareholders' funds.**

- (1) Financial assistance may be given under section 77(1)(c), only if —
  - (a) the amount of the financial assistance, together with any other financial assistance given by the company pursuant to this paragraph, repayment of which remains outstanding, would not exceed five percent of the aggregate of amounts received by the company in respect of the issue of shares and reserves as disclosed in the most recent financial statements of the company that comply with clause 4 of the Ninth Schedule, and the company receives fair value in connection with the assistance; and
  - (b) within 10 working days of providing the financial assistance, the company sends to each shareholder a notice containing the following particulars:
    - (i) the class and number of shares in respect of which the financial assistance has been provided;

- (ii) the consideration paid or payable for the shares in respect of which the financial assistance has been provided;
  - (iii) the identity of the person receiving the financial assistance and, if that person is not the beneficial owner of the shares in respect of which the financial assistance has been provided, the identity of that beneficial owner;
  - (iv) the nature and, if quantifiable, the amount of the financial assistance.
- (2) If a company fails to comply with subsection (1)(b) —
- (a) the company commits an offence and is liable on conviction to the penalty set out in section 377(1); and
  - (b) every director and company secretary of the company commits an offence and is liable on conviction to the penalty set out in section 378(1).

## **82 Enforceability of transactions.**

- (1) Failure to comply with sections 77, 79, 80 or 81 does not affect the validity of a transaction.
- (2) This section does not affect the liability of a director or any other person for breach of a duty, or as a constructive trustee, or otherwise.

### **CROSS-HOLDINGS**

## **83 Subsidiary may not hold shares in holding company.**

- (1) Subject to this section, a subsidiary shall not hold shares in its holding company.
- (2) An issue of shares by a holding company to its subsidiary is void and of no effect.
- (3) A transfer of shares in a holding company to its subsidiary is void and of no effect.
- (4) Where a company that holds shares in another company becomes a subsidiary of that other company —
  - (a) the company may, notwithstanding subsection (1), continue to hold those shares; but
  - (b) the exercise of any voting rights attaching to those shares shall be of no effect.

- (5) Where a company on reregistration under this Act in accordance with the Tenth Schedule held shares in another company and was a subsidiary of that other company —
  - (a) the company may, notwithstanding subsection (1), continue to hold those shares; but
  - (b) the exercise of any voting rights attaching to those shares shall be of no effect.
- (6) Nothing in this section prevents a subsidiary holding shares in its holding company in its capacity as a personal representative or a trustee unless the holding company or another subsidiary has a beneficial interest under the trust other than an interest that arises by way of security for the purposes of a transaction made in the ordinary course of the business of lending money.
- (7) This section applies to a nominee for a subsidiary in the same way as it applies to the subsidiary.

## STATEMENT OF SHAREHOLDER RIGHTS

### **84 Statement of rights to be given to shareholders.**

- (1) Every company shall issue to a shareholder, on request, a statement that sets out —
  - (a) the class of shares held by the shareholder, the total number of shares of that class issued by the company and the number of shares of that class held by the shareholder;
  - (b) the rights, privileges, conditions and limitations, including restrictions on transfer, attaching to the shares held by the shareholder; and
  - (c) the relationship of the shares held by the shareholder to other classes of shares.
- (2) The company is not obliged to provide a shareholder with a statement if —
  - (a) a statement has been provided within the previous six months;
  - (b) the shareholder has not acquired or disposed of shares since the previous statement was provided;
  - (c) the rights attached to shares of the company have not been altered since the previous statement was provided; and
  - (d) there are no special circumstances which would make it unreasonable for the company to refuse the request.

- (3) The statement is not evidence of title to the shares or of any of the matters set out in it.
- (4) The statement shall state in a prominent place that it is not evidence of title to the shares or of the matters set out in it.
- (5) If a company fails to comply with subsection (1) —
  - (a) the company commits an offence and is liable on conviction to the penalty set out in section 377(1); and
  - (b) every director and company secretary of the company commits an offence and is liable on conviction to the penalties set out in section 378(1).

## TRANSFER OF SHARES

### 85 Transfer of shares.

- (1) Subject to the constitution of the company, shares in a company may be transferred by entry of the name of the transferee on the share register.
- (2) For the purpose of transferring shares, a form of transfer signed by the present holder of the shares or by his personal representative shall be delivered to —
  - (a) the company; or
  - (b) an agent of the company who maintains the share register under section 87(3).
- (3) The form of transfer shall be signed by the transferee if registration as holder of the shares imposes a liability to the company on the transferee.
- (4) On receipt of a form of transfer in accordance with subsection (2) and, if applicable, subsection (3), the company shall forthwith enter or cause to be entered the name of the transferee on the share register as holder of the shares, unless —
  - (a) the board resolves within 30 working days of receipt of the transfer to refuse or delay the registration of the transfer and the resolution sets out in full the reasons for so doing;
  - (b) notice of the resolution, including those reasons, is sent to the transferor and to the transferee within five working days of the resolution being passed by the board; and
  - (c) the Act or the constitution expressly permits the board to refuse or delay registration for the reasons stated.
- (5) Subject to the constitution of a company, the board may refuse or delay the registration of a transfer of shares if the holder of the shares has failed to pay to the company an amount due in respect of those shares, whether

by way of consideration for the issue of the shares or in respect of sums payable by the holder of the shares in accordance with the constitution.

- (6) If a company fails to comply with subsection (4) —
- (a) the company commits an offence and is liable on conviction to the penalty set out in section 377(1); and
  - (b) every director and company secretary of the company commits an offence and is liable on conviction to the penalty set out in section 378(1).

## **86 Transfer of shares by operation of law.**

Shares in a company may pass by operation of law notwithstanding the constitution of the company.

### SHARE REGISTER

## **87 Company to maintain share register.**

- (1) A company shall maintain a share register that records the shares issued by the company and states —
- (a) whether, under the constitution of the company or the terms of issue of the shares, there are any restrictions or limitations on their transfer; and
  - (b) where any document that contains, the restrictions or limitations may be inspected.
- (2) The share register shall state, with respect to each class of shares —
- (a) the names, alphabetically arranged, and the latest known address of each person who is, or has within the last 10 years been, a shareholder;
  - (b) the number or” shares of that class held by each shareholder within the last 10 years; and
  - (c) the date of any —
    - (i) issue of shares to;
    - (ii) repurchase or redemption of shares from; or
    - (iii) transfer of shares by or to —

each shareholder within the last 10 years and, in relation to the transfer, the name of the person to or from whom the shares were transferred.

- (3) An agent may maintain the share, register of the company.
- (4) If a company fails to comply with subsection (1) or subsection (2) —

- (a) the company commits an offence and is liable, on conviction to the penalty set out in section 377(2); and
- (b) every director and company secretary of the company commits an offence and is liable on conviction to the penalty set out in section 378(2).

## 88 Place of share register.

- (1) The share register may, if expressly permitted by the constitution, be divided into two or more registers kept in different places.
- (2) The principal register shall be kept in Tonga.
- (3) If a share register is divided into two or more registers kept in different places —
  - (a) notice of the place where each register is kept shall be delivered to the Registrar for registration within 10 working days after the share register is divided, or after any place where a register is kept is altered;
  - (b) a copy of every register shall be kept at the same place as the principal register; and
  - (c) if an entry is made in a register other than the principal register, a corresponding entry shall be made within 10 working days in the copy of that register kept with the principal register.
- (4) In this section, “**principal register**”, in relation to a company, means —
  - (a) if the share register is not divided into two or more registers, the share register; or
  - (b) if the share register is divided into two or more registers, the register described as the principal register in the last notice sent to the Registrar.
- (5) If a company fails to comply with subsection (2) or subsection (3) —
  - (a) the company commits an offence and is liable on conviction to the penalty set out in section 377.(2); and
  - (b) every director and company secretary of the company commits an offence and is liable on conviction to the penalty set out in section 378(2).

## 89 Share register as evidence of legal title.

- (1) Subject to section 91, the entry of the name of a person in the share register as holder of a share is prima facie evidence that legal title to the share vests in that person.

- (2) A company may treat the registered holder of a share as the only person entitled to —
  - (a) exercise the right to vote attaching to the share;
  - (b) receive notices;
  - (c) receive a distribution in respect of the share; and
  - (d) exercise the other rights and powers attaching to the share.

## **90 Directors' and company secretaries' duty to supervise share register.**

- (1) It is the duty of each director and company secretary to take reasonable steps to ensure that the share register is properly kept and that share transfers are promptly entered in it in accordance with section 85.
- (2) A director or company secretary who fails to comply with subsection (1) commits an offence and is liable, on conviction to the penalty set out in section 377(2).

## **91 Power of Court to rectify share register.**

- (1) If the name of a person is wrongly entered in, or omitted from, the share register of a company, the person aggrieved, or any shareholder, may apply to the Court —
  - (a) for rectification of the share register;
  - (b) for compensation for loss sustained; or
  - (c) for both rectification and compensation.
- (2) On an application under this section the Court may order —
  - (a) rectification of the register;
  - (b) payment of compensation by the company or a director or company secretary of the company for any loss sustained; or
  - (c) rectification and payment of compensation.
- (3) On an application under this section, the Court may decide —
  - (a) any question relating to the entitlement of a person who is a party to the application to have his name entered in, or omitted from, the register; and
  - (b) any question necessary or expedient to be decided for rectification of the register.

**92 Trusts not to be entered in register**

No notice of a trust, whether express, implied or constructive, may be entered on the share register.

**93 Personal representative may be registered.**

- (1) Notwithstanding section 92, a personal representative of a deceased person whose name is registered in a share register of a company as the holder of a share in that company is entitled to be registered as the holder of that share as personal representative.
- (2) Notwithstanding section 92, a personal representative of a deceased person beneficially entitled to a share in a company, being a share registered in a share register of that company, is with the consent of the company and the registered holder of that share, entitled to be registered as the holder of that share as personal representative.
- (3) The registration of a trustee, executor or administrator pursuant to this section does not constitute notice of a trust.

**94 Trustee of bankrupt may be registered.**

- (1) Notwithstanding section 92, the trustee of the property of a bankrupt registered in a share register of a company as the holder of a share in that company is entitled to be registered as the holder of that share as the trustee of the property of the bankrupt.
- (2) Notwithstanding section 92, the trustee of the property of a bankrupt beneficially entitled to a share in a company, being a share registered in a register of the company, is, with the consent of the company and the registered holder of that share, entitled to be registered as the holder of that share as the trustee of the property, of the bankrupt.

## SHARE CERTIFICATES

**95 Share certificates.**

- (1) A shareholder in a company may apply to the company for a certificate relating to some or all of the shareholder's shares in the company.
- (2) On receipt of an application for a share certificate under subsection (1), the company shall within 20 working days after receiving the application —
  - (a) if the application relates to some but not all of the shares, separate the shares shown in the register as owned by the applicant into separate parcels; one parcel being the shares to which the share



- certificate relates, and the other parcel being any remaining shares; and
- (b) in all cases send to the shareholder a certificate stating —
    - (i) the name of the company;
    - (ii) the class of shares held by the shareholder; and
    - (iii) the number of shares held by the shareholder to which the certificate relates.
  - (3) Notwithstanding section 85, where a share certificate has been issued, a transfer of the shares to which it relates shall not be registered by the company unless the form of transfer required by that section is accompanied by the share certificate relating to the share, or by evidence as to its loss or destruction and, if required, an indemnity in a form required by the board.
  - (4) Where shares to which a share certificate relates are to be transferred and the share certificate is sent to the company to enable the registration of the transfer, the share certificate shall be cancelled and no further share certificate issued except at the request of the transferee.
  - (5) If a company fails to comply with subsection (2) —
    - (a) the company commits an offence and is liable on conviction to the penalty set out in section 377(1); and
    - (b) every director and company secretary of the company commits an offence and is liable on conviction to the penalty set out in section 378(1).

## **PART VII - SHAREHOLDERS AND THEIR RIGHTS AND OBLIGATIONS**

### **96 Meaning of “shareholder”.**

In this Act, the term “**shareholder**”, in relation to a company, means —

- (a) a person whose name is entered in the share register as the holder for the time being of one or more shares in the company;
- (b) until the person’s name is entered in the share register, a person named as a shareholder in an application for the registration of a company at the time of registration of the company;
- (c) until the person’s name is entered in the share register, a person who is entitled to have his name entered in the share register under a registered amalgamation proposal as a shareholder in an amalgamated company.

---

## LIABILITY OF SHAREHOLDERS

### 97 Liability of shareholders.

- (1) Except where the constitution of a company provides that the liability of the shareholders of the company is unlimited, a shareholder is not liable for an obligation of the company by reason only of being a shareholder.
- (2) Except where the constitution of a company provides that the liability of the shareholders of the company is unlimited, the liability of a shareholder to the company is limited to —
  - (a) any amount unpaid on a share held by the shareholder;
  - (b) any liability expressly provided for in the constitution of the company;
  - (c) any liability under sections 130 to 136 that arises by reason of section 125(2);
  - (d) any liability to repay a distribution received by the shareholder to the extent that the distribution is recoverable under section 60;
  - (e) any liability under section 100.
- (3) Nothing in this section affects the liability of a shareholder to a company under a contract, including a contract for the issue of shares, or for any tort, or breach of a fiduciary duty, or other actionable wrong committed by the shareholder.

### 98 Liability of former shareholders.

- (1) A former shareholder who ceased to be a shareholder during the specified period is liable to the company in respect of any amount unpaid on the shares held by that former shareholder or any liability provided for in the constitution of the company for which that former shareholder was liable to the company if the Court is satisfied that the shareholders of the company are unable to discharge any liability —
  - (a) for any amount unpaid on shares held by them; or
  - (b) expressly provided for in the constitution of the company.
- (2) A former shareholder is not liable under subsection (1) for any debt or liability of the company contracted after ceasing to be a shareholder.
- (3) Subsections (1) and (2) apply, with such modifications as may be necessary, in relation to an existing company that has become reregistered under this Act in accordance with the Tenth Schedule and as if the reference to a former shareholder included a reference to a person who was a member of the company before the reregistration of the company.

- (4) Where a person ceased to be a shareholder of a company before the liability of the shareholders of the company ceased to be limited and became unlimited and that person has not since become a shareholder of the company, that person is liable to the company only to the same extent as if the liability of the shareholders had remained limited.
- (5) Subsection (4) applies, with such modifications as may be necessary, in relation to an existing company that has become reregistered under this Act in accordance with the Tenth Schedule, whether or not the liability of the shareholders ceased to be limited before, on, or after the reregistration of the company and as if the reference to a person who was a shareholder included a reference to a person who was a member of the company before reregistration.
- (6) For the purposes of subsection (1), “**specified period**” means —
  - (a) a period of one year before the commencement of the liquidation of the company; and
  - (b) in the case of a company that has been put into liquidation by the Court, the period of one year before the making of the application to the Court together with the period commencing on the date of the making of that application and ending on the date on which the order was made.

## **99 Additional provisions relating to liability of shareholders and former shareholders.**

- (1) If —
  - (a) a shareholder or former shareholder of a company was, at any time, liable to the company in respect of a share held by that person; and
  - (b) that liability was cancelled or reduced by —
    - (i) an alteration of the constitution, repurchase or redemption of the share, or amalgamation; or
    - (ii) reregistration under this Act in accordance with the Tenth Schedule.
  - (c) the company is, at the commencement of its liquidation, subject to liabilities incurred prior to the alteration of the constitution, repurchase or redemption of the share, amalgamation, reregistration, or change of registration, as the case may be; and
  - (d) the assets of the company are not sufficient to discharge those liabilities in full —

that person is liable to the company for the amount specified in subsection (2).

- (2) A person is liable under subsection (1) for the lesser of —
  - (a) the amount by which the liability in respect of that share was reduced;
  - (b) the amount required to be contributed in respect of each such share in order to discharge those liabilities.
- (3) The liability of a person under subsection. (1) is reduced by an amount received by that person as a distribution under section 61 and recovered from that person by the company.
- (4) The amount received by a person as a distribution under section 61 is reduced by any amount recovered from that person pursuant to subsection (1).
- (5) For the purposes of this section —
  - (a) the term “**company**” includes an amalgamating company which amalgamated with one or more other amalgamating companies to continue as that company;
  - (b) a member of an unlimited company registered under the Companies Act 1912 (Cap. 27) is to be treated as if the member was, prior to reregistration of that company under this Act in accordance with the Tenth Schedule, the holder of a share which rendered the member liable to unlimited calls.

## 100 Liability for calls.

- (1) Where a share renders its holder liable to calls or otherwise imposes a liability on its holder, that liability attaches to the holder of the share for the time being and not to a prior holder of the share, whether or not the liability became enforceable before the share was registered in the name of the current holder.
- (2) Where —
  - (a) all or part of the consideration payable in respect of the issue of a share remains unsatisfied; and
  - (b) the person to whom the share was issued no longer holds that share —

liability in respect of that unsatisfied consideration does not attach to subsequent holders of the share but remains the liability of the person to whom the share was issued or of any other person who assumed that liability at the time of issue.

**101 Shareholders not required to acquire shares by alteration to constitution.**

Notwithstanding anything in the constitution of the company, a shareholder is not bound by an alteration of the constitution of a company that —

- (a) requires the shareholder to acquire or hold more shares in the company than the number held on the date the alteration is made; or
- (b) increases the liability of the shareholder to the company —

unless the shareholder agrees in writing to be bound by the alteration either before, on, or after it is made.

**102 Liability of personal representative.**

- (1) The liability of the personal representative of the estate of a deceased person who is registered as the holder of a share comprised in the estate, does not, in respect of that share, exceed the proportional amount available from the assets of the estate, after satisfaction of prior claims, for distribution among creditors of the estate, being assets which, at the time when any demand is made for the satisfaction of the liability, are held by that personal representative on the same trusts as apply to that share.
- (2) For the purposes of this section, “**trust**” extends to the duties of the personal representative.

**103 Liability of trustee of bankrupt.**

The liability of the trustee in whom the property of bankrupt is vested, who is registered as the holder of a share which is comprised in the property of the bankrupt, does not, in respect of that share, exceed the proportional amount available from the property of the estate of the bankrupt, after satisfaction of prior claims, for distribution among creditors of the estate, being property of the bankrupt which, at the time when demand is made for the satisfaction of the liability, is vested in the trustee.

**POWERS OF SHAREHOLDERS****104 Exercise of powers reserved to shareholders.**

Power reserved to the shareholders of a company by this Act or by and subject to the Constitution may be exercised only —

- (a) at meeting of shareholders pursuant to section 120 or section 121; or
- (b) by a resolution in lieu of a meeting pursuant to section 122.

**105 Exercise of powers by ordinary resolution.**

- (1) Unless otherwise specified in this Act or the constitution of a company, a power reserved to shareholders may be exercised by an ordinary resolution.
- (2) An ordinary resolution is a resolution that is approved by a simple majority or the votes of those shareholders entitled to vote and voting on the question.

**106 Powers exercised by special resolution.**

- (1) Notwithstanding the constitution of a company, when shareholders exercise a power to —
  - (a) alter the company's constitution;
  - (b) approve a major, transaction;
  - (c) approve an amalgamation of the company under section 230;
  - (d) put the company into liquidation, —the power shall be exercised by special resolution.
- (2) A special resolution pursuant to any paragraph (a), (b) or (c) of subsection (1) shall be rescinded only by a special resolution.
- (3) A special resolution pursuant to subsection (1)(d) shall not be rescinded in any circumstances.

**107 Unanimous assent to certain types of action.**

- (1) Notwithstanding section 56 but subject to section 108, if all entitled persons have agreed —
  - (a) a dividend may be authorised otherwise than in accordance with section 57;
  - (b) a discount scheme may be approved otherwise than in accordance with section 59;
  - (c) shares in a company may be acquired otherwise than in accordance with sections 62 to 66;
  - (d) shares in a company may be redeemed otherwise than in accordance with sections 70 to 73;
  - (e) financial assistance may be given for the purpose of, or in connection with, the purchase of shares otherwise than in accordance with sections 77 to 81;
  - (f) any of the matters referred to in section 159(1) may be authorised otherwise than in accordance with that section.

- (2) If all entitled persons have agreed, shares may be issued otherwise than in accordance with sections 46, 48 or 49.
- (3) If all entitled persons have agreed to in a company entering into a transaction in which a director is interested, nothing in sections 139 and 140 shall apply in relation to that transaction.
- (4) For the purposes of this section, no agreement of the entitled persons is valid or enforceable unless the agreement is in writing.
- (5) An agreement may be —
  - (a) a separate agreement to the particular exercise of the power referred to; or
  - (b) an agreement to, the exercise of the power generally or from time to time.
- (6) An entitled person may at any time, by notice in writing to the company, withdraw from any agreement referred to in subsection (5)(b)
- (7) Where a power is exercised pursuant to an agreement referred to in subsection (5)(6), the board of the company shall, within 10 working days of the exercise of the power, send to every entitled person a notice in writing containing details of the exercise of the power.
- (8) If the board of a company fails to comply with subsection (7), every director and company secretary of the company commits an offence and is liable on conviction to the penalty set out in section 378(1).

### **108 Company to satisfy solvency test.**

- (1) A power referred to in section 107(1) shall not be exercised unless the board of the company is satisfied on reasonable grounds that the company will, immediately after the exercise of the power, satisfy the solvency test.
- (2) The directors who vote in favour of the exercise of the power shall sign a certificate stating that, in their opinion, the company will, after the exercise of the power, satisfy the solvency test.
- (3) If, after a resolution is passed under subsection (1) and before the power is exercised, the board ceases to be satisfied on reasonable grounds that the company will, immediately after the power is exercised, satisfy the solvency test, any exercise of the power is deemed not to have been authorised.
- (4) The provisions of section 60 apply in relation to the exercise of a power referred to in section 107(1), with such modifications as may be necessary.
- (5) In applying the solvency test for the purposes of section 107(1)(e) —

- (a) “assets” excludes all amounts of financial assistance given by the company at any time in the form of loans; and
  - (b) “liabilities” includes the face value of all outstanding liabilities, whether contingent or otherwise, incurred by the company at any time in connection with the giving of the financial assistance.
- (6) Every director who fails to comply with subsection (2) commits an offence and is liable on conviction to the penalty set out in section 377(1).

### **109 Management review by shareholders.**

- (1) Notwithstanding; anything in this Act or the constitution of the company, the chairperson of a meeting of shareholders of a company shall allow a reasonable opportunity for shareholders at the meeting to question, discuss or comment on the management of the company.
- (2) Notwithstanding anything in this Act or the constitution of the company, but subject to subsection (3), a meeting of shareholders may pass a resolution under this section relating to the management of a company.
- (3) Unless the constitution provides that the resolution is binding, a resolution passed pursuant to subsection (2) is not binding on the board.

### **MINORITY BUY-OUT RIGHTS**

### **110 Shareholder may require company to purchase shares.**

Where —

- (a) a shareholder is entitled to vote on the exercise of one or more of the powers set out in —
  - (i) section 106(1)(a), and the proposed alteration imposes or removes a restriction on the activities of the company; or
  - (ii) section 106(1)(b) or (c).
- (b) the shareholders resolved, pursuant to section 106, to exercise the power; and
- (c) the shareholder cast all the votes attached to shares registered in the shareholder’s name and having the same beneficial owner against the exercise of the power; or
- (d) the resolution to exercise the power was passed under section 122 and the shareholder did not sign the resolution —

that shareholder is entitled to require the company to purchase those shares in accordance with section 111.



**111 Notice requiring purchase**

- (1) A shareholder of a company who is entitled to require the company to purchase shares by virtue of section 110 or section 118 may —
  - (a) within 10 working days of the passing of the resolution at a meeting of shareholders; or
  - (b) where the resolution was passed under section 122, before the expiration of 10 working days after the date on which notice of the passing of the resolution is given to the shareholder, —

give a written notice to the company requiring the company to purchase those shares.
- (2) Within 20 working days of receiving a notice under subsection (1), the board shall —
  - (a) agree to the purchase of the shares by the company; or
  - (b) arrange for some other person to agree to purchase the shares; or
  - (c) apply to the Court for an order under section 114 or section 155; or
  - (d) arrange for the resolution to be rescinded by special resolution; and
  - (e) give written notice to the shareholder of the board's decision under this subsection.

**112 Purchase by company**

- (1) Where the board agrees under section 111(2)(a) to the purchase of the shares by the company, it shall, on giving notice under that subsection or within 5 working days thereafter, —
  - (a) nominate a fair and reasonable price for the shares to be acquired; and
  - (b) give notice of the price to the holder of those shares.
- (2) A shareholder who considers that the price nominated by the board is not fair or reasonable, shall forthwith give notice of objection to the company.
- (3) If, within 10 working days of giving notice to a shareholder under subsection (1), no objection to the price has been received by the company, the company shall, on such date as the company and the shareholder agree or, in the absence of agreement, as soon as practicable, purchase all the shares at the nominated price.
- (4) If, within 10 working days of giving notice to a shareholder under subsection (1), an objection to the price has been received by the company, the company must —
  - (a) refer the question of what is a fair and reasonable price to the Court; and

- (b) within five working days, pay a provisional price in respect of each share equal to the price nominated by the board.
- (5) The Court shall expeditiously determine a fair and reasonable price for the shares to be purchased.
- (6) If the price determined —
  - (a) exceeds the provisional price, the company shall forthwith pay the balance owing to the shareholder;
  - (b) is less than the provisional price paid, the company may recover the excess paid from the shareholder.
- (7) The Court may —
  - (a) award interest on any balance payable or excess to be repaid under subsection (6) at such rate as it thinks fit having regard to whether the provisional price paid or the reference to the Court, as the case may be, was reasonable; and
  - (b) provide for interest to be paid to or by the shareholder whose shares are to be purchased.
- (8) The Court may make rules for the purposes of this section.

### **113 Purchase of shares by third party.**

- (1) Section 112 applies to the purchase of shares by a person with whom the company has entered into an arrangement for purchase in accordance with section 111(2)(b) subject to such modifications as may be necessary, and, in particular, as if references in that section to the board and the company were references to that person.
- (2) Every holder of shares that are to be purchased in accordance with the arrangement shall be indemnified by the company in respect of loss suffered by reason of the failure by the person who has agreed to purchase the shares to purchase them at the price nominated or fixed by arbitration, as the case may be.

### **114 Court may grant exemption.**

- (1) A company to which a notice has been given under section 111 may apply to the Court for an order exempting it from the obligation to purchase the shares to which the notice relates on the grounds that —
  - (a) the purchase would be disproportionately damaging to the company;
  - (b) the company cannot reasonably be required to finance the purchase; or

- (c) it would not be just and equitable to require the company to purchase the shares.
- (2) On an application under this section, the Court may make an order exempting the company from the obligation to purchase the shares, and may make any other order it thinks fit, including an order —
  - (a) setting aside a resolution of the shareholders;
  - (b) directing the company to take, or refrain from taking, any action specified in the order.
  - (c) requiring the company to pay compensation to the shareholders affected; or
  - (d) that the company be put into liquidation.
- (3) The Court shall not make an order under subsection (2) on either of the grounds set out in paragraph (a) or (b) of subsection (1) unless it is satisfied that the company has made reasonable efforts to arrange for another person to purchase the shares in accordance with section 111(2)(b).

### **115 Court may grant exemption if company insolvent.**

- (1) If —
  - (a) a notice is given to a company under section 111;
  - (b) the board has resolved that the purchase by the company of the shares to which the notice relates would result in it failing to satisfy the solvency test; and
  - (c) the company has, having made reasonable efforts to do so, been unable to arrange for the shares to be purchased by another person in accordance with section 111(2)(b) —the company shall apply to the Court for an order exempting it from the obligation to purchase the shares.
- (2) The Court may, on an application under subsection (1), if it is satisfied that —
  - (a) the purchase of the shares would result in the company failing to satisfy the solvency test; and
  - (b) the company has made reasonable efforts to arrange for the shares to be purchased by another person in accordance with section 111(2)(b) —make —
  - (c) an order exempting the company from the obligation to purchase the shares;

- (d) an order suspending the obligation to purchase the shares; and
- (e) such other order as it thinks fit, including any order referred to in section 114(2).

## INTEREST GROUPS

### 116 Meaning of “class” and “interest group”.

- (1) In this Act, unless the context, otherwise requires, —
    - “**class**” means a class of shares having attached to them identical rights, privileges, limitations and conditions;
    - “**interest group**”, in relation to any action or proposal affecting rights attached to shares, means a group of shareholders —
      - (a) whose affected rights are identical;
      - (b) whose rights are affected by the action or proposal in the same way; and
      - (c) subject to subsection (2)(b), who comprise the holders of one or more classes of shares in the company.
  - (2) For the purposes of this Act and the definition of the term “**interest group**”.
    - (a) One or more interest groups may exist in relation to any action or proposal; and
    - (b) If —
      - (i) action is taken in relation to some holders of shares in a class and not others; or
      - (ii) a proposal expressly distinguishes between some holders of shares in a class and other holders of shares of that class —
- holders of shares in the same class may fall into two or more interest groups.

### 117 Alteration of shareholder rights.

- (1) A company shall not take action that affects the rights attached to shares unless that action has been approved by a special resolution of each interest group.
- (2) For the purposes of subsection (1), the rights attached to a share include —
  - (a) the rights, privileges, limitations and conditions attached to the share by this Act or the constitution, including voting rights and rights to distributions;

- (b) pre-emptive rights arising under section 49;
  - (c) the right to have the procedure set out in this section, and any further procedure required by the constitution for the amendment or alteration of rights, observed by the company;
  - (d) the right that a procedure required by the constitution for the amendment or alteration of rights be not amended.
- (3) For the purposes of subsection (1), the issue of further shares ranking equally with, or in priority to, existing shares, whether as to voting rights or distributions, is deemed to be an action affecting the rights attached to the existing shares, unless —
- (a) the constitution of the company expressly permits the issue of further shares ranking equally with, or in priority to, those shares; or
  - (b) the issue is made in accordance with the pre-emptive rights of shareholders under section 49.

### **118 Shareholder may require company to purchase shares.**

Where —

- (a) an interest group has, under section 117, approved by special resolution the taking of action that affects the rights attached to shares; and
- (b) the company becomes entitled to take the action; and
- (c) a shareholder who was a member of the interest group cast all the votes attached to the shares registered in that shareholder's name and having the same beneficial owner against approving the action; or
- (d) the resolution approving the taking of the action was passed under section 122 and a shareholder who was a member of the interest group did not sign the resolution —

that shareholder is entitled to require the company to purchase those shares in accordance with section 111.

### **119 Actions not invalid.**

The taking of action by a company affecting the rights attached to shares is not invalid by reason only that the action was not approved in accordance with section 117.

---

## MEETINGS OF SHAREHOLDERS

### 120 Annual meeting of shareholders.

- (1) Subject to subsection (2), the board of a company shall call an annual meeting of shareholders to be held —
  - (a) once in each calendar year;
  - (b) not later than six months after the balance date of the company; and
  - (c) not later than 15 months after the previous annual meeting.
- (2) A company need not hold its first annual meeting in the calendar year of its registration but shall hold that meeting within 18 months of its registration.
- (3) The company shall hold the meeting on the date on which it is called to be held.

### 121 Special meetings of shareholders.

A special meeting of shareholders entitled to vote on an issue —

- (a) may be called at any time by —
  - (i) the board; or
  - (ii) a person who is authorised by the constitution to call the meeting;
- (b) shall be called by the board on the written request of shareholders holding shares carrying together not less than five percent of the voting rights entitled to be exercised on the issue.

### 122 Resolution in lieu of meeting.

- (1) Subject to subsections (2) and (3), a resolution in writing signed by not less than 75 percent of the shareholders who would be entitled to vote on the resolution at a meeting of shareholders who together hold not less than 75 percent of the votes entitled to be cast on that resolution is as valid as if it had been passed at a meeting of those shareholders.
- (2) A resolution in writing that —
  - (a) relates to a matter that is required by this Act or by the constitution to be decided at a meeting of the shareholders of a company; and
  - (b) is signed by the shareholders specified in subsection (3), —is made in accordance with this Act or the constitution of the company.
- (3) For the purposes of subsection (2)(b), the shareholders are —

- (a) in the case of a resolution under section 205(2), all the shareholders who are entitled to vote on the resolution;
  - (b) in any other case, the shareholders referred to in subsection (1).
- (4) It shall not be necessary for a company to hold an annual meeting of shareholders under section 120 if everything required to be done at that meeting (by resolution or otherwise) is done by resolution in accordance with subsections (2) and (3).
- (5) Within five working days of a resolution being passed under this section, the company shall send a copy of the resolution to every shareholder who did not sign the resolution or on whose behalf the resolution was not signed.
- (6) A resolution may be signed under section (1) or subsection (2) without any prior notice being given to shareholders.
- (7) If a company fails to comply with subsection (5) —
- (a) the company commits an offence and is liable on conviction to the penalty set out in section 377(1);
  - (b) every director and company secretary of the company commits an offence and is liable on conviction to the penalty set out in section 378(1).

### **123 Court may call meeting of shareholders.**

- (1) If the court is satisfied that —
- (a) it is impracticable to call or conduct a meeting of shareholders in the manner prescribed by this Act or the constitution; or
  - (b) it is in the interests of a company that a meeting of shareholders be held, —

the Court may order a meeting of shareholders to be held or conducted in such manner as the Court directs.

- (2) Application to the Court may be made by a director, a shareholder or a creditor of the company.
- (3) The Court may make the order on such terms as to the costs of conducting the meeting and as to security for those costs as the Court thinks fit.

## **ASCERTAINING SHAREHOLDERS**

### **124 Shareholders entitled to receive distribution, attend meetings and exercise rights.**

- (1) The shareholders who are —

- (a) entitled to receive distributions;
  - (b) entitled to exercise pre-emptive rights to acquire shares in accordance with section 49; or
  - (c) entitled to, exercise any other right or receive any other benefit under this Act or the constitution —
- are —
- (d) if the board fixes a date for the purpose, those shareholders whose names are registered in the share register on that date;
  - (e) if the board does not fix a date for the purpose, those shareholders whose names are registered in the share register on the day on which the board passes the resolution concerned.
- (2) A date shall not be fixed under subsection (1) that precedes by more than 20 working days the date on which the proposed action will be taken.
  - (3) The shareholders who are entitled to receive notice of a meeting of shareholders are —
    - (a) if the board fixes a date for the purpose, those shareholders whose names are registered in the share register on that date;
    - (b) if the board does not fix a date for the purpose, those shareholders whose names are registered in the share register at the close of business on the day immediately preceding the day on which the notice is given.
  - (4) A date shall not be fixed under subsection (3) that precedes by more than 30 working days or less than 10 working days the date on which the meeting is to be held.

## PART VIII - DIRECTORS AND COMPANY SECRETARIES, AND THEIR POWERS AND DUTIES

### 125 Meaning of “director”.

- (1) In this Act, “**director**”, in relation to a company, includes —
  - (a) a person occupying the position of director of the company by whatever name called; and
  - (b) for the purposes of sections 130 to 140, 144 to 148, 307, 308 and 310 —
    - (i) a person in accordance with whose directions or instructions a person referred to in paragraph (a) may be required or is accustomed to act;



- (ii) a person in accordance with whose directions or instructions the board of the company may be required or is accustomed to act; and
    - (iii) a person who exercises or who is entitled to exercise or who controls or who is entitled to control the exercise of powers which, apart from the constitution of the company, would fall to be exercised by the board; and
  - (c) for the purposes of section 130 to 148, 307, 308 and 310, a person to whom a power or duty of the board has been directly delegated by the board with that person's consent or acquiescence, or who exercises the power or duty with the consent or acquiescence of the board; and
  - (d) for the purposes of sections 144 to 148, a person in accordance with whose directions or instructions a person referred to in paragraphs (a) to (c) may be required or is accustomed to act in respect of his duties and powers as a director.
- (2) If the constitution of a company confers a power on shareholders which would otherwise fall to be exercised by the board, any shareholder who exercises that power or who takes part in deciding whether to exercise that power is deemed, in relation to the exercise of the power or any consideration concerning its exercise, to be a director for the purposes of sections 130 to 137.
- (3) If the constitution of a company, requires a director or the board to exercise or refrain from exercising a power in accordance with a decision or direction of shareholders, any shareholder who takes part in —
- (a) the making of any decision that the power should or should not be exercised; or
  - (b) the making of any decision whether to give a direction —
- as the case may be, is deemed, in relation to making any such decision, to be a director for the purposes of sections 130 to 137.
- (4) Paragraphs (b), (c) and (d) of subsection (1) do not include a person to the extent that the person acts only in a professional capacity.

## 126 Meaning of “board” and “board of directors”.

In this Act, the terms “board” and “board of directors”, in relation to a company, means —

- (a) directors of the company who number not less than the required quorum acting together as a board of directors; or
- (b) if the company has only one director, that director.

---

## POWERS OF MANAGEMENT

### 127 Management of company.

- (1) The business and affairs of a company shall be managed by, or under the direction or supervision of, the board of the company.
- (2) The board of a company has all the powers necessary for managing, and for directing and supervising the management of, the business and affairs of the company.
- (3) Subsections (1) and (2) are subject to any modifications, exceptions or limitations contained in this Act or in the company's constitution.

### 128 Major Transactions

- (1) A company shall not enter into a major transaction unless the transaction is —
  - (a) approved by special resolution; or
  - (b) contingent on approval by special resolution.
- (2) In this section —

“**assets**” includes property of any kind, whether tangible or intangible;

“**major transaction**”, in relation to a company, means —

  - (a) the acquisition of, or an agreement to acquire, whether contingent or not, assets equivalent in value to more than half of the value of the assets, of the company before the acquisition;
  - (b) the disposition of, or an agreement to dispose of, whether contingent or not, the whole or more than half of the assets of the company; or
  - (c) a transaction which has or is likely to have the effect of the company acquiring rights or interests or incurring obligations or liabilities equivalent in value to more than half the value of the assets or more than half of the assets of the company before the transaction.
- (3) Nothing in this section applies to a major transaction entered into by a receiver, appointed pursuant to an instrument creating a charge over all or substantially all of the property of a company.

## 129 Delegation of powers

- (1) Subject to any restrictions in the constitution of the company, the board of a company may delegate to a committee of directors, a director, company secretary or employee of the company or any other person, any one or more of its powers other than its powers under any of the sections of this Act set out in the Second Schedule.
- (2) A board that delegates a power under subsection (1) is responsible for the exercise of the power by the delegate as if the power had been exercised by the board, unless the board —
  - (a) believed on reasonable grounds at all times before the exercise of the power that the delegate would exercise the power in conformity with the duties imposed on directors of the company by this Act and the company's constitution; and
  - (b) has monitored, by means of reasonable methods properly used, the exercise of the power by, the delegate.

## DIRECTORS' AND COMPANY SECRETARIES, DUTIES

### 130 Duty of directors and company secretaries to act in good faith and in best interests of company.

- (1) Subject to this section, a director or company secretary of a company, when exercising powers or performing duties, shall act in good faith and in what the director or company secretary believes to be the best interests of the company.
- (2) A director or company secretary of a company that is a wholly-owned subsidiary may, when exercising powers; or performing duties as a director or company secretary, if expressly permitted to do so by the constitution of the company, act in a manner which he believes is in the best interests of that company's holding company even though it may not be in the best interests of the company.
- (3) A director or company secretary of a company that is a subsidiary (but not a wholly-owned, subsidiary) may, when exercising powers or performing duties as a director or company secretary, if expressly permitted to do so by the constitution of the company and with the prior agreement of the shareholders (other than its holding company), act in a manner which he believes is in the best interests of that company's holding company even though it may not be in the best interests of the company.
- (4) A director or company secretary of a company incorporated to carry out a joint venture between the shareholders may, when exercising powers or performing duties as a director or company secretary in connection with the carrying out of the joint venture, if expressly permitted to do so by the

constitution of the company, act in a manner which he believes is in the best interests of a shareholder or shareholders, even though it may not be in the best interests of the company.

### **131 Exercise of powers in relation to employees.**

(1) Nothing in section 130 limits the power of a director to make provision for the benefit of employees of the company in connection with the company ceasing to carry on the whole or part of its business.

(2) In subsection (1) —

“**employees**” includes former employees and the dependants of employees or former employees; but does not include an employee or former employee who is or was a director of the company;

“**company**” includes a subsidiary of a company.

### **132 Powers to be exercised for proper purpose.**

A director or company secretary shall exercise a power for a proper purpose.

### **133 Directors and company secretaries to comply with Act and constitution.**

A director or company secretary of a company shall not act, or agree to the company acting, in a manner that contravenes this Act or the constitution of the company.

### **134 Reckless Trading.**

A director of a company shall not —

- (a) agree to the business of the company being carried on in a manner likely to create a substantial risk of serious loss to the company’s creditors; or
- (b) cause or allow the business of the company to be carried on in a manner likely to create a substantial risk of serious loss to the company’s creditors.

### **135 Duty in relation to obligations.**

A director of a company shall not agree to the company incurring an obligation unless the director believes at that time on reasonable grounds that the company will be able to perform the obligation when it is required to do so.

**136 Director's and company secretary's duty of care.**

A director or company secretary of a company, when exercising powers or performing duties as a director or company secretary, shall exercise reasonable care, diligence and skill taking into account, but without limitation —

- (a) the nature of the company;
- (b) the nature of the decision; and
- (c) the position of the director or company secretary and the nature of the responsibilities undertaken by him.

**137 Use of information and advice.**

- (1) Subject to subsection (2), a director or company secretary of a company, when exercising powers or performing duties as a director or company secretary, may rely on reports, statements and financial data and other information prepared or supplied, and on professional or expert advice given, by any of the following persons;
  - (a) in the case of a director, a company secretary of the company in relation to matters which the director believes on reasonable grounds to be within the company secretary's professional or expert competence;
  - (b) an employee of the company whom the director or company secretary believes on reasonable grounds to be reliable and competent in relation to the matters concerned;
  - (c) a professional adviser or expert in relation to matters which the director or company secretary believes on reasonable grounds to be within the person's professional or expert competence;
  - (d) any other director, company secretary, or committee of directors upon which the director did not serve, in relation to matters within the director's, company secretary's or committee's designated authority.
- (2) Subsection (1) applies to a director or company secretary only if the director or company secretary —
  - (a) acts in good faith;
  - (b) makes proper inquiry where the need for inquiry is indicated by the circumstances; and
  - (c) has no knowledge that such reliance is unwarranted.

## TRANSACTIONS INVOLVING SELF-INTEREST

### 138 Meaning of “interested”.

- (1) Subject to subsection (2), for the purposes of this Act, a director or company secretary of a company is interested in a transaction to which the company is a party if, the director or company secretary —
  - (a) is a party to, or will or may derive a material financial benefit from, the transaction; or
  - (b) has a material financial interest in another party to the transaction; or
  - (c) is a director, company secretary, officer or trustee of another party to, or person who will or may derive a material financial benefit from, the transaction, not being a party or person that is —
    - (i) the company’s holding company being a holding company of which the company is a wholly-owned subsidiary; or
    - (ii) a wholly-owned subsidiary of the company; or
    - (iii) a wholly-owned subsidiary of a holding company of which the company is also a wholly-owned subsidiary; or
  - (d) is the parent, child or spouse of another party to, or person who will or may derive a material financial benefit from, the transaction; or
  - (e) otherwise has a direct or indirect material interest in the transaction.
- (2) For the purposes of this Act, a director or company secretary of a company is not interested in a transaction to which the company is a party if the transaction comprises only the giving by the company of security to a third party which has no connection with the director or company secretary, at the request of the third party, in respect of a debt or obligation of the company for which the director, company secretary or another person has personally assumed responsibility in whole or in part under a guarantee, indemnity, or by the deposit of a security.

### 139 Disclosure of interest

- (1) A director or company secretary of a company shall, forthwith after becoming aware of the fact that he is interested in a transaction or proposed transaction with the company, cause to be entered in the interests register and disclose to the board of the company —
  - (a) if the monetary, value of the director’s or company secretary’s interest is able to be quantified, the nature and monetary value of that interest; or

- (b) if the monetary value of the director's or company secretary's interests cannot be quantified, the nature and extent of that interests.
- (2) For the purposes of subsection (1), a general notice entered in the interests register or disclosed to the board to the effect that a director or company secretary is a shareholder, director, company secretary, officer or trustee of another named company or other person and is to be regarded as interested in any transaction which may, after the date of the entry or disclosure, be entered into with that company or person, is a sufficient disclosure of interest in relation to that transaction.
- (3) A failure by a director or company secretary to comply with subsection (1) does not affect the validity of a transaction entered into by the company or the director or company secretary.
- (4) Every director or company secretary who fails to comply with subsection (1) commits an offence and is liable on conviction to the penalty set out in section 377(2).

#### **140 Avoidance of transactions**

- (1) A transaction entered into by the company in which a director or company secretary of the company is interested may be avoided by the company at any time before the expiration of 3 months after the transaction is disclosed to all the shareholders, whether by means of the company's annual report or otherwise.
- (2) A transaction cannot be avoided if the company receives fair value under it.
- (3) For the purposes of subsection (2) the question whether a company receives fair value under a transaction is to be determined on the basis of the information known to the company and to the interested director or company secretary at the time the transaction is entered into.
- (4) If a transaction is entered into by the company in the ordinary course of its business and on usual terms and conditions, the company is presumed to receive fair value under the transaction.
- (5) For the purposes of this section —
  - (a) a person seeking to uphold a transaction and who knew or ought to have known of the director's or company secretary's interest at the time the transaction was entered into has the onus of establishing fair value; and
  - (b) in any other case, the company has the onus of establishing that it did not receive fair value.

- (6) A transaction in which a director or company secretary is interested can only be avoided on the ground of the director's or company secretary's interest in accordance with this section or the company's constitution.

### **141 Effect on third parties**

The avoidance of a transaction under section 140 does not affect the title or interest of a person in or to property which that person has acquired if the property was acquired —

- (a) from a person other than the company;
- (b) for valuable consideration; and
- (c) without knowledge of the circumstances of the transaction under which the person referred to in paragraph (a) acquired the property from the company.

### **142 Application of sections 139 and 140 in certain cases**

Nothing in section 139 and section 140 applies in relation to —

- (a) remuneration or any other benefit given to a director in accordance with section 159;
- (b) remuneration or any other benefit given to a company secretary in accordance with section 171; or
- (c) an indemnity given or insurance provided in accordance with section 160.

### **143 Interested director or company secretary may attend meeting.**

- (1) Subject to the constitution of the company, a director of a company who is interested in a transaction entered into, or to be entered into, by the company, may —
- (a) attend a meeting of directors at which a matter relating to the transaction arises and be included among the directors present at the meeting for the purpose of a quorum;
  - (b) vote on a matter relating to the transaction;
  - (c) sign a document relating to the transaction on behalf of the company; and
  - (d) do any other thing in his capacity as a director in relation to the transaction —

as if the director was not interested in the transaction.



- (2) Subject to the constitution of the company, a company secretary of a company who is interested in a transaction entered into, or to be entered into, by the company, may —
- (a) attend a meeting of directors at which a matter relating to the transaction arises;
  - (b) sign a document relating to the transaction on behalf of the company; and
  - (c) do any other thing in his capacity as a company secretary in relation to the transaction —
- as if the company secretary were not interested in the transaction.

#### **144 Use of company information.**

- (1) A director or company secretary of a company who has information in his capacity as a director, company secretary or employee of the company, being information that would not otherwise be available to him, shall not disclose that information to any person, or make use of or act on the information, except —
- (a) for the purposes of the company;
  - (b) as required by law;
  - (c) in accordance with subsection (2) or subsection (3); or
  - (d) in complying with section 139.
- (2) A director of a company may, unless prohibited by the board, disclose information to —
- (a) a person whose interests the director represents; or
  - (b) a person in accordance with whose directions or instructions the director may be required or is accustomed to act in relation to the director's powers and duties and, if the director discloses the information, the name of the person to whom it is disclosed shall be entered in the interests register.
- (3) A director or company secretary of a company may disclose, make use of, or act on the information if —
- (a) particulars of the disclosure, use or act in question are entered in the interest register;
  - (b) the director or company secretary is first authorised to do so by the board; and
  - (c) the disclosure, use or act in question will not, or will not be likely to, prejudice the company.

**145 Meaning of “relevant interest”.**

- (1) For the purposes of section 147, a director or company secretary of a company has a relevant interest in a share issued by a company, whether or not the director or company secretary is registered in the share register as the holder of it if the director or company secretary —
- (a) is a beneficial owner of the share;
  - (b) has the power to exercise any right to vote attached to the share;
  - (c) has the power to control the exercise of any right to vote attached to the share;
  - (d) has the power to acquire or dispose of share;
  - (e) has the power to control the acquisition or disposition of the share by another person; or
  - (f) under, or by virtue of, any trust, agreement, arrangement or understanding relating to the share whether or not that director or company secretary is a party to it —
    - (i) may at any time have the power to exercise any right to vote attached to the share;
    - (ii) may at any time have the power to control the exercise of any right to vote attached to the share;
    - (iii) may at any time have the power to acquire or dispose of the share; or
    - (iv) may at any time have the power to control the acquisition or disposition of the share by another person.
- (2) Where a person whether or not a director or company secretary of the company, has a relevant interest in a share by virtue of subsection (1) and —
- (a) that person or its directors are accustomed or under an obligation, whether legally enforceable or not, to act in accordance with directions, instructions or wishes of a director or company secretary of the company in relation to —
    - (i) the exercise of the right to vote attached to the share;
    - (ii) the control of the exercise of any right to vote attached to the share;
    - (iii) the acquisition or disposition of the share; or
    - (iv) the exercise of the power to control the acquisition or disposition of the share by another person; or
  - (b) a director or company secretary of the company has the power to exercise the right to vote attached to 20 percent or more of the shares of that person;

- (c) a director or company secretary of the company has the power to control the exercise of the right to vote attached to 20 percent or more of the shares of that person;
- (d) a director or company secretary of the company has the power to acquire or dispose of 20 percent or more of the shares of that person; or
- (e) a director or company secretary of the company has the power to control the acquisition or disposition of 20 percent or more of the shares of that person —

that director or company secretary has a relevant interest in the share.

- (3) A person who has, or may have, a power referred to in any paragraphs (b) to (f) of subsection (1), has a relevant interest in a share regardless of whether the power —
  - (a) is expressed or implied;
  - (b) is direct or indirect;
  - (c) is legally enforceable or not;
  - (d) is related to a particular share or not;
  - (e) is subject to restraint or restriction or is capable of being made subject to restraint or restriction;
  - (f) is exercisable presently or in the future;
  - (g) is exercisable only on the fulfilment of a condition;
  - (h) is exercisable alone or jointly with another person or persons.
- (4) A power referred to in subsection (1) exercisable jointly with another person or persons is deemed to be exercisable by either or any of those persons.
- (5) A reference to a power includes a reference to a power that arises from, or is capable of being exercised as the result of, a breach of any trust, agreement, arrangement or understanding, or any of them, whether or not it is legally enforceable.

#### **146 Relevant interests to be disregarded in certain cases**

- (1) For the purposes of section 147, no account shall be taken of a relevant interest of a person in a share if —
  - (a) the ordinary business of the person who has the relevant interest consists of, or includes, the lending of money or the provision of financial services, or both, and that person has the relevant interest only as security given for the purposes of a transaction entered into in the ordinary course of his business;

- (b) that person has the relevant interest solely by reason of being appointed as a proxy to vote at a particular meeting of members, or of a class of members, of the company and the instrument of that person's appointment is produced before the start of the meeting by the time specified in the company's constitution;
  - (c) that person —
    - (i) is a trustee corporation or a nominee company; and
    - (ii) has the relevant interest by reason only of acting for another person in the ordinary course of business of that trustee corporation or nominee company; or
  - (d) the person has the relevant interest by reason only that the person is a bare trustee of a trust to which the share is subject.
- (2) For the purposes of subsection (1)(d), a trustee may be a bare trustee notwithstanding that he is entitled as a trustee to be remunerated out of the income or property of the trust.

#### **147 Disclosure of share dealing by directors and company secretaries.**

- (1) A director or company secretary of a company that has become reregistered under this Act in accordance with the Tenth Schedule and who has a relevant interest in any shares issued by the company must, forthwith after the reregistration of the company —
- (a) disclose to the board the number and class of shares in which the relevant interest is held and the nature of the relevant interest; and
  - (b) ensure that the particulars disclosed to the board under paragraph (a) are entered in the interests register.
- (2) A director or company secretary of a company who acquires or disposes of a relevant interest in shares issued by the company shall, forthwith after the acquisition or disposition —
- (a) disclose to the board —
    - (i) the number and class of shares in which the relevant interest has been acquired or the number and class of shares in which the relevant interest was disposed of, as the case may be;
    - (ii) the nature of the relevant interest;
    - (iii) the consideration paid or received; and
    - (iv) the date of the acquisition or disposition;and
  - (b) ensure that the particulars disclosed to the board under paragraph (a) are entered in the interests register.

**148 Restrictions on share dealing by directors and company secretaries.**

- (1) If a director or company secretary of a company has information in his capacity as a director, company secretary or employee of the company or a related company, being information that would not otherwise be available to him, but which is information material to an assessment of the value of shares or other securities issued by the company or a related company, the director or company secretary may acquire or dispose of those shares or securities only if, —
  - (a) in the case of an acquisition, the consideration given for the acquisition is not less than the fair value of the shares or securities; or
  - (b) in the case of a disposition, the consideration received for the disposition is not more than the fair value of the shares or securities.
- (2) For the purposes of subsection (1), the fair value of shares or securities is to be determined on the basis of all information known to the director or company secretary, or publicly available at the time.
- (3) Subsection (1) does not apply in relation to a share or security that is acquired or disposed of by a director or company secretary only as a nominee for the company or a related company.
- (4) Where a director or company secretary acquires shares or securities in contravention of subsection (1)(a) the director or company secretary is liable to the person from whom the shares or securities were acquired for the amount by which the fair value of the shares or securities exceeds the amount paid by the director or company secretary.
- (5) Where a director or company secretary disposes of shares or securities in contravention of subsection (1)(b), the director or company secretary is liable to the person to whom the shares or securities were disposed of for the amount by which the consideration received by the director or company secretary exceeds the fair value of the shares or securities.

**APPOINTMENT AND REMOVAL OF DIRECTORS****149 Number of directors**

A company shall have at least one director.

**150 Qualifications of directors**

- (1) A natural person who is not disqualified by subsection (2) may be appointed as a director of a company.

- (2) The following persons are disqualified from being appointed or holding office as a director of a company:
  - (a) a person who is under 18 years of age;
  - (b) a person who is an undischarged bankrupt;
  - (c) a person who is prohibited from being a director or promoter of or being concerned or taking part in the management of a company under section 386 or section 387 or section 389;
  - (d) in relation to any particular company, a person who does not comply with any qualifications for directors contained in the constitution of that company.
- (3) A person that is not a natural person cannot be a director of a company.
- (4) A person who is disqualified from being a director but who acts as a director is a director for the purposes of a provision of this Act that imposes a duty or an obligation on a director of a company.

### **151 Director's consent required**

A person shall not be appointed a director of a company unless he has, in the prescribed form, consented to be a director and certified that he is not disqualified from being appointed or holding office as a director of a company.

### **152 Appointment of first and subsequent directors**

- (1) A person named as a director in an application for registration, or in an amalgamation proposal holds office as a director from the date of registration or the date the amalgamation proposal is effective, as the case may be, until that person ceases to hold office as a director in accordance with this Act.
- (2) All subsequent directors of a company shall, unless the constitution of the company otherwise provides, be appointed by ordinary resolution.

### **153 Court may appoint directors**

- (1) If —
  - (a) there are no directors of a company or the number of directors is less than the quorum required for a meeting of the board; and
  - (b) it is not possible or practicable to appoint directors in accordance with the company's constitution —

a shareholder or creditor of the company may apply to the Court to appoint one or more persons as directors of the company and the Court

may make an appointment if it considers that it is in the interests of the company to do so.

- (2) An appointment may be made on such terms and conditions as the Court thinks fit.

#### **154 Appointment of directors to be voted on individually**

- (1) Subject to the constitution of the company, the shareholders of a company may vote on a resolution to appoint a director of the company only if —
  - (a) the resolution is for the appointment of one director; or
  - (b) the resolution is a single resolution for the appointment of two or more persons as directors of the company and a separate resolution that it be so voted on has first been passed without a vote being cast against it.
- (2) A resolution moved in contravention of subsection (1) is void even though the moving of it was not objected to at the time.
- (3) Subsection (2) does not limit the operation of section 157.
- (4) No provision for the automatic reappointment of retiring directors in default of another appointment applies on the passing of a resolution in contravention of subsection (1).
- (5) Nothing in this section prevents the election of two or more directors by ballot or poll.

#### **155 Removal of directors**

- (1) Subject to the constitution of a company, a director of the company may be removed from office by ordinary resolution passed at a meeting called for the purpose or for purposes that include the removal of the director
- (2) The notice of meeting shall state that the purpose or a purpose of the meeting is the removal of the director.

#### **156 Director ceasing to hold office.**

- (1) The office of director of a company is vacated if the person holding that office —
  - (a) resigns in accordance with subsection (2);
  - (b) is removed from office in accordance with this Act or the constitution of the company;
  - (c) becomes disqualified from being a director pursuant to section 150;

- (d) dies; or
  - (e) otherwise vacates office in accordance with the constitution of the company.
- (2) A director of a company may resign office by signing a written notice of resignation and delivering it to the address for service of the company. The notice is effective when it is received at that address or at a later time specified in the notice.
- (3) Notwithstanding the vacation of office, a person who held office as a director remains liable under the provisions of this Act that impose liabilities on directors in relation to acts, omissions and decisions made while that person was a director.

### 157 Validity of director's acts

The acts of a person as a director are valid even though —

- (a) the person's appointment was defective; or
- (b) the person is not qualified for appointment.

### 158 Notice of change of directors

- (1) The board of a company shall ensure that notice in the prescribed form of —
- (a) a change in the directors of a company, whether as the result of a director ceasing to hold office or the appointment of a new director, or both; or
  - (b) a change in the name or the residential address of a director of a company —
- is delivered to the Registrar for registration.
- (2) A notice under subsection (1) shall —
- (a) specify the date of the change;
  - (b) include the full name and residential address of every person who is a director or company secretary of the company from the date of the notice;
  - (c) in the case of the appointment of a new director, have attached the form of consent and certificate required pursuant to section 151, and
  - (d) be delivered to the Registrar within 20 working days of —
    - (i) the change occurring, in the case of the appointment or resignation of a director; or



- (ii) the company first becoming aware of the change, in the case of the death of a director or a change in the name or residential address of a director.
- (3) If the board of a company fails to comply with this section, every director or company secretary of the company commits an offence and is liable on conviction to the penalty set out in section 378(2).

## MISCELLANEOUS PROVISIONS RELATING TO DIRECTORS

### 159 Remuneration and other benefits

- (1) The board of a company may, subject to any restrictions contained in the constitution of the company, authorise —
  - (a) the payment of remuneration or the provision of other benefits by the company to a director for services as a director or in any other capacity;
  - (b) the payment by the company to a director or former director of compensation for loss of office;
  - (c) the making of loans by the company to a director;
  - (d) the giving of guarantees by the company for debts incurred by a director;
  - (e) the entering into of a contract to do any of the things set out in paragraphs (a) to (d), — if the board is satisfied that to do so is fair to the company.
- (2) The board shall ensure that forthwith after authorising the making of the payment or the provision of the benefit or the making of the loan or the giving of the guarantee or the entering into of the contract, as the case may be, particulars of the payment or benefit or loan or guarantee or contract are entered in the interests register.
- (3) The payment of remuneration or the giving of any other benefit to a director in accordance with a contract authorised under subsection (1) need not be separately authorised under that subsection.
- (4) Directors who vote in favour of authorising a payment, benefit, loan, guarantee or contract under subsection (1) shall sign a certificate stating that, in their opinion, the making of the payment or the provision of the benefit or the making of the loan or the giving of the guarantee or the entering into of the contract is fair to the company, and the grounds for that opinion.
- (5) Where a payment is made or other benefit provided or a guarantee is given to which subsection (1) applies and either —

- (a) the provisions of subsections (1) and (4) have not been complied with; or
- (b) reasonable grounds did not exist for the opinion set out in the certificate given under subsection (4) —

the director or former director to whom the payment is made or the benefit is provided, or in respect of, whom the guarantee is given, as the case may be, is personally liable to the company for the amount of the payment or the monetary value of the benefit or any amount paid by the company under the guarantee, except to the extent to which he proves that the payment or benefit or guarantee was fair to the company at the time it was made, provided or given.

- (6) Where a loan is made to which subsection (1) applies and either —
  - (a) the provisions of subsections (1) and (4) have not been complied with; or
  - (b) reasonable grounds did not exist for the opinion set out in the certificate given under subsection (4), —

the loan becomes immediately repayable to the company by the director, notwithstanding the terms of any agreement relating to the giving of the loan, except to the extent to which he proves that the loan was fair to the company at the time it was given.

## 160 Indemnity and insurance

- (1) Except as provided in this section, a company shall not indemnify, or directly or indirectly effect insurance for, a director, company secretary or employee of the company or a related company in respect of —
  - (a) liability for any act or omission in his capacity as a director, company secretary or employee; or
  - (b) costs incurred by that director, company secretary or employee in defending or settling any claim or proceeding relating to any such liability.
- (2) An indemnity given in breach of this section is void.
- (3) A company may, if expressly authorised by its constitution, indemnify a director, company secretary or employee of the company or a related company for any costs incurred by him in any proceeding —
  - (a) that relates to liability for any act or omission in his capacity as a director, company secretary or employee; and
  - (b) in which judgment is given in his favour or in which he is acquitted or which is discontinued.

- (4) A company may, if expressly authorised by its constitution, indemnify a director, company secretary or employee of the company or a related company in respect of —
- (a) liability to any person other than the company or a related company for any act or omission in his capacity as a director, company secretary or employee; or
  - (b) costs incurred by that director, company secretary or employee in defending or settling any claim or proceeding relating to any such liability —

not being criminal liability or liability in respect of a breach, in the case of a director or company secretary, of the duty specified in section 130 or in the case of an employee, of any fiduciary duty owed to the company or related company.

- (5) A company may, if expressly authorised by its constitution and with the prior approval of the board, effect insurance for a director, company secretary or employee of the company or a related company in respect of —
- (a) liability, not being criminal liability, for any act or omission in his or her capacity, as a director, company secretary or employee;
  - (b) costs incurred by that director, company secretary or employee in defending or settling any claim or proceeding relating to any such liability; or
  - (c) costs incurred by that director, company secretary or employee in defending any criminal proceedings in which he is acquitted.
- (6) The directors who vote in favour of authorising the effecting of insurance under subsection (5) shall sign a certificate stating that, in their opinion, the cost of effecting the insurance is fair to the company.
- (7) The board of a company shall ensure that particulars of any indemnity given to, or insurance effected for, any director, company secretary or employee of the company or a related company are forthwith entered in the interests register.
- (8) Where insurance is effected for a director, company secretary or employee of a company or a related company and —
- (a) the provisions of either subsection (5) or subsection (6) have not been complied with; or
  - (b) reasonable grounds did not exist for the opinion set out in the certificate given under sub-section (6) —

the director, company secretary or employee is personally liable to the company for the cost of effecting the insurance except to the extent that he

proves that it was fair to the company at the time the insurance was effected.

(9) In this section —

“**company secretary**” includes a former company secretary;

“**director**” includes a former director;

“**effect insurance**” includes pay, whether directly or indirectly, the costs of the insurance;

“**employee**” includes a former employee;

“**indemnify**” includes relief or excuse from liability, whether before or after the liability arises; and “**indemnity**” has a corresponding meaning.

## COMPANY SECRETARIES

### 161 Duties of company secretaries.

- (1) It is the primary duty of a company secretary to advise the board of directors on the proper management of the company.
- (2) A company secretary has the other duties prescribed by this Act and the constitution of the company.

### 162 Number of company secretaries.

A company shall have at least one company secretary.

### 163 Qualifications of company secretaries.

- (1) A natural person who is —
  - (a) a law practitioner whose qualification includes a pass in examination in company law;
  - (b) an accountant whose qualification includes a pass in an examination in company law;
  - (c) a person whose name has been prescribed by the Minister for the purpose of this section by notice in the Gazette; or
  - (d) a person who is a member of a class of persons prescribed by the Minister for the purpose of this section by notice in the Gazette —and who is not disqualified from being appointed or holding office as a company secretary of a company;

- (e) in making a decision under paragraphs (c) and (d) the Minister shall take into account the special circumstances and needs of small companies.
- (2) The following persons are disqualified from being appointed or holding office as a company secretary of a company:
  - (a) a person who is under 18 years of age;
  - (b) a person who is an undischarged bankrupt;
  - (c) a person who is prohibited from being a director, promoter or company secretary of, or being concerned or taking part in the management of a company under section 386 or section 387 or section 389; and
  - (d) in relation to any particular company, a person who does not comply with any qualifications for company secretaries contained in the constitution of that company.
- (3) A person that is not a natural person cannot be a company secretary of a company.
- (4) A person who is disqualified from being a company secretary but who acts as a company secretary is a company secretary for the purposes of a provision of this Act that imposes a duty or an obligation on a company secretary of a company.

#### **164 Company secretary's consent required.**

A person shall not be appointed a company secretary of a company unless he has, in the prescribed form, consented to be a company secretary and certified that he is qualified to be appointed and hold office as a company secretary of a company.

#### **165 Appointment of first and subsequent company secretaries.**

- (1) A person named as a company secretary in an application for registration or in an amalgamation proposal holds office as a company secretary from the date of registration or the date the amalgamation proposal is effective, as the case may be, until that person ceases to hold office as a company secretary in accordance with this Act.
- (2) All subsequent company secretaries of a company shall, unless the constitution of the company otherwise provides, be appointed by the board.

**166 Court may appoint company secretary.**

- (1) If —
  - (a) there is no company secretary of a company; and
  - (b) it is not possible or practicable to appoint a company secretary in accordance with the company's constitution —

a shareholder or creditor of the company may apply to the Court to appoint one or more persons as company secretary of the company, and the Court may make an appointment if it considers that it is in the interests of the company to do so.
- (2) An appointment may be made on such terms and conditions as the Court thinks fit.

**167 Removal of company secretary.**

Subject to the constitution of a company and any agreement entered into in a particular case —

- (a) a company secretary of the company may be removed from office by the board at any time;
- (b) no reason need be given by the board for the removal.

**168 Company secretary ceasing to hold office**

- (1) The office of company secretary of a company is vacated if the person holding that office —
  - (a) resigns in accordance with subsection (2);
  - (b) is removed from office in accordance with this Act or the constitution of the company;
  - (c) ceases to be qualified to be a company secretary pursuant to section 163;
  - (d) becomes disqualified from being a company secretary pursuant to section 163;
  - (e) dies; or
  - (f) otherwise vacates office in accordance with the constitution of the company.
- (2) A company secretary, of a company may resign office by signing a written notice of resignation and delivering it to the address for service of the company. The notice is effective when it is received at that address or at a later time specified in the notice.

- (3) Notwithstanding the vacation of office, a person who held office as a company secretary remains liable under the provisions of this Act that impose liabilities on company secretaries in relation to acts and omissions and decisions made while that person was a company secretary.

### **169 Validity of company secretary's acts.**

The acts of a person as a company secretary are valid even though —

- (a) the person's appointment was defective; or
- (b) the person is not qualified for appointment.

### **170 Notice of change of company secretary.**

- (1) The board of a company shall ensure that notice in the prescribed form of —
  - (a) a change in the company secretary of a company, whether as the result of a company secretary ceasing to hold office or the appointment of a new company secretary, or both; or
  - (b) a change in the name or the residential address of a company secretary of a company, —is delivered to the Registrar for registration.
- (2) A notice under subsection (1) shall —
  - (a) specify the date of the change;
  - (b) include the full name and residential address of every person who is a company secretary or director of the company from the date of the notice;
  - (c) in the case of the appointment of a new company secretary, have attached the form of consent and certificate required pursuant to section 164; and
  - (d) be delivered to the Registrar within 20 working days of —
    - (i) the change occurring, in the case of the appointment or resignation of a company secretary; or
    - (ii) the company first becoming aware of the change, in the case of the death of a company secretary or a change in the name or residential address of a company secretary.
- (3) If the board of a company fails to comply with this section, every director or company secretary of the company commits an offence and is liable on conviction to the penalty set out in section 378(2).

**171 Remuneration and other benefits.**

- (1) The board of a company may, subject to any restrictions contained in the constitution of the company, authorise —
- (a) the payment of remuneration or the provision of other benefits by the company to a company secretary for services as a company secretary or in any other capacity;
  - (b) the payment by the company to a company secretary, or former company secretary of compensation for loss of office;
  - (c) the making of loans by the company to a company secretary;
  - (d) the giving of guarantees by the company for debts incurred by a company secretary;
  - (e) the entering into of a contract to do any of the things set out in paragraphs (a) to (d) —

if the board is satisfied that to do so is fair to the company.

- (2) The board shall ensure that forthwith after authorising the making of the payment or the provision of the benefit or the making of the loan or the giving of the guarantee or the entering into of the contract, as the case may be, particulars of the payment or benefit or loan or guarantee or contract are entered in the interests register.
- (3) The payment of remuneration or the giving of any other benefit to a company secretary in accordance with a contract authorised under subsection (1) need not be separately authorised under that subsection.
- (4) Directors who vote in favour of authorising a payment, benefit, loan, guarantee or contract under subsection (1) must sign a certificate stating that, in their opinion, the making of the payment or the provision of the benefit or the making of the loan or the giving of the guarantee or the entering into of the contract is fair to the company, and the grounds for that opinion.
- (5) Where a payment is made or other benefit provided or a guarantee is given to which subsection (1) applies and either —
- (a) the provisions of subsections (1) and (4) have not been complied with; or
  - (b) reasonable grounds did not exist for the opinion set out in the certificate given under subsection (4), —

the company secretary or former company secretary to whom the payment is made or the benefit is provided, or in respect of whom the guarantee is given, as the case may be, is personally liable to the company for the amount of the payment or the monetary value of the benefit or any amount paid by the company under the guarantee, except to the extent to which he



proves that the payment or benefit or guarantee was fair to the company at the time it was made, provided or given.

- (6) Where a loan is made to which subsection (1) applies and either —
- (a) the provisions of subsections (1) and (4) have not been complied with; or
  - (b) reasonable grounds did not exist for the opinion set out in the certificate given under subsection (4), —

the loan becomes immediately repayable to the company by the company secretary, notwithstanding the terms of any agreement relating to the giving of the loan, except to the extent to which he proves that the loan was fair to the company at the time it was given.

## PART IX - ENFORCEMENT

### 172 Interpretation

In this Part, unless the context otherwise requires, the terms “entitled person”, “former shareholder” and “shareholder” include a reference to a personal representative of an entitled person, former shareholder or shareholder and a person to whom shares of any of those persons have passed by operation of law.

## INJUNCTIONS

### 173 Injunctions

- (1) The Court may, on an application under this section, make an order restraining a company that, or a director or company secretary of a company who, proposes to engage in conduct that would contravene the constitution of the company or this Act from engaging in that conduct.
- (2) An application may be made by —
  - (a) the company;
  - (b) a director, company secretary or shareholder of the company; or
  - (c) an entitled person.
- (3) If the Court makes an order under subsection (1), it may also grant such consequential relief as it thinks fit.
- (4) An order may not be made under this section in relation to conduct or a course of conduct that has been completed.

- (5) The Court may, any time before the final determination of an application under subsection (1), make, as an interim order, any order that it is empowered to make under that subsection.

## DERIVATIVE ACTIONS

### 174 Derivative actions.

- (1) Subject to subsection (3), the Court may, on the application of a shareholder or director of a company, grant leave to that shareholder or director to —
- (a) bring proceedings in the name and on behalf of the company or any related company; or
  - (b) intervene in proceedings to which the company or any related company is a party for the purpose of continuing, defending or discontinuing the proceedings on behalf of the company or related company, as the case may be.
- (2) Without limiting subsection (1), in determining whether to grant leave under that subsection, the Court shall have regard to —
- (a) the likelihood of the proceeding succeeding;
  - (b) the costs of the proceedings in relation to the relief likely to be obtained;
  - (c) any action already taken by the company or related company to obtain relief; and
  - (d) the interests of the company or related company in the proceedings being commenced, continued, defended or discontinued, as the case may be.
- (3) Leave to bring proceedings or intervene in proceedings may be granted under subsection (1), only if the Court is satisfied that either —
- (a) the company or related company does not intend to bring, diligently continue, defend or discontinue the proceedings, as the case may be; or
  - (b) it is in the interests of the company or related company that the conduct of the proceedings should not be left to the directors or to the determination of the shareholders as a whole.
- (4) Notice of the application shall be served on the company or related company.
- (5) The company or related company —
- (a) may appear and be heard; and

- (b) shall inform the Court, whether or not it intends to bring, continue, defend or discontinue the proceedings, as the case may be.
- (6) Except as provided in this section, a shareholder is not entitled to bring or intervene in any proceedings in the name of, or on behalf of, a company or a related company.

### **175 Costs of derivative action to be met by company**

The Court shall, on the application of the shareholder or director to whom leave was granted under section 174 to bring or intervene in the proceedings, order that the whole or part of the reasonable costs of bringing or intervening in the proceedings, including any costs relating to any settlement, compromise or discontinuance approved under section 177, shall be met by the company unless the Court considers that it would be unjust or inequitable for the company to bear those costs.

### **176 Powers of Court where leave granted**

The Court may, at any time, make any order it thinks fit in relation to proceedings brought by a shareholder or a director or in which a shareholder or director intervenes, as the case may be, with leave of the Court under section 174, and without limiting the generality of this section may —

- (a) make an order authorising the shareholder or any other person to control the conduct of the proceedings;
- (b) give directions for the conduct of the proceedings;
- (c) make an order requiring the company or the directors or company secretaries to provide information or assistance in relation to the proceedings;
- (d) make an order directing that any amount ordered to be paid by a defendant in the proceedings shall be paid, in whole or part, to former and present shareholders of the company or related company instead of to the company or the related company.

### **177 Compromise, settlement or withdrawal of derivative action**

No proceedings brought by a shareholder or a director or in which a shareholder or a director intervenes, as the case may be, with leave of the Court under section 174, may be settled or compromised or discontinued without the approval of the Court.

---

## PERSONAL ACTIONS BY SHAREHOLDERS

### **178 Personal actions by shareholders against directors and company secretaries**

- (1) A shareholder or former shareholder may bring an action against a director or company secretary for breach of a duty owed to him as a shareholder.
- (2) An action may not be brought under subsection (1) to recover any loss in the form of a reduction in the value of shares in the company or a failure of the shares to increase in value by reason only of a loss suffered or a gain forgone by the company.
- (3) Without limiting subsection (1), the duties of directors and company secretaries set out in —
  - (a) section 90 (which relates to the duty to supervise the share register);
  - (b) section 139 (which relates to the duty to disclose interests); and
  - (c) section 147 (which relates to the duty to disclose share dealings) — are duties owed to shareholders, while the duties of directors and company secretaries set out in —
    - (d) section 130 (which relates to the duty of directors and company secretaries to act in good faith and in the best interests of the company);
    - (e) section 132 (which relates to the duty to exercise powers for a proper purpose);
    - (f) section 134 (which relates to reckless trading);
    - (g) section 135 (which relates to the duty not to agree to a company incurring certain obligations);
    - (h) section 136 (which relates to a director's and company secretary's duty of care); and
    - (i) section 144 (which relates to the use of company information) — are duties owed to the company and not to shareholders.

### **179 Actions by shareholders to require director or company secretary to act**

Notwithstanding section 178, the Court may, on the application of a shareholder of a company, if it is satisfied it is just and equitable to do so, make an order requiring a director or company secretary of the company to take any action that is required to be taken by the directors or a company secretary under the

constitution of the company or this Act and, on making the order, the Court may grant such other consequential relief as it thinks fit.

### **180 Personal actions by shareholders against company.**

A shareholder of a company may bring, an action against the company for breach of a duty owed by the company to him as a shareholder.

### **181 Actions by shareholders to require company to act.**

Notwithstanding section 180, the Court may, on the application of a shareholder of a company, if it is satisfied that it is just and equitable to do so, make an order requiring the board of the company to take any action that is required to be taken by the constitution of the company or this Act and, on making the order, the Court may grant such other consequential relief as it thinks fit.

### **182 Representative actions.**

Where a shareholder of a company brings proceedings against the company or a director or company secretary and other shareholders have the same or substantially the same interest in relation to the subject-matter of the proceedings, the Court may appoint that shareholder to represent all or some of the shareholders having the same or substantially the same interest, and may, for that purpose, make such order as it thinks fit including, without limiting the generality of this section, and order —

- (a) as to the control and conduct of the proceedings;
- (b) as to the costs of the proceedings;
- (c) directing the distribution of any amount ordered to be paid by a defendant in the proceedings among the shareholders represented.

### **183 Prejudiced shareholders.**

- (1) A shareholder or former shareholder of a company or any other entitled person who considers that the affairs of a company have been, or are being, or are likely to be, conducted in a manner that is, or any act or acts of the company have been, or are, or are likely to be, oppressive, unfairly discriminatory or unfairly prejudicial to him in that capacity or in any other capacity, may apply to the Court for an order under this section.
- (2) If, on an application under this section the Court considers that it is just and equitable to do so, it may make such order as it thinks fit including, without limiting the generality of this subsection, an order —

- (a) requiring the company or any other person to acquire the shareholder's shares;
  - (b) requiring the company or any other person to pay compensation to a person;
  - (c) regulating the future, conduct of the company's affairs;
  - (d) altering or adding to the company's constitution;
  - (e) appointing a receiver of the company;
  - (f) directing the rectification of the records of the company;
  - (g) putting the company into liquidation; or
  - (h) setting aside action taken by the company or the board in breach of this Act or the constitution of the company.
- (3) No order may be made against the company or any other person under subsection (2) unless the company or that person is a party to the proceedings in which the application is made.

#### **184 Certain conduct deemed prejudicial**

- (1) Failure, to comply with any of the following sections of this Act is conduct which is unfairly prejudicial for the purposes of section 183;
- (a) section 49,(which relates to pre-emptive rights to the issue of shares);
  - (b) section 51 (which relates to the consideration for which shares are issued);
  - (c) section 57 (which relates to dividends);
  - (d) section 64 (which relates to offers by a company to acquire its own shares);
  - (e) section 65 (which relates to special offers to acquire shares);
  - (f) section 77 (which relates to the provision of financial assistance by a company to acquire its own shares);
  - (g) section 79 (which relates to special financial assistance);
  - (h) section 81 (which relates to financial assistance not exceeding five percent of shareholders' funds);
  - (i) section 117 (which relates to the alteration of shareholder rights);
  - (j) section 128 (which relates to major transactions).
- (2) The signing by the directors of a company of a certificate required by this Act without reasonable grounds existing for an opinion set out in its conduct that is unfairly prejudicial for the purposes of section 183.

**185 Alteration to constitution**

- (1) Notwithstanding anything in this Act, but subject to the order where the Court makes an order under section 183 altering the constitution of a company, the constitution shall not, to the extent that it has been altered by the Court, again be altered without the leave of the Court.
- (2) Any alteration to the constitution of a company made by an order under section 183 has the same effect as if it had been made by the shareholders of the company pursuant to section 36 and the provisions of this Act shall apply to the constitution as altered.
- (3) Within 10 working days of the making of an order under section 183 altering the constitution of a company, the board of the company must ensure that a copy of the order and the constitution as altered is delivered to the Registrar for registration.
- (4) If the board of a company fails to comply with subsection (3), every director or company secretary of the company commits an offence and is liable, on conviction, to the penalty set out in section 378(2).

**RATIFICATION****186 Ratification of certain actions of directors or company secretary.**

- (1) The purported exercise by a director, the board of a company or a company secretary of a power vested in the shareholders or any other person may be ratified or approved by those shareholders or that other person in the same manner in which the power may be exercised.
- (2) The purported exercise of a power that is ratified under subsection (1) is deemed to be, and always to have been, a proper and valid exercise of that power.
- (3) The ratification or approval under this section of the purported exercise of a power by a director, the board or a company secretary does not prevent the Court from exercising a power which might, apart from the ratification or approval, be exercised in relation to the action of the director, the board or a company secretary.
- (4) Nothing in this section limits or affects any rule of law relating to the ratification or approval by the shareholders or any other person of any act or omission of a director, the board or a company secretary of a company.

## INSPECTION OF RECORDS

### 187 Information for shareholders.

- (1) A shareholder may at any time make a written request to a company for information held by the company.
- (2) The request shall specify the information sought in sufficient detail to enable it to be identified.
- (3) Within 10 working days of receiving a request under subsection (1), the company shall either —
  - (a) provide the information;
  - (b) agree to provide the information within a specified period;
  - (c) agree to provide the information within a specified period if the shareholder pays a reasonable charge to the company (which shall be specified and explained) to meet the cost of providing the information; or
  - (d) refuse to provide the information specifying the reasons for the refusal.
- (4) Without limiting the reasons for which a company may refuse to provide information under this section, a company may refuse to provide information if —
  - (a) the disclosure of the information would or would be likely to prejudice the commercial position of the company;
  - (b) the disclosure of the information would or would be likely to prejudice the commercial position of any other person, whether or not that person supplied the information to the company; or
  - (c) the request for the information is frivolous or vexatious.
- (5) If the company requires the shareholder to pay a charge for the information, the shareholder may withdraw the request and is deemed to have done so unless, within 10 working days of receiving notification of the charge, the shareholder informs the company. —
  - (a) that the shareholder will pay the charge; or
  - (b) that the shareholder considers the charge to be unreasonable.
- (6) The Court may, on the application of a person who has made a request for information, if it is satisfied that —
  - (a) the period specified for providing the information is unreasonable; or
  - (b) the charge set by the company is unreasonable, —



as the case may be make an order requiring the company to supply the information within such time or on payment of such charge as the Court thinks fit.

- (7) The Court may, on the application of a person who has made a request for information, if it is satisfied that —
- (a) the company does not have sufficient reason to refuse to supply the information; or
  - (b) the company has sufficient reason to refuse to supply the information but that other reasons exist that outweigh the refusal, —

as the case may be make an order requiring the company to supply the information.

- (8) Where the Court makes an order under subsection (7), it may specify the use that may be made of the information and the persons to whom it may be disclosed.
- (9) On an application for an order under this section, the court may make such order for the payment of costs as it thinks fit.

## 188 Investigation of records

- (1) The Court may, on the application of a shareholder or creditor of a company, make an order appointing a person named in the order at a time specified in the order to inspect and to make copies of, or take extracts from, the records or other documents of the company or such of the records or documents of the company as are specified in the order and may make such ancillary order as it thinks fit including an order that the accounts of the company be audited by that person.
- (2) The Court may make an order under subsection (1) only if it is satisfied that —
- (a) in making the application, the shareholder or creditor is acting in good faith and that the inspection is proposed to be made for a proper purpose; and
  - (b) the person to be appointed is a proper person for the task.
- (3) A person appointed by the Court under subsection (1) shall diligently carry out the inspection and, having done so, shall make a full report to the Court.
- (4) On receiving the report of a person appointed, the Court may make such order in relation to the disclosure and use that may be made of records and information obtained as it thinks fit.
- (5) An order made under subsection (4) may be varied from time to time.

- (6) The reasonable costs of the inspection shall be met by the company unless the Court orders otherwise.
- (7) A person may only disclose or make use of information or records obtained under this section in accordance with an order made under subsection (4) or varied under subsection (5).
- (8) A person who discloses or makes use of information or records obtained under this section other than in accordance with an order made under subsection (4) or varied under subsection (5) commits an offence and is liable on conviction to the penalty set out in section 377(2).

## PART X - ADMINISTRATION OF COMPANIES

### AUTHORITY TO BIND COMPANY

#### 189 Method of contracting

- (1) A contract or other enforceable obligation may be entered into by a company as follows:
  - (a) an obligation which, if entered into by a natural person, would, by law, be required to be by deed, may be entered into on behalf of the company in writing signed under the name of the company by —
    - (i) two or more directors of the company;
    - (ii) one or more directors and one or more company secretaries of the company;
    - (iii) if the constitution of the company so provides, a director, company secretary or other person or class or persons whose signature or signatures shall be witnessed; or
    - (iv) one or more attorneys appointed by the company in accordance with section 190.
  - (b) an obligation which, if entered into by a natural person, would, by law, be required to be in writing, may be entered into on behalf of the company in writing by a person acting under the company's express or implied authority;
  - (c) an obligation which, if entered into by a natural person, would not, by law, be required to be in writing, may be entered into on behalf of the company in writing or orally by a person acting under the company's express or implied authority.
- (2) Subsection (1) applies to a contract or other obligation —
  - (a) whether or not that contract or obligation was entered into in Tonga; and

- (b) whether or not the law governing the contract or obligation is the law of Tonga.

### 190 Attorneys.

- (1) Subject to its constitution, a company may, by an instrument in writing executed in accordance with section 189(1)(a), appoint a person as its attorney either generally or in relation to a specified matter.
- (2) An act of the attorney in accordance with the instrument binds the company.
- (3) Section 52 of the Evidence Act (Cap. 15) applies to a power of attorney executed by a company.

## PRE-INCORPORATION CONTRACTS

### 191 Pre-incorporation contracts may be ratified.

- (1) In this section and in sections 192 to 194, the term “**pre-incorporation contract**” means —
  - (a) a contract purporting to be made by a company before its incorporation; or
  - (b) a contract made by a person on behalf of a company before and in contemplation of its incorporation.
- (2) Notwithstanding any enactment or rule of law, a pre-incorporation contract may be ratified within such period as may be specified in the contract or, if no period is specified, then within a reasonable time after the incorporation of the company in the name of which, or on behalf of which, it has been made.
- (3) A contract that is ratified is a valid and enforceable as if the company had been a party to the contract when it was made.
- (4) A pre-incorporation contract may be ratified by a company in the same manner as a contract may be entered into on behalf of a company under section 189.
- (5) If a pre-incorporation contract has not been ratified by a company or validated by the Court under section 193, the company shall not enforce it or take the benefit of it.

### 192 Warranties implied in pre-incorporation contracts

- (1) Notwithstanding any enactment or rule of law, in a pre-incorporation contract, unless a contrary intention is expressed in the contract, there is

an implied warranty by the person who purports to make the contract in the name of, or on behalf of, the company —

- (a) that the company will be incorporated within such period as may be specified in the contract or, if no period is specified, then within a reasonable time after the making of the contract; and
  - (b) that the company will ratify the contract within such period as may be specified in the contract or, if no period is specified, then within a reasonable time after the incorporation of the company.
- (2) The amount of damages recoverable in an action for breach of a warranty implied by subsection (1) is the same as the amount of damages that would be recoverable in an action against the company for damages for breach by the company of the unperformed obligations under, the contract if the contract had been ratified and cancelled.
- (3) If, after its incorporation, a company enters into a contract in the same terms as, or in substitution for, a pre-incorporation contract not being a contract ratified by the company under section 191, the liability of a person under subsection (1) including any liability under an order made by the Court for the payment of damages is discharged.

### **193 Failure to ratify.**

- (1) A party to a pre-incorporation contract that has not been ratified by the company after its incorporation may apply to the Court for an order —
- (a) directing the company to return property, whether real or personal, acquired under the contract to that party;
  - (b) for any other relief in favour of that party relating to that property; or
  - (c) validating the contract in whole or in part.
- (2) The Court may, if it considers it just and equitable to do so, make any order or grant any relief it thinks fit and may do so whether or not an order has been made under section 192(2).

### **194 Breach of pre-incorporation contract.**

In proceedings against a company for breach of a pre-incorporation contract which has been ratified by the company, the Court may, on the application of the company, any other party to the proceedings or of its own motion, make such order for the payment of damages or other relief as the Court considers just and equitable in addition to or in substitution for any order which may be made against the company, against a person by whom the contract was made.

---

## REGISTERED OFFICE

### 195 Registered office.

- (1) A company shall always have a registered office in Tonga.
- (2) Subject to section 196, the registered office of a company at a particular time is the place that is described as its registered office in the Tongan register at that time.
- (3) The description of the registered office shall —
  - (a) state the address of the registered office;
  - (b) if the registered office is at the offices of any firm of accountants, law practitioners or any other person, state —
    - (i) that the registered office of the company is at the offices of that firm or person; and
    - (ii) particulars of the location in any building of those offices; or
  - (c) if the registered office is not at the offices of any such firm or person but is located in a building occupied by persons other than the company, state particulars of its location in the building.

### 196 Change of Registered Office

- (1) Subject to the company's constitution and to subsection (3), the board of a company may change the registered office of the company at any time.
- (2) Notice in the prescribed form of the change must be given to the Registrar for registration.
- (3) The change in the registered office takes effect on a date stated in the notice not less than 5 working days after the notice is registered.

### 197 Requirement to change registered office.

- (1) Subject to this section, a company shall change its registered office if it is required to do so by the Registrar.
- (2) The Registrar may require a company to change its registered office by notice in writing delivered or sent to the company at its registered office.
- (3) The notice shall —
  - (a) state that the company is required to change its registered office by a date stated in the notice, not less than 20 working days after the date of the notice;
  - (b) state the reasons for requiring the change;

- (c) state that the company has the right to appeal to the Court under section 374; and
  - (d) be dated and signed by the Registrar.
- (4) A copy of the notice shall also be sent to each director and company secretary of the company.
- (5) The company shall change its registered office —
- (a) by the date stated in the notice; or
  - (b) if it appeals to the Court and the appeal is dismissed, within 5 working days after the decision of the Court.
- (6) If a company fails to comply with this section, every director or company secretary of the company commits an offence and is liable on conviction to the penalty set out in section 378(1).

## COMPANY RECORDS

### 198 Company records.

- (1) Subject to subsection. (3) and to section 88 and section 204, a company shall keep the following documents at its registered office:
- (a) the constitution of the company;
  - (b) minutes of all meetings and resolutions of shareholders within the last 10 years;
  - (c) an interests register;
  - (d) minutes of all meetings and resolutions of directors and directors' committees within the last 10 years;
  - (e) certificates given by directors under this Act within the last 10 years;
  - (f) the full names and addresses of the current directors and company secretaries;
  - (g) copies of all written communications to shareholders or all holders of the same class of shares during the last 10 years including annual reports made under section 217;
  - (h) copies of all financial statements and group financial statements required to be completed by this Act for the last 10 completed accounting periods of the company;
  - (i) the accounting records required by section 203 for the current accounting period and for the last 10 completed accounting periods of the company; and
  - (j) the share register.

- (2) The references in paragraphs (b), (d), (e) and (g) of subsection (1) to 10 years and the references in paragraphs (h) and (i) of that subsection to 10 completed accounting periods include such lesser periods as the Registrar may approve by notice in writing to the company.
- (3) The records referred to in paragraphs (a) to (h) of subsection (1) may be kept at a place in Tonga, notice of which is given to the Registrar in accordance with subsection (4).
- (4) If any records are not kept at the registered office of the company, or the place at which they are kept is changed, the company, shall ensure that within 10 working days of their first being kept elsewhere or moved, as the case may be, notice is given to the Registrar for registration of the places where the records are kept.
- (5) If a company fails to comply with subsection (1) or subsection (4) —
  - (a) the company commits an offence and is liable on conviction to the penalty set out in section 377(2); and
  - (b) every director or company secretary of the company commits an offence and is liable on conviction to the penalty set out in section 378(2).

### **199 Form of records.**

- (1) The records of a company shall be kept —
  - (a) in written form; or
  - (b) in a form or in a manner that allows the documents and information that comprise the records to be easily accessible and convertible into written form.
- (2) The board shall ensure that adequate measures exist to —
  - (a) prevent the records being falsified; and
  - (b) detect any falsification of them.
- (3) If the board fails to comply with subsection (2), every director or company secretary commits an offence and is liable on conviction to the penalty set out in section 378(2).

### **200 Inspection of records by directors and company secretaries.**

- (1) Subject to subsection (2), every director or company secretary of a company is entitled, on giving reasonable notice, to inspect the records of the company —
  - (a) in written form;

- (b) without charge; and
  - (c) at a reasonable time specified by the director or company secretary.
- (2) The Court may, on application by the company, if it is satisfied that —
- (a) it would not be in the company's interests for a director or company secretary to inspect the records; or
  - (b) the proposed inspection is for a purpose that is not properly connected with the director's or company secretary's duties —
- direct that the records need not be made available for inspection or limit the inspection of them in any manner it thinks fit.

### ADDRESS FOR SERVICE

#### 201 Address for service.

- (1) A company shall have an address for service in Tonga.
  - (2) The address for service may be the company's registered office or another place but it shall not be at a post office.
  - (3) A company's address for service at any particular time is the address that is described as its address for service in the Tongan register at that time.
  - (4) The description of the address for service must state that it is at the registered office of the company, or if it is at another place, must —
    - (a) state the address of that place; and
    - (b) if the address for service is at the offices of any firm of accountants, law practitioners or any other person, state —
      - (i) that the address for service of the company is at the offices of that firm or person; and
      - (ii) particulars of the location in any building of those offices;
- or
- (c) if the address for service is not at the offices of any such firm or person but is located in a building occupied by persons other than the company, state particulars of its location in the building.

#### 202 Change of address for service.

- (1) Subject to the company's constitution and to subsection (3), the board of a company may change the address for service of the company at any time.
- (2) Notice in the prescribed form of the change shall be given to the Registrar for registration.



- (3) A change of address for service takes effect on a date stated in the notice, not less than 5 working days after the notice is registered.

## PART XI - ACCOUNTING RECORDS AND AUDIT

### ACCOUNTING RECORDS

#### 203 Accounting records to be kept

- (1) The board of a company shall cause accounting records to be kept that —
- (a) correctly record and explain the transactions of the company;
  - (b) will at any time enable the financial position of the company to be determined with reasonable accuracy;
  - (c) will enable the directors to ensure that the financial statements of the company comply with clause 3 of the Ninth Schedule and any group financial statements comply with clause 5 of that Schedule; and
  - (d) will enable the financial statements of the company to be readily and properly audited.
- (2) Without limiting subsection, (1), the accounting records shall contain —
- (a) entries of money received and spent each day and the matters to which it relates;
  - (b) a record of the assets and liabilities of the company;
  - (c) if the company's business involves dealing in goods —
    - (i) a record of goods bought and sold, except goods sold for cash in the ordinary course of carrying on a retail business, that identifies both the goods and buyers and sellers and relevant invoices; and
    - (ii) a record of stock held at the end of the financial year together with records of any stocktakings during the year; and
  - (d) the company's business involves providing services, a record of services provided and relevant invoices.
- (3) The accounting records shall be kept —
- (a) in written form and in English or Tongan; or
  - (b) in a form or manner in which they are easily accessible and convertible into written form either in English or Tongan.

- (4) If the board of a company fails to comply with the requirements of this section, every director or company secretary of the company commits an offence and is liable on conviction to the penalty set out in section 378(2).

## 204 Place accounting records to be kept

- (1) A company need not keep its accounting records in Tonga.
- (2) If the records are not kept in Tonga, —
- (a) the company shall ensure that accounts and returns for the operations of the company that —
- (i) disclose with reasonable accuracy the financial position of the company at intervals not exceeding six months; and
- (ii) will enable the preparation in accordance with the Ninth Schedule of the company's financial statements and any group financial statements and any other document required by this Act, —

are sent to, and kept at, a place in Tonga; and

- (b) notice of the place where —
- (i) the accounting records; and
- (ii) the accounts and returns required under paragraph (a), —

are kept, shall be given to the Registrar.

- (3) If a company fails to comply with subsection (2) —
- (a) the company commits an offence and is liable on conviction to the penalty set out in section 377(2); and
- (b) every director or company secretary of the company commits an offence and is liable on conviction to the penalty set out in section 378 (2).

## AUDITORS

### 205 Appointment of auditors.

- (1) Subject to this section, a company shall, at each annual meeting, appoint an auditor to —
- (a) hold office from the conclusion of the meeting until the conclusion of the next annual meeting; and
- (b) audit the financial statements of the company and, if the company is required to complete group financial statements, those group financial statements for the accounting period next after the meeting.

- (2) A company need not appoint an auditor in accordance with subsection (1) if, at or before the meeting, a unanimous resolution is passed by the company that no auditor be appointed. Such a resolution shall cease to have effect at the commencement of the next annual meeting.
- (3) Nothing in subsection (2) applies to a company —
  - (a) that is a subsidiary of a company or body corporate incorporated outside Tonga; or
  - (b) in which shares that in aggregate carry the right to exercise or control the exercise of 25 percent or more of the voting power at a meeting of the company are held by —
    - (i) a subsidiary of a company or body corporate incorporated outside Tonga or a subsidiary of that subsidiary;
    - (ii) a company or body corporate incorporated outside Tonga;
    - (iii) a person not ordinarily resident in Tonga.
- (4) The board of a company may fill any casual vacancy in the office of auditor, but while the vacancy remains, the surviving or continuing auditor, if any, shall continue to act as auditor.
- (5) If —
  - (a) at an annual meeting of a company no auditor is appointed or reappointed and no resolution has been passed pursuant to subsection (2); or
  - (b) a casual vacancy in the office of auditor is not filled within one month of the vacancy occurring, —the Registrar may appoint an auditor.
- (6) A company shall, within 5 working days of the power becoming exercisable, give written notice to the Registrar of the fact that the Registrar is entitled to appoint an auditor under subsection (5).
- (7) If a company fails to comply with subsection (6) —
  - (a) the company commits an offence and is liable on conviction to the penalty set out in section 377(2); and
  - (b) every director or company secretary of the company commits an offence and is liable on conviction to the penalty set out in section 378(2).
- (8) For the purposes of subsection (3)(b)(iii), a person is ordinarily resident in Tonga if that person —
  - (a) is domiciled in Tonga; or
  - (b) is living in Tonga and the place where that person usually lives is, and has been for the immediately preceding 12 months, in Tonga,

whether or not that person has on occasions which on aggregate do not exceed 3 months been away from Tonga during that period.

## **206 Auditor's fees and expenses.**

The fees and expenses of an auditor of a company shall be fixed —

- (a) if the auditor is appointed at a meeting of the company, by the company at the meeting or in such manner as the company determines at the meeting;
- (b) if the auditor is appointed by the directors, by the directors; and
- (c) if the auditor is appointed by the Registrar, by the Registrar.

## **207 Appointment of partnership as auditor.**

- (1) A partnership may be appointed in its firm name to be the auditor of a company if all or some of the partners are persons who are qualified to be appointed as auditors of the company.
- (2) The appointment of a partnership in its firm name to be the auditor of a company is deemed, notwithstanding section 208, to be the appointment of all the persons who are partners, in the firm from time to time.
- (3) Where partnership that includes persons who are not qualified to be appointed as auditors of a company is appointed as auditor of a company, the persons who are not qualified to be appointed as auditors must not act as auditors of the company.

## **208 Qualifications of auditors.**

- (1) A person shall not be appointed or act as auditor of a company unless the person is —
  - (a) a member of the Tonga Society of Accountants who holds a qualification which is for the time being approved for the purposes of this section by the Minister by notice in the Gazette;
  - (b) an officer of the Audit Department authorised in writing by the Auditor-General to be an auditor of a company for the purposes of this section; or
  - (c) a member, fellow or associate of an association of accountants constituted outside Tonga which is for the time being approved for the purposes of this section by the Minister by notice in the Gazette.
- (2) The following persons shall not be appointed or act as auditor of a company:

- (a) a director, company secretary or employee of the company;
- (b) a person who is a partner, or in the employment, of a director, company secretary or employee of the company;
- (c) a liquidator or a person who is a receiver in respect of the property of the company;
- (d) a body corporate; or
- (e) a person who, by virtue of paragraphs (a) or (b), shall not be appointed or act as auditor of a related company.

## **209 Automatic reappointment**

- (1) An auditor of a company, other than an auditor appointed under section 210(1), is automatically reappointed at an annual meeting of the company unless —
  - (a) the auditor is not qualified for appointment;
  - (b) the company passes a resolution at the meeting appointing another person to replace him or her as auditor;
  - (c) the company passes a resolution under section 205(2) that no auditor be appointed; or
  - (d) the auditor has given notice to the company that he does not wish to be reappointed.
- (2) An auditor is not automatically reappointed if the person who it is proposed will replace him dies, or is, or becomes incapable of, or disqualified from, appointment.

## **210 Appointment of first auditor.**

- (1) The first auditor of a company may be appointed by the directors of the company before the first annual meeting, and, if so appointed, shall hold office until the conclusion of that meeting.
- (2) If the directors do not appoint an auditor under subsection (1), the company shall appoint the first auditor at a meeting of the company.
- (3) Neither the directors nor the company need appoint an auditor in accordance with this section if an unanimous resolution is passed by the company that no auditor be appointed. Such a resolution ceases to have effect at the commencement of the first annual meeting.
- (4) Nothing in subsection (3) applies to a company referred to in section 205(3).

**211 Replacement of auditor.**

- (1) A company shall not appoint a new auditor in the place of an auditor who is qualified for reappointment, unless —
  - (a) not less than 20 working days written notice of a proposal to do so has been given to the auditor; and
  - (b) the auditor has been given a reasonable opportunity to make representations to the shareholders on the appointment of another person either in writing or by the auditor or his representative speaking at a shareholders' meeting; whichever the auditor may choose.
- (2) An auditor is entitled to be paid by the company reasonable fees and expenses for making the representations to shareholders.

**212 Auditor not seeking reappointment**

- (1) If an auditor gives the board of a company written notice that he does not wish to be reappointed, the board shall, if requested to do so by that auditor —
  - (a) distribute to all shareholders, at the expense of the company, a written statement of the auditor's reasons for his wish not to be reappointed; or
  - (b) permit the auditor or his representative to explain at a shareholders' meeting the reasons for his wish not to be reappointed.
- (2) An auditor is entitled to be paid by the company reasonable fees and expenses for making the representations to shareholders.

**213 Auditor to avoid conflict of interest.**

An auditor of a company shall ensure, in carrying out the duties of an auditor under this Part, that his judgment is not impaired by reason of any relationship with or interest in the company or any of its subsidiaries.

**214 Auditor's report.**

- (1) The auditor of a company shall make a report to the shareholders on the financial statements audited by him.
- (2) The auditor's report shall state the matters required to be stated in an auditor's report under the Ninth Schedule.

**215 Access to information.**

- (1) The board of a company shall ensure that an auditor of a company has access at all times to the accounting records and other documents of the company.
- (2) An auditor of a company may require from a director, company secretary or employee of the company such information and explanations as he thinks necessary for the performance of his duties as auditor.
- (3) If the board of a company fails to comply with subsection (1), every director or company secretary commits an offence and is liable on conviction to the penalty set out in section 378(2).
- (4) A director, company secretary or employee who fails to comply with subsection (2) commits an offence and is liable on conviction to the penalty set out in section 377(2).
- (5) It shall be a defence to an employee charged with an offence against subsection (4) if he proves that —
  - (a) he did not have the information required in his possession or under his control; or
  - (b) by reason of the position occupied by him or the duties assigned to him, he was unable to give the explanations required, —as the case may be.

**216 Auditor's attendance at shareholders' meeting.**

- (1) The board of a company shall ensure that an auditor of the company —
  - (a) is permitted to attend a meeting of shareholders of the company;
  - (b) receives the notices and communications that a shareholder is entitled to receive relating to a meeting of shareholders; and
  - (c) may be heard at a meeting of shareholders which he attends on any part of the business of the meeting which concerns him as auditor.
- (2) If the board of a company fails to comply with subsection (1), every director or company secretary of the company commits an offence and is liable on conviction to the penalty set out in section 378(2).

## PART XII - DISCLOSURE BY COMPANIES

### DISCLOSURE TO SHAREHOLDERS

#### 217 Obligation to prepare annual report.

- (1) The board of every company shall, within 5 months after the balance date of the company, prepare an annual report on the affairs of the company during the accounting period ending on that date.
- (2) If the board of a company fails to comply with subsection (1), every director or company secretary of the company commits an offence and is liable on conviction to the penalty set out in section 378(2).

#### 218 Sending of annual report to shareholders.

- (1) Subject to subsection (2), the board of a company shall cause a copy of the annual report to be sent to every shareholder of the company not less than 20 working days before the date fixed for holding the annual meeting of shareholders.
- (2) The board of a company is not required to send an annual report to a shareholder if —
  - (a) the shareholder has given notice in writing to the company waiving the right to be sent a copy of that annual report or copies of annual reports of the company generally;
  - (b) the shareholder has not revoked that notice; and
  - (c) a copy of the report is available for inspection by the shareholder in the manner prescribed by section 226.
- (3) If the board of a company fails to comply with subsection (1), every director or company secretary of the company commits an offence and is liable on conviction to the penalty set out in section 378(2).

#### 219 Sending of financial statements to shareholders who elect not to receive annual report.

- (1) The board of a company shall cause to be sent to every shareholder of the company referred to in section 218(2), not less than 20 working days before the annual meeting of shareholders —
  - (a) financial statements for the most recently completed accounting period completed and signed in accordance with clause 3 of the Ninth Schedule and any group financial statements for the most



- recently completed accounting period completed and signed in accordance with clause 5 of that Schedule; and
- (b) any auditor's report on those financial statements and any group financial statements required under Part XI.
- (2) If the board of a company fails to comply with subsection (1), every director or company secretary of the company commits an offence and is liable on conviction to the penalty set out in section 378(2).

## 220 Contents of annual report

- (1) Every annual report for a company shall be in writing and be dated and, subject to subsection (2), shall —
- (a) describe, so far as the board believes is material for the shareholders to have an appreciation of the state of the company's affairs and will not be harmful to the business of the company or of any of its subsidiaries, any change during the accounting period in —
    - (i) the nature of the business of the company or any of its subsidiaries; or
    - (ii) the classes of business in which the company has an interest, whether as a shareholder of another company or otherwise;and
  - (b) include financial statements for the accounting period completed and signed in accordance with clause 3 of the Ninth Schedule and any group financial statements for the accounting period completed and signed in accordance with clause 5 of that Schedule;
  - (c) where an auditor's report is required under Part XI in relation to the financial statements or group financial statements, as the case may be, included in the report, include that auditor's report;
  - (d) describe any change in accounting policies made during the accounting period;
  - (e) state particulars of entries in the interests register made during the accounting period;
  - (f) state, in respect of each director or former director of the company, the total of the remuneration and the value of other benefits received by that director or former director during the accounting period;
  - (g) state, in respect of each company secretary or former company secretary of the company, the total of the remuneration and the value of other benefits received by that company secretary or former company secretary during the accounting period;

- (h) state the number of employees or former employees of the company, not being directors or company secretaries of the company, who, during the accounting period, received remuneration and any other benefits in their capacity as employees the value of which was or exceeded \$10,000 per annum, and shall state the number of such employees or former employees in brackets of \$1,000;
  - (i) state the total amount of donations made by the company and any subsidiary during the accounting period;
  - (j) state the names of the persons holding office as directors of the company at the end of the accounting period and the names of any persons who ceased to hold office as directors of the company during the accounting period;
  - (k) state the names of the persons holding office as company secretaries of the company at the end of the accounting period and the names of any persons who ceased to hold office as company secretaries of the company during the accounting period;
  - (l) state the amounts payable by the company to the person or firm holding office as auditor of the company as audit fees and, as a separate item, fees payable by the company for other services provided by that person or firm; and
  - (m) be signed on behalf of the board by two directors of the company, or by one director and one company secretary.
- (2) A company that is required to include group financial statements in its annual report must include, in relation to its subsidiaries, the information specified in paragraphs (d) to (l) of subsection (1).
- (3) The annual report of a company need not comply with any of paragraphs (a) and (d) to (l) of subsection (1) if all shareholders agree.

## **221 Shareholders may elect not to receive documents.**

Subject to section 219, a shareholder of a company may, by written notice to the company, waive the right to receive all or any documents from the company and may revoke the waiver in the same manner and, while the waiver is in effect, the company need not send to the shareholder the documents to which the waiver relates.

## **222 Failure to disclose.**

Subject to the constitution of a company, the failure to send an annual report, notice or other document to a shareholder in accordance with this Act does not

affect the validity of proceedings at a meeting of the shareholders of the company if the failure to do so was accidental.

## 223 Annual return.

- (1) The board of a company shall ensure that there is delivered to the Registrar each year, for registration, during the month allocated to the company for the purpose, an annual return in the prescribed form or in a form the use of which by the company has been approved by the Registrar pursuant to subsection (8), or as near to it as circumstances allow, and containing the information specified in the Third Schedule and such other information as is prescribed.
- (2) The annual return shall be dated within the month during which the return is required to be delivered to the Registrar and the information, required to be contained in it shall be compiled as at that date.
- (3) The annual return shall be signed by a director or company secretary of the company, or by a law practitioner or accountant authorised for the purpose.
- (4) On registration of a company under Part 11, the Registrar shall allocate a month to the company for the purpose of this section
- (5) The Registrar may, by written notice to a company, alter the month allocated to the company under subsection (4).
- (6) Notwithstanding subsection (1) —
  - (a) a company need not make an annual return in the calendar year of its registration;
  - (b) a subsidiary may, with the written approval of the Registrar; make an annual return during the month allocated to its holding company instead of during the month allocated to it.
- (7) For the purposes of this section, “**prescribed**” means prescribed by regulations made under this Act or by the Minister by notice in the Gazette and different forms of annual return may be prescribed in respect of different classes of companies.
- (8) The Registrar may, on the application of any person, approve the use, by such company or companies as the Registrar may specify, of a form of annual return different from that prescribed and may, at any time, revoke, in whole or in part, any such approval.
- (9) Annual return in a form approved under subsection (8) shall contain all the prescribed information.
- (10) If the board of a company fails to comply with subsection (1) or subsection (2), every director or company secretary of the company

commits an offence and is liable on conviction to the penalty set out in section 378(2).

## INSPECTION OF COMPANY RECORDS

### **224 Public inspection of company records.**

- (1) A company shall keep the following records available for inspection in the manner prescribed in section 226 by a person who serves written notice of intention to inspect on the company:
  - (a) the certificate of incorporation or registration of the company;
  - (b) the constitution of the company;
  - (c) the share register;
  - (d) the full names and residential addresses of the directors and company secretaries; and
  - (e) the registered office and address for service of the company.
- (2) If a company fails to comply with subsection (1) —
  - (a) the company commits an offence and is liable on conviction to the penalty set out in section 377(2); and
  - (b) every director or company secretary of the company commits an offence and is liable on conviction to the penalty set out in section 378(2).

### **225 Inspection of company records by shareholders.**

- (1) In addition to the records available for public inspection, a company shall keep the following records available for inspection in the manner prescribed in section 226 by a shareholder of the company or by a person authorised in writing by a shareholder for the purpose who serves written notice of intention to inspect on the company:
  - (a) minutes of all meetings and resolutions of shareholders;
  - (b) copies of written communications to all shareholders or to all holders of a class of shares during the preceding 10 years including annual reports, financial statements and group financial statements;
  - (c) certificates given by directors under this Act; and
  - (d) the interests register of the company.
- (2) If a company fails to comply with subsection (1) —
  - (a) the company commits an offence and is liable on conviction to the penalty set out in section 377(2); and

- (b) every director or company secretary of a company commits an offence and is liable on conviction to the penalty set out in section 378(2).

### **226 Manner of inspection.**

- (1) Documents which may be inspected under section 224 or section 225 shall be available for inspection between the hours of 10.00 a.m. and 4.00 p.m. on each working day during the inspection period at the place at which the company's records are kept.
- (2) In this section, the term “**inspection period**” means the period commencing on the third working day after the day on which notice of intention to inspect is served on the company by the person or shareholder concerned and ending with the eighth working day after the day of service.

### **227 Copies of documents.**

- (1) A person may require a copy of, or extract from, a document which is available for inspection by him or her under section 224 or section 225 to be sent to him —
  - (a) within 5 working days after he has made a request in writing for the copy or extract; and
  - (b) if he has paid a reasonable copying and administration fee prescribed by the company.
- (2) If a company fails to provide a copy of, or extract from, a document in accordance with a request under subsection (1) —
  - (a) the company commits an offence and is liable on conviction to the penalty set out in section 377(1); and
  - (b) every director or company secretary of the company commits an offence and is liable on conviction to the penalty set out in section 378(1).

## **PART XIII - AMALGAMATIONS**

### **228 Amalgamations**

Two or more companies may amalgamate and continue as one company which may be one of the amalgamating companies or may be a new company.

**229 Amalgamation proposal.**

- (1) An amalgamation proposal shall set out the terms of the amalgamation, shall include —
  - (a) the name of the amalgamated company, if it is the same as the name of one of the amalgamating companies;
  - (b) the registered office of the amalgamated company;
  - (c) the full name or names and residential address or addresses of the director or directors of the amalgamated company;
  - (d) the full name or names and residential address or addresses of the company secretary or company secretaries of the amalgamated company;
  - (e) the address for service of the amalgamated company;
  - (f) the share structure of the amalgamated company, specifying —
    - (i) the number of shares of the company;
    - (ii) the rights, privileges, limitations and conditions attached to each share of the company, if different from those set out in section 40;
  - (g) the manner in which the shares of each amalgamating company are to be converted into shares of the amalgamated company;
  - (h) if shares of an amalgamating company are not to be converted into shares of the amalgamated company, the consideration that the holders of those shares are to receive instead of shares of the amalgamated company;
  - (i) any payment to be made to a shareholder, director or company secretary of an amalgamating company, other than a payment of the kind described in paragraph (h); and
  - (j) details of any arrangement necessary to complete the amalgamation and to provide for the subsequent management and operation of the amalgamated company.
- (2) An amalgamation proposal may specify the date on which the amalgamation is intended to become effective.
- (3) If shares of one of the amalgamating companies are held by or on behalf of another of the amalgamating companies, the amalgamation, proposal —
  - (a) shall provide for the cancellation of those shares without payment or the provision of other consideration when the amalgamation becomes effective; and
  - (b) shall not provide for the conversion of those shares into shares of the amalgamated company.

**230 Approval of amalgamation proposal.**

- (1) The board of each amalgamating company shall resolve that —
  - (a) in its opinion the amalgamation is in the best interest of the company; and
  - (b) it is satisfied on reasonable grounds that the amalgamated company will, immediately after the amalgamation becomes effective, satisfy the solvency test.
- (2) The directors who vote in favour of a resolution required by subsection (1) shall sign a certificate stating that, in their opinion, the conditions set out in that subsection are satisfied, and the grounds for that opinion.
- (3) The board of each amalgamating company shall send to each shareholder of the company, not less than 20 working days before the amalgamation is proposed to take effect —
  - (a) a copy of the amalgamation proposal;
  - (b) copies of the certificates given by the directors of each board;
  - (c) a summary of the principal provisions of the constitution of the amalgamated company;
  - (d) a statement that a copy of the constitution of the amalgamated company will be supplied to any shareholder who requests it;
  - (e) a statement setting out the rights of shareholders under section 110;
  - (f) a statement of any material interests of the directors and company secretaries in the proposal, whether in that capacity or otherwise; and
  - (g) such further information and explanation as may be necessary to enable a reasonable shareholder to understand the nature and implications for the company and its shareholders of the proposed amalgamation.
- (4) The board of each amalgamating company shall, not less than 20 working days before the amalgamation is proposed to take effect —
  - (a) send a copy of the amalgamation proposal to every secured creditor of the company; and
  - (b) give public notice of the proposed amalgamation, including a statement that —
    - (i) copies of the amalgamation proposal are available for inspection by any shareholder or creditor of an amalgamating company or any person in whom an amalgamating company is under an obligation at the registered offices of the amalgamating companies and at such other places as may be specified during normal business hours; and

- (ii) a shareholder or creditor of an amalgamating company or any person to whom an amalgamating company is under an obligation is entitled to be supplied free of charge with a copy of the amalgamation proposal upon request to an amalgamating company.
- (5) The amalgamation proposal shall be approved —
  - (a) by the shareholders of each amalgamating company, in accordance with section 106; and
  - (b) if a provision in the amalgamation proposal would, if contained in an amendment to an amalgamating company's constitution or otherwise proposed in relation to that company, require the approval of an interest group, by a special resolution of that interest group.
- (6) A director who fails to comply with subsection (2) commits an offence and is liable on conviction to the penalty set out in section 377(1).

### **231 Short form amalgamation.**

- (1) A company and one or more other companies that is or that are directly or indirectly wholly owned by it may amalgamate and continue as one company, being the company first referred to, without complying with section 229 and section 230 if —
  - (a) the amalgamation is approved by a resolution of the board of each amalgamating company; and
  - (b) each resolution provides that —
    - (i) the shares of each amalgamating company, other than the amalgamated company, will be cancelled without payment or other consideration;
    - (ii) the constitution of the amalgamated company will be the same as the constitution of the company first referred to; and
    - (iii) the board is satisfied on reasonable grounds that the amalgamated company will, immediately after the amalgamation becomes effective, satisfy the solvency test.
- (2) Two or more companies, each of which is directly or indirectly wholly owned by the same company, may amalgamate and continue as one company without complying with section 229 or section 230 if —
  - (a) the amalgamation is approved by a resolution of the board of each amalgamating company; and
  - (b) each resolution provides that —



- (i) the shares of all but one of the amalgamating companies will be cancelled without payment or other consideration;
- (ii) the constitution of the amalgamated company will be the same as the constitution of the amalgamating company whose shares are not cancelled; and
- (iii) the board is satisfied on reasonable grounds that the amalgamated company will, immediately after the amalgamation becomes effective, satisfy the solvency test.

### **Short form amalgamation**

- (3) The board of each amalgamating company shall, not less than 20 working days before the amalgamation is proposed to take effect, give written notice of the proposed amalgamation to every secured creditor of the company.
- (4) The resolutions approving an amalgamation under this section, taken together, shall be deemed to constitute an amalgamation proposal that has been approved.
- (5) The directors who vote in favour of a resolution required by subsection (1) or subsection (2), as the case may be, shall sign a certificate stating that, in their opinion, the conditions set out in subsection (1) or subsection (2) are satisfied, and the grounds for that opinion.
- (6) A director who fails to comply with subsection (5) commits an offence and is liable on conviction to the penalty set out in section 377(1).

### **232 Registration of amalgamation proposal.**

For the purpose of effecting an amalgamation the following documents shall be delivered to the Registrar for registration:

- (a) the approved amalgamation proposal;
- (b) any certificates required under section 230(2) or section 231(5);
- (c) a certificate signed by the board of each amalgamating company stating that the amalgamation has been approved in accordance with this Act and the constitution of the company;
- (d) if the amalgamated company is a new company or the amalgamation proposal provides for a change of the name of the amalgamated company, a copy of the notice reserving the name of the company;
- (e) a certificate signed by the board, or proposed board, of the amalgamated company stating that, where the proportion of the claims of creditors of the amalgamated company in relation to the value of the assets of the company is greater than the proportion of

the claims of creditors of an amalgamating company in relation to the value of the assets of that amalgamating company, no creditor will be prejudiced by that fact; and

- (f) a document in the prescribed form signed by each of the persons named in the amalgamation proposal as a director or company secretary of the amalgamated company containing his consent to be a director or company secretary and a certificate that he is not disqualified from being appointed or holding office as a director or company secretary, as the case may be, of a company.

### **233 Certificate of amalgamation.**

- (1) Forthwith after receipt of the documents required under section 232, the Registrar shall, —
  - (a) if the amalgamated company is the same as one of the amalgamating companies, issue a certificate of amalgamation in the prescribed form; or
  - (b) if the amalgamated company is a new company —
    - (i) enter particulars of the company on the Tongan register; and
    - (ii) issue a certificate of amalgamation in the prescribed form together, with a certificate of incorporation in the prescribed form.
- (2) If an amalgamation proposal specifies a date on which the amalgamation is intended to become effective and that date is the same as, or later than, the date on which the Registrar receives the documents, the certificate of amalgamation and any certificate of incorporation must be expressed to have effect on the date specified in the amalgamation proposal.

### **234 Effect of certificate of amalgamation.**

On the date shown in a certificate of amalgamation —

- (a) the amalgamation is effective;
- (b) if it is the same as a name of one of the amalgamating companies, the amalgamated company has the name specified in the amalgamation proposal;
- (c) the Registrar shall remove the amalgamating companies, other than the amalgamated company, from the Tongan register;
- (d) the amalgamated company succeeds to all the property, rights; powers and privileges of each of the amalgamating companies;
- (e) the amalgamated company succeeds to all the liabilities and obligations of each of the amalgamating companies;

- (f) proceedings pending by, or against, an amalgamating company may be continued by, or against, the amalgamated company;
- (g) a conviction, ruling, order or judgment in favour of or against, an amalgamating company may be enforced by, or against, the amalgamated company; and
- (h) any provisions of the amalgamation proposal that provide for the conversion of shares or rights of shareholders in the amalgamating companies have effect according to their terms.

### 235 Powers of Court in other cases.

- (1) If the Court is satisfied that giving effect to an amalgamation proposal would unfairly prejudice a shareholder or creditor of an amalgamating company or a person to whom an amalgamating company is under an obligation, it may, on the application of that person, made at any time before the date on which the amalgamation becomes effective, make any order it thinks fit in relation to the proposal, and may, without limiting the generality of this subsection, make an order —
  - (a) directing that effect shall not be given to the proposal;
  - (b) modifying the proposal in such manner as may be specified in the order; or
  - (c) directing the company or its board to reconsider the proposal or any part of it.
- (2) An order may be made under subsection (1) on such conditions as the Court thinks fit.

## PART XIV - COMPROMISES WITH CREDITORS

### 236 Interpretation.

In this Part, unless the context otherwise requires —

“**compromise**” means a compromise between a company and its creditors, including a compromise —

- (a) cancelling all or part of a debt of the company;
- (b) varying the rights of its creditors or the terms of a debt; or
- (c) relating to an alteration of a company’s constitution that affects the likelihood of the company being able to pay a debt;

“**creditor**” includes a person who, in a liquidation, would be entitled to claim in accordance with section 312 that a debt is owing to that person by the company;

“**proponent**” means a person referred to in section 237 who proposes a compromise in accordance with this Part.

### **237 Compromise proposal**

- (1) Any of the following persons may propose a compromise under this Part if that person has reason to believe that a company is or will be unable to pay its debts within the meaning of section 296.
  - (a) the board of directors of the company;
  - (b) a receiver appointed in relation to the whole or substantially the whole of the assets and undertaking of the company;
  - (c) a liquidator of the company; and
  - (d) with the leave of the Court, any creditor or shareholder of the company.
- (2) Where the Court grants leave to a creditor or shareholder under subsection (1)(d), the Court may make an order directing the company to supply to the creditor or shareholder, within such time as may be specified, a list of the names and addresses of the company’s creditors showing the amounts owed to each of them or such other information as may be specified to enable the creditor or shareholder to propose a compromise.

### **238 Notice of proposed compromise.**

- (1) The proponent shall compile, in relation to each class of creditors of the company, a list of creditors known to the proponent who would be affected by the proposed compromise, setting out —
  - (a) the amount owing or estimated to be owing to each of them; and
  - (b) the number of votes which each of them is entitled to cast on a resolution approving the compromise.
- (2) The proponent shall give to each known creditor, the company and any receiver or liquidator, and deliver to the Registrar for registration —
  - (a) notice in accordance with the Fourth Schedule of the intention to hold a meeting of creditors, or any two or more classes of creditors, for the purpose of voting on the resolution;
  - (b) a statement —
    - (i) containing the name and address of the proponent and the capacity in which the proponent is acting;

- (ii) containing the address and telephone number to which inquiries may be directed during normal business hours;
  - (iii) setting out the terms of the proposed compromise and the reasons for it;
  - (iv) setting out the reasonably foreseeable consequences for creditors of the company of the compromise being approved;
  - (v) setting out the extent of any interest of a director or company secretary in the proposed compromise;
  - (vi) explaining that the proposed compromise and any amendment to it proposed at a meeting of creditors or any classes of creditors will be binding on all creditors, or on all creditors of that class, if approved in accordance with section 239; and
  - (vii) containing, details of any procedure proposed as part of the proposed compromise for varying the compromise following its approval;
- and
- (c) a copy of the list or lists of creditors referred to in subsection (1).

### **239 Approval and Effect of compromise.**

- (1) A compromise, including any amendment proposed at the meeting, is approved by creditors, or a class of creditors, if, at a meeting of creditors or that class of creditors conducted in accordance with the Fourth Schedule, the compromise, including any amendment, is adopted in accordance with clause 5 of that Schedule.
- (2) A compromise, including any amendment, approved by creditors or a class of creditors of a company in accordance with this Part is binding on the company and on —
  - (a) all creditors; or
  - (b) if there is more than one class of creditors, on all creditors of that class, —to whom notice of the proposal was given under section 238.
- (3) If a resolution proposing a compromise, including any amendment; is put to the vote of more than one class of creditors, it is to be presumed, unless the contrary is expressly stated in the resolution, that the approval of the compromise, including any amendment, by each class is conditional on the approval of the compromise, including any amendment, by every other class voting on the resolution.

- (4) The proponent shall give written notice of the result of the voting to each known creditor, the company, any receiver or liquidator and the Registrar.

## 240 Variation of compromise.

- (1) A compromise approved under section 239 may be varied either —
- (a) in accordance with any procedure for variation incorporated in the compromise as approved; or
  - (b) by the approval of a variation of the compromise in accordance with this Part which, for that purpose, shall apply with such modifications as may be necessary as if any proposed variation were a proposed compromise.
- (2) The provisions of this Part shall apply to any compromise that is varied in accordance with this section.

## 241 Powers of Court

- (1) On the application of the proponent or the company, the Court may —
- (a) give directions in relation to a procedural requirement imposed by this Part, or waive or vary any such requirement, if satisfied that it would be just to do so; or
  - (b) order that, during a period specified in the order, beginning not earlier than the date on which notice was given of the proposed compromise and ending not later than 10 working days after the date on which notice was given of the result of the voting on it, —
    - (i) proceedings in relation to a debt owing by the company be stayed; or
    - (ii) a creditor refrain from taking any other measure to enforce payment of a debt owing by the company.
- (2) Nothing in subsection (1)(b) affects the right of a secured creditor during that period to take possession of, realise, or otherwise deal with, property of the company over which that creditor has a charge.
- (3) If the Court is satisfied, on the application of a creditor of a company who was entitled to vote on a compromise that —
- (a) insufficient notice of the meeting or of the matter required to be notified under section 238 was given to that creditor;
  - (b) there was some other material irregularity in obtaining approval of the compromise; or

- (c) in the case of a creditor who voted against the compromise, the compromise is unfairly prejudicial to that creditor, or to the class of creditors to which that creditor belongs —

the Court may order that the creditor or the class of creditors to which that creditor belongs shall not be bound by the compromise or make such other order as it thinks fit.

- (4) An application under subsection (3) shall be made not later than 10 working days after the date on which notice of the result of the voting was given to the creditor.

## **242 Effect of compromise in liquidation of company.**

- (1) Where a compromise is approved under section 239, the Court may, on the application of —
- (a) the company;
  - (b) a receiver appointed in relation to property of the company; or
  - (c) with the leave of the Court, any creditor or shareholder of the company, —

make such order as the Court thinks fit with respect to the extent, if any, to which the compromise will, if the company is put into liquidation, continue in effect and be binding on the liquidator of the company.

- (2) Where a compromise is approved under section 239 and the company is subsequently put into liquidation, the Court may, on the application of —
- (a) the liquidator;
  - (b) a receiver appointed in relation to property of the company; or
  - (c) with the leave of the Court, any creditor or shareholder of the company, —

make such order as the Court thinks fit with respect to the extent, if any, to which the compromise will continue in effect and be binding on the liquidator of the company.

## **243 Costs of compromise.**

Unless the Court orders otherwise, the costs incurred in organising and conducting a meeting of creditors for the purpose of voting on a proposed compromise —

- (a) shall be met by the company;
- (b) if incurred by a receiver or a liquidator, are a cost of the receivership or liquidation; or

- (c) if incurred by any other person, are a debt due to that person by the company and, if the company is put into liquidation, are payable in the order of priority specified in the Sixth Schedule.

## **PART XV - APPROVAL OF ARRANGEMENTS, AMALGAMATIONS AND COMPROMISES BY COURT**

### **244 Interpretation.**

In this Part, unless the context otherwise requires —

“**arrangement**” includes a reorganisation of the share capital of a company by the consolidation of shares of different classes, or by the division of shares into shares of different classes, or by both those methods;

“**company**” means —

- (a) a company within the meaning of section 2;
- (b) an overseas company that is registered on the overseas register; and
- (c) an incorporated society that may be wound up under section 25 of the Incorporated Societies Act (Cap. 38);

“**creditor**” includes a person who, in a liquidation, would be entitled to claim in accordance with section 312 that a debt is owing to that person by the company.

### **245 Court Approval of arrangements, amalgamations and compromises.**

- (1) Notwithstanding the provisions of this Act or the constitution of the company, the Court may, on the application of the company or any shareholder or creditor of the company, order that an arrangement or amalgamation or compromise shall be binding on the company and on such other persons or classes of persons as the Court may specify and any such order may be made on such terms and conditions as the Court thinks fit.
- (2) Before making an order under subsection (1), the Court may, on the application of the company or any shareholder or creditor or other person who appears to the Court to be interested, or of its own motion, make any one or more of the following orders:
  - (a) an order that notice of the application, together with such information relating to it as the Court thinks fit, be given in such



- form and in such manner and to such persons or classes of persons as the Court may specify;
- (b) an order directing the holding of a meeting or meetings of shareholders or any class of shareholders or creditors or any class of creditors of the company to consider and, if thought fit, to approve, in such manner as the Court may specify; the proposed arrangement or amalgamation or compromise and, for that purpose, may determine the shareholders or creditors that constitute a class of shareholders or creditors of the company;
  - (c) an order requiring that a report on the proposed arrangement or amalgamation or compromise be prepared for the Court by a person specified by the Court and, if the Court thinks fit, be supplied to the shareholders or any class of shareholders or creditors or any class of creditors of the company or to any other person who appears to the Court to be interested;
  - (d) and order as to the payment of the costs incurred in the preparation of any such report; and
  - (e) an order specifying the persons who shall be entitled to appear and be heard on the application to approve the arrangement or amalgamation or compromise.
- (3) An order made under this section has effect on and from the date specified in the order.
  - (4) Within 10 working days of an order being made by the Court, the board of the company shall ensure that a copy of the order is delivered to the Registrar for registration.
  - (5) If the board of a company fails to comply with subsection (4), every director or company secretary of the company commits an offence and is liable on conviction to the penalty set out in section 378(2).

#### **246 Court may make additional orders.**

- (1) Without limiting section 245, the Court may, for the purpose of giving effect to any arrangement or amalgamation or compromise approved under that section, either by the order approving the arrangement or amalgamation or compromise, or by any subsequent order, provide for, and prescribe terms and conditions relating to —
  - (a) the transfer or vesting of real or personal property, assets, rights, powers, interests, liabilities, contracts and engagements;
  - (b) the issue of shares, securities or policies of any kind;
  - (c) the continuation of legal proceedings;
  - (d) the liquidation of any company;

- (e) the provisions to be made for persons who voted against the arrangement or amalgamation or compromise at any meeting called in accordance with any order made under subsection (2)(b) of that section or who appeared before the Court in opposition to the application to approve the arrangement or amalgamation or compromise; and
  - (f) such other matters that are necessary or desirable to give effect to the arrangement or amalgamation or compromise.
- (2) Within 10 working days of an order being made by the Court, the board of the company shall ensure that a copy of the order is delivered to the Registrar for registration.
- (3) If the board of a company fails to comply with subsection (2), every director or company secretary of the company commits an offence and is liable on conviction to the penalty set out in section 378(2).

#### **247 Parts XIII and XIV not affected.**

The Court may —

- (a) approve an amalgamation under section 245 even though the amalgamation could be effected under Part XIII;
- (b) approve a compromise under section 245 even though the compromise could be approved under Part XIV.

#### **248 Application of section 242.**

The provisions of section 242 shall apply with such modifications as may be necessary in relation to any compromise approved under section 245.

## **PART XVI - LIQUIDATIONS**

### **THE PROCESS OF LIQUIDATION**

#### **249 Interpretation.**

- (1) In this Part, unless the context otherwise requires —

“**creditor**” means a person who, in a liquidation, would be entitled to claim in accordance with section 312 that a debt is owing to that person by the company; but does not include a secured creditor;

“**liquidation committee**” means a liquidation committee appointed under section 323;

“**Official Liquidator**” means the Official Liquidator or a Deputy Official Liquidator appointed by the Minister from time to time as necessary for the purposes of this Act;

“**statutory demand**” has the meaning set out in section 298.

- (2) For the purposes of this Act, the power to appoint a liquidator of a company includes the power to appoint two or more persons as liquidators of a company.

## **250 Commencement of liquidation.**

- (1) A company may be put into liquidation by the appointment as liquidator of a named person or of the Official Liquidator.
- (2) A liquidator may be appointed by —
  - (a) special resolution of those shareholders entitled to vote and voting on the question;
  - (b) the board of the company on the occurrence of an event specified in the constitution; or
  - (c) the Court, on the application of the company, or a director, company secretary or shareholder, or other entitled person, or a creditor of the company including any contingent or prospective creditor, or the Registrar.
- (3) The Official Liquidator may be appointed liquidator of a company only —
  - (a) if the special resolution passed in accordance with subsection (2)(a) is passed by reason of the Official Liquidator exercising voting rights attaching to shares in the company of another company held by which the Official Liquidator is liquidator; or
  - (b) by the Court.
- (4) The Court may appoint a liquidator if it is satisfied that —
  - (a) the company is unable to pay its debts;
  - (b) the company or the board has persistently or seriously failed to comply with this Act;
  - (c) the company does not comply with section 13; or
  - (d) it is just and equitable that the company be put into liquidation.
- (5) The liquidation of a company commences on the date on which the liquidator is appointed.

**251 Liquidators to act jointly unless otherwise stated.**

Where two or more persons are appointed as liquidators of a company, those persons shall act jointly unless the special resolution of shareholders or the resolution of the board of the company or the order of the Court appointing the liquidators states that the liquidators may exercise their powers individually.

**252 Liquidator to summon meeting of creditors.**

- (1) Subject to section 254 and to subsection (8), the liquidator of a company must call a meeting of the creditors of the company for the purpose —
  - (a) in the case of a liquidator appointed pursuant to section 250(2)(a) or (b), of resolving whether to appoint another liquidator in place of the liquidator so appointed;
  - (b) in the case of a liquidator appointed pursuant to section 250(2)(c), of resolving whether to make an application to the Court for the appointment of a liquidator in place of the liquidator so appointed; and
  - (c) in either case, of determining whether to pass a resolution for the purposes of section 267(1)(b).
- (2) Notice in writing of a meeting of creditors shall be given to every known creditor and —
  - (a) if section 264(2)(c) applies, shall be given together with the report and notice referred to in that paragraph; and
  - (b) if the liquidator receives a notice under section 254(1)(b)(iii) requiring a meeting of creditors to be called, shall be given forthwith after receiving the notice.
- (3) Public notice of the meeting of creditors shall also be given by the liquidator not less than five working days before the date of the meeting.
- (4) Subject to subsection (2)(b), a meeting of creditors shall be held —
  - (a) in the case of a liquidator appointed under section 250(2)(a) or (b), within 10 working days of the liquidator's appointment;
  - (b) in the case of a liquidator appointed under section 250(2)(c), within 30 working days of the liquidator's appointment; or
  - (c) in either case, within such longer period as the Court may allow.
- (5) Every meeting of creditors shall be held in accordance with the Fourth Schedule.
- (6) If at a meeting of creditors it is resolved to appoint a person as liquidator of the company in place of the liquidator appointed pursuant to section

250(2)(a) or (b), the person who it is resolved to appoint as liquidator shall, subject to section 291, be the liquidator of the company.

- (7) If at a meeting of creditors it is resolved to apply to the Court for the appointment of a person as liquidator in place of the liquidator appointed pursuant to section 250(2)(c), the liquidator of the company must forthwith apply to the Court for the appointment of that person as liquidator and the Court may, if it thinks fit, appoint that person as the liquidator of the company.
- (8) Nothing in this section applies to the liquidator of a company appointed pursuant to section 250(2)(a) or (b) if, within 20 working days before the appointment of the liquidator, the board of the company resolved that the company would, on the appointment of a liquidator under either section 250(2)(a) or (b), be able to pay its debts and a copy of the resolution is delivered to the Registrar for registration.
- (9) The directors who vote in favour of such a resolution shall sign a certificate stating that, in their opinion, the company would, on the appointment of a liquidator under either section 250(2)(a) or (b), as the case may be, be able to pay its debts, and the grounds for that opinion.
- (10) Every director who fails to comply with subsection (9) commits an offence and is liable on conviction to the penalty set out in section 377(1).

### **253 Liquidator to summon meeting of creditors in other cases.**

Subject to section 254, the liquidator of a company who was not, by reason of section 252(8), required to call a meeting of creditors of the company shall —

- (a) if the liquidator is satisfied that the directors who voted in favour of a resolution referred to in that subsection did not have reasonable grounds to believe that the company would, on the appointment of a liquidator under section 250(2)(a) or (b), be able to pay its debts; or
- (b) if the liquidator is satisfied that the company is not able to pay its debts, forthwith call a meeting of the creditors of the company for the purpose specified in section 252(1)(a) or (b), as the case may be; and the provisions of that section shall apply accordingly with such modifications as may be necessary.

### **254 Liquidator may dispense with meetings of creditors.**

- (1) A liquidator is not required to call a meeting of creditors under section 252 or section 253, as the case may be if —
  - (a) the liquidator considers, having regard to the assets and liabilities of the company, the likely result of the liquidation of the company,

- and any other relevant matters, that no such meeting should be held; and
- (b) the liquidator gives notice in writing to the creditors stating —
    - (i) that the liquidator does not consider that a meeting should be held; and
    - (ii) the reasons for the liquidator's view; and
    - (iii) that no such meeting will be called unless a creditor gives notice in writing to the liquidator, within 10 working days after receiving the notice, requiring a meeting to be called; and
  - (c) no notice requiring the meeting to be called is received by, the liquidator within that period.
- (2) Notice under subsection (1)(b) shall be given to every known creditor —
- (a) if section 264(2)(c) applies together with the report and notice referred to in that paragraph; or
  - (b) if section. 264(2)(c) is not applicable, at the time the liquidator would have been required to send the report and notice referred to in that paragraph if it were applicable.

### **255 Interim liquidator.**

- (1) If an application has been made to the Court for an order that a company be put into liquidation, the Court may, if it is satisfied that it is necessary or expedient for the purpose of maintaining the value of assets owned or managed by the company, appoint a named person, or the Official Liquidator, as interim liquidator.
- (2) Subject to subsection (3), an interim liquidator has the rights and powers of a liquidator to the extent necessary or desirable to maintain the value of assets owned or managed by the company.
- (3) The Court may limit the rights and powers of an interim liquidator in such manner as it thinks fit.

### **256 Power to stay or restrain certain proceedings against company.**

At any time after the making of an application to the Court under section 250(2)(c) to appoint a liquidator of a company and before a liquidator is appointed, the company or any creditor or shareholder of the company may —

- (a) in the case of any application or proceeding against the company that is pending in the Court or Court of Appeal apply to the Court

or Court of Appeal, as the case may be, for a stay of the application or proceeding; and

- (b) in the case of any other application or proceeding pending against the company in any court, apply to the Court to restrain the application or proceeding —

and the Court or Court of Appeal, as the case may be, may stay or restrain the application or proceeding on such terms as it thinks fit

## **257 Effect of commencement of liquidation.**

- (1) With effect from the commencement of the liquidation of a company —
  - (a) the liquidator has custody and control of the company's assets;
  - (b) the directors and company secretaries remain in office but cease to have powers, functions or duties other than those required to be exercised by this Part;
  - (c) Unless the liquidator agrees or the Court orders otherwise, a person shall not —
    - (i) commence or continue legal proceedings against the company or in relation to its property; or
    - (ii) exercise or enforce or continue to exercise or enforce, a right or remedy over or against property of the company;
  - (d) unless the Court orders otherwise, a share in the company shall not be transferred;
  - (e) an alteration shall not be made to the rights or liabilities of a shareholder of the company;
  - (f) a shareholder shall not exercise a power under the constitution of the company or this Act except for the purposes of this Part; and
  - (g) the constitution of the company shall not be altered.
- (2) Subsection (1) does not affect the right of a secured creditor, subject to section 314, to take possession of, and realise or otherwise deal with property of the company over which that creditor has a charge.

## **258 Completion of liquidation.**

The liquidation of a company is completed when the liquidator —

- (a) complies with section 266(1)(b); or
- (b) delivers to the Registrar for registration —
  - (i) a copy of any order made by the Court under section 266(2)(a); or

- (ii) a copy of any order made by the Court under section 266(2)(b) together with any documents required to comply with the order, as the case may be.

## **259 Court may terminate liquidation.**

- (1) The Court may, at any time after the appointment of a liquidator of a company, if it is satisfied that it is just and equitable to do so, make an order terminating the liquidation of the company.
- (2) An application under this section may be made by the liquidator, or a director, company secretary or shareholder of the company, or any other entitled person, or a creditor of the company, or the Registrar.
- (3) The Court may require the liquidator of the company to furnish a report to the Court with respect to any facts or matters relevant to the application.
- (4) The Court may, on making an order under subsection (1), or at any time thereafter, make such other order as it thinks fit in connection with the termination of the liquidation.
- (5) Where the Court makes an order under this section, the person who applied for the order shall, within 10 working days after the order was made deliver a copy of the order to the Registrar for registration.
- (6) Where the Court makes an order under subsection (1), the company shall cease to be in liquidation and the liquidator shall cease to hold office with effect on and from the making of the order or such other date as may be specified in the order.
- (7) Every person who fails to comply with subsection (5) commits an offence and is liable on conviction to the penalty set out in section 377(2).

### **PROVISIONS RELATING TO PRIOR EXECUTION PROCESS**

## **260 Restriction on, rights of, creditors to complete execution, distraint or attachment.**

- (1) Subject to subsection (3), a creditor is not entitled to retain the benefit of any execution process, distress or attachment over or against, the property of a company unless the execution process, distress or attachment is completed before —
  - (a) the passing of a special resolution under section 250(2)(a) appointing a liquidator of the company, or the date on which the creditor had notice of the calling of a meeting at which such a resolution was proposed, whichever occurs first;



- (b) the passing of a resolution by the board of a company under section 250(2)(b) appointing a liquidator or the company, or the date on which the creditor had notice of the calling of a meeting at which such a resolution was proposed, whichever occurs first; or
  - (c) the making of an application to the Court under section 250(2)(c) to appoint a liquidator of the company.
- (2) Notwithstanding subsection (1) —
- (a) a person who, in good faith, purchases property of a company from an officer charged with an execution process acquires a good title as against the liquidator of the company; and
  - (b) a person who, in good faith, purchases property of a company on which distress has been levied acquires a good title as against the liquidator of the company.
- (3) The Court may set aside the application of subsection (1) to such an extent and on such terms and conditions as the Court thinks fit.
- (4) For the purposes of this section —
- (a) an execution or distraint against personal property is completed by seizure and sale;
  - (b) an attachment of a debt is completed by receipt of the debt; and
  - (c) an execution against land is completed by disposition in accordance of the Land Act (Cap. 132) and, in the case of an equitable interest, by the appointment of a receiver.
- (5) Nothing in this section limits or affects section 301.

## **261 Duties of officer in execution process.**

- (1) Subject to subsection (6), where —
- (a) property of a company is taken in an execution process; and
  - (b) before completion of the execution process the officer charged with the execution process receives notice that a liquidator of the company has been appointed. —

he shall, on being required by the liquidator to do so, deliver or transfer the property and any money received in satisfaction or partial satisfaction of the execution of paid to avoid a sale of the property, as the case may be, to the liquidator.

- (2) The costs of the execution process are a first charge on any property or money delivered or transferred to the liquidator under subsection (1) and the liquidator may sell all or some 61 the property 16 satisfy that charge.
- (3) Subject to subsection (6), where —

- (a) property of a company is sold in an execution process in respect of a judgment for a sum exceeding \$50; or
  - (b) money is paid to the officer charged with the execution process to avoid a sale of the property, —
- the officer shall retain the proceeds of sale or the money so paid for 10 working days.
- (4) Subject to subsection (6), if —
    - (a) with the period of 10 working days, the officer charged with the execution process, has notice of —
      - (i) the calling of a meeting at which a special resolution is proposed, to appoint a liquidator pursuant to section 250(2)(a);
      - (ii) the calling of a meeting of the board at which a resolution is proposed to appoint a liquidator pursuant to section 250(2)(b); or
      - (iii) the making of an application to the Court to appoint a liquidator pursuant to section 250(2)(c); and
    - (b) the company is put into liquidation, — the officer shall deduct from the amount the costs of the execution process and pay the balance to the liquidator.
  - (5) A liquidator to whom money is paid under subsection (4) is entitled to retain, it as against the execution creditor.
  - (6) The Court may set aside the application of this section to such extent and on such terms and conditions as it thinks fit.

## DUTIES, RIGHTS AND POWERS OF LIQUIDATORS

### **262 Principal duty of liquidator.**

Subject to sections 263, the principal duty of a liquidator of a company is —

- (a) to take possession of, protect, realise and distribute the assets, or the proceeds of the realisation of the assets of the company to its creditors in accordance with this Act; and
- (b) if there are surplus assets remaining, to distribute them, or the proceeds of the realisation of the surplus assets, in accordance with section 322(4), —

in a reasonable and efficient manner.

**263 Liquidator not required to act in certain cases.**

Notwithstanding any other provisions of this Part —

- (a) except where the charge is surrendered or taken to be surrendered or redeemed under section 314, a liquidator may, but is not required to, carry out any duty or exercise any power in relation to property that is subject to a charge;
- (b) where —
  - (i) a company is put into liquidation under section 250(2)(c);
  - (ii) the Official Liquidator is the liquidator of the company; and
  - (iii) the company has no assets available for distribution to creditors of the company, —

the Official Liquidator shall not be required, without the consent of the Minister, to carry out any duty or exercise any power in connection with the liquidation if, to do so, would or would be likely to involve incurring any expense.

**264 Other duties of liquidator.**

- (1) Without limiting section 262, a liquidator has the other functions and duties specified in this Act.
- (2) Without limiting subsection (1), a liquidator shall —
  - (a) forthwith after being appointed or being notified of his appointment, give public notice of
    - (i) the liquidator's appointment;
    - (ii) the date of the commencement of the liquidation; and
    - (iii) the address and telephone number to which, during normal business hours, inquiries may be directed by creditor or shareholder;
  - and
  - (b) within 10 working days of being appointed or being notified of his appointment, deliver to the Registrar for registration a notice of the liquidator's appointment; and
  - (c) within the applicable period referred to in subsection (3) —
    - (i) prepare a list of every known creditor of the company; and
    - (ii) prepare and send to every known creditor, every shareholder and the Registrar for registration —

- (A) a report containing a statement of the company's affairs, proposals for conducting the liquidation, and, if practicable, the estimated date of its completion; and
  - (B) a notice explaining the right of a creditor or shareholder to require the liquidator to call a meeting of creditors under section 323;
- and
- (d) within 20 working days of the end of each period of 6 months following the commencement of the liquidation, prepare and send to every known creditor and every shareholder, and send or deliver to the Registrar, a report —
    - (i) on the conduct of the liquidator during the preceding 6 months; and
    - (ii) of any further proposals which the liquidator has for completing the liquidation.
- (3) For the purposes of subsection (2)(c), “**applicable period**” means —
- (a) in the case of a liquidator appointed under section 250(2)(a) or (b), 5 working days after the liquidator's appointment;
  - (b) in the case of a liquidator appointed under section 250(2)(c), 25 working days after the liquidator's appointment; or
  - (c) in either case, such longer period as the Court may allow.
- (4) The Court may, on the application of a liquidator —
- (a) exempt the liquidator from compliance with the provisions of subsection (2)(c) or (d); or
  - (b) modify the application of those provisions in relation to the liquidator, —
- on such terms and conditions as the Court thinks fit.
- (5) The liquidator is not required to comply with the provisions of subsection (2)(c) or (d) if the liquidator is satisfied that the value of the assets of the company available for distribution to unsecured creditors, not being creditors entitled to be paid in the order of priority set out in the Sixth Schedule, is not likely to exceed 20 seniti, or such other sum as may be prescribed, in every pa'anga owed to such creditors.

## 265 Duties in relation to accounts.

- (1) Subject to subsection (2), the liquidator of a company shall —

- (a) keep accounts and records of the liquidation and permit those accounts and records, and the accounts and records in the company to be inspected by —
    - (i) any liquidation committee appointed under section 323, unless the liquidator believes on reasonable grounds that inspection would be prejudicial to the liquidation; and
    - (ii) if the Court so orders, a creditor or shareholder;
- and
- (b) retain the accounts and records of the liquidation and of the company for not less than one year after completion of the liquidation.
- (2) The Registrar may, whether before or after the completion of the liquidation —
- (a) authorise the disposal of any accounts and records; and
  - (b) require accounts or records to be retained for longer than one year after the completion of the liquidation.

## **266 Duties in relation to final report and accounts.**

- (1) As soon as practicable after completing his duties in relation to the liquidation, the liquidator of a company shall —
- (a) prepare and send to every creditor whose claim has been admitted and every shareholder —
    - (i) the final report and statement of realisation and distribution in respect of the liquidation; and
    - (ii) a statement that. —
      - (A) all known assets have been disclaimed, or, realised, or distributed without realisation;
      - (B) all proceeds of realisation have been distributed; and
      - (C) the company is ready to be removed from the Tongan register;
- and
- (iii) a summary of the applicable grounds on which the creditor or shareholder may object to the removal of the company from the Tongan register under section 330;
  - (b) send or deliver copies of the documents referred to in paragraph (a) to the Registrar for registration.
- (2) The Court may, on the application of a liquidator —

- (a) exempt the liquidator from compliance with the provisions of subsection (1); or
- (b) modify the application of those provisions in relation to the liquidator —

on such terms and conditions as the Court thinks fit.

## **267 Duty to have regard to views of creditors and shareholders.**

- (1) The liquidator shall have regard to —
  - (a) the views of the shareholders by whom any special resolution was passed at a meeting held for the purposes of section 250(2)(a) set out in a resolution passed at that meeting;
  - (b) the views of creditors set out in any resolution passed at a meeting, held for the purposes of section 252;
  - (c) the views of creditors or shareholders set out in a resolution passed at a meeting called in accordance with subsection (2); and
  - (d) the view of any liquidation committee given in writing to the liquidator.
- (2) For the purposes of subsection (1), a liquidator —
  - (a) shall summon meetings of shareholders at such times as may be specified by any resolution of shareholders passed at a meeting held for the purposes of section 250(2)(a);
  - (b) shall summon meetings of creditors at such times as may be specified by any resolution of creditors passed at a meeting held for the purposes of section 252;
  - (c) shall summon a meeting of shareholders forthwith when required to do so by notice in writing given by shareholders holding shares on which has been paid up not less than 10 percent of the total amount paid up on all shares issued by the company;
  - (d) shall summon a meeting of creditors forthwith when required to do so by notice in writing given by creditors to whom is owed not less than 10 percent of the total amount owed to all creditors of the company; and
  - (e) may at his discretion, summon a meeting of shareholders or creditors of the company.
- (3) A liquidator who calls a meeting of creditors or shareholders shall call such a meeting in accordance with the constitution of the company or, if applicable, the Fourth Schedule, as the case may be.
- (4) Nothing in this section limits or prevents a liquidator from exercising his discretion in carrying out his functions and duties under this Act.

**268 Documents to state company in liquidation.**

Every document entered into, made or issued by a liquidator of a company on behalf of the company shall state in a prominent position that the company is in liquidation.

**269 Powers of Liquidator.**

- (1) A liquidator has the powers —
  - (a) necessary to carry out the functions and duties of a liquidator under this Act; and
  - (b) conferred on a liquidator by this Act.
- (2) Without limiting subsection (1), a liquidator has the powers set out in the Fifth Schedule.

**270 Power to obtain documents and information.**

- (1) A liquidator may, from time to time, by notice in writing, require a director, company secretary or shareholder of the company or any other person to deliver to the liquidator such books, records or documents of the company in that person's possession or under that person's control as the liquidator requires.
- (2) A liquidator may by notice in writing require —
  - (a) a director or former director of the company;
  - (b) a company secretary or former company secretary of the company;
  - (c) a shareholder of the company;
  - (d) a person who was involved in the promotion or formation of the company;
  - (e) a person who is, or has been, an employee of the company;
  - (f) a receiver, accountant, auditor, bank officer or other person having knowledge of the affairs of the company; or
  - (g) a person who is acting or who has at any time acted as a law practitioner for the company, —to do any of the things specified in subsection (3).
- (3) A person referred to in subsection (2) may be required —
  - (a) to attend on the liquidator at such reasonable time or times and at such place as may be specified in the notice;
  - (b) to provide the liquidator with such information about the business, accounts or affairs of the company as the liquidator requests;

- (c) to be examined on oath or affirmation by the liquidator or by a law practitioner acting on behalf of the liquidator on any matter relating to the business, accounts or affairs of the company; and
  - (d) assist in the liquidation to the best of the person's ability.
- (4) Without limiting subsection (5), the liquidator may pay to a person referred to in subsection (2)(e), (f) or (g), not being an employee of the company, reasonable travelling and other expenses incurred in complying with a requirement of the liquidator under subsection (3).
- (5) The Court may, on the application of the liquidator or a person referred to in subsection (2)(e), (f) or (g), not being an employee of the company, order that that person is entitled to receive reasonable remuneration and travelling and other expenses incurred in complying with a requirement of the liquidator under subsection (3).
- (6) A person referred to in subsection (2)(e), (f) or (g) is not entitled to refuse to comply with a requirement of the liquidator under subsection (3) by reason only that —
- (a) an application to the Court to be paid remuneration or travelling and other expenses has not been made or determined;
  - (b) remuneration or travelling and other expenses to which that person is entitled have not been paid in advance; or
  - (c) the liquidator has not paid that person travelling or other expenses.
- (7) Nothing in this section limits or affects section 269.

## **271 Documents in possession of receiver.**

- (1) A receiver is not required to deliver to a liquidator under section 270 any books, records or documents that the receiver requires for the purpose of exercising any powers or functions as receiver in relation to property of a company in liquidation.
- (2) The liquidator may, from time to time, by notice in writing, require the receiver —
- (a) to make such books, records and documents available for inspection by the liquidator at any reasonable time or times; and
  - (b) to provide the liquidator with copies of such books, records and documents or extracts from them.
- (3) The liquidator may take copies of such books, records and documents made available for inspection or extracts from them.
- (4) The liquidator shall pay the reasonable expenses of the receiver in complying with a requirement of the liquidator under subsection (2).



**272 Restriction on enforcement of lien over documents.**

- (1) A person is not entitled, as against the liquidator of a company, to claim or enforce a lien over books, records or documents of the company
- (2) If the lien arises in relation to a debt for the provision of services to the company before the commencement of the liquidation, the debt is a preferential claim against the company under section 321 to the extent of \$50 or such greater amount as may be prescribed at the commencement of the liquidation.
- (3) Nothing in this section applies to a company that was put into liquidation pursuant to section 250(2)(a) or (b) if —
  - (a) the board of the company passed a resolution of the kind referred to in section 252(8); and
  - (b) section 253 does not apply in relation to the company.

**273 Delivery of document creating charge over property.**

- (1) A person is required to deliver a document to a liquidator under section 270 even though possession of the document creates a charge over property of a company.
- (2) Production of the document to the liquidator does not prejudice the existence or priority of the charge, but the liquidator must make the document available to the person entitled to it for the purpose of dealing with or realising the charge or the secured property.

**274 Examination by liquidator.**

- (1) A liquidator or law practitioner acting on behalf of the liquidator may administer an oath to, or take the affirmation of, a person required to be examined under section 270.
- (2) A person required to be examined under section 270 is entitled to be represented by a law practitioner.
- (3) A liquidator or a law practitioner acting on behalf of the liquidator who conducts an examination under section 270 shall ensure that the examination is recorded in writing or by means of a tape recorder or other similar device.

**275 Powers of Court**

- (1) The Court may, on the application of the liquidator, order a person who has failed to comply with a requirement of the liquidator under section 270 to comply with that requirement.

- (2) The Court may, on the application of the liquidator, order a person to whom section 270 applies to —
  - (a) attend before the Court and be examined on oath or affirmation by the Court or the liquidator or a law practitioner acting on behalf of the liquidator on any matter relating to the business, accounts or affairs of the company;
  - (b) produce any books, records or documents relating to the business, accounts or affairs of the company in that person's possession or under that person's control.
- (3) Where a person is examined under subsection (2)(a) —
  - (a) the examination shall be recorded in writing; and
  - (b) the person examined shall sign the record.
- (4) Subject to any directions by the Court, a record of an examination under this section is admissible in evidence in any proceedings under this Part or section 387.

## **276 Self-incrimination.**

- (1) A person is not excused from answering a question in the course of being examined under section 270 or section 275 on the ground that the answer may incriminate or tend to incriminate that person.
- (2) The testimony of the person examined is not admissible as evidence in criminal proceedings against him except on a charge of perjury in relation to that testimony.

## **277 Power of liquidator to enforce liability of shareholders and former shareholders.**

- (1) The liquidator may —
  - (a) if a shareholder is liable to calls, make calls on the shares held by that shareholder; and
  - (b) if a shareholder or former shareholder is liable to the company, enforce that liability.
- (2) A call made under subsection (1)(a) shall be made in writing.

## **278 Power to disclaim onerous property.**

- (1) Subject to section 279, a liquidator may disclaim onerous property even though the liquidator has taken possession of it, tried to sell it or otherwise exercised rights of ownership in relation to it.

- (2) For the purposes of this section, “**onerous property**” means —
  - (a) an unprofitable contract; or
  - (b) property of the company which is unsaleable or not readily saleable or which may give rise to a liability to pay money or perform an onerous act.
- (3) A disclaimer under this section —
  - (a) brings to an end, on and from the date of the disclaimer, the rights, interests and liabilities of the company in relation to the property disclaimed;
  - (b) does not, except so far as necessary to release the company from a liability, affect the rights or liabilities of any other person.
- (4) A liquidator who disclaims onerous property shall, within 10 working days of the disclaimer, give notice in writing, of the disclaimer to every person whose rights are, to the knowledge of the liquidator, affected by the disclaimer.
- (5) A person suffering loss or damage as a result of a disclaimer under this section may —
  - (a) claim as a creditor of the company for the amount of the loss or damage, taking account of the effect of an order made by the Court under paragraph (b);
  - (b) apply to the Court for an order that the disclaimed property be delivered to or vested in that person.
- (6) The Court may make an order under subsection (5)(b) if it is satisfied that it is just that the property should be. vested in the applicant.

### **279 Liquidator may be required to elect whether to disclaim onerous property.**

If a person whose rights would be affected by the disclaimer of onerous property gives a liquidator notice in writing requiring the liquidator to elect, before the close of such date as is stated in the notice, being a date that is not less than 20 working days after the date on which the notice is received by the liquidator, whether to disclaim the onerous property, the liquidator is not entitled to disclaim the onerous property unless he does so before the close of that date.

### **280 Pooling of assets of related companies.**

- (1) On the application of the liquidator or a creditor or shareholder, the Court, if satisfied that it is just and equitable to do so, may order that —

- (a) a company that is, or has been, related to the company in liquidation must pay to the liquidator the whole or part of any or all of the claims made in the liquidation;
  - (b) where two or more related companies are in liquidation, the liquidations in respect of each company must proceed together as if they were one company to the extent that the Court so orders and subject to such terms and conditions as the Court may impose.
- (2) The Court may make such other order or give such directions to facilitate giving effect to an order under subsection (1) as it thinks fit.

### **281 Guidelines for orders.**

- (1) In deciding whether it is just and equitable to make an order under section 280(1)(a), the Court shall have regard to the following matters:
- (a) the extent to which the related company took part in the management of the company in liquidation;
  - (b) the conduct of the related company towards the creditors of the company in liquidation;
  - (c) the extent to which the circumstances that gave rise to the liquidation of the company are attributable to the actions of the related company;
  - (d) such other matters as the Court thinks fit.
- (2) In deciding whether it is just and equitable to make an order under section 280(1)(b), the Court shall have regard to the following matters:
- (a) the extent to which any of the companies took part in the management of any of the other companies;
  - (b) the conduct of any of the companies towards the creditors of any of the other companies;
  - (c) the extent to which the circumstances that gave rise to the liquidation of any of the companies are attributable to the actions of any of the other companies;
  - (d) the extent to which the businesses of the companies have been combined;
  - (e) such other matters as the Court thinks fit.
- (3) The fact that creditors of a company in liquidation relied on the fact that another company is, or was, related to it is not a ground for making an order under section 280.

**282 Certain conduct prohibited.**

- (1) If a company is in liquidation, or an application has been made to the Court for an order that a company be put into liquidation, as the case may be, no person may —
    - (a) leave Tonga with the intention of —
      - (i) avoiding payment of money due to the company;
      - (ii) avoiding examination in relation to the affairs of the company;

**Guidelines for orders**

    - (iii) avoiding compliance with an order of the Court or some other obligation under this Part in relation to the affairs of the company;
  - or
  - (b) destroy, conceal or remove property of the company with the intention of preventing or delaying the liquidator taking custody or control of it; or
  - (c) destroy, conceal or remove records or other documents of the company.
- (2) A person who contravenes subsection (1) commits an offence and is liable on conviction to the penalty set out in section 377(3).

**283 Duty to identify and deliver property.**

- (1) A present or former director, company secretary or employee of a company in liquidation shall —
  - (a) forthwith after the company is put into liquidation, give the liquidator details of property of the company in his possession or under his control; and
  - (b) on being required to do so by the liquidator, forthwith or within such time as may be specified by the liquidator, deliver the property to the liquidator or such other person as the liquidator may direct or dispose of the property in such manner as the liquidator may direct.
- (2) A person who fails to comply with subsection. (1) commits an offence and is liable on conviction to the penalty set out in section 377(3).

**284 Refusal to supply essential services prohibited.**

- (1) For the purposes of this section, an “essential service” means —
  - (a) the retail supply of gas;

- (b) the retail supply of electricity;
  - (c) the supply of water; and
  - (d) telecommunications services.
- (2) For the purposes of this section, “**telecommunications services**” means the conveyance from one device to another by a line, radio frequency or other medium, of a sign, signal, impulse, writing, image, sound, instruction, information or intelligence of any nature, whether or not for the information of a person using the device.
- (3) Notwithstanding the provisions of any other Act or any contract, a supplier of an essential service shall not —
- (a) refuse to supply the service to a liquidator, or to a company in liquidation, by reason of the company’s default in paying charges due for the service in relation to a period before the commencement of the liquidation;
  - (b) make it a condition of the supply of the service to a liquidator, or to a company in liquidation, that payment be made of outstanding charges due for the service in relation to a period before the commencement of the liquidation; or
  - (c) make it a condition of the supply of the service to a company in liquidation that the liquidator personally guarantees payment of the charges that would be incurred for the supply of the service.
- (4) The charges incurred by a liquidator for the supply of an essential service are an expense incurred by the liquidator for the purposes of clause 1 (a) of the Sixth Schedule.

## **285 Remuneration of liquidators.**

- (1) Subject to section 293(1)(e), every liquidator, not being the official Liquidator, appointed under section 250(1)(a) or (b) is entitled to charge reasonable remuneration for carrying out his duties and exercising his powers as liquidator.
- (2) Unless the Court otherwise orders, every Official Liquidator who is appointed a liquidator under section 250(2)(a) and every liquidator appointed under section 250(2)(c) shall charge remuneration either —
- (a) of an amount equal to the amount fixed under section 286; or
  - (b) at, or in accordance with, such rate or rates as may be prescribed under that section.

**286 Rates of remuneration.**

- (1) His Majesty may by Order in Council, make regulations fixing an amount or prescribing a rate or rates in respect of the remuneration of liquidators to which section 285 applies.
- (2) Without limiting subsection (1), such regulations may —
  - (a) prescribe an hourly or other rate or rates of remuneration and different rates may be prescribed in respect of work undertaken in the liquidation by different classes of person;
  - (b) prescribe a rate or rates by reference to the net value of the assets realised by the liquidator, together with such other amounts as may be specified;
  - (c) prescribe a rate or rates in respect of the exercise of particular function or power;
  - (d) prescribe a rate or rates by reference to such other criteria as may be specified.

**287 Expenses and remuneration payable out of assets of company.**

The expenses and remuneration of the liquidator are payable out of the assets of the company.

**288 Liquidator shall cease to hold office on completion of liquidation.**

- (1) A liquidator shall cease to hold office on the completion of the liquidation in accordance with section 258.
- (2) Subsection (1) does not limit sections 293 or 295.

**QUALIFICATIONS AND SUPERVISION OF LIQUIDATORS****289 Qualifications of liquidators.**

- (1) Unless the Court orders otherwise, none of the following persons may be appointed or act as a liquidator of a company:
  - (a) a person less than 18 years old;
  - (b) a creditor of the company in liquidation;
  - (c) a person, who has, within the 2 years immediately preceding the commencement of the liquidation, been a shareholder, director, company secretary, auditor or receiver of the company or of a related company;
  - (d) an undischarged bankrupt;

- (e) a person who has been detained in hospital for treatment as a mentally disordered person in accordance with section 11 or 13 of the Mental Health Act 1992, and who has not been released in accordance with sections 11, 12 or 13 of that Act;
  - (f) a person in respect; of whom an order has been made under section 295(5); and
  - (g) a person who is prohibited from being a director, promoter or company secretary of, or being concerned or taking part in the management of a company under section 386, 387 or 389.
- (2) A body corporate shall not be appointed or act as a liquidator.
- (3) A person who contravenes subsection (1) or subsection (2) commits an offence and is liable on conviction to the penalty set out in section 377(2).

## **290 Validity of acts of liquidators.**

The acts of a person as a liquidator are valid even though that person is not qualified to act as a liquidator.

## **291 Consent to appointment.**

The appointment of a person, other than the Official Liquidator, as liquidator is of no effect unless that person has consented in writing to the appointment.

## **292 Vacancies in office of liquidator.**

- (1) The office of liquidator becomes vacant if the person holding office resigns, dies, or becomes disqualified under section 289.
- (2) A person, other than the Official Liquidator, may resign from the office of liquidator by appointing another such person as his successor and sending or delivering notice in writing of the appointment of his successor to the Registrar for registration.
- (3) The Official Liquidator may resign from the office of liquidator by appointing a Deputy Official Liquidator as his successor.
- (4) With the approval of the Official Liquidator, a Deputy Official Liquidator may resign from the office of liquidator by appointing the Official Liquidator or another Deputy Official Liquidator as his successor.
- (5) The Court may, on the application of the company or a shareholder or other entitled person or a director, company secretary or creditor of the company, review the appointment of a successor to a liquidator and may appoint any person who could be appointed as liquidator under section



250(2)(a), (b) or (c), as the case may be, to be the liquidator of the company.

- (6) If, for any reason other than resignation, a vacancy occurs in the office of liquidator, written notice of the vacancy must forthwith be sent or delivered to the Registrar by the person vacating office or, if that person is unable to act, by his personal representative.
- (7) If, as the result of the vacation of office by a liquidator, other than the official Liquidator, no person is acting as liquidator, the Registrar may appoint a person to act as liquidator until a successor is appointed under this section.
- (8) If a vacancy occurs in the office of the liquidator, or a liquidator has been appointed under subsection (7), as the case may be, the Court may, on the application of the company or a shareholder or other entitled person or a director, company secretary or creditor of the company or the Registrar, appoint any person who could be appointed as liquidator under section 250(2)(a), (b) or (c), as the case may be, to be the liquidator of the company.
- (9) A liquidator appointed under subsection (8) shall, within 10 working days of being appointed or being notified of his or her appointment, deliver a notice of his appointment to the Registrar for registration.
- (10) A person vacating the office of liquidator shall, where practicable, provide such information and give such assistance to that person's successor as he reasonably requires in taking over the duties of liquidator.

### **293 Court supervision of liquidation.**

- (1) On the application of the liquidator, a liquidation committee or, with the leave of the Court, a creditor, shareholder, other entitled person or director or company secretary of a company in liquidation, the Court may —
  - (a) give directions in relation to any matter arising in connection with the liquidation;
  - (b) confirm, reverse or modify an act or decision of the liquidator;
  - (c) order an audit of the accounts of the liquidation;
  - (d) order the liquidator to produce the accounts and records of the liquidation for audit and to provide the auditor with such information concerning the conduct of the liquidation as the auditor requests;
  - (e) in respect of any period, review or fix the remuneration of the liquidator at a level which is reasonable in the circumstances;

- (f) to the extent that an amount retained by the liquidator as remuneration is found by the Court to be unreasonable in the circumstances, order the liquidator to refund the amount;
  - (g) declare whether or not the liquidator was validly appointed or validly assumed custody or control of property;
  - (h) make an order concerning the retention or the disposition of the accounts and records of the liquidation or of the company.
- (2) The powers given by subsection (1) are in addition to any other powers the Court may exercise in its jurisdiction relating to liquidators under this Part and may be exercised in relation to a matter occurring either before or after the commencement of the liquidation, or the removal of the company from the Tongan register and whether or not the liquidator has ceased to act as liquidator when the application or the order is made.
- (3) Subject to subsection (4), a liquidator who has —
- (a) obtained a direction of the Court with respect to a matter connected with the exercise of the powers or functions of liquidator; and
  - (b) acted in accordance with the direction —
- is entitled to rely on having so acted as a defence to a claim in relation to anything done or not done in accordance with the direction.
- (4) The Court may, on the application of any person, order that, by reason of the circumstances in which a direction was obtained under subsection (1), the liquidator does not have the protection given by subsection (3).

## 294 Meaning of “failure to comply”.

In section 295 unless the context otherwise requires, “**failure to comply**” means a failure of a liquidator to comply with a relevant duty arising —

- (a) under this or any other Act or rule of law or Rules of Court; or
- (b) under any order or direction of the Court other than an order to comply made under that section; —

and “**comply**”, “**compliance**” and “**failed to comply.**” have corresponding meanings.

## 295 Orders to enforce liquidator’s duties.

- (1) An application for an order under this section may be made by
- (a) a liquidator;
  - (b) a person seeking appointment as a liquidator;
  - (c) a liquidation committee;

- (d) a creditor, shareholder, other entitled person or a director or company secretary of the company in liquidation;
  - (e) a receiver appointed in relation to property of the company in liquidation;
  - (f) if the liquidator is an accountant, the President of the Tonga Society of Accountants;
  - (g) if the liquidator is a law practitioner, the President of the Tonga Law Society;
  - (h) the Registrar.
- (2) No application may be made to the Court by a person other than a liquidator in relation to a failure to comply unless notice of the failure to comply has been served on the liquidator not less than 5 working days before the date of the application and, as at the date of the application, there is a continuing failure to comply.
- (3) If the Court is satisfied that there is, or has been, a failure to comply, the Court may —
- (a) relieve the liquidator of the duty to comply wholly or in part; or
  - (b) without prejudice to any other remedy which may be available in relation to a breach of duty by the liquidator, order the liquidator to comply to the extent specified in the order.
- (4) The Court may, in relation to a person who fails to comply with an order made under subsection (3), or is or becomes disqualified under section 289 to become or remain a liquidator
- (a) remove the liquidator from office; or
  - (b) order that the person may be appointed and act, or may continue to act, as liquidator, notwithstanding the provisions of section 289.
- (5) If it is shown to the satisfaction of the Court that a person is unfit to act as liquidator by reason of —
- (a) persistent failures to comply; or
  - (b) the seriousness of a failure to comply —
- the Court shall make, in relation to that person, a prohibition order for a period not exceeding five years.
- (6) A person to whom a prohibition order applies shall not —
- (a) act as a liquidator in a current or other liquidation; or
  - (b) act as a receiver in a current or other receivership.
- (7) Evidence that, on two or more occasions within the preceding five years —

- (a) the Court has made an order to comply under this section in respect of the same person; or
- (b) an application for an order to comply under this section has been made in respect of the same person and that in each case the person has complied after the making of the application and before the hearing —

is, in the absence of special reasons to the contrary, evidence of persistent failures to comply for the purposes of this section.

- (8) In making an order under this section the Court may, if it thinks fit —
  - (a) make an order extending the time for compliance;
  - (b) impose a term or condition; or
  - (c) make an ancillary order.
- (9) A copy of every order made under subsection (5) shall, within 10 working days of the order being made, be delivered by the applicant to the Registrar who shall keep it on a file indexed by reference to the name of the liquidator concerned.

## COMPANY UNABLE TO PAY ITS DEBTS

### **296 Meaning of “inability to pay debts”.**

Unless the contrary is proved, and subject to section 297, a company is presumed to be unable to pay its debts if —

- (a) the company has failed to comply with a statutory demand;
- (b) execution issued against the company in respect of a judgment debt has been returned unsatisfied in whole or in part;
- (c) a person entitled to a charge over all or substantially all of the property of the company has appointed a receiver under the instrument creating the charge; or
- (d) a compromise between a company and its creditors has been put to a vote in accordance with Part XIV but has not been approved.

### **297 Evidence and other matters.**

- (1) On an application to the Court for an order that a company be put into liquidation, evidence of failure to comply with a statutory demand is not admissible as evidence that a company is unable to pay its debts unless the application is made within 30 working days after the last date for compliance with the demand.

- (2) Section 296 does not prevent proof by other means that a company is unable to pay its debts
- (3) Information or records acquired under section 187 or, if the Court so orders, under section 188, may be received as evidence that a company is unable to pay its debts.
- (4) In determining whether a company is unable to pay its debts, its contingent or prospective liabilities may be taken into account.
- (5) An application to the Court for an order that a company be put into liquidation on the ground that it is unable to pay its debts may be made by a contingent or prospective creditor only with the leave of the Court; and the Court shall only give such leave, with or without conditions, if it is satisfied that a prima facie case has been made out that the company is unable to pay its debts.

### **298 Statutory demand.**

- (1) A statutory demand is a demand by a creditor in respect of a debt owing by a company made in accordance with this section.
- (2) A statutory demand shall —
  - (a) be in respect of a debt that is due and is not less than the prescribed amount;
  - (b) be in writing;
  - (c) be served on the company; and
  - (d) require the company to pay the debt or enter into a compromise under Part XIV or otherwise compound with the creditor or give a charge over its property to secure payment of the debt, to the reasonable satisfaction of the creditor, within 15 working days of the date of service or such longer period as the Court may order.

### **299 Court may set aside statutory demand.**

- (1) The Court may, on the application of the company, set aside a statutory demand.
- (2) The application shall be —
  - (a) made within 10 working days of the date of service of the demand; and
  - (b) served on the creditor within 10 working days of the date of service of the demand.

- (3) No extension of time shall be given for making or serving an application to have a statutory demand set aside, but, at the hearing of the application, the Court may extend the time for compliance with the statutory demand.
- (4) The Court may grant an application to set aside a statutory demand if it is satisfied that —
  - (a) there is a substantial dispute whether or not the debt is owing or is due;
  - (b) the company appears to have a counterclaim, set-off or cross-demand and the amount specified in the demand less the amount of the counterclaim, set-off or cross-demand is less than the prescribed amount; or
  - (c) the demand ought to be set aside on other grounds.
- (5) A demand shall not be set aside by reason only of a defect or irregularity unless the Court considers that substantial injustice would be caused if it were not set aside.
- (6) In subsection (5), “**defect**” includes a material misstatement of the amount due to the creditor and a material misdescription of the debt referred to in the demand.
- (7) An order under this section may be made subject to conditions.

### **300 Additional powers of Court on application to set aside statutory demand.**

- (1) If, on the hearing of an application under section 299, the Court is satisfied that there is a debt due by the company to the creditor that is not the subject of a substantial dispute, or is not subject to a counterclaim, set-off or cross-demand, the Court may —
  - (a) order the company to pay the debt within a specified period and that, in default of payment, the creditor may make an application to put the company into liquidation; or
  - (b) dismiss the application and forthwith make an order under section 250(4) putting the company into liquidation, —

on the ground that the company is unable to pay its debts.
- (2) For the purposes of the hearing of an application to put the company into liquidation pursuant to an order made under subsection (1)(a), the company is presumed to be unable to pay its debts if it failed to pay the debt within the specified period.

---

## VOIDABLE TRANSACTIONS

### 301 Transactions having preferential effect.

- (1) In this section, “**transaction**”, in relation to a company, means –
  - (a) a conveyance or transfer of property by the company;
  - (b) the giving of a security or charge over the property of the company;
  - (c) the incurring of an obligation by the company;
  - (d) the acceptance by the company of execution under a judicial proceeding;
  - (e) the payment of money by the company, including the payment of money under a judgment or order of a court.
- (2) A transaction by a company is voidable on the application of the liquidator if the transaction —
  - (a) was made —
    - (i) at a time when the company was unable to pay its due debts; and
    - (ii) within the specified period;and
  - (b) enabled another person to receive more towards satisfaction of a debt than the person would otherwise have received or be likely to have received in the liquidation, —unless the transaction took place in the ordinary course of business.
- (3) Unless the contrary is proved, for the purposes of subsection (2), a transaction that took place within the restricted period is presumed to have been made —
  - (a) at a time when the company was unable to pay its debts; and
  - (b) otherwise than in the ordinary course of business.
- (4) For the purposes of this section, in determining whether a transaction took place in the ordinary course of business no account is to be taken of any intent or purpose on the part of a company —
  - (a) to enable another person to receive more towards satisfaction of a debt than the person would otherwise receive or be likely to receive in the liquidation;
  - (b) to reduce or cancel the liability, whether in whole or in part, of another person in respect of a debt incurred by the company; or

- (c) to contribute towards the satisfaction of the liability, whether in whole or in part, of another person in respect of a debt incurred by the company, —
- unless that other person knew that was the intent or purpose of the company.
- (5) For the purposes of subsection (2)(a)(ii), “**specified period**” means —
- (a) the period of 2 years before the commencement of the liquidation; and
- (b) in the case of a company that was put into liquidation by the Court, the period of 2 years before the making of the application to the Court together with the period commencing on the date of the making of that application and ending on the date on which the order was made.
- (6) For the purposes of subsection (3), “**restricted period**” means —
- (a) the period of six months before the commencement of the liquidation; and
- (b) in the case of a company that was put into liquidation by the Court, the period of 6 months before the making of the application to the Court together with the period commencing on the date of the making of that application and ending on the date on which the order of the Court was made.

### 302 Voidable charges.

- (1) A charge over any property or undertaking of a company is voidable on the application of the liquidator if the charge was given within the specified period, unless. —
- (a) the charge secures money actually advanced or paid or the actual price or value of property sold or supplied to the company or any other valuable consideration given in good faith by the grantee of the charge at the time of, or at any time after, the giving of the charge;
- (b) immediately after the charge was given, the company was able to pay its due debts; or
- (c) the charge is in substitution not a charge given before the specified period.
- (2) Unless the contrary is proved, a company giving a charge within the restricted period is presumed to have been unable to pay its due debts immediately after giving the charge.
- (3) Subsection (1)(c) does not apply to the extent that —



- (a) the amount secured by the substituted charge exceeds the amount secured by the existing charge; or
  - (b) the value of the property subject to the substituted charge at the date of the substitution exceeds the value of the property subject to the existing charge at that date.
- (4) Nothing in subsection (1) applies to a charge given by a company that secures the unpaid purchase price of property, whether or not the charge is given over that property, if the instrument creating the charge is executed not later than 30 days after the sale of the property or, in the case of the sale of an interest in land, not later than 30 days after the final settlement of the sale.
- (5) For the purposes of subsection. (1)(a) and subsection (4), where any charge was given by the company within the period specified in subsection (1), all payments received by the grantee of the charge after it was given shall be deemed to have been appropriated so far as may be necessary —
- (a) towards repayment, of money actually advanced or paid by the grantee to the company on or after the giving of the charge;
  - (b) towards payment of the actual price or value of property sold by the grantee to the company on or after the giving of the charge; or
  - (c) towards payment of any other liability of the company to the grantee in respect of any other valuable consideration given in good faith on or after the giving of the charge.
- (6) For the purposes of subsection (1), “**specified period**” means —
- (a) the period of one year before the commencement of the liquidation; and
  - (b) in the case of a company that was put into liquidation by the Court, the period of one year before the making of the application to the Court together with the period commencing on the date of the making of the application and ending on the date on which the order of the Court was made.
- (7) For the purposes of subsection (2), “**restricted period**” means —
- (a) the period of 6 months before the commencement of the liquidation; and
  - (b) in the case or a company that was put into liquidation by the Court, the period of 6 months before the making of the application to the Court together with the period commencing on the date of the making of the application and ending on the date on which the order of the Court was made.

**303 Procedure for setting aside voidable transactions and charges.**

- (1) A liquidator who wishes to have a transaction that is voidable under section 301 or a charge that is voidable under section 302 set aside shall —
  - (a) file in the Court a notice to that effect specifying the transaction or charge to be set aside and, in the case of a transaction, the property or value which the liquidator wishes to recover and also the effect of subsections (2), (3) and (4); and
  - (b) serve a copy of the notice on the other party to the transaction or the grantee of the charge and on every other person from whom the liquidator wishes to recover.
- (2) A person —
  - (a) who would be affected by the setting, aside of the transaction or charge specified in the notice; and
  - (b) who considers that the transaction or charge is not voidable —may apply to the Court for an order that the transaction or charge be not set aside.
- (3) Unless a person on whom the notice was served has applied to the Court under subsection (2), the transaction or charge is set aside on the 20<sup>th</sup> working day after the date of service of the notice.
- (4) If one or more persons have applied to the Court under subsection (2), the transaction or charge is set aside on the day on which the last application is finally determined, unless the Court orders otherwise.

**304 Other orders.**

If a transaction or charge is set aside under section 303, the Court may make one or more of the following orders:

- (a) an order requiring a person to pay to the liquidator, in respect of benefits received by that person as a result of the transaction or charge, such sums as fairly represent those benefits;
- (b) an order requiring property transferred as part of the transaction to be restored to the company;
- (c) an order requiring property to be vested in the company if it represents in a person's hands the application, either of the proceeds of sale of property or of money so transferred;
- (d) an order releasing, in whole or in part, a charge given by the company;
- (e) an order requiring security to be given for the discharge of an order made under this section;

- (f) an order specifying the extent to which a person affected by the setting aside of a transaction or by an order made under this section is entitled to claim as a creditor in the liquidation.

### **305 Additional provisions relating to setting aside transactions and charge.**

- (1) The setting aside of a transaction or an order made under section 304 does not affect the title or interest of a person in property which that person has acquired —
  - (a) from a person other than the company;
  - (b) for valuable consideration; and
  - (c) without knowledge of the circumstances under which the property was acquired from the company.
- (2) The setting aside of a charge or an order made under section 304 does not affect the title or interest of a person in property which that person has acquired —
  - (a) as the result of the exercise of a power of sale by the grantee of the charge;
  - (b) for valuable consideration; and
  - (c) without knowledge of the circumstances relating to the giving of the charge.
- (3) Recovery by the liquidator of property or its equivalent value, whether under section 304 or any other section of this Act or under any other enactment or in equity or otherwise, may be denied wholly or in part if —
  - (a) the person from whom recovery is sought received the property in good faith and has altered his position in the reasonably held belief that the transfer to that person was validly made and would not be set aside; and
  - (b) in the opinion of the Court, it is inequitable to order recovery or recovery in full.
- (4) This section and sections 301 to 304 apply subject to the Land Act (Cap. 132).

### **RECOVERY IN OTHER CASES**

### **306 Transactions at undervalue.**

- (1) Where —
  - (a) a transaction was entered into by a company within the specified period;

- (b) the value of the consideration or benefit received by the company was less than the value of the consideration provided by the company or the company received no consideration or benefit;
- (c) when the transaction was entered into, the company –
  - (i) was unable to pay its due debts;
  - (ii) was engaged, or about to engage, in business for which its financial resources were unreasonably small; or
  - (iii) incurred an obligation knowing that the company would not be able to perform the obligation when required to do so;
 and
- (d) when the transaction was entered into, the other party to the transaction knew or ought to have known of the matter referred to in paragraph (c)(i), (ii) or (iii), as the case may be, —

the liquidator may recover from any other party to the transaction any amount by which the value of the consideration or benefit provided by the company exceeded the value of the consideration or benefit received by the company.

(2) Where —

- (a) a transaction was entered into by a company within the specified period;
- (b) the value of the consideration or benefit received by the company was less than the value of the consideration provided by the company or the company received no consideration or benefit;
- (c) the company became unable to pay its due debts as a result of the transaction; and
- (d) when the transaction was entered into, the other party to the transaction knew or ought to have known that the company would become unable to pay its due debts as a result of the transaction, —

the liquidator may recover from any other party to the transaction any amount by which the value of the consideration or benefit provided by the company exceeded the value of the consideration or benefit received by the company.

(3) For the purposes of this section, —

- (a) “**transaction**” includes the giving of a guarantee by a company;
- (b) “**specified period**” means —
  - (i) the period of one year before the commencement of the liquidation; and
  - (ii) in the case of a company that was put into liquidation by the Court, the period of one year before the making of the

application to the Court together with the period commencing on the date of the making of that application and ending on the date on which the order of the Court was made.

### **307 Transactions for inadequate or excessive consideration with directors, company secretaries and certain other persons.**

- (1) Where, within the specified period, a company has acquired a business or property from, or the services of —
  - (a) a person who was, at the time of the acquisition, a director or company secretary of the company or a nominee or relative of or a trustee for, or a trustee for a relative of, a director or company secretary of the company;
  - (b) a person or a relative of a person who, at the time of the acquisition, had control of the company;
  - (c) another company that was, at the time of the acquisition, controlled by a director or company secretary of the company or a nominee or relative of or a trustee for, or a trustee for a relative of a director or company secretary of the company; or
  - (d) another company that was, at the time of the acquisition, a related company —

the liquidator may recover from the person, relative, company or related company, as the case may be, any amount by which the value of the consideration given for the acquisition of the business, property or services exceeded the value of the business, property or services at the time of the acquisition.

- (2) Where, within the specified period, a company has disposed of a business or property or provided services, or issued shares, to —
  - (a) a person who was, at the time of the disposition, provision or issue, a director or company secretary of the company, or a nominee or relative of, or a trustee for, or a trustee for a relative of; a director or company secretary of the company;
  - (b) a person, or a relative of a person, who, at the time of the disposition, provision or issue, had control of the company;
  - (c) another company that was, at the time of the disposition, “provision or issue, controlled by a director or company secretary of the company, or a nominee or relative of, or a trustee for, or a trustee for a relative of, a director or company secretary of the company; or
  - (d) another company that, at the time of the disposition, provision or issue, was a related company, —

the liquidator may recover from the person, relative, company or related company, as the case may be, any amount by which the value of the business, property or services or the value of the shares at the time of the disposition, provision or issue exceeded the value of any consideration received by the company.

- (3) For the purposes of this section, —
- (a) the value of a business or property includes the value of any goodwill attaching to the business or property;
  - (b) the provisions of section 7 apply with such modifications as may be necessary to determine control of a company.
- (4) For the purposes of subsections (1) and (2), “**specified period**” means —
- (a) the period of 3 years before the commencement of the liquidation; and
  - (b) in the case of a company that was put into liquidation by the Court, the period of 3 years before the making of the application to the Court together with the period commencing on the date of the making of the application and ending on the date on which the order of the Court was made.

### **308 Court may set aside certain securities and charges.**

- (1) Subject to subsection (2), if a company that is in liquidation is unable to meet all its debts, the Court, on the application of the liquidator, may order that a security or charge or part of it created by the company over any of its property or undertaking in favour of —
- (a) a person who was, at the time the security or charge was created, a director or company secretary of the company or a nominee or relative of, or a trustee for, or a trustee for a relative of, a director or company secretary of the company;
  - (b) a person, or a relative of a person who, at the time when the security or charge was created, had control of the company; or
  - (c) another company that was, when the security or charge was created, controlled by a director or company secretary of the company or a nominee or relative of, or a trustee for, or a trustee for a relative of, a director or company secretary of the company; or
  - (d) another company, that at the time when the security or charge was created, was a related company, —

shall, so far as any security on the property or undertaking is conferred, be set aside as against the liquidator of the company, if the Court considers that, having regard to the circumstances in which the security or charge was created, the conduct of the person, relative, company or related

company, as the case may be, in relation to the affairs of the company and any other relevant circumstances, it is just and equitable to make the order.

- (2) Subsection (1) does not apply to a security or charge that has been transferred by the person in whose favour it was originally created and has been purchased by another person (whether or not from the first-mentioned person) if —
  - (a) at the time of the purchase, the purchaser was not a person specified in any of paragraphs (a) to (d) of that subsection; and
  - (b) the purchase was made in good faith and for valuable consideration.
- (3) The Court may make such other orders as it thinks proper for the purpose of giving effect to an order under this section.
- (4) This section applies subject to the Land Act (Cap. 132).
- (5) The provisions of section 7 apply with such modifications as may be necessary to determine control of a company.

### **309 Liability if proper accounting records not kept.**

- (1) Subject to subsection (2), if —
  - (a) a company that is in liquidation and is unable to pay all its debts has failed to comply with —
    - (i) section 203 (which relates to the keeping of accounting records); or
    - (ii) clause 3 of the Ninth Schedule (which relates to the preparation of financial statements); and
  - (b) the Court considers that —
    - (i) the failure to comply has contributed to the company's inability to pay all its debts or has resulted in substantial uncertainty as to the assets and liabilities of the company or has substantially impeded the orderly liquidation; or
    - (ii) for any other reason it is proper to make a declaration under this section, —

the Court, on the application of the liquidator, may, if it thinks it proper to do so, declare that any one or more of the directors, former directors, company secretaries and former company secretaries of the company is, or are, personally responsible, without limitation of liability, for all or any part of the debts and other liabilities of the company as the Court may direct.

- (2) The Court shall not make a declaration under subsection (1) in relation to a person if the Court considers that the person —
  - (a) took all reasonable steps to secure compliance by the company with the applicable provision referred to in paragraph (a) of that subsection; or
  - (b) had reasonable grounds to believe and did believe that a competent and reliable person was charged with the duty of seeing that provision was complied with and was in a position to discharge that duty.
- (3) The Court may give any direction it thinks fit for the purpose of giving effect to the declaration.
- (4) The Court may make a declaration under this section even though the person concerned is liable to be convicted of an offence.
- (5) An order under this section is deemed to be a final judgment for the purpose of the law of bankruptcy.

### **310 Power of Court to require persons to repay money or return property.**

- (1) If, in the course of the liquidation of a company, it appears to the Court that a person who has taken part in the formation or promotion of the company or a past or present director, company secretary, manager, liquidator or receiver of the company, has misapplied or retained or become liable or accountable for money or property of the company or been guilty of negligence, default or breach of duty or trust in relation to the company, the Court may, on the application of the liquidator or a creditor or shareholder —
  - (a) inquire into the conduct of the promoter, director, company secretary, manager, liquidator or receiver; and
  - (b) order that person —
    - (i) to repay or restore the money or property or any part of it with interest at a rate the Court thinks just; or
    - (ii) to contribute such sum to the assets of the company by way of compensation as the Court thinks just;or
  - (c) on the application of a creditor, order that person to pay or transfer the money or property or any part of it with interest at a rate the Court thinks just to the creditor.
- (2) This section has effect even though the conduct may constitute an offence.



- (3) An order for payment of money under this section is deemed to be a final judgment for the purpose of the law of bankruptcy.

## CREDITORS CLAIMS

### **311 Application of bankruptcy rules to liquidation of insolvent companies.**

- (1) Subject to this Part, the rules in force under the law of bankruptcy with respect to the estates of persons adjudged bankrupt apply in the liquidation of a company that is unable to pay its debts to —
- (a) the rights of secured and unsecured creditors;
  - (b) claims by creditors;
  - (c) the valuation of annuities and future and contingent liabilities, —
- and all persons who in any such case would be entitled to make claims and receive payment in whole or in part are so entitled in the liquidation.
- (2) In applying in a liquidation the rules in force under the law of bankruptcy, a claim made under section 313 and admitted by a liquidator is to be treated as if it were a debt proved in accordance with the requirements of the law of bankruptcy.

### **312 Admissible claims.**

A debt or liability, present or future, certain or contingent, whether it is an ascertained debt or liability or a liability for damages, may be admitted as a claim against a company in liquidation.

### **313 Claims by unsecured creditors.**

- (1) A claim by an unsecured creditor against a company in liquidation shall be made in the prescribed form and shall —
- (a) contain full particulars of the claim; and
  - (b) identify any documents that evidence or substantiate the claim.
- (2) The liquidator may require the production of a document referred to in subsection (1)(b).
- (3) The liquidator shall, as soon as practicable, either admit or reject a claim in whole or in part and, if the liquidator subsequently considers that a claim has been wrongly admitted or rejected in whole or in part, may revoke or amend that decision.

- (4) If a liquidator rejects a claim, whether in whole or in part, he shall forthwith give notice in writing of the rejection to the creditor.
- (5) The costs of making a claim under subsection (1) or producing a document under subsection (2) shall be met by the creditor making the claim.
- (6) Every person who —
  - (a) makes, or authorises the making of, a claim under this section that is false or misleading in a material particular knowing it to be false or misleading; or
  - (b) omits, or authorises the omission, from a claim under this section of any matter knowing that the omission makes the claim false or misleading in a material particular, —commits an offence, and is liable on conviction to the penalty set out in section 377(4).

### **314 Rights and duties of secured creditors.**

- (1) A secured creditor may —
  - (a) realise property subject to a charge, if entitled to do so;
  - (b) value the property subject to the charge and claim in the liquidation as an unsecured creditor for the balance due, if any; or
  - (c) surrender the charge to the liquidator for the general benefit of creditors and claim in the liquidation as an unsecured creditor for the whole debt.
- (2) A secured creditor may exercise the power referred to in paragraph (a) of subsection (1) whether or not the secured creditor has exercised the power referred to in paragraph (b) of that subsection.
- (3) A secured creditor who realises property subject to a charge —
  - (a) may, unless the liquidator has accepted a valuation and claim by the secured creditor under subsection (6), claim as an unsecured creditor for any balance due after deducting the net amount realised;
  - (b) shall account to the liquidator for any surplus remaining from the net amount realised after satisfaction of the debt including interest payable in respect of that debt up to the time of its satisfaction and after making any proper payments to the holder of any other charge over the property subject to the charge.
- (4) If a secured creditor values the security and claims as an unsecured creditor, for the balance due, if any, the valuation and any claim shall be made in the prescribed form and —

- (a) contain full particulars of the valuation and any claim;
- (b) contain full particulars of the charge including the date on which it was given; and
- (c) identify any documents that substantiate the claim and the charge, —

and sections 315, 316 and 317 apply to any claim as a secured creditor.

- (5) The liquidator may require production of any document referred to in subsection (4)(c).
- (6) Where a claim is made by a secured creditor under subsection (4), the liquidator shall —
  - (a) accept the valuation and claim; or
  - (b) reject the valuation and claim in whole or in part, but —
    - (i) where a valuation and claim is rejected in whole or in part, the creditor may make a revised valuation and claim within 10 working days of receiving notice of the rejection; and
    - (ii) the liquidator may, if he subsequently considers that a valuation and claim was wrongly rejected in whole or in part, revoke or amend that decision.
- (7) Where the liquidator —
  - (a) accepts a valuation and claim under subsection (6)(a);
  - (b) accepts a revised valuation and claim under subsection (6)(b)(i); or
  - (c) accepts a valuation and claim on revoking or amending a decision to reject a claim under subsection (6)(b)(ii) —

the liquidator may, unless the secured creditor has realised the property, at any time, redeem the security on payment of the assessed value.

- (8) The liquidator may at any time, by notice in writing, require a secured creditor, within 20 working days after receipt of the notice —
  - (a) to elect which of the powers referred to in subsection (1) the creditor wishes to exercise; and
  - (b) if the creditor elects to exercise the power referred to in subsection (1)(b) or (c), to exercise the power within that period.
- (9) A secured creditor on whom notice has been served under subsection (8) who fails to comply with the notice is to be taken as having surrendered the charge to the liquidator under subsection (1)(c) for the general benefit of creditors and may claim in the liquidation as an unsecured creditor for the whole debt.
- (10) A secured creditor who has surrendered a charge under subsection (1)(c) or who is taken as having surrendered a charge under subsection (9) may,

with the leave of the Court or the liquidator and subject to such terms and conditions as the Court or the liquidator thinks fit, at any time before the liquidator has realised the property charged —

- (a) withdraw the surrender and rely on the charge, or
- (b) submit a new claim under this section.

(11) Every person who —

- (a) makes, or authorises the making of, a claim under subsection (4) that is false or misleading in a material particular knowing it to be false or misleading; or
- (b) omits, or authorises the omission, from a claim under that subsection of any matter knowing that the omission makes the claim false or misleading in a material particular, —

commits an offence, and is liable on conviction to the penalty set out in section 377(4).

### **315 Ascertainment of amount of claim.**

- (1) The amount of a claim shall be ascertained as at the date of commencement of the liquidation.
- (2) The amount of a claim based on a debt or liability denominated in a currency other than Tongan currency shall be converted into Tongan currency at the rate of exchange on the date of commencement of the liquidation or, if there is more than one rate of exchange on that date, at the average of those rates.

### **316 Claim not of a certain amount**

- (1) If a claim is subject to a contingency or is for damages or, if for some other reason, the amount of the claim is not certain, the liquidator may —
  - (a) make an estimate of the amount of the claim; or
  - (b) refer the matter to the Court for a decision on the amount of the claim.
- (2) On the application of the liquidator, or of a claimant who is aggrieved by an estimate made by the liquidator, the Court shall determine the amount of the claim as it sees fit.

### **317 Fines and penalties.**

Nothing in this Part limits or affects the recovery of —

- (a) a fine imposed on a company, whether before or after the commencement of the liquidation of the company, for the commission of an offence;
- (b) a monetary penalty payable to the Crown imposed on a company by a court, whether before or after the commencement of the liquidation of the company, for the breach of any enactment; or
- (c) costs ordered to be paid by the company in relation to proceedings for the offence or breach.

### **318 Claims relating to debts payable after commencement of liquidations.**

- (1) A claim in respect of a debt that; but for the liquidation, would not be payable until a date that is not less than 6 months, after the commencement of the liquidation is to be treated, for the purposes of this Part, as a claim for the present value of the debt.
- (2) For the purposes of subsection (1), the present value of a debt is to be determined by deducting from the amount of the debt interest at the prescribed rate for the period from the date on which the company is put into liquidation to the date when the debt is due.

### **319 Mutual credit and set-off.**

- (1) Where there have been mutual credits, mutual debts or other mutual dealings between a company and a person who seeks or, but for the operation of this section, would seek to have a claim admitted in the liquidation of the company —
  - (a) an account shall be taken of what is due from the one party to the other in respect of those credits, debts or dealings;
  - (b) an amount due from one party shall be set off against an amount due from the other party; and
  - (c) only the balance of the account may be claimed in the liquidation or is payable to the company, as the case may be.
- (2) A person, other than a related person, is not entitled under this section to claim the benefit of a set-off arising from —
  - (a) a transaction made within the specified period, being a transaction by which the person gave credit to the company or the company gave credit to the person; or
  - (b) the assignment within the specified period to that person of a debt owed by the company to another person, —

unless the person proves that, at the time of the transaction or assignment, the person did not have reason to suspect that the company was unable to pay its debts as the debt became due.

- (3) A related person is not entitled under this section to claim the benefit of a set-off arising from —
- (a) a transaction made within the restricted period, being a transaction by which the related person gave credit to the company or the company gave credit to the related person; or
  - (b) the assignment within the restricted period to that person of a debt owed by the company to another person, —

unless the related person proves that, at the time of the transaction or assignment, the related person did not have reason to suspect that the company was unable to pay its debts as they became due.

- (4) This section does not apply to an amount paid or payable by a shareholder —
- (a) as the consideration, or part of the consideration, for the issue of a share; or
  - (b) in satisfaction of a call in respect of an outstanding liability of the shareholder made by the board of directors or by the liquidator.
- (5) In this section, “**related person**” means a related company and includes a director or company secretary of the company in liquidation.
- (6) For the purposes of subsection.(2), “**specified period**” means —
- (a) the period of 6 months before the commencement of the liquidation; and
  - (b) in the case of a company that was put into liquidation by the Court, the period of 6 months before the making of the application to the Court together with the period commencing on the date of the making of that application and ending on the date on which the order of the Court was made.
- (7) For the purposes of subsection (3) “**restricted period**” means —
- (a) the period of 2 years before the commencement of the liquidation; and
  - (b) in the case of a company that was put into liquidation by the Court, the period of 2 years before the making of the application to the Court together with the period commencing on the date of the making of that application and ending on the date on which the order of the Court was made.

**320 Interest on claims.**

- (1) The amount of a claim may include interest up to the commencement of the liquidation —
  - (a) at such rate as may be specified or contained in any contract that makes provision for the payment of interest on that amount; or
  - (b) in the case of a judgment debt, at such rate as is payable on the judgment debt.
- (2) If any surplus assets remain after the payment of all admitted claims, interest shall be paid at the prescribed rate on those claims from the date of commencement of the liquidation to the date on which each claim is paid and, if the amount of the surplus assets is insufficient to pay interest in full on all claims, payment shall abate pro rata among all claims.
- (3) If any surplus assets remain after the payment of interest in accordance with subsection (2), interest shall be paid on all admitted claims referred to in subsection (1) from the commencement of the liquidation to the date on which the claim is paid at the rate referred to in subsection (1)(a) or (b), as the case may be, and, if the amount of the surplus assets is insufficient to pay interest in full on all claims, payment shall abate pro rata among all claims.

**321 Preferential claims.**

- (1) The liquidator shall pay out of the assets of the company the expenses, fees and claims set out in the Sixth Schedule to the extent and in the order of priority specified in that Schedule and that Schedule applies to the payment of those expenses, fees and claims according to its terms.
- (2) Without limiting clause 8(b) of the Sixth Schedule, the term “assets” in subsection (1) doesn’t include assets subject to a charge unless the charge is surrendered or taken to be surrendered or redeemed under section 314.

**322 Claims of other creditors and distribution of surplus assets.**

- (1) After paying preferential claims in accordance with section 321, the liquidator shall apply the assets of the company in satisfaction of all other claims.
- (2) The claims referred to in subsection (1) rank equally among themselves and shall be paid in full, unless the assets are insufficient to meet them, in which case payment shall abate pro rata among all claims.
- (3) Where, before the commencement of a liquidation, a creditor agrees to accept a lower priority, in respect of a debt than that which it would

otherwise have under this section, nothing in this section prevents the agreement from having effect according to its terms.

- (4) Subject to section 320, after paying the claims referred to in subsection (1), the liquidator shall distribute the company's surplus assets —
  - (a) in accordance with the provisions contained in the company's constitution; or
  - (b) if the company's constitution does not contain provisions for the distribution of surplus assets, in accordance with this Act.

### LIQUIDATION COMMITTEES

#### **323 Meetings of creditors or shareholders.**

- (1) At any time in the course of the liquidation, the liquidator shall subject to subsection (2), at the request in writing of any creditor or shareholder or may on the liquidator's own motion, call a meeting of creditors of shareholders —
  - (a) to vote on a proposal that a liquidation committee be appointed to act with the liquidator; and
  - (b) if it is so decided, to choose the members of the committee.
- (2) A liquidator may decline a request by a creditor or shareholder to call a meeting on the ground that —
  - (a) the request is frivolous or vexatious;
  - (b) the request was not made in good faith;
  - (c) the costs of calling a meeting would be out of proportion to the value of the company's assets.
- (3) The decision of a liquidator to decline the request may be reviewed by the Court on the application of any creditor or shareholder, as the case may be.
- (4) Subject to subsections (2) and (3), a liquidator who receives a request to call a meeting of creditors or of shareholders shall forthwith call such a meeting in accordance with the constitution of the company or, if applicable, the Fourth Schedule as the case may be.
- (5) The members of a liquidation committee chosen by a meeting of creditors or shareholders take office forthwith but if there is a difference between the decisions of meetings of creditors and meetings of shareholders on —
  - (a) the question of appointing a liquidation committee; or
  - (b) the membership of a liquidation committee, —



the liquidator shall refer the matter to the Court which may make such decision as it thinks fit.

- (6) The sole shareholder of a company may present to the liquidator a view on any matter which could have been decided at a meeting of shareholders under this section and that view shall, for all purposes, be treated as though it were a decision taken at a meeting of shareholders.

### **324 Liquidation committees.**

- (1) A liquidation committee shall consist of not less than three persons who are —
  - (a) creditors or shareholders;
  - (b) persons holding general powers of attorney from creditors or shareholders; or
  - (c) authorised directors, company secretaries or representatives of companies which are creditors or shareholders of the company in liquidation.
- (2) A liquidation committee has the power to —
  - (a) call for reports from the liquidator on the progress of the liquidation;
  - (b) call a meeting of creditors or of shareholders;
  - (c) apply to the Court under section 293 and section 295;
  - (d) assist the liquidator as appropriate in the conduct of the liquidation.
- (3) The provisions set out in the Seventh Schedule shall govern proceedings at meetings of liquidation committees.
- (4) A meeting of creditors called under subsection (2)(b) shall be held in accordance with the Fourth Schedule.
- (5) Where, by reason of vacancies in a liquidation committee, the committee is unable to act, the liquidator shall call attention to the situation in the next six-monthly report required to be prepared and sent under section 264(2)(d).

### **LIQUIDATION SURPLUS ACCOUNT**

### **325 Establishment of Liquidation Surplus Account.**

- (1) Money representing unclaimed assets of a company standing to the credit of the Official Liquidator shall, after completion of the liquidation, be held, by the Official Liquidator for a period of 12 months.

- (2) At the expiration of the period of 12 months after the completion of the liquidation, the Official Liquidator shall, after deduction of any amount required to meet the claim of any person which is established within that period, pay the balance into an account entitled the “Liquidation Surplus Account” for distribution in accordance with this section.
- (3) Money held in the Liquidation Surplus Account may only be invested —
  - (a) in any of the stock, funds or other securities of the Government, or of any statutory corporation as defined in section 2 of the National Reserve Bank of Tonga Act (Cap. 102);
  - (b) on deposit with any financial institution as defined in section 2 of the National Reserve Bank of Tonga Act;
  - (c) in any other manner prescribed by regulations under this Act, —an interest on any investment shall be distributed in accordance with this section.
- (4) Money held in the Liquidation Surplus Account may be —
  - (a) paid or distributed to any person entitled to payment or distribution in the liquidation of a company any money representing the surplus assets of which has been created to the Account; or
  - (b) paid, subject to such conditions as the Official Liquidator may impose, in meeting the claims of the creditors of a company in the liquidation of which the Official Liquidator or any other person is the liquidator, for payment of the costs of proceedings in the liquidation after the commencement of the liquidation, legal or other expert advice, or the costs of any expert witness, where the Official Liquidator is satisfied that it is fair and reasonable for those costs to be met out of the Account.
- (5) Payments from the Liquidation Surplus Account shall be made by or at the direction of the Official Liquidator.

## PART XVII - REMOVAL FROM THE TONGAN REGISTER

### 326 Removal from register.

A company is removed from the Tongan register when a notice signed by the Registrar stating that the company is removed from the Tongan register is registered under this Act.

**327 Grounds for removal from register.**

- (1) Subject to this section, the Registrar shall remove a company from the Tongan register if —
- (a) the company is an amalgamating company, other than an amalgamated company, on the day on which the Registrar issues a certificate of amalgamation under section 233;
  - (b) the Registrar is satisfied that —
    - (i) the company, has ceased to carry on business; or
    - (ii) the company does not have adequate liquidity; or
    - (iii) the company has persistently failed to comply with this Act whether or not any offences have been prosecuted or convictions recorded; and
    - (iv) there is no other reason for the company to continue in existence;
  - (c) the company has been put into liquidation, and —
    - (i) no liquidator is acting; or
    - (ii) the documents referred to in section 266(1)(a) have not been sent or delivered to the Registrar within six months after the liquidation of the company is completed;
  - (d) there is sent or delivered to the Registrar a request in the prescribed form made by —
    - (i) those shareholders entitled to vote and voting on the question, by special resolution; or
    - (ii) the board of directors or any other person, if the constitution of the company so requires or permits, —that the company be removed from the Tongan register on either of the grounds specified in subsection (2); or
  - (e) A liquidator sends or delivers to the Registrar the documents referred to in section 266(1)(a).
- (2) A request that a company be removed from the Tongan register under section.(1)(d) may be made on the grounds —
- (a) that the company has ceased to carry on business, has discharged in full its liabilities to all its known creditors and has distributed its surplus assets in accordance with its constitution and this Act; or
  - (b) that the company has no surplus assets after paying its debts in full or in part and no creditor has applied to the Court under section 250 for an order putting the company into liquidation.

- (3) A request that a company be removed from the Tongan register under section (1)(d) shall be accompanied by a written notice from the Commissioner of Inland Revenue stating that the Commissioner has no objection to the company being removed from the Tongan register.
- (4) The Registrar shall only remove a company from the Tongan register under subsection (1)(b) if —
  - (a) the Registrar has complied with section 328;
  - (b) the company has not satisfied the Registrar that there are not proper grounds for the removal under subsection (1)(b); and
  - (c) the Registrar —
    - (i) is satisfied that no person has objected under section 330 to the removal under section 330; or
    - (ii) if an objection to the removal has been received, has complied with section 331.
- (5) The Registrar shall only remove a company from the Tongan register under subsection (1)(c), (d) or (e) if —
  - (a) he is satisfied that notice has been given in accordance with section 329; and
    - (i) he satisfied that no person has objected under section 330 to the removal; or
    - (ii) if an objection to the removal has been received, he has complied with section 331.

### **328 Notice of intention to remove under section 327(1)(b).**

- (1) Before a company can be removed from the Tongan register under section 327(1)(b), the Registrar shall —
  - (a) give notice to the company in accordance with subsection (2); and
  - (b) give public notice of the matters set out in subsection (3).
- (2) The notice to be given under subsection (1)(a) shall —
  - (a) state the section under, and the grounds on which, it is intended to remove the company from the Tongan register; and
  - (b) state that, unless —
    - (i) by the date specified in the notice, which shall not be less than 20 working days after the date of the notice, the company satisfies the Registrar by notice in writing that he should change the view formed for the purpose of section 327(1)(b); or

- (ii) the Registrar does not, in accordance with section 331, proceed to remove the company from the register, —  
the company will be removed from the Tongan register.
- (3) The notice to be given under subsection (1)(b) shall specify —
  - (a) the name of the company and its registered office;
  - (b) the section under, and the grounds on which, it is intended to remove the company from the Tongan register; and
  - (c) the date by which an objection under section 330 to the removal shall be delivered to the Registrar, which shall not be less than 20 working days after the date of the notice.

### **329 Notice of intention to remove in other cases.**

- (1) If a company is to be removed from the register under section 327(1)(c), the Registrar shall give public notice of the matters set out in subsection (4).
- (2) If a company is to be removed from the register under section 327(1)(d) or (e), the applicant or the liquidator, as the case may be, shall give public notice of the matters set out in subsection (4).
- (3) If a company is to be removed from the register under section 327(1)(c), the Registrar, or, if it is to be removed from the register under section 327(1)(d), the applicant, as the case may be, shall also give notice of the matters set out in subsection (4) to the company.
- (4) The notice to be given under this section shall specify —
  - (a) the name of the company and its registered office;
  - (b) the section under, and the grounds on which, it is intended to remove the company from the Tongan register; and
  - (c) the date by which an objection under section 330 to the removal shall be delivered to the Registrar, which shall be not less than 20 working days after the date of the notice.

### **330 Objection to removal from register.**

- (1) Where a notice is given of an intention to remove a company from the Tongan register, any person may deliver to the Registrar, not later than the date specified in the notice, an objection to the removal on any of the following grounds:
  - (a) that there are not proper grounds for the removal;
  - (b) that the company is a party to legal proceedings;

- (c) that the company is in receivership or liquidation or both;
  - (d) that the person objecting is a creditor or a shareholder or a person who has an undischarged claim against the company;
  - (e) that the person objecting believes that there exists, and intends to pursue, a right of action on behalf of the company under Part IX; or
  - (f) that, for any other reason, it would not be just or equitable to remove the company from the Tongan register.
- (2) For the purposes, of subsection (1)(d) —
- (a) a claim by a creditor against a company is not an undischarged claim if —
    - (i) the claim has been paid in full;
    - (ii) the claim has been paid in part under a compromise entered into under Part XIV or by being otherwise compounded to the reasonable satisfaction of the creditor;
    - (iii) the claim has been paid in full or in part by a receiver or a liquidator in the course of a completed receivership or liquidation; or
    - (iv) a receiver or a liquidator has notified the creditor that the assets of the company are not sufficient to enable any payment to be made to the creditor; and
  - (b) a claim by a shareholder or any other person against a company is not an undischarged claim if —
    - (i) payment has been made to the shareholder or that person in accordance with a right under the company's constitution or this Act to receive or share in the company's surplus assets; or
    - (ii) a receiver or liquidator has notified the shareholder or that person that the company has no surplus assets.

### **331 Duties of Registrar if objection received.**

- (1) If an objection to the removal of a company from the Tongan register is made on a ground specified in section 330(1)(a), (b) or (c), the Registrar shall not proceed with the removal unless he is satisfied that —
- (a) the objection has been withdrawn;
  - (b) any facts on which the objection is based are not, or are no longer, correct; or
  - (c) the objection is frivolous or vexatious.

- (2) If an objection to the removal of a company from the Tongan register is made on a ground specified in section 330(1)(d), (e) or (f), the Registrar shall give notice to the person objecting that, unless notice of an application to the Court by that person for an order —
- (a) under section 250(2)(c), that the company be put into liquidation; or
  - (b) under section 332, that, on any ground specified in section 330, the company be not removed from the Tongan register —

is served on the Registrar not later than 20 working days after the date of the notice, the Registrar intends to proceed with the removal.

- (3) If —
- (a) notice of such an application to the Court is not served on the Registrar;
  - (b) the application is withdrawn; or
  - (c) on the hearing of such an application, the Court refuses to grant either an order putting the company into liquidation or an order that the company be not removed from the Tongan register, —

the Registrar shall proceed with the removal.

- (4) Every person who makes such an application shall give the Registrar notice in writing of the decision of the Court within 5 working days of the decision being given.

- (5) The Registrar shall send —
- (a) a copy of an objection under section 330;
  - (b) a copy of a notice given by or served on the Registrar under this section; and
  - (c) if the company is removed from the Tongan register, notice of the removal, —

to a person who sent or delivered to the Registrar a request that the company be removed from the Tongan register under section 327(1)(d) or, while acting as liquidator, sent or delivered to the Registrar the documents referred to in section 327(1)(e).

### **332 Powers of Court.**

- (1) A person who gives a notice objecting to the removal of a company from the Tongan register on a ground specified in section 330(1) may apply to the Court for an order that the company be not removed from the register on any ground set out in that subsection.
- (2) On an application for an order under subsection (1), the Court may, if it is satisfied that the company should not be removed from the register on any

of those grounds, make an order that the company is not to be removed from the register.

### **333 Property of company removed from register.**

- (1) Property that, immediately before the removal of a company from the Tongan register, had not been distributed or disclaimed vests in the Crown with effect from the removal of the company from the register.
- (2) For the purposes of this section, property of the former company includes leasehold property and all other rights vested in or held on trust for the former company, but does not include property held by the former company on trust for any other person.
- (3) The Minister shall, forthwith on becoming aware of the vesting of the property, give public notice of the vesting, setting out the name of the former company and particulars of the property.
- (4) Where property is vested in the Crown under this section, a person who would have been entitled to receive all or part of the property or payment from the proceeds of its realisation, if it had been in the hands of the company immediately before the removal of the company from the Tongan register, or any other person claiming through that person, may apply to the Court for an order —
  - (a) vesting all or part of the property in that person; or
  - (b) for payment to that person by the Crown of compensation of an amount not greater than the value of the property.
- (5) On an application made under subsection (4), the Court may —
  - (a) decide any question concerning the value of the property the entitlement of any applicant to the property or to compensation and the apportionment of the property of compensation among two or more applicants;
  - (b) order that the hearing of two or more applications be consolidated;
  - (c) order that an application be treated as an application on behalf of all persons, or all members of a class of persons, with an interest in the property; or
  - (d) make an ancillary order.
- (6) Compensation ordered to be paid under subsection (4) shall be paid out of the General Revenue without further appropriation than this section.



**334 Disclaimer of property by the Crown.**

- (1) The Minister may, by notice in writing, disclaim the Crown's title to property vesting in the Crown under section 333 if the property is onerous property within the meaning of section 278.
- (2) The Minister shall forthwith give public notice of the disclaimer.
- (3) Property that is disclaimed under this section shall be deemed not to have vested in the Crown under section 333.
- (4) Sections 278(3), 278(5) and 278(6) apply, to any property that is disclaimed under this section as if the property had been disclaimed under that section immediately before the company was removed from the Tongan register.
- (5) Subject to any order of the Court, the Minister is not entitled to disclaim property unless —
  - (a) the property is disclaimed within 12 months after the vesting of the property in the Crown first comes to the notice of the Minister; or
  - (b) if any person gives notice in writing to the Minister requiring the Minister to elect, before the close of such date as is stated in the notice not being a date not less than 20 working days after the date on which the notice is received by the Minister, whether to disclaim the property, the property is disclaimed before the close of that date, —

whichever occurs first.

- (6) A statement in a notice disclaiming property under this section that the vesting of the property in the Crown first came to the notice of the Minister on a specified date shall, in the absence of proof to the contrary, be evidence of the fact stated.

**335 Liability of directors, company secretaries, shareholders and others to continue.**

The removal of a company from the Tongan register does not affect the liability of any former director, company secretary or shareholder of the company or any other person in respect of any act or omission that took place before the company was removed from the register and that liability continues and may be enforced as if the company had not been removed from the register.

**336 Liquidation of company removed from Tongan register.**

- (1) Notwithstanding the fact that a company has been removed from the Tongan register, the Court may appoint a liquidator under section 250 as if the company continued in existence.
- (2) If a liquidator is appointed under subsection (1) —
  - (a) Part XVI applies to the liquidation with such modifications as may be necessary;
  - (b) the provisions of section 340 shall apply, with such modifications as may be necessary, to property of the company that is vested in the Crown under section 333 as if the company had been restored to the Tongan register.

**337 Registrar may restore company to Tongan register.**

- (1) Subject to this section, the Registrar shall, on the application of a person referred to in subsection (2), and may, on his own motion, restore a company that has been removed from the Tongan register to the register if he is satisfied that, at the time the company was removed from the register —
  - (a) there were not proper grounds for the removal;
  - (b) the company was a party to legal proceedings; or
  - (c) the company was in receivership or liquidation or both.
- (2) Any person who, at the time the company was removed from the Tongan register, was —
  - (a) a shareholder, director or company secretary, of the company;
  - (b) a creditor of the company; or
  - (c) a liquidator, or a receiver of the property, of the company, —  
may make an application under subsection (1).
- (3) Before the Registrar restores a company to the Tongan register, the Registrar must give public notice setting out —
  - (a) the name of the company;
  - (b) the name and address of the applicant;
  - (c) the section under, and the grounds on which, the application is made or the Registrar proposes to act, as the case may be; and
  - (d) the date by which an objection to restoring the company to the register shall be delivered to the Registrar, not being not less than 20 working days after the date of the notice.

- (4) The Registrar shall not restore a company to the Tongan register if the Registrar receives an objection to the restoration within the period stated in the notice.
- (5) Before the Registrar restores a company to the Tongan register under this section, the Registrar may require any of the provisions of this Act or any regulations made under this Act, being provisions with which the company had failed to comply before it was removed from the register, to be complied with.
- (6) The Court may, on the application of the Registrar or the applicant, give such directions or make such orders as may be necessary or desirable for the purpose of placing a company that is restored to the Tongan register under this section and any other persons as nearly as possible in the same position as if the company had not been removed from the register.
- (7) Nothing in this section limits or affects section 338.

### **338 Court may restore company to Tongan register.**

- (1) The Court may, on the application of a person referred to in subsection (2), order that a company that has been removed from the Tongan register be restored to the register if it is satisfied that —
  - (a) at the time the company was removed from the register —
    - (i) there were not proper grounds for the removal;
    - (ii) the company was a party to legal proceedings;
    - (iii) the company was in receivership or liquidation or both;
    - (iv) the applicant was a creditor or a shareholder or a person who had an undischarged claim against the company; or
    - (v) the applicant believed that a right of action existed, or intended to pursue a right of action, on behalf of the company, under Part IX; or
  - (b) for any other reason it is just and equitable to restore the company to the Tongan register.
- (2) The following persons may make an application under subsection (1);
  - (a) any person who, at the time the company was removed from the Tongan register —
    - (i) was a shareholder, director or company secretary of the company;
    - (ii) was a creditor of the company;
    - (iii) was a party to any legal proceedings against the company;
    - (iv) had an undischarged claim against the company; or

- (v) was the liquidator, or a receiver of the property, of the company;
  - (b) the Registrar;
  - (c) with the leave of the Court.
- (3) Before the Court makes an order restoring a company to the Tongan register under this section, it may require any provisions of this Act or any regulations made under this Act, being provisions with which the company had failed to comply before it was removed from the register, to be complied with.
- (4) The Court may give such directions or make such orders as may be necessary or desirable for the purpose of placing a company that is restored to the Tongan Register under this section and any other persons as nearly as possible in the same position as if the company had not been removed from the Tongan register.

### **339 Restoration to register.**

- (1) A company is restored to the Tongan register when a notice signed by the Registrar stating that the company is restored to the Tongan register is registered under this Act.
- (2) A company that is restored to the Tongan register shall be deemed to have continued in existence as if it had not been removed from the register.

### **340 Vesting of property in company on restoration to register.**

- (1) Subject to this section, property of a company that is, at the time the company is restored to the Tongan register, vested in the Crown pursuant to section 333, shall, on the restoration of the company to the Tongan register, vest in the company as if the company had not been removed from the register.
- (2) Nothing in subsection (1) applies to any property vested in the Crown pursuant to section 333 if the Court has made an order for the payment of compensation to any person pursuant to section 333(4)(b) in respect of that property.

## **PART XVIII - OVERSEAS COMPANIES**

### **341 Meaning of “carrying on business”.**

For the purposes of this Part —

- (a) a reference to an overseas company carrying on business in Tonga includes a reference to the overseas company —
  - (i) establishing or using a share transfer office or a share registration office in Tonga; or
  - (ii) administering, managing and dealing with property in Tonga as an agent or personal representative or trustee and whether through its employees or an agent or in any other manner;
- (b) an overseas company does not carry on business in Tonga merely because in Tonga it —
  - (i) is or becomes a party to a legal proceeding; or settles a legal proceeding or a claim or dispute;
  - (ii) holds meetings of its directors or shareholders or carries on other activities concerning its internal affairs;
  - (iii) maintains a bank account;
  - (iv) effects a sale of property through an independent contractor;
  - (v) solicits or procures an order that becomes a binding contract only if the order is accepted outside Tonga;
  - (vi) creates evidence of a debt or creates a charge on property;
  - (vii) secures or collects any of its debts or enforces its rights in relation to securities relating to those debts;
  - (viii) conducts an isolated transaction that is completed within a period of 31 days, not being one of a number of similar transactions repeated from time to time; or
  - (ix) invests its funds or holds property.

### **342 Name to be reserved before carrying on business.**

- (1) An overseas company shall not carry on business in Tonga on or after the commencement of this Act unless the name of the overseas company has been reserved.
- (2) Subsection (1) does not apply to an overseas company that, immediately before the commencement of this Act, is registered under Part V of the Companies Act (Cap. 27).
- (3) An overseas company registered under this Part that carries on business in Tonga shall not change its name unless the new name has first been reserved.
- (4) The provisions of sections 24, 25 and 26 apply subject to any necessary modifications to the reservation of the name of an overseas company, including reservation on a change of name, in the same way as they apply

to the registration of companies under this Act and to the change of names of companies registered under this Act.

- (5) If an overseas company contravenes this section —
- (a) the company commits an offence and is liable on conviction to the penalty set out in section 377(2); and
  - (b) every director or company secretary of the company commits an offence and is liable on conviction to the penalty set out in section 378(2).

### **343 Overseas companies to register under this Act.**

- (1) An overseas company that, on or after the commencement of this Act, commences to carry on business in Tonga shall within 10 working days of commencing to carry on business apply for registration under this Part in accordance with section 345.
- (2) An overseas company that, immediately before the commencement of this Act, was carrying on business in Tonga and on the commencement of this Act, continues to carry on business in Tonga, shall within 10 working days of the commencement of this Act apply for registration under this Part in accordance with section 345.
- (3) An overseas company registered under Part V of the Companies Act of 1912 immediately before the date of commencement of this Act is, on and from that date, deemed to be registered under this Part instead of under Part V of the Companies Act (Cap. 27).
- (4) An overseas company that is deemed to be registered under this Part shall, within 20 working days of the commencement of this Act, deliver to the Registrar for registration, a notice in the prescribed form stating the full address of the principal place of business in Tonga of the overseas company.
- (5) An overseas company that changes its name shall within 10 working days of the change of name send or deliver to the Registrar a notice in the prescribed form of the change of name accompanied by the notice reserving the name.
- (6) If an overseas company fails to comply with this section —
  - (a) the overseas company commits an offence and is liable on conviction to the penalty set out in section 377(2); and
  - (b) every director or company secretary of the overseas company commits an offence and is liable on conviction to the penalty set out in section 378(2).

**344 Validity of transactions not affected.**

A failure by an overseas company to comply with section 342 or section 343 does not affect the validity or enforceability of any transaction entered into by the overseas company.

**345 Application for registration.**

- (1) An application for registration of an overseas company under this Part shall be delivered to the Registrar and shall —
  - (a) be in the prescribed form;
  - (b) be signed by or on behalf of the overseas company.
- (2) Without limiting subsection (1), the application must —
  - (a) state the name of the overseas company;
  - (b) state the full names and residential addresses of the directors and company secretaries of the overseas company at the date of the application;
  - (c) state the full address of the place of business in Tonga of the overseas company or, if the overseas company has more than one place of business in Tonga, the full address of the principal place of business in Tonga of the overseas company;
  - (d) have attached evidence of incorporation of the overseas company and a copy of the instrument constituting or defining the constitution of the company, and, if not in English, a translation of such documents certified in accordance with regulations, made under this Act;
  - (e) have attached the notice of reservation of the name; and
  - (f) state the full name and address of one or more persons resident or incorporated in Tonga who are authorised to accept service in Tonga of documents on behalf of the overseas company.

**346 Registration of overseas company.**

- (1) Where the Registrar receives a properly completed application for registration under this Part of an overseas company, the Registrar must forthwith register the application on the overseas register.
- (2) Where an overseas company is deemed to be registered under this Part by virtue of section 343(3), the Registrar shall, forthwith after the commencement of this Act, transfer the registration of the overseas company to the overseas register.

- (3) Where the Registrar receives a notice of a change of name of an overseas company in accordance with section 343(5), the Registrar shall register the change of name on the overseas register.

### **347 Use of name by overseas company.**

- (1) Every overseas company that carries on business in Tonga shall ensure that its full name and the name of the country where it was incorporated are clearly stated in —
  - (a) communications sent by, or on behalf of the company; and
  - (b) documents issued or signed by, or on behalf of, the company that evidence or create a legal obligation of the company.
- (2) For the purposes of subsection (1), a generally recognised abbreviation of a word or words may be used in the name of an overseas company if it is not misleading.

### **348 Alteration of constitution.**

- (1) An overseas company that carries on business in Tonga shall ensure that, within 20 working days of the change or alteration, notice in the prescribed form is given to the Registrar of —
  - (a) an alteration to the instrument constituting or defining the constitution of the overseas company;
  - (b) a change in the directors or company secretaries of the overseas company; or
  - (c) a change in the persons authorised to accept service in Tonga of documents on behalf of the overseas company.
- (2) If an overseas company fails to comply with subsection (1) —
  - (a) the overseas company commits an offence and is liable on conviction to the penalty set out in section 377(2); and
  - (b) every director or company secretary of the overseas company commits an offence and is liable on conviction to the penalty set out in section 378(2).

### **349 Annual return of overseas company.**

- (1) Every overseas company that carries on business in Tonga shall ensure that the Registrar receives each year, during the month allocated to the overseas company for the purposes of this section, an annual return in the prescribed form confirming that the information on the overseas register



in respect of an overseas company referred to in the return is correct at the date of the return.

- (2) The annual return shall be dated within the month during which the return is required to be received by the Registrar.
- (3) On registration of an overseas company under this Part, the Registrar shall allocate a month to the company for the purposes of this section.
- (4) The Registrar may, by written notice to an overseas company, alter the month allocated to the company under subsection (3).
- (5) Notwithstanding subsection (1), an overseas company, not being an overseas company that is deemed to be registered under this Part, need not make an annual return in the calendar year of its registration under this Part.
- (6) If an overseas company fails to comply with subsection (1) or subsection (2) —
  - (a) the company commits an offence and is liable on conviction to the penalty set out in section 377(2); and
  - (b) every director or company secretary of the overseas company commits an offence and is liable on conviction to the penalty set out in section 378(2).

### **350 Overseas company ceasing to carry on business in Tonga.**

- (1) An overseas company registered under this Part that intends to cease carrying on business in Tonga shall —
  - (a) give public notice of that intention; and
  - (b) not earlier than three months after giving notice in accordance with paragraph (1), giving notice to the Registrar in the prescribed form stating the date on which it will cease to carry on business in Tonga.
- (2) The Registrar shall remove an overseas company from the overseas register forthwith after receipt of a notice given in accordance with subsection (1)(b) or by a liquidator in accordance with the provisions of the Eighth Schedule.

### **351 Liquidation of assets in Tonga.**

- (1) An application may be made to the Court for the liquidation of the assets in Tonga of an overseas company in accordance with Part XVI, subject to the modifications and exclusions set out in the Eighth Schedule.

- (2) An application may be made under subsection (1) whether or not the overseas company —
- (a) is registered under this Part;
  - (b) has given public notice of an intention to cease carrying on business in Tonga in accordance with section 350(1)(a);
  - (c) has given notice to the Registrar of the date on which it will cease to carry on business in Tonga in accordance with section 350(1)(b); or
  - (d) has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of any other country.

### **352 Attorneys of overseas companies.**

- (1) Section 52 of the Evidence Act (Cap. 15) applies to a power of attorney executed by an overseas company registered under this Part to the same extent as if the company were a natural person.
- (2) A declaration endorsed on or annexed to an instrument appointing, or appearing to appoint, an attorney of an overseas company, made or appearing to be made by one of the directors or company secretaries before a foreign Notary Public within the meaning of section 2 of the Notaries Public Act (Cap. 23) to the effect that —
- (a) the company is incorporated under the name stated in the instrument in accordance with the law of the country in which it is so incorporated, the name of which is stated in the declaration;
  - (b) the instrument has been executed and the powers appearing to be conferred on the attorney are authorised to be conferred under the constitution of the company or under the Act or instrument under which the company is incorporated or by any other instrument constituting or defining the constitution of the company; and
  - (c) the person making the declaration is a director or company secretary of the company, —
- shall be conclusive evidence of those facts.

## PART XIX - TRANSFER OF REGISTRATION

### REGISTRATION OF OVERSEAS COMPANIES AS COMPANIES UNDER THIS ACT

#### **353 Overseas companies may be registered as companies under Act.**

Subject to this Part, an overseas company may be registered as a company under this Act.

#### **354 Application for registration.**

- (1) An application by an overseas company to register as a company under this Act shall be in the prescribed form and shall be accompanied by —
  - (a) a certified copy of its certificate of incorporation or other similar document that evidences its incorporation;
  - (b) a certified copy of the documents defining its constitution;
  - (c) evidence acceptable to the Registrar that the company is not prevented from being registered as a company under this Act by either section 355 or section 356;
  - (d) the documents and information that are required to register a company under Part II; and
  - (e) any other documents and information the Registrar may require.
- (2) The Registrar may direct that a document that has been delivered to the Registrar or registered under Part XVIII need not accompany the application.

#### **355 Overseas companies shall be authorised to register.**

An overseas company shall not be registered as a company under this Act unless —

- (a) the company is authorised to transfer its incorporation under the law of the country in which it is incorporated;
- (b) the company has complied with the requirements of that law in relation to the transfer of its incorporation; and
- (c) if that law does not require its shareholders, or a specified proportion of them, to consent to the transfer of its incorporation, the transfer has been consented to by not less than 75 percent of its shareholders entitled to vote and voting in person or by proxy at a meeting of which not less than 21 days notice is given specifying the intention to transfer the company's incorporation.

**356 Overseas companies that cannot be registered.**

- (1) An overseas company shall not be registered as a company under this Act if —
  - (a) the company is in liquidation;
  - (b) a receiver or manager has been appointed, whether by a court or not, in relation to the property of the company;
  - (c) the company has entered into a compromise or arrangement with a creditor that is in force; or
  - (d) an application has been made to a court, whether in Tonga or in another country —
    - (i) to put the company into liquidation or wind it up; or
    - (ii) for the approval of a compromise or arrangement between the company and a creditor, —  
and has not been dealt with.
- (2) An overseas company shall not be registered as a company under this Act unless the overseas company would, immediately after becoming registered under this Act, satisfy the solvency test.

**357 Registration.**

- (1) Forthwith on receiving a properly completed application for registration of an overseas company as a company under this Act, the Registrar shall —
  - (a) enter on the overseas register the particulars of the company required under section 367; and
  - (b) issue a certificate of registration in the prescribed form
- (2) A certificate of registration of a company issued under this section is conclusive evidence that —
  - (a) all the requirements of this Act as to registration have been complied with; and
  - (b) on and from the date of registration stated in the certificate, the company is registered under this Act.

**358 Effect of registration.**

- (1) The registration of an overseas company under this Act does not —
  - (a) create a new legal entity;
  - (b) prejudice or affect the identity of the body corporate constituted by the company or its continuity as a legal entity;

- (c) affect the property, rights or obligations of the company; or
  - (d) affect proceedings by or against the company.
- (2) Proceedings that could have been commenced or continued by or against the overseas company before registration under this Act may be commenced or continued by or against the company after registration.

## TRANSFER OF REGISTRATION OF COMPANIES TO OTHER JURISDICTIONS

### **359 Companies may transfer incorporation.**

Subject to this Part, a company may be removed from the Tongan register in connection with becoming incorporated under the law in force in, or in any part of, another country.

### **360 Application to transfer incorporation.**

An application by a company for removal from the Tongan register in connection with becoming incorporated under the law in force in, or in any part of, another country must be in the prescribed form and shall be accompanied by —

- (a) evidence acceptable to the Registrar that section 361 and 362 have been complied with;
- (b) evidence acceptable to the Registrar that the removal of the company from the Tongan register is not prevented by section 363;
- (c) written notice from the Commissioner of Inland Revenue that the Commissioner has no objection to the company being removed from the Tongan register;
- (d) evidence acceptable to the Registrar that the company is incorporated under that law; and
- (e) any other documents or information the Registrar may require.

### **361 Approval of shareholders**

A company shall not apply to be removed from the Tonga register under section 360 unless the making of application has been approved by special resolution.

### **362 Company to give public notice.**

A company shall not apply to be removed from the Tongan register under section 360 unless —

- (a) the company gives public notice —
  - (i) stating that it intends, after the date specified in the notice, which shall be not less than 20 working days after the date of the notice, to apply under section 360 for the company to be removed from the Tongan register in connection with the company becoming incorporated under the law in force in, or in any part of, another country; and
  - (ii) specifying the country or part of the country under the law of which it is proposed that the company will become incorporated; and
- (b) The application is made after the date specified in the notice.

### **363 Companies that cannot transfer Incorporation.**

- (1) A company shall not be removed from the Tongan register under section 364 if —
  - (a) the company is in liquidation or an application has been made to the Court under section 250 to put the company into liquidation;
  - (b) a receiver or manager has been appointed, whether by a court or not, in relation to the property of the company;
  - (c) the company has entered into a compromise with creditors or a class of creditors under Part XIV or a compromise has been proposed under that Part in relation to the company; or
  - (d) a compromise has been approved by the Court under Part XV in relation to the company or an application has been made to the Court to approve a compromise under that Part.
- (2) A company shall not be removed from the Tongan register under section 364 unless the company would, immediately before it is removed from the register, satisfy the solvency test.

### **364 Removal from register.**

- (1) Forthwith on receiving a properly completed application under section 360 to remove a company from the Tongan register, the Registrar shall remove, the company from the register.
- (2) A company is removed from the Tongan register when a notice signed by the Registrar stating that the company is removed from the Tongan register is registered under this Act.

**365 Effect of removal from register.**

- (1) The removal of a company from the Tongan register under section 364 does not —
  - (a) prejudice or affect the identity of the body corporate that was constituted under this Act or its continuity as a legal person;
  - (b) affect the property, rights or obligations of that body corporate; or
  - (c) affect proceedings by or against that body corporate.
- (2) Proceedings that could have been commenced or continued by or against a company before the company was removed from the Tongan register under section 364 may be commenced or continued by or against the body corporate that continues in existence after the removal of the company from the register.

**PART XX - REGISTRAR OF COMPANIES****366 Registrar, Deputy and Assistant Registrars of Companies.**

- (1) There shall be —
  - (a) a Registrar of Companies; and
  - (b) as many Deputy and Assistant Registrars or Companies as may be necessary for the purposes of this Act.
- (2) Subject to the control of the Registrar, a Deputy Registrar has and may exercise the powers, duties and functions of the Registrar under this Act.
- (3) Subject to the control of the Registrar and of a Deputy Registrar, an Assistant Registrar has and may exercise the powers, duties and functions of the Registrar.
- (4) The fact that a Deputy or Assistant Registrar exercises those powers, duties or functions is conclusive evidence of the authority to do so.
- (5) The person holding office as Registrar of Companies under the Companies Act 1912 (Cap. 27) and every person holding office as a Deputy or Assistant Registrar of Companies under that Act, immediately before the commencement of this Act, shall be deemed to have been appointed as Registrar of Companies or as a Deputy or Assistant Registrar of Companies, as the case may be, in accordance with this section.

**367 Registers.**

- (1) The Registrar shall ensure that —

- (a) a register of companies registered under Part II or reregistered under this Act in accordance with the Tenth Schedule, as the case may be; and
- (b) a register of overseas companies registered or deemed to be registered under Parts XVIII, and XIX —

is kept in Tonga.

- (2) The Tongan register may be divided into different parts which shall be kept in such places in Tonga as the Registrar determines from time to time.
- (3) The overseas register shall be kept at such place in Tonga as the Registrar determines from time to time.
- (4) The Tongan register and the overseas register may be kept in such manner as the Registrar thinks fit including, either wholly or partly, by means of a device or facility —
  - (a) that records or stores information electronically or by other means; and
  - (b) that permits the information so recorded or stored to be readily inspected or reproduced in usable form.

### **368 Registration of documents.**

- (1) On receipt of a document for registration under this Act, the Registrar shall —
  - (a) subject to subsection (2), register the document in the Tongan register or the overseas register, as the case may be; and
  - (b) give written advice of the registration to the person from whom the document was received.
- (2) If a document received by the Registrar for registration under this Act —
  - (a) is not in the prescribed form, if any;
  - (b) does not comply with this Act or regulations made under this Act;
  - (c) is not printed or typewritten;
  - (d) where the Tongan register or the overseas register is kept wholly or partly by means of a device or facility referred to in section 367(4), is not in a form that enables particulars to be entered directly by electronic or other means in the device or facility;
  - (e) has not been properly completed; or
  - (f) contains material that is not clearly legible —



the Registrar may refuse to register the document, and in that event, shall request either —

- (g) that the document be appropriately amended or completed and submitted for registration again; or
  - (h) that a fresh document be submitted in its place.
- (3) For the purposes of this Act, a document is registered when —
- (a) the document itself is constituted part of the Tongan register or the overseas register; or
  - (b) particulars of the document are entered in any device or facility referred to in section 367(4).
- (4) Neither registration nor refusal of registration of a document by the Registrar affects, or creates a presumption as to, the validity or invalidity of the document or the correctness or otherwise of the information contained in it.

### **369 Inspection and evidence of registers.**

- (1) A person may, on payment of any fees that are prescribed, inspect —
- (a) any document that constitutes part of the Tongan register or the overseas register;
  - (b) particulars of any registered document that have been entered on any device or facility referred to in section 367(4); and
  - (c) any registered document particulars of which have been entered in any such device or facility —

during the hours when the office of the Registrar is open to the public for the transaction of business on a working day.

- (2) A person may, on payment of any fees that are prescribed, require the Registrar to give or certify —
- (a) a certificate of incorporation of a company;
  - (b) a certificate of reregistration of a company under this Act in accordance with the Tenth Schedule;
  - (c) a copy of, or extract from, a document that constitutes part of the Tongan register or the overseas register;
  - (d) particulars of any registered document that have been entered in any device or facility referred to in section 367(4); or
  - (e) a copy of, or extract from, a registered document particulars of which have been entered in any such device or facility.
- (3) A process to compel the production of —

- (a) a registered document kept by the Registrar; or
- (b) evidence of the entry of particulars of a registered document in any device or facility referred to in section 367(4), —

shall not issue from the Court without a statement attached that it is issued with the leave of the Court.

- (4) A copy of, or extract from a registered document —
  - (a) that constitutes part of the Tongan register or the overseas register; or
  - (b) particulars of which have been entered in any device or facility referred to in section 367(4), —

certified to be a true copy or extract by the Registrar shall be in evidence in legal proceedings to the same extent as the original document.

- (5) An extract certified by the Registrar as containing particulars of a registered document that have been entered in any device or facility referred to in section 367(4) shall be, in the absence of proof to the contrary, conclusive evidence of the entry of those particulars.

### **370 Notice by Registrar.**

- (1) A notice that the Registrar is required by this Act to give to a natural person, shall be given in writing and in a manner that the Registrar considers appropriate in the circumstances.
- (2) Without limiting subsection (1), the Registrar may give notice in writing to a natural person by —
  - (a) having it delivered to that person;
  - (b) posting it, or delivering it by courier, to that person at his last known address;
  - (c) sending it by facsimile machine to a telephone number used by that person for transmission of documents by facsimile; or
  - (d) having it published in a newspaper or other publication in circulation in the area where that person lives or is believed to live.
- (3) Section 396 shall apply, with such modifications as may be necessary, in respect of notices by the Registrar.
- (4) A document that —
  - (a) appears to be a copy of a notice given by the Registrar; and
  - (b) is certified by the Registrar, or by a person authorised by the Registrar, as having been derived from a device or facility that records or stores information electronically or by other means, —

should be admissible in legal proceedings as a copy of the notice.

### **371 Registrar's powers of inspection.**

- (1) The Registrar or a person authorised by the Registrar may, —
  - (a) For the purpose of —
    - (i) ascertaining whether a company, or a director or company secretary of a company, is complying or has complied with this Act;
    - (ii) ascertaining whether the Registrar should exercise any of his rights or powers under this Act; or
    - (iii) detecting offences against this Act; and
  - (b) if, in the Registrar's opinion, it is in the public interest —

do any of the following —

    - (i) require a person, including a person carrying on the business of banking, to produce for inspection relevant documents within that person's possession or control;
    - (ii) inspect and take copies of relevant documents;
    - (iii) take possession of relevant documents and remove them from the place where they are kept and retain them for a reasonable time for the purpose of taking copies; or
    - (iv) retain relevant documents for a period which is, in all the circumstances, reasonable if there are reasonable grounds for believing that they are evidence of the commission of an offence.
- (2) Nothing in this section limits or affects the powers of any public officer under any other enactment.
- (3) The Registrar or a person authorised by the Registrar shall consult with the National Reserve Bank of Tonga before exercising any of the powers conferred by subsection (1) if the purpose of exercising the power relates to a company that is a financial institution as defined in section 2 of the National Reserve Bank of Tonga Act (Cap. 102).
- (4) A person shall not obstruct or hinder the Registrar or a person authorised by the Registrar while exercising a power conferred by subsection (1).
- (5) Any person who —
  - (a) fails to comply with a requirement under subsection (1)(b)(i); or
  - (b) acts in contravention of subsection (4), —

commits an offence and is liable on conviction to the penalty set out in section 377(2).

(6) In this section —

“**company**” includes an overseas company;

“**relevant document**”, in relation to a company, means a document that contains information relating to —

- (a) the company; or
- (b) money or other property that is, or has been, managed, supervised, controlled or held in trust by or for the company.

### **372 Disclosure of information and reports.**

(1) A person authorised by the Registrar for the purpose of section 371 who has —

(a) obtained a document of information in the course of making an inspection under that section; or

(b) prepared a report in relation to an inspection under that section —

shall, if so directed by the Registrar, give the document, information or report to —

- (c) the Minister;
- (d) the Secretary for Labour, Commerce and Industries;
- (e) any person authorised by the Registrar to receive the document, information or report for the purposes of this Act or in connection with the exercise of powers conferred by this Act;
- (f) a liquidator for the purposes of the liquidation of a company; or
- (g) any person authorised by the Registrar to receive the document, information or report for the purposes of detecting offences against any Act.

(2) A person authorised by the Registrar for the purposes of section 371 who has —

(a) obtained a document or information in the course of making an inspection under that section; or

(b) prepared a report in relation to an inspection under that section, —

shall give the document, information or report to the Registrar, Deputy Registrar or an Assistant Registrar when directed to do so by any person holding any of those offices.

(3) A person authorised by the Registrar for the purposes of section 371 who has —

- (a) obtained a document or information in the course of making an inspection under that section; or
  - (b) prepared a report in relation to an inspection under that section — shall not disclose that document, information or report except —
  - (c) in accordance with subsection (1) or subsection (2);
  - (d) subject to the approval of the Registrar, and the consent of the person to whom it relates;
  - (e) subject to the approval of the Registrar, for the purposes of this Act or in connection with the exercise of powers conferred by this Act;
  - (f) to the extent that the information, or information contained in the document or report, is available under any Act or in a public document;
  - (g) subject to the approval of the Registrar, to a liquidator for the purposes of the liquidation of a company or the assets of an overseas company;
  - (h) in the course of criminal proceedings; or
  - (i) subject to the approval of the Registrar, for the purpose of detecting offences against any Act.
- (4) A person who fails to comply with this section commits an offence and is liable on conviction to the penalty set out in section 377(2).

### **373 Inspector's report admissible in liquidation proceedings.**

Notwithstanding any other Act or rule of law, a report prepared by a person in relation to an inspection carried out by him under section 371 is admissible in evidence at the hearing of an application to the Court to appoint a liquidator.

### **374 Appeals from Registrar's decisions.**

- (1) A person who is aggrieved by any act or decision of the Registrar under this Act may appeal to the Court within 15 working days after the date of notification of the act or decision, or within such further time as the Court may allow.
- (2) On hearing the appeal, the Court may approve the Registrar's act or decision or may give such directions or make such determination in the matter as the Court thinks fit.

**375 Exercise of powers under section 371 not affected by appeal.**

- (1) Subject to subsection (2), but notwithstanding any provision of any other Act or any rule of law, where a person appeals or applies to the Court in relation to an act or decision of the Registrar or a person authorised by the Registrar under section 371 —
  - (a) the Registrar, or that person, shall continue to exercise the powers under that section as if no such appeal or application had been made; and
  - (b) no person is excused from fulfilling an obligation under that section by reason of that appeal or application until a decision on the appeal or application is given.
- (2) If the appeal or application is allowed or granted, as the case may be —
  - (a) the Registrar shall ensure that, forthwith after the decision of the Court is given, any copy of a document taken or retained by the Registrar, or by a person authorised by the Registrar in respect of that act or decision, is destroyed; and
  - (b) no information acquired under that section in relation to that act or decision is admissible in evidence in any proceedings unless the Court hearing the proceedings in which it is sought to adduce the evidence is satisfied it was obtained fairly.

**376 Fees.**

- (1) His Majesty may by Order in Council, make regulations prescribing —
  - (a) fees or other amounts payable to the Registrar in respect of the performance of functions and the exercise of powers under this Act;
  - (b) fees or other amounts payable to the Registrar in respect of failure to deliver a document to the Registrar within the time prescribed by this Act; and
  - (c) fees or other amounts payable to the Registrar in respect of any other matter under this Act.
- (2) The Registrar may refuse to perform a function or exercise a power until the prescribed fee or amount is paid.
- (3) Any Order in Council made under subsection (1), may authorise the Registrar to waive, in whole or in part and on such conditions as may be prescribed, payment of any amount referred to in paragraph (b) of that subsection.
- (4) Any fee or amount payable to the Registrar is recoverable by the Registrar in any court of competent jurisdiction as a debt due to the Crown.

## PART XXI - OFFENCES AND PENALTIES

### 377 Penalty for failure to comply with Act.

- (1) A person convicted of an offence against any of the following sections is liable to a fine not exceeding \$200 —
- (a) section 29(5)(a) (which relates to the use of a company name);
  - (b) section 51(7) (which relates to the consideration for which shares are issued);
  - (c) section 53(5) (which relates to the consideration for which convertible securities, options and shares are issued);
  - (d) section 56(5) (which relates to distributions to shareholders);
  - (e) section 64(7) (which relates to offers to shareholders to acquire shares);
  - (f) section 65(8) (which relates to the procedure for making a certain type of offer to shareholders);
  - (g) section 65(9)(a) (which relates to the procedure for making a certain type of offer to shareholders);
  - (h) section 70(6) (which relates to the redemption of shares at the option of a company);
  - (i) section 71(4) (which relates to the requirement for a company to satisfy the solvency test on the redemption of shares);
  - (j) section 72(8) (which relates to special redemptions of shares);
  - (k) section 72(9)(a) (which relates to special redemptions of shares);
  - (l) section 77(7) (which relates to offers of financial assistance to acquire shares);
  - (m) section 78(4) (which relates to the requirement to satisfy the solvency test);
  - (n) section 79(8) (which relates to offers of financial assistance in certain cases);
  - (o) section 79(9)(a) (which relates to offers of financial assistance in certain cases);
  - (p) section 81(2)(a) (which relates to the limit of financial assistance);
  - (q) section 84(5)(a) (which relates to statements of shareholders' rights);
  - (r) section 85(6)(a) (which relates to the transfer of shares);
  - (s) section 95(5)(a) (which relates to share certificates);

- (t) section 108(6) (which relates to the requirement to satisfy the solvency test);
  - (u) section 122(7)(a) (which relates to resolutions in lieu of meetings);
  - (v) section 227(2)(a) (which relates to the obligation to provide copies of documents);
  - (w) section 230(6) (which relates to approval of an amalgamation proposal);
  - (x) section 231(6) (which relates to short term amalgamations);
  - (y) section 252(10) (which relates to the duty of a liquidator to summon meeting of creditors).
- (2) A person convicted of an offence against any of the following sections is liable to a fine not exceeding \$500 —
- (a) section 38(3) (which relates to an alteration to the constitution of a company by the Court);
  - (b) section 87(4)(a) (which relates to the obligation to keep a share register);
  - (c) section 88(5)(a) (which relates to the place where the share register must be kept);
  - (d) section 90(2) (which relates to the duties of directors and company secretaries to supervise the share register);
  - (e) section 139(4) (which relates to the disclosure of directors' and company secretaries' interests);
  - (f) section 188(8) (which relates to disclosure and use of information obtained in the course of an investigation);
  - (g) section 198(5) (which relates to company records);
  - (h) section 204(3)(a) (which relates to the place where accounting records must be kept);
  - (i) section 205(7)(a) (which relates to the appointment of an auditor);
  - (j) section 215(4) (which relates to access to information by auditors);
  - (k) section 224(2)(a) (which relates to public inspection of company records);
  - (l) section 225(2)(a) (which relates to inspection of company records by shareholders);
  - (m) section 259(7) (which relates to the termination of the liquidation of a company);
  - (n) section 289(3) (which relates to the qualifications of liquidators);
  - (o) section 342(5)(a) (which relates to name reservation by overseas companies);



- (p) section 343(6)(a) (which relates to the registration of overseas companies);
  - (q) section 348(2)(a) (which relates to alteration to the constitution of an overseas company);
  - (r) section 349(6)(a) (which relates to the filing of annual returns by overseas companies);
  - (s) section 371(5) (which relates to the Registrar's powers of inspection);
  - (t) section 372(4) (which relates to the disclosure of information and reports obtained during an investigation);
  - (u) section 385 (which relates to improper use of the word "Limited").
- (3) A person convicted of an offence against any of the following sections is liable to a fine not exceeding \$1000 or to imprisonment for a term not exceeding 2 years or to both —
- (a) section 282(2) (which relates to certain prohibited conduct); and
  - (b) section 283(2) (which relates to the duty to identify and deliver property).
- (4) A person convicted of an offence against any of the following sections is liable to imprisonment for a term not exceeding 5 years or to a fine not exceeding \$2,000 or to both —
- (a) section 313(6) (which relates to false claims by unsecured creditors in liquidations);
  - (b) section 314(11) (which relates to false claims by secured creditors in liquidations);
  - (c) section 381 (which relates to false statements);
  - (d) section 382 (which relates to the fraudulent use or destruction of property);
  - (e) section 383 (which relates to falsifying records);
  - (f) section 384 (which relates to carrying on business fraudulently.);
  - (g) section 386(4) (which relates to persons prohibited from managing companies);
  - (h) section 387(6) (which relates to acting as a director or company secretary of a company while prohibited by the Court);
  - (i) section 389(9) (which relates to acting as a director or company secretary of a company or taking part in the management of a company while prohibited by the Registrar).

**378 Penalties that may be imposed on directors or company secretaries in cases of failure by board or company to comply with Act.**

- (1) A director or company secretary of a company who is convicted of an offence against any of the following sections is liable to a fine not exceeding \$200 —
- (a) section 29(5)(b) (which relates to the use of a company name);
  - (b) section 65(9)(b) (which relates to the procedure for making a certain type of offer to shareholders);
  - (c) section 72(9)(b) (which relates to special redemptions of shares);
  - (d) section 79(9)(b) (which relates to offers of financial assistance in certain cases);
  - (e) section 81(2)(b) (which relates to the limit of financial assistance);
  - (f) section 84(5)(b) (which relates to statements of shareholders' rights);
  - (g) section 85(6)(b) (which relates, to the transfer of shares);
  - (h) section 95(5)(b) (which relates to share certificates);
  - (i) section 107(8). (which relates to unanimous assent to certain types of action);
  - (j) section 122(7)(b) (which relates to resolutions in lieu of meetings);
  - (k) section 197(6) (which relates to a requirement to change a company's registered office);
  - (l) section 227(2)(b) (which relates to the obligation to provide copies of documents).
- (2) A director or company secretary of a company who is convicted of an offence against any of the following sections is liable to a fine not exceeding \$500 —
- (a) section 14(6) (which relates to maintaining adequate liquidity);
  - (b) section 36(3) (which relates to the alteration of a constitution);
  - (c) section 37(6) (which relates to a consolidated constitution);
  - (d) section 47(2) (which relates to the obligation of the board to deliver a notice of the issue of shares);
  - (e) section 48(6) (which relates to the issue of shares with the approval of shareholders);
  - (f) section 51 (9) (which relates to the consideration for which shares are issued);
  - (g) section 53(6) (which relates to the consideration for which convertible securities, options and shares are issued);

- (h) section 62(4) (which relates to the acquisition by a company of its own shares);
- (i) section 87(4)(b) (which relates to the obligation to keep a share register);
- (j) section 88(5)(b) (which relates to the place where the share register must be kept);
- (k) section 158(3) (which relates to the obligation to give notice of a change of directors);
- (l) section 170(3) (which relates to the obligation to give notice of a change of company secretary);
- (m) section 185(4)(which relates to alteration to the constitution of a company by the Court);
- (n) section 198(5)(b) (which relates to company records);
- (o) section 199(3) (which relates to the form of company records are kept);
- (p) section 203(4) (which relates to the keeping of accounting records);
- (q) section 204(3)(b) (which relates to the place where accounting records must be kept.);
- (r) section 205(7)(b) (which relates to the appointment of an auditor);
- (s) section 215(3) (which relates to access to information by auditors);
- (t) section 216(2) (which relates to the attendance of auditors at meetings of shareholders);
- (u) section 217(2)(which relates to the obligation to prepare an annual report);
- (v) section 218(3) (which relates to the duty to send an annual report to shareholders);
- (w) section 219(2) (which relates to the duty to send financial statements to shareholders who elect not to receive an annual report);
- (x) section 223(10) (which relates to the obligation to file an annual return);
- (y) section 224(2) (which relates to public inspection of company records);
- (z) section 225(2)(b) (which relates to inspection of company records by shareholders);
- (aa) section 245(5) (which relates to the approval of arrangements, amalgamations and compromises by the Court);

- (bb) section 246(3) (which relates to the power of the Court to make additional orders in connection with the approval of an arrangement or amalgamation or compromise);
- (cc) section 342(5)(b) (which relates to name reservation by overseas companies);
- (dd) section 343(6)(b) (which relates to the registration of overseas companies);
- (ee) section 348(2)(B) (which relates to alteration to the constitution of an overseas company);
- (ff) section 349(6)(b) (which relates to the filing of annual returns by overseas companies).

### 379 Proceedings for offences.

- (1) The offences specified in sections 377(1) to 377(3) and section 378 are triable summarily under Part II of The Magistrates' Courts Act (Cap. 11).
- (2) The offences specified in section 377(4) are triable on indictment in the Supreme Court.
- (3) An information for an offence referred to in subsection (1) may not be laid more than 5 years after the date of the offence.
- (4) Nothing in section 381 to 384 affects the liability of any person under any other Act, but no person shall be convicted of an offence against any of those sections and a provision of any other Act in respect of the same conduct.

### 380 Defences

- (1) It is a defence to a director or company secretary charged with an offence in relation to a duty imposed on the board of a company if the director or company secretary proves that —
  - (a) the board took all reasonable and proper steps to ensure that the requirements of this Act would be complied with;
  - (b) he took all reasonable and proper steps to ensure that the board complied with the requirements of this Act; or
  - (c) in the circumstances he could not reasonably have been expected to take steps to ensure that the board complied with the requirements of this Act.
- (2) It is a defence to a director or company secretary charged with an offence in relation to a duty imposed on the company if the director or company secretary proves that —

- (a) the company took all reasonable and proper steps to ensure that the requirements of this Act would be complied with;
- (b) he took all reasonable steps to ensure that the company complied with the requirements of this Act; or
- (c) in the circumstances he could not reasonably have been expected to take step to ensure that the company complied with the requirements of this Act.

### **381 False statements.**

- (1) Every person who, with respect to a document required by or for the purposes of this Act, —
  - (a) makes, or authorises the making of, a statement in it that is false or misleading in a material particular knowing it to be false or misleading; or
  - (b) omits or authorises the omission of, any matter knowing the omission makes the document false or misleading in a material particular, —commits an offence and is liable on conviction to the penalties set out in section 377(4).
- (2) Every director, company secretary or employee of a company who makes or furnishes, or authorises or permits the making or furnishing of, a statement or report relating to the affairs of the company that is false or misleading in a material particular, to —
  - (a) a director, company secretary, employee, auditor, shareholder, debenture holder or trustee for debenture holders of the company;
  - (b) a liquidator, liquidation committee or receiver or manager of property of the company; or
  - (c) if the company is a subsidiary, a director, company secretary, employee or auditor of its holding company, —knowing it to be false or misleading commits an offence, and is liable on conviction to the penalty set out in section 377(4).
- (3) For the purposes of this section, a person who voted in favour of the making of a statement at a meeting is deemed to have authorised the making of the statement.

### **382 Fraudulent use or destruction of property.**

Every director, company secretary, employee or shareholder of a company who —

- (a) fraudulently takes or applies property of the company for his own use or benefit or for a use or purpose other than the use or purpose of the company; or
  - (b) fraudulently conceals or destroys property of the company, —
- commits an offence and is liable on conviction to the penalty set out in section 377(4).

### **383 Falsification of records.**

- (1) Every director, company secretary, employee or shareholder of a company who, with intent to defraud or deceive a person —
  - (a) destroys, parts with, mutilates, alters or falsifies, or is a party to the destruction removal, mutilation, alteration or falsification of any register, accounting record, book, paper or other document belonging or relating to the company; or
  - (b) makes, or is a party to the making of, a false entry in any register, accounting records, book, paper or other document belonging or relating to the company —

commits an offence and is liable, on conviction to the penalty set out in section 377(4).

- (2) Every person who, in relation to a mechanical, electronic, or other device used in connection with the keeping of preparation of any register, accounting or other record, index, book, paper or other document for the purposes of a company or this Act —
  - (a) records or stores in the device, or makes available to a person from the device to a person, matter that he knows to be false or misleading in a material particular; or
  - (b) with intent to falsify or render misleading any such register, accounting or other record, index, book, paper or other document, destroys, removes or falsifies matter recorded or stored in the device, or fails or omits to record or store any matter in the device, —

commits an offence and is liable on conviction to the penalty set out in section 377(4).

### **384 Carrying on business fraudulently.**

- (1) Every person who is knowingly a party to a company carrying on business with intent to defraud creditors of the company or any other person or for any fraudulent purpose commits an offence and is liable on conviction to the penalty set out in section 377(4).

- (2) Every director or company secretary of a company who —
  - (a) by false pretences or other fraud induces a person to give credit to the company; or
  - (b) with intent to defraud creditors of the company —
    - (i) gives, transfers, or causes a charge to be given on, property of the company to any person;
    - (ii) causes property to be given or transferred to any person;
    - (iii) causes or is a party to execution being levied against property of the company.

commits an offence and is liable on conviction to the penalty set out in section 377(4).

### **385 Improper use of “Limited”.**

Any person who, not being incorporated with limited liability, whether alone or with other persons, carries on business under a name or title of which “Limited” or “Limiteti”, or a contraction or imitation of either word is the last word, commits an offence and is liable on conviction to the penalty set out in section 377(2).

### **386 Persons prohibited from managing companies.**

- (1) Where a person —
  - (a) has been convicted on indictment of any offence in connection with the promotion, formation or management of a company; or
  - (b) has been convicted of an offence under any of sections 381 to 384 or of any crime involving dishonesty, —

that person shall not, during the period of five years after the conviction judgment, be a director, promoter or company secretary of, or in any way, whether directly or indirectly, be concerned or take part in the management of, a company unless that person first obtains the leave of the Court which may be given on such terms and conditions as the Court thinks fit.

- (2) A person intending to apply for the leave of the Court under this section shall give the Registrar not less than 10 days notice of his intention to apply.
- (3) The Registrar, and such other persons as the Court thinks fit, may attend and be heard at the hearing of any application under this section;

- (4) A person who acts in contravention of this section or of any order made under this section commits an offence and is liable on conviction to the penalty set out in section 377 (4).
- (5) In this section, the term “company” includes an overseas company that carries on business in Tonga.

### **387 Court may disqualify directors and company secretaries.**

- (1) Where a person —
  - (a) has been convicted on indictment of an offence in connection with the promotion, formation or management of a company;
  - (b) has been convicted of a crime involving dishonesty;
  - (c) has committed an offence for which the person is liable (whether convicted or not) under this Part;
  - (d) has, while a director or company secretary of a company and whether convicted or not —
    - (i) persistently failed to comply with this Act or the Companies Act of 1912 (Cap. 27) or, where the company has failed to so comply, persistently failed to take all reasonable steps to obtain such compliance;
    - (ii) been guilty of fraud in relation to the company or of a breach of duty to the company or a shareholder; or
    - (iii) acted in a reckless or incompetent manner in the performance of his duties as director or company secretary; or
  - (e) has become of unsound mind, —

the Court may make an order that the person shall not, without the leave of the Court, be a director, promoter or company secretary of, or in any way, whether directly or indirectly, be concerned or take part in the management of, a company for such period not exceeding 10 years as may be specified in the order.
- (2) A person intending to apply for an order under this section shall give not less than 10 days notice of that intention to the person against whom the order is sought, and on the hearing of the application the last-mentioned person may appear and give evidence or call witnesses.
- (3) An application for an order under this section may be made by the Registrar, the Official Liquidator, the liquidator of the company or a person who is, or has been, a shareholder or creditor of the company; and on the hearing of —
  - (a) an application for an order under this section by the Registrar, the Official Liquidator or the liquidator; or



- (b) an application for leave under this section by a person against whom an order has been made on the application of the Registrar, the Official Liquidator or the liquidator, —

the Registrar, Official Liquidator or liquidator shall appear and call the attention of the Court to any matters which seem to him to be relevant, and may give evidence or call witnesses.

- (4) An order may be made under this section even though the person concerned may be criminally liable in respect of the matters on which the order is to be made.
- (5) The Registrar of the Court shall, as soon as practicable after the making of an order under this section, give notice to the Registrar that the order has been made and the Registrar shall give notice in the Gazette of the name of the person against whom the order is made.
- (6) Every person who acts in contravention of an order under this section commits an offence and is liable on conviction to the penalty set out in section 377(4).
- (7) In this section, “company” includes an overseas company.

### **388 Liability for contravening section 386 and 387.**

A person who acts as a director or company secretary of a company in contravention of section 386 or an order made under section 387 is personally liable to. —

- (a) a liquidator of the company for every unpaid debt incurred by the company; and
- (b) a creditor of the company for a debt to that creditor incurred by the company, —

while that person was so acting.

### **389 Registrar may prohibit persons from managing companies.**

- (1) This section applies in relation to a company —
- (a) that has been put into liquidation because of its inability to pay its debts as and when they became due;
- (b) that has ceased to carry on business because of its inability to pay its debts as and when they became due;
- (c) in respect of which execution is returned unsatisfied in whole or in part;
- (d) in respect of the property of which a receiver, or a receiver and manager, has been appointed by the Court or pursuant to the powers

- contained in an instrument, whether or not the appointment has been terminated;
- (e) in respect of which, or in respect of the property of which, a person has been appointed as a receiver and manager, or a judicial manager, or a statutory manager, or as a manager, or to exercise control, under or pursuant to any enactment, whether or not the appointment has been terminated;
  - (f) that has entered into a compromise or arrangement with its creditors.
- (2) This section also applies in relation to a company the liquidation of which has been completed whether or not the company has been removed from the Tongan register.
- (3) The Registrar may, by notice in writing to a person, prohibit that person from being a director, promoter or company secretary of a company, or being concerned in, or taking part, whether directly or indirectly, in the management of, a company during such period not exceeding five years after the date of the notice as is specified in the notice. Every notice shall be published by the Registrar in the Gazette.
- (4) The power conferred by subsection (3) may be exercised in relation to —
- (a) any person who the Registrar is satisfied was, within a period of five years before a notice was given to that person under subsection (5) (whether that period commenced before or after the commencement of this section), a director or company secretary of, or concerned in, or a person who took part in, the management of, a company in relation to which this section applies if the Registrar is also satisfied that the manner in which the affairs of it were managed was wholly or partly responsible for the company being a company in relation to which this section applies; or
  - (b) any person who the Registrar is satisfied was, within a period of 5 years before a notice was given to that person under subsection (5) (whether that period commenced before or after the commencement of this section), a director or company secretary of, or concerned in, or a person who took part in, the management of, two or more companies to which this section applies, unless that person satisfies the Registrar —
    - (i) that the manner in which the affairs of all, or all but one, of those companies were managed was not wholly or partly responsible for them being companies in relation to which this section applies; or
    - (ii) that it would not be just or equitable for the power to be exercised.

- (5) The Registrar shall not exercise the power conferred by subsection (3) unless —
- (a) not less than 10 working days notice of the fact that the Registrar intends to consider the exercise of it is given to the person and the Registrar considers any representations made by the person; and
  - (b) the Minister, after considering the information in the Registrar's possession, any representations made by the person concerned to the Registrar and, if the Minister thinks fit, any representations made by that person to the Minister, authorises the Registrar to exercise the power.
- (6) No person to whom a notice under subsection (3) applies shall be a director, promoter or company secretary of a company, or be concerned or take part whether directly or indirectly in the management of a company during the period specified in the notice.
- (7) Where a person to whom the Registrar has issued a notice under subsection (3) appeals against the issue of the notice under this Act or otherwise seeks judicial review of the notice, the notice remains in full force and effect pending the determination of the appeal or review, as the case may be.
- (8) The Registrar may, by notice in writing to a person to whom a notice under subsection (3) has been given —
- (a) revoke that notice; or
  - (b) exempt that person from the notice in relation to a specified company or companies.
- Every such notice shall be published by the Registrar in the Gazette.
- (9) Every person to whom a notice under subsection (3) is given who fails to comply with the notice commits an offence and is liable on conviction to the penalties set out in section 377(4).
- (10) In this section “company” includes an overseas company that carries on business in Tonga.

### **390 Liability for contravening section 389.**

A person who acts in contravention of a notice under section 389 is personally liable to —

- (a) a liquidator of the company for every unpaid debt incurred by the company; and
- (b) a creditor of the company for a debt to that creditor incurred by the company, —

while that person was so acting.

## PART XXII - MISCELLANEOUS

### 391 Service of documents on companies in legal proceedings.

- (1) A document in any legal proceedings may be served on a company as follows —
  - (a) by delivery to a person named as a director or company secretary of the company on the Tongan register;
  - (b) by delivery to an employee of the company at the company's head office or principal place of business;
  - (c) by leaving it at the company's registered office or address for service;
  - (d) by serving it in accordance with any directions as to service given by the court having jurisdiction in the proceedings, or
  - (e) in accordance with an agreement made with the company.
- (2) The methods of service specified in subsection (1) are the only methods by which a document in legal proceedings may be served on company in Tonga.

### 392 Service of other documents on companies.

A document, other than a document in any legal proceedings, may be served on a company as follows —

- (a) by any of the methods set out in section 391(a), (b), (c) or (e);
- (b) by posting it to the company's registered office or address for service; or
- (c) by sending it by facsimile machine to a telephone number used for the transmission of documents by facsimile at the company's registered office or address for service or its head office or principal place of business.

### 393 Service of documents on overseas companies in legal proceedings.

- (1) A document, in any legal proceedings may be served on an overseas company in Tonga as follows —
  - (a) by delivery to a person named in the overseas register as a director or company secretary of the overseas company and who is resident in Tonga;

- (b) by delivery to a person named in the overseas register as being authorised to accept service in Tonga of documents on behalf of the overseas company;
  - (c) by delivery to an employee of the overseas company at the overseas company's place of business in Tonga or, if the overseas company has more than one place of business in Tonga, at the overseas company's principal place of business in Tonga;
  - (d) by serving it in accordance with any directions as to service given by the court having jurisdiction in the proceedings; or
  - (e) in accordance with an agreement made with the overseas company.
- (2) The methods of service specified in subsection (1) are the only methods by which a document in legal proceedings may be served on an overseas company in Tonga.

### **394 Service of other documents on overseas companies.**

A document, other than a document in any legal proceedings, may be served on an overseas company as follows —

- (a) by any of the methods set out in section 393(1)(a), (b), (c) or (e);
- (b) by posting it to the address of the overseas company's principal place of business in Tonga; or —
- (c) by sending it by facsimile machine to a telephone number used for the transmission of documents by facsimile at the principal place of business in Tonga of the overseas company.

### **395 Service of documents on shareholders and creditors.**

- (1) A notice, statement, report, account or other document to be sent to a shareholder or creditor who is a natural person may be —
  - (a) delivered to that person;
  - (b) posted to that person's address; or
  - (c) sent by facsimile machine to a telephone number used by that person for the transmission of documents by facsimile.
- (2) A notice, statement, report, account or other document to be sent to a shareholder or creditor that is a company or an overseas company may be sent by any of the methods of serving documents referred to in section 392 or section 394, as the case may be.
- (3) A notice, statement, report, account or other document to be sent to a creditor that is a body corporate, not being a company or an overseas company, may be —

- (a) delivered to a person who is a principal officer of the body corporate;
  - (b) delivered to an employee of the body corporate at the principal office or principal place of business of the body corporate;
  - (c) delivered in such manner as the Court directs;
  - (d) delivered in accordance with an agreement made with the body corporate;
  - (e) posted to the address of the principal office of the body corporate; or
  - (f) sent by facsimile machine to a telephone number used for the transmission of documents by facsimile at the principal office or principal place of business of the body corporate.
- (4) Where a liquidator sends documents —
- (a) to the last known address of a shareholder or creditor who is a natural person; or
  - (b) to the address for service of a shareholder or creditor that is a company, —

and the documents are returned unclaimed three consecutive times, the liquidator need not, send further documents to the shareholder or creditor until the shareholder or creditor gives notice to the company of its new address.

### **396 Additional provisions relating to service.**

- (1) Subject to subsection (2), for the purposes of sections 391 to 395 —
- (a) If a document is to be served by delivery to a natural person, service must be made —
    - (i) by handing the document to the person; or
    - (ii) if the person refuses to accept the document, by bringing it to the attention of, and leaving it in a place accessible to, the person.
  - (b) A document sent by facsimile machine is deemed to have been received on the working day following the day on which it was sent.
  - (c) In proving service of a document by post, it is sufficient to prove that —
    - (i) the document was properly addressed;
    - (ii) all postal charges were paid; and
    - (iii) the document was posted.

- (d) In proving service of a document by facsimile machine, it is sufficient to prove that the document was properly transmitted by facsimile machine to the person concerned.
- (2) A document is not to be deemed to have been served or sent or delivered to a person if the person proves that, through no fault on his part the document was not received within the time specified.

### **397 Privileged communications.**

- (1) Subject to subsection (2), nothing in this Act requires a law practitioner to disclose a privileged communication.
- (2) Nothing in subsection (1) applies to a communication made to or by a person referred to in section 270(2)(f) while acting or having acted as a law practitioner for a company to which that section applies, and which that person is required to disclose under section 270(3).
- (3) For the purposes of this section, a communication is a privileged communication only if —
  - (a) it is a confidential communication, whether oral or written, passing between —
    - (i) a law practitioner in his professional capacity and another law practitioner in that capacity; or
    - (ii) a law practitioner in his professional capacity and his client, —

whether made directly or indirectly through an agent; and

- (b) it is made or brought into existence for the purpose of obtaining or giving legal advice or assistance; and
- (c) it is not made or brought into existence for the purpose of committing or furthering the commission of an illegal or wrongful act.
- (4) If the information or document consists wholly of payments, income, expenditure or financial transactions of a specified person whether a law practitioner, his client or any other person, it is not a privileged communication if it is contained in, or comprises the whole or part of, a book, account, statement or other record prepared or kept by the law practitioner in connection with a trust account of the law practitioner.
- (5) The Court may, on the application of any person, determine whether or not a claim of privilege is valid and may, for that purpose, require the information or document to be produced.
- (6) For the purposes of this section, references to a law practitioner include a firm in which he is a partner or is held out to be a partner.

**398 Directors' certificates.**

A requirement imposed by any provision of this Act that directors of a company shall sign a certificate is complied with if the directors who are required to sign the certificate —

- (a) sign the same certificate; or
- (b) sign separate certificates in the same terms.

**399 Regulations.**

His Majesty may, by Order in Council, make regulations for all or any of the following purposes —

- (a) prescribing forms for the purposes of this Act; and those regulations may require —
  - (i) the inclusion in, or attachment to, forms of specified information or documents;
  - (ii) forms to be signed by specified persons;
- (b) prescribing requirements, with which documents delivered for registration shall comply;
- (c) regulating, the conduct of liquidations;
- (d) providing for such other matters as are contemplated by or necessary for giving effect to the provisions of this Act and for its due administration.

**400 Repeal of the Companies Act 1912 (Cap. 27).**

- (1) On the removal of the last company from the old register in accordance with clause 3(3) or 5(1) of the Tenth Schedule, the Companies Act 1912 (Cap. 27) is repealed.
- (2) The repeal by subsection (1) of the Companies Act 1912 (Cap. 27) does not affect —
  - (a) the previous operation of that Act or anything duly done or suffered under that Act;
  - (b) any right, privilege, obligation or liability acquired, accrued or incurred under that Act;
  - (c) any penalty, forfeiture or punishment incurred in respect or an offence committed against that Act; or
  - (d) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as is mentioned in paragraphs (b) and (c), —



and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if that Act had not been repealed.

Passed in the Legislative Assembly the 26<sup>th</sup> day of October, 1995

## SCHEDULES

**FIRST SCHEDULE**

(Section 32)

**STANDARD CONSTITUTION ARRANGEMENT OF CLAUSES****PART I - CONSEQUENCES OF INCORPORATION****1 Name.**

- (1) The name of the company is (insert name) Limited.
- (2) The company shall ensure that its name is clearly stated in —
  - (a) every written communication sent by, or on behalf of, the company; and
  - (b) every document issued or signed by, or on behalf of, the company that evidences or creates a legal obligation of the company.
- (3) If, within the period of 12 months immediately preceding the giving by the company of any public notice, the name of the company was changed, the company shall ensure that the notice states —
  - (a) that the name of the company was changed in that period; and
  - (b) the former name or names of the company.

**2 Effect of constitution.**

Subject to the Act, this constitution is binding as between —

- (a) the company and each shareholder; and
- (b) each shareholder, —

in accordance with its terms, as if it were a contract.

**3 Separate legal personality.**

The company is a legal entity in its own right separate from its shareholders, directors and company secretary.

**4 Capacity and powers.**

Subject to the Act, any other enactment and the general law, the company has, both within and outside Tonga —

- (a) full capacity to carry on or undertake any business or activity, to any act, or enter into any transaction; and
- (b) for the purposes of paragraph (a), full rights, powers and privileges.

**5 Adequate liquidity.**

The company shall at all times maintain adequate liquidity in accordance with section 14.

**PART II - SHARES****6 Rights and powers attaching to shares.**

A share in the company confers on the holder —

- (a) the right to one vote on a poll at a meeting of the company on any resolution, including any resolution to —
  - (i) appoint or remove a director, company secretary or auditor;
  - (ii) alter the company's constitution;
  - (iii) approve a major transaction;
  - (iv) approve an amalgamation of the company under section 230;
  - (v) put the company into liquidation;
- (b) The right to an equal share in dividends authorised by the board;
- (c) The right to an equal share in the distribution of the surplus assets of the company.

**7 Types of shares.**

- (1) Different classes of shares may be issued in the company
- (2) Without limiting subclause (1), shares in the company may —
  - (a) be redeemable;
  - (b) confer preferential rights to distributions of capital or income;
  - (c) confer special, limited or conditional voting rights; or
  - (d) not confer voting rights.

**8 Transferability of shares.**

- (1) A share in the company is transferable.
- (2) A share is transferred by entry in the share register in accordance with clause 26.
- (3) The personal representative of a deceased shareholder may transfer a share even though the personal representative is not a shareholder at the time of transfer.

**9 Issues of shares on registration.**

The company shall forthwith after the registration of the company, issue to any person or persons named in the application for registration as a shareholder or shareholders, the number of shares specified in the application as being the number of shares to be issued to that person or those persons.

**10 Issue of other shares.**

Subject to the Act and this constitution, the board of the company may issue shares at any time, to any person, and in any number it thinks fit.

**11 Notice of share issue.**

The board of the company shall deliver to the Registrar for registration, within 10 working days of the issue of shares under clause 9 or clause 10, a notice in the prescribed form of the issue of the shares by the company.

**12 Pre-emptive rights.**

- (1) Shares issued or proposed to be issued by the company that rank or would rank as to voting or distribution rights, or both, equally with or prior to shares already issued by the company shall be offered for acquisition to the holders of the shares already issued in a manner and on terms that would, if accepted, maintain the existing voting or distribution rights, or both, of those holders.
- (2) An offer under subclause (1) shall remain open for acceptance for a reasonable time.

**13 Consideration for issue of shares.**

The consideration for which a share is issued shall be decided by the board of the company in accordance with sections 50 and 51, subject to section 52.

**14 Issue of options and convertible securities.**

The board of the company may only issue any securities that are convertible into shares in the company or any options to acquire shares in the company in accordance with section 53.

**15 Consent to issue of shares.**

The issue by the company of a share that —

- (a) increases a liability of a person to the company; or
- (b) imposes, a new liability on a person to the company; —

is void if that person or an agent of that person authorised in writing does not consent in writing to becoming the holder of the share before it is issued.

**16 Time of issue of shares.**

A share is issued when the name of the holder is entered on the share register.

**17 Board may authorise distributions.**

The board of the company may only authorise a distribution by the company in accordance with section 56.

**18 Dividends.**

The board of the company may only authorise a dividend in accordance with section 57.

**19 Shares in lieu of dividends.**

The board of the company may only issue shares in lieu of a dividend in accordance with section 58.

**20 Shareholder discounts.**

The board of the company may only resolve that the company offer shareholders discounts in respect of some or all of the goods sold or services provided by the company in accordance with section 59.

**21 Reduction of shareholder a distribution.**

Under section 61 the cancellation of or reduction in the liability of a shareholder to the company may be a distribution or dividend for the purposes of this constitution.

**22 Company may acquire its own shares.**

The company may acquire its own shares in accordance with section 63 to 67, section 107 and sections 110 to 112, but not otherwise.

**23 Redemption of shares.**

- (1) The company may issue redeemable shares in any of the manners contemplated by section 69.
- (2) The date for redemption may be specified by the board, subject to subclause (3).
- (3) Sections 70 to 76 apply to the redemption of shares in the company.

**24 Assistance by the company in the purchase of its own shares.**

The company may give financial assistance to a person for the purpose of, or in connection with, the purchase of a share issued or to be issued by the company, or by its holding company, whether directly or indirectly, only if the financial assistance is given in accordance with section 77.

**25 Statement of rights to be given to shareholders.**

- (1) The company shall issue to a shareholder, on request, a statement that sets out —
  - (a) the class of shares held by the shareholder, the total number of shares of that class issued by the company and the number of shares of that class held by the shareholder;
  - (b) the rights, privileges, conditions and limitation, including restrictions on transfer, attaching to the shares held by the shareholder; and
  - (c) the relationship of the shares held by the shareholder to other classes of shares, —subject to section 84 (2).
- (2) The statement shall state in a prominent place that it is not evidence of title to the shares or of the matters set out in it.

**26 Transfer of shares.**

- (1) Shares in the company may be transferred by entry of the name of the transferee on the share register.
- (2) For the purpose of transferring shares, a form of transfer signed by the present holder of the shares or by his personal representative shall be delivered to —
  - (a) the company; or
  - (b) an agent of the company who maintains the share register under clause. 28(3).
- (3) The form of transfer shall be signed by the transferee if registration as holder of the shares imposes a liability to the company on the transferee.
- (4) On receipt of a form of transfer in accordance with subclause (2) and, if applicable, subclause (3), the company shall forthwith enter or cause to be entered the name of the transferee on the share register as holder of the shares, unless —
  - (a) the board resolves within 30 working days of receipt of the transfer to refuse or delay the registration of the transfer, and the resolution sets out in full the reasons for doing so;
  - (b) notice of the resolution, including those reasons, is sent to the transferor and to the transferee within five working days of the resolution being passed by the board; and
  - (c) the Act or this constitution expressly permits the board to refuse or delay registration for the reasons stated.
- (5) The board may refuse or delay the registration of a transfer of shares if the holder of the shares has failed to pay to the company an amount due in respect of those shares, whether by way of consideration for the issue, of the shares or in respect of sums payable by the holder of the shares in accordance with this constitution.

**27 Transfer of shares by operation of law.**

Shares in the company may pass by operation of law notwithstanding this constitution.

**28 Company to maintain share register.**

- (1) The company shall maintain share register that records the shares issued by the company and states —
  - (a) whether, under the terms of issue of the shares, there are any restrictions or limitations of their transfer; and

- (b) where any document that contains the restrictions or limitations may be inspected.
- (2) The share register shall state, with respect to each class of shares —
- (a) the names, alphabetically arranged, and the latest known address of each person who is, or has within the last 10 years been, a shareholder;
  - (b) the number of shares of that class held by each shareholder within the last 10 years; and
  - (c) the date of any —
    - (i) issue of shares to;
    - (ii) repurchase or redemption of shares from; or
    - (iii) transfer of shares by or to, —each shareholder within the last 10 years, and in relation to the transfer, the name of the person to or from whom the shares were transferred.
- (3) An agent may maintain the share register of the company.

### **29 Place of share register.**

The share register shall be kept as one register in Nuku'alofa.

### **30 Share register as evidence of legal title.**

Subject to section 91, the entry of the name of a person in the share register as holder of a share is prima facie evidence that legal title to the share vests in that person.

### **31 Directors' and company secretaries' duty to supervise share register.**

It is the duty of each director and company secretary to take reasonable steps to ensure that the share register is properly kept and that share transfers are promptly entered on it in accordance with clause 26.

### **32 Trusts not to be entered on register.**

No notice of a trust, whether express, implied or constructive, may be entered on the share register.



**33 Personal representative may be registered.**

- (1) Notwithstanding clause 32, a personal representative of a deceased person whose name is registered in a share register of the company as the holder of a share in the company is entitled to be registered as the holder of that share as personal representative.
- (2) Notwithstanding clause 32, a personal representative of a deceased person beneficially entitled to a share in the company, being a share registered in a share register of the company, is with the consent of the company and the registered holder of that share, entitled to be registered as the holder of that share as personal representative.
- (3) The registration of a trustee, executor or administrator pursuant to this clause does not constitute notice of a trust.

**34 Trustee of bankrupt may be registered.**

- (1) Notwithstanding clause 32, the trustee of the property of a bankrupt registered in a share register of the company as the holder of a share in the company is entitled to be registered as the holder of that share as the trustee of the property of the bankrupt.

**35 Share certificates.**

- (1) A shareholder in the company may apply to the company for a certificate relating to some or all of the shareholder's shares in the company.
- (2) On receipt of an application for a share certificate under subclause (1), the company shall, within 20 working days after receiving the application —
  - (a) if the application relates to some but not all of the shares, separate the shares shown in the register as owned by the applicant into separate parcels; one parcel being the shares to which the share certificate relates, and the other parcel being any remaining shares; and
  - (b) in all cases send to the shareholder a certificate stating —
    - (i) the name of the company;
    - (ii) the class of shares held by the shareholder; and
    - (iii) the number of shares held by the shareholder to which the certificate relates.
- (3) Notwithstanding clause 26, where a share certificate has been issued, a transfer of the shares to which it relates shall not be registered by the company unless the form of transfer required by that clause is accompanied by the share certificate relating to the share, or by evidence

as to its loss or destruction and, if required, an indemnity in a form required by the board.

- (4) Where shares to which a share certificate relates are to be transferred, and the share certificate is sent to the company to enable the registration of the transfer, the share certificate shall be cancelled and no further share certificate issued except at the request of the transferee.

### PART III - SHAREHOLDERS

#### 36 Meaning of “shareholder”.

In this constitution, the term “shareholder”, in relation to the company, means —

- (a) a person whose name is entered in the share register as the holder for the time being of one or more shares in the company;
- (b) until the person’s name is entered in the share register, a person named as a shareholder in an application for the registration of the company at the time of registration of the company;
- (c) until the person’s name is entered in the share register, a person who is entitled to have his name entered in the share register under a registered amalgamation proposal as a shareholder in an amalgamated company.

#### 37 Liability of shareholders.

- (1) A shareholder is not liable for an obligation of the company by reason only of being a shareholder.
- (2) The liability of a shareholder to the company is limited to —
  - (a) any amount unpaid on a share held by the shareholder;
  - (b) any liability expressly provided for in this constitution;
  - (c) any liability under sections 130 to 136 that arises by reason of section 125(2);
  - (d) any liability to repay a distribution received by the shareholder to the extent that the distribution is recoverable under section 60;
  - (e) any liability under section 100.
- (3) Nothing in this clause affects the liability of a shareholder to the company under a contract, including a contract for the issue of shares, or for any tort, or breach of a fiduciary duty, or other actionable wrong committed by the shareholder.

**38 Additional provisions relating to liability of shareholders and former shareholders.**

- (1) Former shareholders may continue to be liable to the company in accordance with section 98.
- (2) Shareholders and former shareholders may also be liable to the company in accordance with section 99.

**39 Exercise of powers reserved to shareholders.**

Powers reserved to the shareholders of the company by the Act or this constitution may be exercised only —

- (a) at a meeting of shareholders pursuant to clause 46 or clause 47; or
- (b) by a resolution in lieu of a meeting pursuant to clause 48.

**40 Exercise of powers by ordinary resolution.**

- (1) Unless otherwise specified in the Act or this constitution, a power reserved to shareholders may be exercised by an ordinary resolution.
- (2) An ordinary resolution is a resolution that is approved by a simple majority of the votes of those shareholders entitled to vote and voting on the question.

**41 Powers exercised by special resolution.**

- (1) When shareholders exercise a power to —
  - (a) alter the company's constitution;
  - (b) approve a major transaction;
  - (c) approve an amalgamation of the company under section 230;
  - (d) put the company into liquidation, —the power shall be exercised by special resolution.
- (2) A special resolution pursuant to any of subclause (1)(a), (b) or (c) can be rescinded only by a special resolution.
- (3) A special resolution pursuant to subclause (1)(d) cannot be rescinded in any circumstances.

**42 Unanimous assent to certain types of action.**

- (1) Notwithstanding clause 17, if all entitled persons have agreed or concur —

- (a) a dividend may be authorised otherwise than in accordance with clause 18;
  - (b) a discount scheme may be approved otherwise than in accordance with clause 20;
  - (c) shares in the company may be acquired otherwise than in accordance with clause 22;
  - (d) shares in the company may be redeemed otherwise than in accordance with clause 23;
  - (e) financial assistance may be given for the purpose of, or in connection with, the purchase of shares otherwise than in accordance with clause 24;
  - (f) any of the matters referred to in section 159(1) may be authorised otherwise than in accordance with that section, —
- in accordance with sections 107 and 108.
- (2) If all entitled persons have agreed or concur in accordance with section 107, shares may be issued otherwise than in accordance with clause 10 or section 48 or clause 12.
  - (3) If all entitled persons have agreed to or concur in the company entering into a transaction in which a director is interested in accordance with section 107, nothing in section 139 and 140 shall apply in relation to that transaction.

#### **43 Management review by shareholders.**

- (1) Notwithstanding anything in the Act or this constitution, the chairperson of a meeting of shareholders of the company shall allow a reasonable opportunity for shareholders at the meeting to question, discuss or comment on the management of the company.
- (2) Notwithstanding anything in the Act or this constitution, but subject to subclause (3), a meeting of shareholders may pass a resolution under this clause relating to the management of the company.
- (3) A resolution passed pursuant to subclause (2) is not binding on the board.

#### **44 Shareholder may require company to purchase shares.**

In the circumstances described in section 110, a shareholder may require the company to purchase his shares in accordance with section 111.

**45 Alteration of shareholder rights.**

- (1) The company shall not take action that affects the rights attached to shares unless that action has been approved by a special resolution of each interest group in accordance with section 117.
- (2) In the circumstances described in section 118, a shareholder may require the company to purchase his shares in accordance with section 111.

**PART IV - MEETINGS OF SHAREHOLDERS****46 Annual meeting of shareholders.**

- (1) Subject to subclause (2), the board of the company shall call an annual meeting of shareholders to be held —
  - (a) once in each calendar year;
  - (b) not later than six months after the balance date of the company; and
  - (c) not later than 15 months after the previous annual meeting.
- (2) The company does not have to hold its first annual meeting in the calendar year of its registration but shall hold that meeting within 18 months of its registration.
- (3) The company shall hold the meeting on the date on which it is called to be held.

**47 Special meetings of shareholders.**

A special meeting of shareholders entitled to vote on an issue —

- (a) may be called at any time by the board;
- (b) shall be called by the board on the written request of shareholders holding shares carrying together not less than five percent of the voting rights entitled to be exercised on the issue.

**48 Resolution in lieu of meeting.**

- (1) Subject to subclauses (2) and (3), a resolution in writing signed by not less than 75 percent of the shareholders who would be entitled to vote on that resolution at a meeting of shareholders who together hold not less than 75 percent of the votes entitled to be cast on that resolution is as valid as if it had been passed at a meeting of those shareholders.
- (2) A resolution in writing that —

- (a) relates to a matter that is required by the Act or this constitution to be decided at a meeting of the shareholders of the company; and
  - (b) is signed by the shareholders specified in subclause (3) —
- is made in accordance with the Act or this constitution.
- (3) For the purposes of subclause (2)(b), the shareholders are —
    - (a) in the case of a resolution under section 205(2), all the shareholders who are entitled to vote on the resolution;
    - (b) in any other case, the shareholders referred to in subclause (1).
  - (4) It shall not be necessary for the company to hold an annual meeting of shareholders under clause 46 if everything required to be done at that meeting (by resolution or otherwise) is done by resolution in accordance with subclauses (2) and (3).
  - (5) Within 5 working days of a resolution being passed under this clause, the company shall send a copy of the resolution to every shareholder who did not sign the resolution or on whose behalf the resolution was not signed.
  - (6) A resolution may be signed under subclause (1) or subclause (2) without any prior notice being given to shareholders.

#### **49 Shareholders entitled to receive distributions, attend meetings and exercise rights.**

The entitlement of shareholders to receive distributions, attend meetings and exercise other rights shall be determined in accordance with section 124.

#### **50 Chairperson.**

- (1) If the directors have elected a chairperson of the board, and the chairperson of the board is present at a meeting of shareholders, he must chair the meeting.
- (2) If no chairperson of the board has been elected or if, at any meeting of shareholders, the chairperson of the board is not present within 15 minutes of the time appointed for the commencement of the meeting, the shareholders present may choose one of their number to be chairperson of the meeting.

#### **51 Notice of meetings.**

- (1) Written notice of the time and place of a meeting of shareholders shall be sent to every shareholder entitled to receive notice of the meeting and to

every director, company secretary and an auditor of the company not less than 10 working days before the meeting.

- (2) The notice shall state —
  - (a) the nature of the business to be transacted at the meeting in sufficient detail to enable a shareholder to form a reasoned judgment in relation to it; and
  - (b) the text of any special resolution to be submitted to the meeting.
- (3) An irregularity in a notice of a meeting is waived if all the shareholders entitled to attend and vote at the meeting attend the meeting without protest as to the irregularity, or if all such shareholders agree to the waiver.
- (4) If a meeting of shareholders is adjourned for less than 30 days, it is not necessary to give notice of the time and place of the adjourned meeting other than by announcement at the meeting which is adjourned.

## **52 Methods of holding meetings.**

A meeting of shareholders may be held either —

- (a) by a number of shareholders who constitute a quorum, being assembled together at the place, date and time appointed for the meeting; or
- (b) by means of audio, or audio and visual, communication by which all shareholders participating and constituting a quorum, can simultaneously hear each other throughout the meeting.

## **53 Quorum.**

- (1) Subject to subclause (3), no business may be transacted at a meeting of shareholders if a quorum is not present.
- (2) A quorum for a meeting of shareholders is present if shareholders or their proxies are present or have cast postal votes who are between them able to exercise a majority of the votes to be cast on the business to be transacted by the meeting.
- (3) If a quorum is not present within 30 minutes after the time appointed for the meeting —
  - (a) in the case of a meeting called under clause 47(b), the meeting is dissolved;
  - (b) in the case of any other meeting, the meeting is adjourned to the same day in the following week at the same time and place, or to such other date, time and place as the directors may appoint, and if,

at the adjourned meeting, a quorum is not present within 30 minutes after the time appointed for the meeting, the shareholders or their proxies present are a quorum.

#### 54 Voting.

- (1) In the case of a meeting of shareholders held under clause 3(a), unless a poll is demanded, voting at the meeting shall be by whichever of the following methods is determined by the chairperson of the meeting —
  - (a) voting by voice; or
  - (b) voting by show of hands.
- (2) In the case of a meeting of shareholders held under clause 3(b), unless a poll is demanded, voting at the meeting shall be by the shareholders signifying individually their assent or dissent by voice.
- (3) A declaration by the chairperson of the meeting that a resolution is carried by the requisite majority is conclusive evidence of that fact unless a poll is demanded in accordance with subclause (4).
- (4) At a meeting of shareholders a poll may be demanded by —
  - (a) not less than 5 shareholders having the right to vote at the meeting;
  - (b) a shareholder or shareholders representing not less than 10 percent of the total voting rights of all shareholders having the right to vote at the meeting; or
  - (c) by a shareholder or shareholders holding shares in the company that confer a right to vote at the meeting and on which the aggregate amount paid up is not less than 10 percent of the total amount paid up on all shares that confer that right.
- (5) A poll may be demanded either before or after the vote is taken on a resolution.
- (6) If a poll is taken, votes must be counted according to the votes attached to the shares of each shareholder present in person or by proxy and voting.
- (7) The chairperson of a shareholders' meeting is not entitled to a casting vote.
- (8) For the purposes of this clause, the instrument appointing a proxy to vote at a meeting of the company confers authority to demand or join in demanding a poll and a demand by a person as proxy for a shareholder has the same effect as a demand by the shareholder.



**55 Proxies.**

- (1) A shareholder may exercise the right to vote either by being present in person or by proxy.
- (2) A proxy for a shareholder is entitled to attend and be heard at a meeting of shareholders as if the proxy were the shareholder.
- (3) A proxy shall be appointed by notice in writing signed by the shareholder and the notice shall state whether the appointment is for a particular meeting or a specified term not exceeding 12 months.
- (4) No proxy is effective in relation to a meeting unless a copy of the notice of appointment is produced before the start of the meeting.

**56 Postal votes.**

- (1) A shareholder may exercise the right to vote at a meeting by casting a postal vote in accordance with the provisions of this clause.
- (2) The notice of a meeting at which shareholders are entitled to cast a postal vote shall state the name of the person authorised by the board to receive and count postal votes at that meeting.
- (3) If no person has been authorised to receive and count postal votes at a meeting, or if no person is named as being so authorised in the notice of the meeting, every company secretary is deemed to be so authorised.
- (4) A shareholder may cast a postal vote on all or any of the matters to be voted on at the meeting by sending a notice of the manner in which his shares are to be voted to a person authorised to receive and count postal votes at that meeting. The notice shall reach that person not less than 48 hours before the start of the meeting.
- (5) It is the duty of a person authorised to receive and count postal votes at a meeting —
  - (a) to collect together all postal votes received by him or by the company; and
  - (b) in relation to each resolution to be voted on at the meeting, to count —
    - (i) the number of shareholders voting in favour of the resolution and the number of votes cast by each shareholder in favour of the resolution; and
    - (ii) the number of shareholders voting against the resolution, and the number of votes cast by each shareholder against the resolution;

- (c) to sign a certificate that he has carried out the duties set out in paragraphs (a) and (b) and which sets out the results of the counts required by paragraph (b); and
  - (d) to ensure that the certificate required by paragraph (c) is presented to the chairperson of the meeting.
- (6) If a vote is taken at a meeting on a resolution on which postal votes have been cast, the chairperson of the meeting shall —
- (a) on a vote by show of hands, count each shareholder who has submitted a postal vote for or against the resolution;
  - (b) on a poll, count the votes cast by each shareholder who has submitted a postal vote for or against the resolution.
- (7) The chairperson of a meeting shall call for a poll on a resolution on which he or she holds sufficient postal votes that he believes that if a poll is taken the result may differ from that obtained on a show of hands.
- (8) The chairperson of a meeting shall ensure that a certificate of postal votes held by him is annexed to the minutes of the meeting.

## **57 Minutes.**

- (1) The board shall ensure that minutes are kept of all proceedings at meetings of shareholders.
- (2) Minutes which have been signed correct by the chairperson of the meeting are prima facie evidence of the proceedings.

## **58 Shareholder proposals.**

- (1) A shareholder may give written notice to the board of a matter the shareholder proposes to raise for discussion or resolution at the next meeting of shareholders at which the shareholder is entitled to vote.
- (2) If the notice is received by the board not less than 20 working days before the last day on which notice of the relevant meeting of shareholders is required to be given by the board, the board shall, at the expense of the company, give notice of the shareholder proposal and the text of any proposed resolution to all shareholders entitled to receive notice of the meeting.
- (3) If the notice is received by the board not less than 5 working days and not more than 20 working days before the last day on which notice of the relevant meeting of shareholders is required to be given by the board the board shall, at the expense of the shareholder, give notice of the shareholder proposal and the text of any proposed resolution to all shareholders entitled to receive notice of the meeting.

- (4) If the notice is received by the board less than 5 working days before the last day on which notice of the relevant meeting of shareholders is required to be given by the board, the board may, if practicable, and at the expense of the shareholder, give notice of the shareholder proposal and the text of any proposed resolution to all shareholders entitled to receive notice of the meeting.
- (5) If the directors intend that shareholders may vote on the proposal by proxy or by postal vote, they shall give the proposing shareholder the right to include in or with the notice given by the board a statement of not more than 1000 words prepared by the proposing shareholder in support of the proposal, together with the name and address of the proposing shareholder.
- (6) The board is not required to include in or with the notice given by the board a statement prepared by a shareholder which the directors consider to be defamatory, frivolous or vexatious.
- (7) Where the costs of giving notice of the shareholder proposal and the text of any proposed resolution are required to be met by the proposing shareholder, the proposing shareholder shall, on giving notice to the board, deposit with the company or tender to the company a sum sufficient to meet those costs.

#### **59 Corporations may act by representative.**

A body corporate which is a shareholder may appoint a representative to attend a meeting of shareholders on its behalf in the same manner as that in which it would appoint a proxy.

#### **60 Votes of joint holders.**

Where 2 or more persons are registered as the holder of a share, the vote of the person named first in the share register and voting on a matter shall be accepted to the exclusion of the votes of the other joint holders.

#### **61 Loss of voting right if calls unpaid.**

If a sum due to the company in respect of a share has not been paid, that share may not be voted at a shareholder's meeting other than a meeting of an interest group.

**62 Other proceedings.**

Except as provided in this constitution, a meeting of shareholders may regulate its own procedure.

**PART V - DIRECTORS AND COMPANY SECRETARIES****63 Management of company.**

- (1) The business and affairs to the company shall be managed by, or under the direction or supervision of, the board of the company.
- (2) The board of the company has all the powers necessary for managing, and for directing and supervising the management of, the business and affairs of the company.
- (3) Subclauses (1) and (2) are subject to any modifications, exceptions or limitations contained in the Act or in this constitution.

**64 Major transactions.**

- (1) The company shall not enter into a major transaction unless the transaction is —
  - (a) approved by special resolution; or
  - (b) contingent on approval by special resolution.
- (2) In this clause —

“**assets**” includes property of any kind, whether tangible or intangible;

“**major transaction**”, in relation to the company, means —

  - (a) the acquisition of, or an agreement to acquire, whether contingent or not, assets equivalent in value to the value of the assets or more than half of the assets of the company before the acquisition;
  - (b) the disposition of, or an agreement to dispose of; whether contingent or not, the whole or more than half of the assets of the company; or
  - (c) a transaction which has or is likely to have the effect of the company acquiring rights or interests or incurring obligations or liabilities equivalent in value to the value of the assets or the greater part of the assets of the company before the transaction.

**65 Delegation of powers.**

- (1) The board of the company may delegate to a committee of directors, a director, company secretary or employee of the company, or any other person, any one or more of its powers other than its powers under any of the sections of the Act set out in the Second Schedule to the Act.
- (2) If the board delegates a power under subclause (1), it is responsible for the exercise of the power by the delegate as if the power had been exercised by the board, unless the board —
  - (a) believed on reasonable grounds at all times before the exercise of the power that the delegate would exercise the power in conformity with the duties imposed on directors of the company by the Act and this constitution; and
  - (b) has monitored, by means of reasonable methods properly used, the exercise of the power by the delegate.

**66 Duty of directors and company secretaries to act in good faith and in best interest of company.**

A director or company secretary of the company, when exercising powers or performing duties, shall act in good faith and in what the director or company secretary believes to be the best interests of the company.

**67 Powers to be exercised for proper purpose.**

A director or company secretary shall exercise a power for a proper purpose.

**68 Directors and company secretaries to comply with Act and constitution.**

A director or company secretary of the company shall not act, or agree to the company acting, in a manner that contravenes the Act or this constitution.

**69 Reckless trading.**

A director of the company must not —

- (a) agree to the business of the company being carried on in a manner likely to create a substantial risk of serious loss to the company's creditors; or
- (b) cause or allow the business of the company to be carried on in a manner likely to create a substantial risk of serious loss to the company's creditors.

**70 Duty in relation to obligations.**

A director of the company shall not agree to the company incurring an obligation unless the director believes at that time on reasonable grounds that the company will be able to perform the obligation when it is required to do so.

**71 Director's and company secretary's duty of care.**

A director or company secretary of the company, when exercising powers of performing duties as a director or company secretary, shall exercise the care, diligence and skill that a reasonable director or company secretary would exercise in the same circumstances taking into account, but without limitation, —

- (a) the nature of the company;
- (b) the nature of the decision; and
- (c) the position of the director or company secretary and the nature of the responsibilities undertaken by him.

**72 Use of information and advice**

(1) Subject to subclause (2), a director or company secretary of the company, when exercising powers or performing duties as a director or company secretary, may rely on reports, statements and financial data and other information prepared or supplied, and on professional, or expert, advice given, by any of the following persons —

- (a) in the case of a director, a company secretary of the company in relation to matters which the director believes on reasonable grounds to be within the company secretary's professional or expert competence;
- (b) an employee of the company whom the director or company secretary believes on reasonable grounds to be reliable and competent in relation to the matters concerned;
- (c) a professional adviser or expert in relation to matters which the director or company secretary believes on reasonable grounds to be within the person's professional or expert competence; and
- (d) any other director, company secretary, or committee of directors upon which the director did not serve, in relation to matters within the director's, company secretary's or committee's designated authority.

(2) Subclause (1) applies to a director or company secretary only if the director or company secretary —

- (a) acts in good faith;

- (b) makes proper inquiry where the need for inquiry is indicated by the circumstances; and
- (c) has no knowledge that such reliance is unwarranted.

### **73 Meaning of “interested”.**

- (1) Subject to subclause (2), for the purposes of this constitution, a director or company secretary of the company is interested in a transaction to which the company is a party if, and only if, the director or company secretary —
  - (a) is a party to, or will or may derive a material financial benefit from, the transaction;
  - (b) has a material financial interest in another party to the transaction;
  - (c) is a director, company secretary, officer or trustee of another party to, or person who will or may derive a material financial benefit from, the transaction, not being a party or person that is —
    - (i) the company’s holding company being a holding company of which the company is a wholly-owned subsidiary;
    - (ii) a wholly-owned subsidiary of the company; or
    - (iii) a wholly-owned subsidiary of a holding company of which the company is also a wholly-owned subsidiary; or
  - (d) is the parent, child or spouse of another party to, or person who will or may derive a material financial benefit from, the transaction; or
  - (e) is otherwise directly or indirectly materially interested in the transaction.
- (2) For the purposes of this constitution, a director or company secretary of the company is not interested in a transaction to which the company is a party if the transaction comprises only the giving by the company of security to a third party which has no connection with the director or company secretary, at the request of the third party, in respect of a debt or obligation of the company for which the director, company secretary or another person has personally assumed responsibility in whole or in part under a guarantee, indemnity, or by the deposit of a security.

### **74 Disclosure of interest.**

- (1) A director or company secretary of the company shall, forthwith after becoming aware of the fact that he is interested in a transaction or proposed transaction with the company, cause to be entered in the interests register, and disclose to the board of the company —

- (a) if the monetary value of the director's or company secretary's interest is able to be quantified, the nature and monetary value of that interest; or
  - (b) if the monetary value of the director's or company secretary's interest cannot be quantified, the nature and extent of that interest.
- (2) For the purposes of subclause (1), a general notice entered in the interests register or disclosed to the board to the effect that a director or company secretary is a shareholder, director, company secretary, officer or trustee of another named company or other person and is to be regarded as interested in any transaction which may, after the date of the entry or disclosure, be entered into with that company or person, is a sufficient disclosure of interest in relation to that transaction.

## **75 Avoidance of transactions.**

A transaction entered into by the company in which a director or company secretary of the company is interested may be avoided by the company in accordance with section 140.

## **76 Interested director or company secretary may attend meeting.**

- (1) A director of the company who is interested in a transaction entered into, or to be entered into, by the company, may —
- (a) attend a meeting of directors at which a matter relating to the transaction arises and be included among the directors present at the meeting for the purpose of a quorum;
  - (b) vote on a matter relating to the transaction;
  - (c) sign a document relating to the transaction on behalf of the company; and
  - (d) do any other thing in his capacity as a director in relation to the transaction, —
- as if the director were not interested in the transaction.
- (2) A company secretary of the company who is interested in a transaction entered into, or to be entered into, by the company, may —
- (a) attend a meeting of directors at which a matter relating to the transaction arises;
  - (b) sign a document relating to the transaction on behalf of the company; and
  - (c) do any other things in his capacity as a company secretary in relation to their transaction, —



as if the company secretary were not interested in the transaction.

## **77 Use of company Information.**

- (1) A director or company secretary of the company who has information in his capacity as a director, company secretary or employee of the company, being information that would not otherwise be available to him, shall not disclose that information to any person; or make use of or act on the information; except —
  - (a) for the purposes of the company;
  - (b) as required by law;
  - (c) in accordance with subclause (2) or subclause (3); or
  - (d) in complying with clause 74.
- (2) A director of the company may, unless prohibited by the board, disclose information to —
  - (a) a person whose interests the director represents; or
  - (b) a person in accordance with whose directions or instructions the director may be required or is accustomed to act in relation to the director's powers and duties and, if the director discloses the information, the name of the person to whom it is disclosed shall be entered in the interests register.
- (3) A director or company secretary of the company may disclose, make use of, or act on the information if —
  - (a) particulars of the disclosure, use or the act in question are entered in the interests register;
  - (b) the director or company secretary is first authorised to do so by the board; and
  - (c) the disclosure, use or act in question will not, or will not be likely to, prejudice the company.

## **78 Disclosure of share dealing by directors and company secretaries.**

- (1) A director or company secretary of the company who acquires or disposes of a relevant interest in shares issued by the company must, forthwith after the acquisition or disposition —
  - (a) disclose to the board —
    - (i) the number and class of shares in which the relevant interest has been acquired or the number and class of shares in which the relevant interest was disposed of, as the case may be;
    - (ii) the nature of the relevant interest;

- (iii) the consideration paid or received; and
  - (iv) the date of the acquisition or disposition; and
  - (b) ensure that the particulars disclosed to the board under paragraph (a) are entered in the interests register.
- (2) For the purposes of subclause (1), “**relevant interest**” has the meaning given in section 145, subject to section 146.

## **79 Restrictions on share dealing by directors and company secretaries.**

- (1) If a director or company secretary of the company has information in his capacity as a director, company secretary or employee of the company or a related company, being information that would not otherwise be available to him, but which is information material to an assessment of the value of shares or other securities issued by the company or a related company, the director or company secretary may acquire or dispose of those shares or securities only if —
- (a) in the case of an acquisition, the consideration given for the acquisition is not less than the fair value of the shares or securities; or
  - (b) in the case of a disposition, the consideration received for the disposition is not more than the fair value of the shares or securities.
- (2) For the purposes of subclause (1), the fair value of shares or securities is to be determined on the basis of all information known to the director or company secretary, or publicly available at the time.
- (3) Subclause (1) does not apply in relation to a share or security that is acquired or disposed of by a director or company secretary only as a nominee for the company or a related company.

## **80 Number of directors.**

The company shall have at least one director.

## **81 Qualifications of directors.**

- (1) A natural person who is not disqualified by subclause (2) may be appointed as a director of the company.
- (2) The following persons are disqualified from being appointed or holding office as a director of the company:
- (a) a person who is under 18 years of age;

- (b) a person who is an undischarged bankrupt;
  - (c) a person who is prohibited from being a director or promoter of or being concerned or taking part in the management of a company under section 386 or section 387 or section 389.
- (3) A person that is not a natural person cannot be a director of the company.

## **82 Director's consent required.**

A person shall not be appointed a director of the company unless he has, in the prescribed form, consented to be a director and certified that he is not disqualified from being appointed or holding office as a director of the company.

## **83 Appointment of first and subsequent director.**

- (1) A person named as a director in an application for registration or in an amalgamation proposal holds office as a director from the date of registration or the date the amalgamation proposal is effective, as the case may be, until that person ceases to hold office as a director in accordance with the Act or this constitution.
- (2) All subsequent directors of the company shall be appointed by ordinary resolution.

## **84 Appointment of directors to be voted on individually.**

- (1) The shareholders of the company may vote on a resolution to appoint a director of the company only if —
- (a) the resolution is for the appointment of one director; or
  - (b) the resolution is a single resolution for the appointment of two or more persons as directors of the company and a separate resolution that it be so voted on has first been passed without a vote being cast against it.
- (2) A resolution moved in contravention of subclause (1) is void even though the moving of it was not objected to at the time.
- (3) Nothing in this clause prevents the election of two or more directors by ballot or poll.

## **85 Removal of Directors.**

- (1) A director of the company may be removed from office by ordinary resolution passed at a meeting called for the purpose or for purposes that include the removal of the director.

- (2) The notice of meeting shall state that the purpose or a purpose of the meeting is the removal of the director.

## **86 Director ceasing to hold office.**

- (1) The office of director of the company is vacated if the person holding that office —
- (a) resigns in accordance with subclause (2);
  - (b) is removed from office in accordance with the Act or this constitution;
  - (c) becomes disqualified from being a director pursuant to clause 81; or
  - (d) dies.
- (2) A director of the company may resign office by signing a written notice of resignation and delivering it to the address for service of the company. The notice is effective when it is received at that address or at a later time specified in the notice.

## **87 Notice of change of directors.**

- (1) The board of the company shall ensure that notice in the prescribed form of —
- (a) a change in the directors of the company, whether as the result of a director ceasing to hold office or the appointment of a new director, or both; or
  - (b) a change in the name or the residential address of a director of the company —
- is delivered to the Registrar for registration.
- (2) A notice under subclause (1) shall —
- (a) specify the date of the change;
  - (b) include the full name and residential address of every person who is a director or company secretary of the company from the date of the notice;
  - (c) in the case of the appointment of a new director, have attached the form of consent and certificate required pursuant to clause 82; and
  - (d) be delivered to the Registrar within 20 working days of —
    - (i) the change occurring, in the case of the appointment or resignation of a director; or

- (ii) the company first becoming aware of the change, in the case of the death of a director or a change in the name or residential address of a director.

### **88 Remuneration and other benefits.**

The board of the company may authorise the payment of remuneration or the provision of other benefits by the company to a director or former director, or company secretary or former company secretary for services in that or any other capacity in accordance with section 159 or section 171, as the case may be.

### **89 Indemnity and insurance.**

The company may indemnify a director, company secretary or employee of the company or a related company in accordance with section 160.

### **90 Duties of company secretaries.**

- (1) It is the primary duty of a company secretary to advise the board of directors on the proper management of the company.
- (2) A company secretary has the other duties prescribed by the Act and his constitution.

### **91 Number of company secretaries.**

The company shall have at least one company secretary.

### **92 Qualifications of company secretaries.**

- (1) A natural person who is —
  - (a) a law practitioner whose qualification includes a pass in company law;
  - (b) an accountant whose qualification includes a pass in company law;
  - (c) a person whose name has been prescribed by the Minister for the purpose of section 163 by notice in the Gazette;
  - (d) a person who is a member of a class of persons prescribed by the Minister for the purpose of section 163 by notice in the Gazette, —and who is not disqualified by subclause (2), may be appointed as a company secretary of the company.
- (2) The following persons are disqualified from being appointed or holding office as a company secretary of the company —

- (a) a person who is under 18 years of age;
  - (b) a person who is an undischarged bankrupt;
  - (c) a person who is prohibited from being a director, promoter or company secretary of, or being concerned or taking part in the management of a company under section 386, 387 or 389.
- (3) A person that is not a natural person cannot be a company secretary of the company.

### **93 Company secretary's consent required.**

A person shall not be appointed a company secretary of the company unless he has, in the prescribed form, consented to be a company secretary and certified that he is qualified to be appointed and hold office as a company secretary of the company.

### **94 Appointment of first and subsequent company secretaries.**

- (1) A person named as a company secretary in an application for registration or in an amalgamation proposal holds office as a company secretary from the date of registration or the date the amalgamation proposal is effective, as the case may be, until that person ceases to hold office as a company secretary in accordance with the Act or this constitution.
- (2) All subsequent company secretaries of the company shall be appointed by the board.

### **95 Removal of the company secretary.**

Subject to any agreement entered into in a particular case —

- (a) a company secretary of the company may be removed from office by the board at any time;
- (b) no reason need be given by the board for the removal.

### **96 Company secretary ceasing to hold office.**

- (1) The office of company secretary of the company is vacated if the person holding that office —
  - (a) resigns in accordance with subclause (2);
  - (b) is removed from office in accordance with the Act or this constitution;

- (c) ceases to be qualified to be a company secretary pursuant to section 163;
  - (d) becomes disqualified from being a company secretary pursuant to section 163; or
  - (e) dies.
- (2) A company secretary of the company may resign office by signing a written notice of resignation and delivering it to the address for service of the company. The notice is effective when it is received at that address or at a later time specified in the notice.

### **97 Notice of change of company secretary.**

- (1) The board of the company shall ensure that notice in the prescribed form of —
- (a) a change in the company secretary of the company, whether as the result of a company secretary ceasing to hold office or the appointment of a new company secretary, or both; or
  - (b) a change in the name or the residential address of a company secretary of the company, —
- is delivered to the Registrar for registration.
- (2) A notice under subclause (1) shall —
- (a) specify the date of the change;
  - (b) include the full name and residential address of every person who is a company secretary or director of the company from the date of the notice;
  - (c) in the case of the appointment of a new company secretary, have attached the form of consent and certificate required pursuant to section 164; and
  - (d) be delivered to the Registrar within 20 working days of —
    - (i) the change occurring, in the case of the appointment or resignation of a company secretary; or
    - (ii) the company first becoming aware of the change, in the case of the death of a company secretary or a change in the name or residential address of a company secretary.

### **PART VI - PROCEEDINGS OF THE BOARD**

**98 Chairperson.**

- (1) The directors may elect one of their number as chairperson of the board.
- (2) The director elected as chairperson holds that office until he dies or resigns or the directors elect a chairperson in his place.
- (3) If no chairperson is elected, or if at a meeting of the board the chairperson is not present within 5 minutes after the time appointed for the commencement of the meeting, the directors present may choose one of their number to be chairperson of the meeting.

**99 Notice of meeting.**

- (1) A director or a company secretary of the company, may convene a meeting of the board by giving notice in accordance with this clause.
- (2) Not less than 2 days notice of a meeting of the board shall be sent to every director and company secretary who is in Tonga, and the notice shall include the date, time and place of the meeting and the matters to be discussed.
- (3) An irregularity in the notice of a meeting is waived if all directors and company secretaries entitled to receive notice of the meeting attend the meeting without protest as to the irregularity or if all directors and company secretaries entitled to receive notice of the meeting agree to the waiver.

**100 Methods of holding meetings.**

A meeting of the board may be held —

- (a) by a number of the directors, who constitute a quorum, being assembled together at the place, date and time appointed for the meeting; or
- (b) by means of audio, or audio and visual, communication by which all directors participating and constituting a quorum can simultaneously hear each other throughout the meeting.

**101 Quorum.**

- (1) A quorum for a meeting of the board is a majority of the directors.
- (2) No business may be transacted at a meeting of directors if a quorum is not present.



**102 Voting.**

- (1) Every director has one vote.
- (2) The chairperson does not have a casting vote.
- (3) A resolution of the board is passed if it is agreed to by all directors present without dissent or if a majority of the votes cast on it are in favour of it.
- (4) A director present at a meeting of the board is presumed to have agreed to, and to have voted in favour of, a resolution of the board unless he expressly dissents from or votes against the resolution at the meeting.

**103 Minutes.**

The board shall ensure that minutes are kept of all proceedings at meetings of the board.

**104 Unanimous resolution.**

- (1) A resolution in writing, signed or assented to by all directors then entitled to receive notice of a board meeting, is as valid and effective as if it had been passed at a meeting of the board duly convened and held.
- (2) Any such resolution may consist of several documents (including facsimile or other similar means of communication) in like form each signed or assented to by one or more directors.
- (3) A copy of any such resolution shall be entered in the minute book of board proceedings.

**105 Other proceedings.**

Except as provided in this constitution, the board may regulate its own procedure.

**PART VII - ADMINISTRATION, ACCOUNTING, AUDIT AND REPORTING****106 Method of contracting.**

A contract or other enforceable obligation may be entered into by the company as follows —

- (a) an obligation which, if entered into by a natural person, would, by law, be required to be by deed, may be entered into on behalf of the company in writing signed under the name of the company by —

- (i) two or more directors of the company;
  - (ii) one or more directors and one or more company secretaries of the company;
  - (iii) one or more attorneys appointed by the company in accordance with clause 107;
- (b) an obligation which, if entered into by a natural person, is, by law, required to be in writing, may be entered into on behalf of the company in writing by a person acting under the company's express or implied authority;
- (c) an obligation which, if entered into by a natural person, is not, by law, required to be in writing, may be entered into on behalf of the company in writing or orally by a person acting under the company's express or implied authority.

### **107 Attorneys.**

- (1) The company may, by an instrument in writing, executed in accordance with clause 106(a), appoint a person as its attorney either generally or in relation to a specified matter.
- (2) An act of the attorney in accordance with the instrument binds the company.

### **108 Registered office.**

- (1) The company shall always have a registered office in Nuku'alofa.
- (2) Subject to subclause (4), the board of the company may change the registered office of the company at any time.
- (3) Notice in the prescribed form of the change shall be given to the Registrar for registration.
- (4) The change in the registered office takes effect on a date stated in the notice not being a date that is earlier than 5 working days after the notice is registered.

### **109 Company records.**

- (1) The company shall keep the documents required by section 198 at its registered office in accordance with that section.
- (2) The company shall keep its records in the form required by section 199.

- (3) Every director or company secretary of the company is entitled, on giving reasonable notice, to inspect the records of the company in accordance with section 200.

#### **110 Address for service.**

- (1) The company shall have an. address for service in Tonga in accordance with section 201.
- (2) The company may change its address for service in accordance with section 202.

#### **111 Accounting records.**

The board of the company shall cause accounting records to be kept in accordance with sections 203 and 204.

#### **112 Appointment of Auditor.**

- (1) The company shall, at each annual meeting, appoint an auditor in accordance with section 205 to 212, subject to subclause (2).
- (2) The company need not appoint an auditor in accordance with subclause (1) if, at or before the meeting, a unanimous resolution is passed by the company that no auditor be appointed. Such a resolution ceases to have effect at the commencement of the next annual meeting.

#### **113 Access to information by auditor.**

- (1) The board of the company shall ensure that the auditor of the company has access at all times to the accounting records and other documents of the company.
- (2) The auditor of the company is entitled to require from a director, company secretary or employee of the company such information and explanations as he thinks necessary for the performance of his duties as auditor.

#### **114 Auditor's attendance at shareholders' meeting.**

The board of the company shall ensure that the auditor of the company —

- (a) is permitted to attend a meeting of shareholders of the company;
- (b) receives the notices and communications that a shareholder is entitled to receive relating to a meeting of shareholders; and

- (c) may be heard at a meeting of shareholders which he attends on any part of the business of the meeting which concerns him or her as auditor.

### **115 Annual report.**

The board of the company shall, within five months after the balance date of the company —

- (a) prepare an annual report on the affairs of the company during the accounting period ending on that date; and
- (b) cause a copy of the annual report to be sent to every shareholder of the company not less than 20 working days before the date fixed for holding the annual meeting of shareholders, —

in accordance with and subject to sections 217 to 221.

### **116 Annual return.**

The board of the company shall ensure that there is delivered to the Registrar each year an annual return of the company in accordance with section 223.

### **117 Inspection of company records.**

The company shall make its records available for inspection by shareholders and the public in accordance with sections 224 to 227.

### **118 Service of documents on shareholders and creditors.**

Documents may be served on shareholders and creditors of the company in accordance with section 395 and 396.

### **119 Alteration of constitution.**

- (1) The shareholders of the company may, by special resolution —
  - (a) revoke its previous constitution and adopt a new constitution for the company;
  - (b) alter the constitution of the company.
- (2) Within 10 working days of the adoption of a new constitution by the company or the alteration of the constitution of the company, as the case may be, the board shall ensure that a notice in the prescribed form of the adoption of the new constitution or of the alteration of the constitution is delivered, to the Registrar for registration.

**120 Winding Up.**

The company may only be wound up in accordance with Part XVI of the Act.

**121 Interpretation**

In this constitution, unless the context otherwise requires —

“**the Act**” means the Companies Act 1995;

“**prescribed**” means prescribed under the Act; and

“**section**” means a section of the Act.

**SECOND SCHEDULE**

(Section 129)

**SECTIONS THAT CONFER POWERS ON DIRECTORS THAT  
CANNOT BE DELEGATED**

- (a) Section 27(1)(c) (which relates to the change of company names);
- (b) Section 46 (which relates to the issue of shares);
- (c) Section 48 (which relates to shareholder approval to the issue of shares);
- (d) Section 51 (which relates to the consideration for the issue of shares);
- (e) Section 56 (which relates to distributions);
- (f) Section 58 (which relates to the issue of shares in lieu of dividends);
- (g) Section 59 (which relates to shareholder discounts);
- (h) Section 64 (which relates to offers to acquire shares);
- (i) Section 65 (which relates to special offers to acquire shares);
- (j) Section 70 (which relates to the redemption of shares at the option of a company);
- (k) Section 72 (which relates to special redemptions of shares);
- (l) Section 77 (which relates to the provision of financial assistance);
- (m) Section 79 (which relates to special financial assistance);
- (n) Section 81 (which relates to financial assistance not exceeding five percent of shareholders' funds);
- (o) Section 85(4) (which relates to the transfer of shares);
- (p) Section 196 (which relates to a change of registered office);
- (q) Section 202 (which relates to a change of address for service);
- (r) Section 230 (which relates to the manner of approving an amalgamation proposal);
- (s) Section 231 (which relates to short form amalgamations).

**THIRD SCHEDULE**

(Section 223)

**INFORMATION TO BE CONTAINED IN ANNUAL RETURN**

- (a) The address of the registered office of the company;
- (b) The address for service of the company;
- (c) The postal address of the company;
- (d) If the share register is divided into two or more registers kept in different places, the place in which each register is kept;
- (e) If any records are not kept at the company's registered office under section 198(1), details of those records and of the place of places where they are kept;
- (f) The following information relating to the shares in the company;
  - (i) the number of shares issued and if there is more than one class of shares, the number of shares in each class;
  - (ii) the value of the consideration for each share issued;
  - (iii) where the full consideration was not payable or required to be provided in respect of the issue of share, the value of that part of the consideration paid or provided in respect of the issue of the share;
  - (iv) the amount called up on each share;
  - (v) the total amount of calls received;
  - (vi) the total amount of calls unpaid;
  - (vii) the total number of shares forfeited and not sold or otherwise disposed of;
  - (viii) the total number of shares purchased or otherwise acquired by the company;
  - (ix) the total number of shares redeemed by the company;
- (g) The full names and residential addresses of the directors and company secretaries of the company;
- (h) The following information relating to past and present shareholders of the company;
  - (i) the names and addresses of all the shareholders of the company;

- (ii) the names and addresses of all persons who ceased to be shareholders of the company .
  - (A) since the date of the last annual return; or
  - (B) in the case of the first annual return of a company registered under this Act, since the date of registration; or
  - (C) in the case of the first annual return of a company reregistered under this Act in accordance with the Tenth Schedule, since the date of that return;
- (iii) the number of shares held by each shareholder;
- (iv) the shares transferred by existing shareholders or past shareholders (including the dates of registration of the transfers) —
  - (A) since the last annual return;
  - (B) in the case of the first annual return of a company registered under this Act, since the date of registration; or
  - (C) in the case of the first annual return of a company reregistered under this Act in accordance with the Tenth Schedule, since the date of that return;
- (i) A certificate in the prescribed form signed by at least one director or company secretary of the company that as at the date of the annual return the company had adequate liquidity;
- (j) A statement whether, at any time —
  - (i) since the last annual return;
  - (ii) in the case of the first annual return of a company registered under this Act, since the date of registration; or
  - (iii) in the case of the first annual return of a company reregistered under this Act in accordance with the Tenth Schedule, since the date of that return —  
clause 8 of the Ninth Schedule applied to the company;
- (k) In the case of a company which has passed a resolution under section 205(2) that no auditor be appointed, the text and date of the resolution;
- (l) The date of the last annual meeting of the company held under this Act or, if the company avoided the need for an annual meeting by doing everything required to be done at that meeting by passing a resolution under section 122, the date on which the resolution was passed;



- (m) in the case of a company reregistered under this Act in accordance with the Tenth Schedule that has not been required to hold an annual meeting under this Act, the date of the first annual general meeting held under the Companies Act of 1912 (Cap. 27).

**NOTES:**

The information required by paragraph (f)(i) shall show separately the number of shares issued for cash and the number of shares issued as fully or partly paid up for a consideration other than cash.

The information required under paragraph (h) need relate only to persons who have become shareholders or who have ceased to be shareholders since the date of an annual return filed under this Act for one of the two preceding years if that annual return contained the information required by that paragraph.

**FOURTH SCHEDULE**

(Section 238(2), 239(1), 252(5), 323(4), 324(4))

**PROCEEDINGS AT MEETINGS OF CREDITORS****1 Method of holding meetings.**

A meeting of creditors may be held —

- (a) by assembling together those creditors entitled to take part and who choose to attend the place, date and time appointed for the meeting; or
- (b) by means of audio, or audio and visual, communication by which all creditors participating can simultaneously hear each other throughout the meeting; or
- (c) by conducting a postal ballot in accordance with clause 7 of those creditors entitled to take part.

**2 Notice of meeting.**

(1) Written notice of-

- (a) the time and place of every meeting to be held under clause 1 (a);
- (b) the time and method of communication for every meeting to be held under clause 1(b); or
- (c) the time and address for the return of voting papers for every meeting to be held under clause 1(a), (b) or (c), —

shall be sent to every creditor entitled to attend the meeting, and to any liquidator not less than five working days before the meeting.

(2) The notice shall —

- (a) state the nature of the business to be transacted at the meeting in sufficient detail to enable a creditor to form a reasoned judgment in relation to it;
- (b) set out the text of any resolution to be submitted to the meeting; and
- (c) include a voting paper in respect of each such resolution and voting and mailing instructions.

(3) An irregularity in or a failure to receive a notice of meeting of creditors does not invalidate anything done by a meeting of creditors if —

- (a) the irregularity or failure is not material; or
  - (b) all the creditors entitled to attend and vote at the meeting attend the meeting without protest as to the irregularity or failure; or
  - (c) all such creditors agree to waive the irregularity of failure.
- (4) If the meeting of creditors agrees, the chairperson may adjourn the meeting from time to time and from place to place.
- (5) An adjourned meeting shall be held in the same place unless another place is specified in the resolution for the adjournment.
- (6) If a meeting of creditors under clause 1(a) or (b) is adjourned for less than 30 days, it is not necessary to give notice of the time and place of the adjourned meeting other than by announcement at the meeting which is adjourned.

### **3 Chairperson.**

- (1) If a liquidator has been appointed and is present, or if the liquidator has appointed a nominee and the nominee is present, he shall act as chairperson of a meeting held in accordance with clause 1(a) or (b).
- (2) In any case where there is no liquidator or neither the liquidator nor any nominee of the liquidator is present, the creditors participating shall choose one of their number to act as chairperson of the meeting.
- (3) The person convening a meeting under clause 1(c) shall do everything necessary that would otherwise be done by the person chairing a meeting.

### **4 Quorum.**

- (1) A quorum for a meeting of creditors is present if —
- (a) three creditors who are entitled to vote or their proxies are present or have cast postal votes; or
  - (b) if the number of creditors entitled to vote does not exceed 3, the creditors who are entitled to vote or their proxies are present or have cast postal votes.
- (2) If a quorum is not present within 30 minutes after the time appointed for the meeting, the meeting is adjourned to the same day in the following week at the same time and place, or to such other date, time and place as the chairperson may appoint, and if, at the adjourned meeting, a quorum is not present within 30 minutes after the time appointed for the meeting, the creditors present or their proxies are a quorum.

**5 Voting.**

- (1) At any meeting of creditors or a class of creditors, not being a meeting held for the purposes of section 239, a resolution is adopted if a majority in number and value of the creditors or the class of creditors voting in person or by proxy vote in favour of the resolution.
- (2) At any meeting of creditors or a class of creditors held for the purposes of section 239, a resolution is adopted if a majority in number representing 75 percent in value of the creditors or class of creditors voting in person or by proxy vote in favour of the resolution.
- (3) A creditor chairing the meeting does not have a casting vote.

**6 Proxies.**

- (1) A creditor may exercise the right to vote either by being present in person or by proxy.
- (2) A proxy for a creditor is entitled to attend and be heard at a meeting of creditors as if the proxy were the creditor.
- (3) A proxy shall be appointed by notice in writing signed by the creditor and the notice must state whether the appointment is for a particular meeting or a specified term not exceeding 12 months.
- (4) No proxy is effective in relation to a meeting unless a copy of the notice of appointment is delivered to the liquidator or, if no liquidator is acting, to this person by whom the notice convening the meeting was given, not later than 48 hours before the start of the meeting.

**7 Postal votes.**

- (1) A creditor entitled to vote at a meeting of creditors held in accordance with clause 1(a), (b) or (c) may exercise the right to vote by casting a postal vote in relation to a matter to be decided at that meeting.
- (2) The notice of meeting shall state the name of the person authorised to receive and count postal votes in relation to that meeting.
- (3) If no person has been authorised to receive and count postal votes in relation to a meeting, or if no person is named as being so authorised in the notice of the meeting, every company secretary, or if the company is in liquidation, the liquidator, is deemed to be so authorised.
- (4) A creditor may cast a postal vote on all or any of the matters to be voted on at the meeting by sending a marked voting paper to a person authorised to receive and count postal votes in relation to that meeting, so as to reach that person not later than 24 hours before the start of the meeting or, if the

meeting is held under clause 1(c), not later than the date named for the return of the voting paper.

- (5) It is the duty of a person authorised to receive and count postal votes in relation to a meeting —
- (a) to collect together all postal votes received by him; and
  - (b) in relation to each resolution to be voted on —
    - (i) to count the number of creditors or creditors belonging to a class of creditors, as the case may be, voting in favour of the resolution and determine the total amount of the debts owed by the company to those creditors; and
    - (ii) to count the number of creditors or creditors belonging to a class of creditors, as the case may be, voting against the resolution and determine the total amount of the debts owed by the company to those creditors; and
  - (c) to sign a certificate —
    - (i) that he has carried out the duties set out in paragraphs (a) and (b); and
    - (ii) stating the results of the counts and determinations required by paragraph (b); and
  - (d) to ensure that the certificate required by paragraph (c) is presented to the person chairing or convening the meeting.
- (6) If a vote is taken at a meeting held under clause 1(a) or (b) on a resolution on which postal votes have been cast, the person chairing the meeting shall include the results of voting by all creditors who have sent in a voting paper duly marked as for or against the resolution.
- (7) A certificate given under subclause (5) in relation to the postal votes cast in respect of a meeting of creditors shall be annexed to the minutes of the meeting.

## 8 Minutes.

- (1) The person chairing a meeting of creditors, or in the case of a meeting held under clause 1(c), the person convening the meeting, shall ensure that minutes are kept of all proceedings.
- (2) Minutes which have been signed correct by the person chairing or convening the meeting are prima facie evidence of the proceedings.

**9 Corporations may act by representatives.**

A body corporate which is a creditor may appoint a representative to attend a meeting of creditors on its behalf.

**10 Other proceedings.**

Except as provided in this Schedule and in any regulations made under this Act, a meeting of creditors may regulate its own procedure.

**FIFTH SCHEDULE**

(Section 269(2))

**POWERS OF LIQUIDATORS**

A liquidator of a company has power to —

- (a) commence, continue, discontinue and defend legal proceedings;
- (b) the extent necessary for the liquidation carry on the business of the company;
- (c) appoint a law practitioner;
- (d) pay any class of creditors in full;
- (e) make a compromise or an arrangement with creditors or persons claiming to be creditors or who have or allege the existence of a claim against the company, whether present or future, actual or contingent, or ascertained or not;
- (f) compromise calls and liabilities for calls, debts and liabilities capable of resulting in debts, and claims, present or future, actual or contingent, or ascertained or not subsisting or supposed to subsist between the company and any person and all questions relating to or affecting the assets or the liquidation of the company, on such terms as may be agreed, and take security for the discharge of any such call, debt, liability or claim, and give a complete discharge;
- (g) sell or otherwise dispose of the property of the company;
- (h) act in the name and on behalf of the company and enter into deeds, contracts and arrangements in the name and on behalf of the company.
- (i) prove, rank and claim in the bankruptcy or insolvency of a shareholder for any balance against that person's estate, and to receive dividends in the bankruptcy or insolvency, as a separate debt due from the bankrupt or insolvent, and rateably with the other separate creditors;
- (j) draw, accept, make and endorse a bill of exchange or promissory note in the name and on behalf of the company, with the same effect as if the bill or note had been drawn, accepted, made or endorsed by or on behalf of the company in the course of its business;
- (k) borrow money on the security of the company's assets;

- (l) take out, in his name as liquidator, letters of administration to a deceased shareholder, and to do in that name any other act necessary for obtaining payment of money due from a shareholder or his estate which cannot be conveniently done in the name of the company, and in all such cases the money due shall, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator;
- (m) call a meeting of creditors or shareholder; for —
  - (i) the purpose of informing creditors or shareholders of progress in the liquidation;
  - (ii) the purpose of ascertaining the views, of creditors or shareholders on any matter arising in the liquidation;
  - (iii) such other purpose connected with the liquidation as the liquidator thinks fit,
- (n) appoint an agent to do anything which the liquidator is unable to do.



**SIXTH SCHEDULE**

(Sections 243, 264(5), 321)

**PREFERENTIAL CLAIMS**

1. The liquidator must first pay, in the order of priority in which they are listed —
  - (a) the fees and expenses properly incurred by the liquidator in carrying out the duties and exercising the powers of the liquidator and the remuneration of the liquidator;
  - (b) the reasonable costs of a person who applied to the Court for an order that the company be put into liquidation, including the reasonable costs of a person appearing on the application whose costs are allowed by the Court;
  - (c) the actual out-of-pocket expenses necessarily incurred by a liquidation committee.
2. After paying the claims referred to in clause 1, the liquidator shall next pay the following claims —
  - (a) subject to clause 6, all wages or salary of any employee, whether or not earned wholly or in part by way of commission, and whether payable for time or for piece work, in respect of services rendered to the company during the four months preceding the commencement of the liquidation;
  - (b) subject to clause 6, holiday pay becoming payable to an employee (or where the employee has died, to any other person in the employee's right) on the termination of the employment before or by reason of the commencement of the liquidation;
  - (c) subject to clause 6, amounts deducted by the company from the wages or salary of an employee in order to satisfy obligations of the employee;
  - (d) amounts that are preferential claims under section 272(2);
  - (e) all sums which by any other enactment are required to be paid in accordance with the priority established by this clause.
3. After paying the claims referred to in clause 2, the liquidator shall next pay all sums paid —
  - (a) by a buyer to a seller on account of the purchase price of goods; and
  - (b) for which the buyer is a creditor in the liquidation of the company.

4. After paying the claims referred to in clause 3, the liquidator shall next pay the amount of any costs referred to in section 243(c).
5. After paying the sums referred to in clause 4, the liquidator must next pay the amount of —
  - (a) tax payable by the company in the manner required by section 5 of the Sales Tax Act (Cap. 69);
  - (b) tax deductions made by the company under Part V of the Income Tax Act (Cap. 68);
  - (c) withholding tax deducted by a company under Part VI of The Income Tax Act (Cap. 68);
  - (d) duty payable by the company under section 7 of the Customs and Excise Act (Cap.67), —

to the extent that the amount is for the time being unpaid to the Commissioner of Inland Revenue or to the Collector of Customs, as the case may require.

6. The total sum to which priority is to be given under clause 2(a), (b) or (c) shall not, in the case of any one employee, exceed \$600 or such greater amount as is prescribed that the commencement of the liquidation.
7. Where a payment has been made —
  - (a) to an employee of a company on account of wages or salary; or
  - (b) to any such employee or, where the employee has died, to any other person in the employee's right, on account of holiday pay, —

out of money advanced by some person for that purpose, the person by whom the money was advanced has, in a liquidation, the same right of priority in respect of the money so advanced as the employee, or other person receiving the payment in right of the employee, would have if the payment had not been made.

8. The claims listed in each of clauses 2, 3, 4 and 5 —
  - (a) rank equally among themselves and shall be paid in full, unless the assets are insufficient to meet them, in which case they abate in equal proportions; and
  - (b) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of persons in respect of assets which are subject to a floating charge and shall be paid accordingly out of those assets.

For the purposes of this clause, the term “floating charge” includes a charge that conferred a floating security at the time of its creation but has since become a fixed or specific charge.

9. To the extent that the claims to which clause 8 applies are paid out of assets referred to in paragraph (b) of that clause, the amount so paid is an unsecured debt due by the company to the secured party.
10. If a landlord or other person has distrained on goods or effects of the company within the month preceding the commencement of the liquidation, the claims to which priority is given by this Schedule are a first charge on the goods or effects so distrained on, or the proceeds from their sale, but where any money is paid to a claimant under any such charge, the landlord or other person has the same rights of priority as that claimant.
11. For the purposes of this Schedule —
  - (a) remuneration in respect of a period of holiday or of absence from work through sickness or other good cause is to be treated as wages in respect of services rendered to the company during that period.
  - (b) the expression “holiday pay”, in relation to a person, means all sums which by or under any enactment or any award, agreement or contract of service are payable to that person by the company as holiday pay.

**SEVENTH SCHEDULE**

(Section 324(3))

**PROCEEDINGS AT MEETINGS OF LIQUIDATION COMMITTEE:****1 Frequency of meetings.**

The committee shall meet at such times as it from time to time appoints, and the liquidator or a member of the committee may also call a meeting of the committee as and when necessary.

**2 Majorities.**

The committee may act by a majority of its members present at a meeting, but may not act unless a majority of the committee are present.

**3 Resignation.**

A member of the committee may resign by notice in writing signed by him and delivered to the liquidator.

**4 Office becoming vacant.**

If a member of the committee becomes bankrupt, or compounds or arranges with his creditors, or is absent from three consecutive meetings of the committee without the leave of those members who together with that member represent the creditors of shareholders, as the case may be, the office of that member becomes vacant.

**5 Removal of a member.**

A member of the committee may be removed by a resolution carried at a meeting of creditors if the member represents creditors, or of shareholders, of which five working days' notice has been given, stating the object of the meeting.

**6 Vacancy filled.**

A vacancy in the committee may be filled by the appointment by the committee of —

- (a) the same or another creditor or shareholder, as the case may be; or
- (b) a person holding a general power of attorney from, or being an authorised director or company secretary of, a company which is a creditor or shareholder, as the case may be.

**7 Committee with vacancy may act.**

The continuing members of the committee, if not less than 2, may act even though a vacancy exists in the committee.

**EIGHTH SCHEDULE**

(Sections 350(2), 351(1))

**LIQUIDATION OF ASSETS OF OVERSEAS COMPANIES****1 Modified application of Part XVI.**

Part XVI applies to the liquidation of the assets in Tonga of an overseas company, with the following modifications and exclusions —

- (a) references to assets are to be taken as references to assets in Tonga;
- (b) references to a company are to be taken as references to an overseas company;
- (c) references to removal from the Tongan register are to be taken as references to ceasing to carry on business in Tonga;
- (d) the following provisions of that Part do not apply to such a liquidation:
  - (i) section 257(1)(d), (e) (f) and (g);
  - (ii) section 227;
- (e) section 257(1)(b) does not affect the tenure of directors or company secretaries of an overseas company, but the overseas company and its directors and company secretaries cease to have any powers, functions or duties in relation to the company's assets in Tonga, other than those required or permitted to be exercised by Part XVI;
- (f) section 266 applies to such a liquidation, but instead of making the statement required by subsection (1)(a)(ii)(C) of that section, the liquidator shall state that the company has ceased to carry on business in Tonga and is ready to be removed from the overseas register.

**2 Rights of action not affected.**

Nothing in this Act excludes the right of a creditor of an overseas company in relation to the assets of which a liquidator has been appointed —

- (a) to bring proceedings outside Tonga against the overseas company in relation to a debt not claimed in the liquidation or the balance of a debt remaining unpaid after the completion of a liquidation; or

- (b) to bring an action in Tonga in relation to the balance of a debt remaining unpaid after the completion of a liquidation.

**NINTH SCHEDULE**

(Sections 4(2)(a)(i), 4(3)(a)(i), 8 i ( i )(a), 203(1 )(c), 219(1 )(a), 220(1)(b), 309(1)(a)(ii), Schedule 3 clause (j))

**FINANCIAL REPORTING REQUIREMENTS****1 Interpretation.**

In this Schedule, unless the context otherwise requires —

“**approved financial reporting standard**” means a financial reporting standard approved by the Minister by notice in the Gazette; and includes an amendment to an approved financial reporting standard that is approved by the Minister by notice in the Gazette;

“**generally accepted accounting practice**” means financial statements and group financial statements which comply with —

- (a) approved financial reporting standards; and
- (b) in relation to matters for which no provision is made in approved financial reporting standards and that are not subject to any applicable rule of law, accounting policies that —
  - (i) are appropriate to that circumstances of the company; and
  - (ii) have authoritative support within the accounting profession in Tonga.

**2 Obligation to prepare financial statements.**

The directors of every company shall ensure that, within 5 months after the balance date of the company or, where the company is required by any other Act to prepare financial statements or accounts within a shorter period after the end of its financial year or balance date, within that period, financial statements that comply with clause 4 are —

- (a) completed in relation to the company and that balance date; and
- (b) dated and signed on behalf of the directors by two directors of the company, or by one director and one company secretary.



**3 Content of financial statements of companies.**

- (1) The financial statements of a company shall comply with generally accepted accounting practice.
- (2) If, in complying with generally accepted accounting practice, the financial statements do not give a true and fair view of the matters to which they relate, the directors of the company shall add such information and explanations as will give a true and fair view of those matters.
- (3) Where the Registrar notifies a company that is an overseas company that he is satisfied that —
  - (a) the financial statements of the company comply with the requirements of the law in force in the country where the company is incorporated; and
  - (b) those requirements are substantially the same as those of this Schedule,-

those financial statements shall be taken to comply with this clause and every approved financial reporting standard.

**4 Obligation to prepare group financial statements.**

- (1) Subject to subclause (2), the directors of a company that has, on the balance date of the company, one or more subsidiaries, shall, in addition to complying with clause 3, ensure that, within five months after that balance to date or, where the company is required by any other Act to prepare group financial statements or group accounts within a shorter period after the end of its financial year or balance date, within that period, group financial statements that comply with clause 6 are —
  - (a) completed in relation to that group and that balance date; and
  - (b) dated and signed on behalf of the directors by two directors of the company, or by one director and one company secretary.
- (2) Group financial statements are not required in relation to a company and a balance date if the only shareholders of the company at that balance date comprise —
  - (a) a body corporate that is incorporated in Tonga or a nominee of such a body corporate; or
  - (b) a body corporate that is incorporated in Tonga or a nominee of such a body corporate and a subsidiary of such a body corporate or a nominee of such a subsidiary.

**5 Content of group financial statements.**

- (1) The financial statements of a group shall comply with generally accepted accounting practice.
- (2) If, in complying with generally accepted accounting practice, the group financial statements do not give a true and fair view of the matters to which they relate, the directors of the company shall add such information and explanations as will give a true and fair view of those matters.
- (3) In any case where a subsidiary became a subsidiary of a company during the accounting period to which the group financial statements relate, the consolidated profit and loss statement or the consolidated income and expenditure statement for the group, must, unless any approved financial reporting standard otherwise requires, relate to the profit or loss of the subsidiary for each part of that accounting period during which it was such a subsidiary, and not to any other part of that accounting period.
- (4) Subject to subclause (3), where the balance date of a subsidiary of a company is not the same as that of the company, the group financial statements shall —
  - (a) if the balance date of the subsidiary does not precede that of the company by more than three months, incorporate the financial statements of the subsidiary for the accounting period ending on that date, or incorporate interim financial statements of the subsidiary completed in respect of a period that is the same as the accounting period of the company; or
  - (b) in any other case, incorporate interim financial statements of the subsidiary completed in respect of a period that is the same as the accounting period of the company;
- (5) Where the Registrar notifies a company that is an overseas company that he is satisfied that —
  - (a) the group financial statements of the group that comprises the company and its subsidiaries comply with the requirements of the law in force in the country where the company is incorporated; and
  - (b) those requirements are substantially the same as those of this Schedule, —those financial statements shall be taken to comply with this clause and every approved financial reporting standard.
- (6) Subject to subclause (3), group financial statements shall, except where otherwise required by an approved financial reporting standard, incorporate the financial statements of every subsidiary of the company.

**6 Auditors report on companies.**

- (1) Where, pursuant to this Act or the Companies Act of 1912 (Cap. 27), the financial statements of a company or group financial statements are required to be audited, the auditor's report on the financial statements or group financial statements shall state —
  - (a) the work done by the auditor;
  - (b) the scope and limitations of the audit;
  - (c) the existence of any relationship (other than that of auditor) which the auditor has with, or any interests which the auditor has in, the company or any of its subsidiaries;
  - (d) whether the auditor has obtained all information and explanations that he has required;
  - (e) whether, in the auditor's opinion, as far as appears from an examination of them, proper accounting records have been kept by the company;
  - (f) whether, in the auditor's opinion, the financial statements and any group financial statements comply with generally accepted accounting practice, and if they do not, the respects in which they fail to comply; and
  - (g) whether, in the auditor's opinion and having regard to any information or explanations that may have been added by the company pursuant to clause 4(2) or clause 6(2), the financial statements and any group financial statements give a true and fair view of the matters to which they relate, and, if they do not, the respects in which they fail to give such a view.
- (2) Where the auditor's report indicates that the requirements of this Schedule have not been complied with, the auditor shall, within seven working days after completing the report, send a copy of the report and a copy of the financial statements and any group financial statements to which it relates, to the Registrar who shall, in turn, forthwith send copies of the report and statements to the Minister.

**7 Overseas companies and certain other companies to register financial statements.**

- (1) This clause applies to any company —
  - (a) that is an overseas company;
  - (b) that is a subsidiary of a company or body corporate incorporated outside Tonga; or

- (c) in which shares that in aggregate carry the right to exercise or control the exercise of 25 percent or more of the voting power at a meeting of the company are held by —
  - (i) a subsidiary of a company or body corporate incorporated outside Tonga and a subsidiary of that subsidiary;
  - (ii) a company or body corporate incorporated outside Tonga; or
  - (iii) a person not ordinarily resident in Tonga.
- (2) The directors of every company to which this clause applies shall ensure that, within 20 working days after the financial statements of the company and any group financial statements in relation to a group comprising that company and its subsidiaries are required to be signed, copies of those statements, together with a copy of the auditor's report on those statements, are delivered to the Registrar for registration.
- (3) The company shall, at the same time, pay to the Registrar, the prescribed registration fee.
- (4) For the purposes of subclause (1), a person is ordinarily resident in Tonga if that person —
  - (a) is domiciled in Tonga; or
  - (b) is living in Tonga and the place where that person usually lives is, and has been for the immediately preceding 12 months, in Tonga, whether or not that person has on occasions been away from Tonga during that period.
- (5) For the purposes of subclause (1), a subsidiary does not include any company or body corporate or association of persons that is classified as a subsidiary in any approved financial reporting standard.

## **8 Offences by directors and company secretaries of companies.**

- (1) Where —
  - (a) financial statements in relation to a company are not completed and signed within the time specified in clause 3; or
  - (b) group financial statement in relation to a group comprising a company and its subsidiaries are not completed and signed within the time specified in clause 5, —

every director or company secretary of the company commits an offence and is liable on conviction on indictment to imprisonment for a term not exceeding three years or to a fine not exceeding \$1,000.

- (2) Where the financial statements of a company or group financial statements in relation to a group comprising a company and its subsidiaries fail to comply with an approved financial reporting standard,

every director or company secretary of the company commits an offence and is liable on conviction on indictment to imprisonment for a term not exceeding three years or to a fine not exceeding \$1,000.

## **9 Offences by directors and company secretaries of overseas companies and subsidiaries of overseas companies**

Where a copy of the financial statements of a company to which clause 8 applies and any group financial statements relating to a group comprising that company and its subsidiaries, and a copy of the auditor's report on those statements are not delivered to the Registrar in accordance with subclause (2) of that clause, every director or company secretary of the company commits an offence and is liable on conviction on indictment to imprisonment for a term not exceeding three years or to a fine not exceeding \$1,000.

## **10 Defences.**

If is a defence to a director or company secretary of a company charged with an offence under any of clauses 9 and 10 if the director or company secretary proves that —

- (a) the directors of the company took all reasonable and proper steps to ensure that the applicable requirement of this Schedule would be complied with;
- (b) he took all reasonable and proper steps to ensure that the directors of the company complied with the applicable requirement; or
- (c) in the circumstances he could not reasonably have been expected to take steps to ensure that the directors of the company complied with the applicable requirement.

## **11 False statements.**

(1) Every person who, with respect to a document required by this Schedule —

- (a) makes, or authorises the making of, a statement in the document that is false or misleading in a material particular knowing the statement to be false or misleading; or
- (b) omits, or authorises the omission, from the document of any matter knowing that the omission makes the document false or misleading in a material particular, —

commits an offence and is liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine not exceeding \$2,000.

- (2) For the purposes of this clause, a person who voted in favour of the making of a statement at a meeting of directors or members or shareholders of a company is deemed to have authorised the making of the statement.

**TENTH SCHEDULE**

(Sections 2(1), 33(b), 83(5), 98(3), 98(5), 99(1)(b)(ii), 99(5)(b), 99(5)(c), 147(1)(a), 367(1)(a), 369(2)(b); Schedule 3)

**REREGISTRATION OF EXISTING COMPANIES****1 Interpretation.**

In this Schedule, unless the context otherwise requires —

“**application for reregistration**” means an application for registration of an existing company in accordance with this Schedule;

“**old register**” means the register of companies under the Companies Act 1912 (Cap. 27);

“**transition period**”, in relation to an existing company, means the period beginning on the 1<sup>st</sup> day of July 1996 and ending with the close of the 31<sup>st</sup> December, 1997.

**2 Existing companies to reregister.**

- (1) Every existing company shall apply for reregistration in accordance with this Schedule before the end of the transition period.
- (2) Every application shall be —
  - (a) made in accordance with this Schedule;
  - (b) in the prescribed form; and
  - (c) delivered to the Registrar.
- (3) Without limiting subclause (2), every application shall state —
  - (a) the name of the existing company;
  - (b) the full names and residential addresses of the directors and company secretaries of the existing company at the date of the application;
  - (c) the number of shares of the existing company, and the rights, privileges, limitations, and conditions attached, to each of those shares, if they differ from those that, pursuant to section 40, will attach to the shares on reregistration;
  - (d) the registered office of the existing company at the date of the application;

- (e) the proposed address for service of the existing company on its reregistration;
  - (f) that the application has been approved —
    - (i) in the case of a company having a share capital, by a special resolution of the members of each class of shares in the company;
    - (ii) in the case of a company not having a share capital, by a special resolution of the members of the company, —
- and shall be accompanied by —
- (g) a document certified by at least one director or company secretary of the company as the company's constitution as at the date of the application; and
  - (h) a certificate in the prescribed form signed by at least one director or company secretary of the company that on reregistration the company will have adequate liquidity.
- (4) An application for reregistration may be made only in accordance with this Schedule.

### **3 Reregistration.**

- (1) Subject to this Schedule, as soon as the Registrar receives a properly completed application for reregistration of an existing company in accordance with this Schedule, the Registrar shall —
  - (a) enter on the Tongan register the particulars of the company required under section 367; and
  - (b) issue a certificate of reregistration in the prescribed form.
- (2) A certificate of reregistration of a company issued under this clause is conclusive evidence that —
  - (a) all the requirements of this Schedule as to reregistration have been complied with; and
  - (b) on and from the date of reregistration stated in the certificate, the company is reregistered under this Act.
- (3) Immediately after reregistering the company in accordance with this clause, the Registrar shall remove the company from the old register.

### **4 Effect of reregistration.**

- (1) The reregistration of an existing company does not
  - (a) create a new legal entity;



- (b) prejudice or affect the identity of the body corporate constituted by the company or its continuity as a legal entity;
  - (c) affect the property, rights, or obligations of the company; or
  - (d) affect proceedings by or against the company.
- (2) Proceedings that could have been commenced or continued by or against the company before reregistration may be commenced or continued by or against the company after reregistration.

## **5 Companies that do not register.**

- (1) The Registrar shall remove from the old register any company that has not made a properly completed application for reregistration within the transition period.
- (2) Part XVII applies with such modifications as may be necessary to the removal of companies from the old register under subclause (1) as if a reference to the Tongan register were a reference to the old register.
- (3) For the purpose of section 327(1)(b) the fact that the company has not made an application for reregistration within the transition period shall of itself be sufficient to satisfy the Registrar without further enquiry that the company has ceased to carry on business.
- (4) If the Registrar is prevented by section 331(1) or by an order under section 332(2) from removing a company to which subclause (1) applies from the old register, the company shall reregister in accordance with this Schedule.
- (5) The provisions of this clause are in addition to, and not limited by, section 67 of the Companies Act of 1912 (Cap. 27).