

No. 10 of 1997.

***Companies Act 1997.***

Certified on: / /20 .



INDEPENDENT STATE OF PAPUA NEW GUINEA.



No. 10 of 1997.

*Companies Act 1997.*

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INDEPENDENT STATE OF PAPUA NEW GUINEA.



AN ACT

entitled

***Companies Act 1997,***

Being an Act to reform the law relating to companies and to repeal the *Companies Act* (Chapter 146) and for related purposes,

MADE by the National Parliament to come into operation in accordance with a notice in the National Gazette by the Head of State, acting with, and in accordance with the advice of the Minister.

**PART I. – PRELIMINARY.**

**1. COMPLIANCE WITH CONSTITUTIONAL REQUIREMENTS.**

(1) For the purposes of Section 41 of the *Organic Law on Provincial Governments and Local-level Governments*, it is declared that this law relates to a matter of national interest.

(2) This Act, to the extent that it regulates or restricts a right or freedom referred to in Subdivision III.3.C. (*qualified rights*) of the *Constitution*, namely–

- (a) the right to freedom from arbitrary search and entry conferred by Section 44 of the *Constitution*; and
- (b) the right to freedom of employment conferred by Section 48 of the *Constitution*; and
- (c) the right to privacy conferred by Section 49 of the *Constitution*; and
- (d) the right to freedom of information conferred by Section 51 of the *Constitution*,

is a law that is made for the purpose of giving effect to the public interest in public welfare.

**2. INTERPRETATION.**

(1) In this Act, unless the contrary intention appears–

“**accounting period**”, in relation to a company, means a year ending on a balance date of the company and, where as a result of the date of the registration or incorporation 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;

“**Accounting Standards Board**” means the body established by Section 204;

“**address for service**” in relation to a company, means the company’s address for service adopted in accordance with Section 167;

“**agent**”, in relation to an overseas company, means a person named on the register as a person who is—

- (a) authorized to accept service in the country of documents on behalf of the overseas company; and
- (b) responsible for submitting to the Registrar the documents required by this Act to be submitted in respect of the overseas company;

“**annual meeting**” means a meeting required to be held by Section 101, and includes a resolution in lieu of meeting under Section 103;

“**balance date**” has the meaning set out in Section 176;

“**banking corporation**” means a bank as defined in Section 3 of the *Banks and Financial Institutions Act 2000*;

“**board**” and “**board of directors**” have the meanings set out in Section 108;

“**certified**” means certified in accordance with Regulations made under this Act;

“**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 361, but does not include a charge under a charging order issued by a court in favour of a judgment creditor;

“**class**” has the meaning set out in Section 97;

“**company**” means a company registered under Part II and includes an existing company registered under this Act in accordance with Section 442 or deemed to be registered under this Act in accordance with Section 443;

“**constitution**” means a document referred to in Section 30;

“**Court**” means the National Court;

“**debenture**” includes debenture stock, bonds, notes, certificates of deposit and convertible notes;

“**director**” has the meaning set out in Section 107;

**“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 51;

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

- (a) any writing on any material; and
- (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; and
- (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 the repealed Act or any corresponding previous law;

**“financial statements”** has the meaning set out in Section 177;

**“foreign company”** means a body corporate registered under Division XII.3 of the repealed Act or any corresponding law;

**“group financial statements”** has the meaning set out in Section 178;

**“group of companies”** has the meaning set out in Section 171;

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

**“interested”**, in relation to a director, has the meaning set out in Section 117;

**“interest group”** has the meaning set out in Section 97;

**“interests register”** means the register kept under Section 164(1)(c);

**“major transaction”** has the meaning set out in Section 110(2);

**“ordinary resolution”** has the meaning set out in Section 87(2);

“**overseas company**” means a body corporate that is incorporated outside of Papua New Guinea;

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

“**pre-emptive rights**” means the rights conferred on shareholders under Section 45;

“**prescribed form**” means a form prescribed by Regulation that contains, or has attached to it, such information or documents as that Regulation 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;

“**receiver**” has the meaning set out in Section 254;

“**records**” means the documents required to be kept by a company under Section 164(1);

“**redeemable**” has the meaning set out in Section 59;

“**register**” means the register kept pursuant to Section 395(1) of—

- (a) companies incorporated in Papua New Guinea that are registered or deemed to be registered under Part II; and
- (b) bodies corporate incorporated outside Papua New Guinea that are registered or deemed to be registered under Part XX.

“**registered office**” has the meaning set out in Section 161;

“**Registrar**” means the Registrar of Companies appointed in accordance with Section 394(1);

“**related company**” and “**related corporation**” have 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;  
or
- (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 124;

“**repealed Act**” means the *Companies Act* (Chapter 146) and other Acts repealed by Section 440;

“**resident agent**” means the person referred to in Section 386(2)(e);

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

**“Securities Commission of Papua New Guinea”** means the Securities Commission of Papua New Guinea established under the *Securities Act 1997*;

**“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 property); and
- (b) any renewal or variation of the terms or conditions of any existing security;

**“share”** has the meaning set out in Section 36;

**“shareholder”** has the meaning set out in Section 78;

**“share register”** means the share register required to be kept under Section 67;

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

**“special meeting”** means a meeting called in accordance with Section 102;

**“special resolution”** means a resolution approved by a majority of 75% or, where 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, includes a person with whom that person has a relationship in the nature of marriage;

**“stockbroker”** means any person who is in the business of, whether as principal or agent, dealing in securities;

**“stock exchange”** means a stock exchange that is a member of the Federation International des Bourses de Valeurs;

**“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 361 prior to the removal of the company from the register;

**“this Act”** includes the regulations made under this Act.

(2) Where—

- (a) in relation to a company or an overseas company, any document is required to be submitted or any thing is required to be done in regard to the Registrar within a period specified by this Act; and
- (b) the last day of that period falls on a day when the office of the Registrar is not open for business,

the document may be submitted or that thing may be done in regard to the Registrar on the next day on which the office is open for business.

- (3) In this Act, a corporation is related to another corporation where—
- (a) the other corporation is its holding corporation or subsidiary; or
  - (b) more than half of the issued shares of the corporation, 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 corporation and corporations related to that other corporation (whether directly or indirectly, but other than in a fiduciary capacity); or
  - (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); or
  - (d) the businesses of the corporations have been so carried on that the separate business of each corporation, or a substantial part of it, is not readily identifiable; or
  - (e) there is another corporation to which both corporations are related,

and “**related company**” and “**related corporation**” have a corresponding meaning.

- (4) A reference in this Act to an address means—
- (a) in relation to a natural person, the full address of the place where that person usually lives; and
  - (b) in relation to any other person, its registered office or, where it does not have a registered office, its principal place of business.

(5) In relation to banks and financial institutions within the meaning of the *Central Banking Act 2000*, this Act shall be read subject to that Act and the *Banks and Financial Institutions Act 2000*.

### 3. PUBLIC NOTICE.

Where, pursuant to this Act, public notice is required to be given of any matter affecting a company or an overseas company, that notice shall be given by publishing notice of the matter in at least one issue of—

- (a) the National Gazette; and
- (b) a newspaper circulating throughout the country.

### 4. MEANING OF “SOLVENCY TEST”.

- (1) For the purposes of this Act, a company satisfies the solvency test where—
- (a) the company is able to pay its debts as they become due in the ordinary 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 Sections 50 and 53(3), in determining for the purposes of this Act (other than Sections 234 and 235 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 Section 179; 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 its liabilities, including its contingent liabilities; and
- (b) may rely on valuations of assets or estimates of liabilities that are reasonable in the circumstances.

(3) Without limiting Sections 234 and 235, in determining for the purposes of this Act whether the value of an 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 Section 179 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; and
- (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 Act, 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 where, but only where—

- (a) that other company—
  - (i) controls the composition of the board of the company; or

- (ii) is in a position to exercise, or control the exercise of, more than one-half of the maximum number of votes that can be exercised at a meeting of the company; or
  - (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, where, but only where, that other company is its subsidiary.

(3) In this section and Sections 6 and 7, the expression "company" includes a body corporate.

#### **6. "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 where the other company, by exercising a power exercisable (whether with or without the consent or concurrence of any other person) by it, 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 is to be taken as having power to make such an appointment where—

- (a) a person cannot 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.

#### **7. 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 that other company; and
- (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; and
- (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; and
- (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 where—
  - (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 good faith in the ordinary course of that business.

**8. OTHER INTERPRETATION PROVISIONS.**

(1) As well as in this Part interpretation provisions relevant to a particular Part or a Division may be found at the beginning of that Part or Division.

(2) Some sections also contain their own interpretation provisions, not necessarily at the beginning.

**9. APPLICATION OF ACT TO BANKS AND FINANCIAL INSTITUTIONS.**

In relation to banks and financial institutions within the meaning of the *Central Banking Act 2000*, this Act shall be read subject to that Act and the *Banks and Financial Institutions Act 2000*.

**10. ACT BINDS THE STATE.**

This Act binds the State.

**PART II. – INCORPORATION.*****Division 1.******Essential Requirements.*****11. ESSENTIAL REQUIREMENTS.**

A company shall have–

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

***Division 2.******Method of Incorporation.*****12. RIGHT TO APPLY FOR REGISTRATION.**

Any person may, either alone or together with another person, apply for registration of a company under this Act, despite the contrary in any other Act.

**13. APPLICATION FOR REGISTRATION.**

(1) An application for registration of a company under this Act shall be submitted to the Registrar, and shall be–

- (a) in the prescribed form; and
- (b) accompanied by a document in the prescribed form signed by every person named as a director, containing his consent to being a director and a certificate that he is not disqualified from being appointed or holding office as a director of a company; and
- (c) accompanied by a document in the prescribed form signed by any person named as a secretary, containing his consent to being the secretary; and
- (d) accompanied by–
  - (i) a document in the prescribed form signed by every person named as a shareholder, or by an agent of that person authorized in writing, containing his consent to being a shareholder and to taking the class and number of shares specified in the document; and
  - (ii) where the document has been signed by an agent, the instrument authorizing the agent to sign it; and
- (e) accompanied by a notice reserving a name for the proposed company; and

(f) where the proposed company is to have a constitution, accompanied by a certified copy of the company's constitution.

(2) Without limiting Subsection (1), an application under Subsection (1) shall state—

(a) the number of persons named as directors of the proposed company; and

(b) the number of persons (if any) named as secretaries of the proposed company; and

(c) the postal address of the proposed company; and

(d) the registered office of the proposed company; and

(e) the address for service of the proposed company.

#### **14. REGISTRATION.**

After the Registrar receives a properly completed application for registration of a company, under Section 13 or Section 442, the Registrar shall—

(a) register the application; and

(b) issue a certificate of incorporation in the prescribed form.

#### **15. CERTIFICATE OF INCORPORATION.**

A certificate of incorporation of a company issued under Section 14 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.

#### ***Division 3.***

#### ***Separate Legal Personality.***

#### **16. 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 register.

**PART III. – CAPACITY, POWERS, AND VALIDITY OF ACTIONS.**

***Division 1.***

***Capacity and Powers.***

**17. CAPACITY AND POWERS.**

(1) Subject to this Act and to any other law, a company has, both within and outside the country–

- (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 where the provision restricts the capacity of the company or those rights, powers, and privileges.

***Division 2.***

***Validity of Actions.***

**18. 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 any of Sections 142, 143, 147, and 148.

(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.

**19. 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; or
- (b) a person named as a director of the company in the most recent notice received by the Registrar under Section 137–
  - (i) is not a director of a company; or
  - (ii) has not been duly appointed; or
  - (iii) does not have authority to exercise a power which a director of a company carrying on business of the kind carried on by the company customarily has authority to exercise; or

- (c) a person held out by the company as a director, 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, employee, or agent of a company carrying on business of the kind carried on by the company customarily has authority to exercise; or
- (d) a person held out by the company as a director, employee, or agent of the company with authority to exercise a power which a director, employee, or agent of a company carrying on business of the kind carried on by the company does not customarily have authority to exercise, does not have authority to exercise that power; or
- (e) a document issued on behalf of a company by a director, 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), (b), (c), (d), or (e), as the case may be.

(2) Subsection (1) applies even though a person of the kind referred to in any of Paragraphs (b) to (e) (inclusive) 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.

## **20. 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 the constitution or document is—

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

**PART IV. – COMPANY NAMES.****21. NAME TO BE RESERVED.**

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

**22. REQUIREMENTS RELATING TO NAMES OF COMPANIES.**

(1) The registered name of a company shall end with the word “Limited” where the liability of the shareholders of the company is limited.

(2) A company shall not be registered by a name—

- (a) the use of which would contravene any law; or
- (b) that is identical or almost identical to the name of another company; or
- (c) that is identical or almost identical to a name that the Registrar has already reserved and that is still available for registration.

(3) Except with the consent of the Minister, a company shall not be registered by a name that is, in the opinion of the Registrar—

- (a) undesirable; or
- (b) misleading, deceptive or offensive; or
- (c) a name, or a name of a kind, that the Minister has directed the Registrar not to accept for registration.

**23. APPLICATION FOR RESERVATION OF NAME.**

(1) An application for reservation of the name of a company shall be made to the Registrar in the prescribed form.

(2) The Registrar shall not reserve a name where Section 22 prohibits the registration of a company with that name.

(3) The Registrar shall advise the applicant by notice in writing—

- (a) whether or not the Registrar has reserved the name; and
- (b) where the name has been reserved, that, unless the reservation is sooner revoked by the Registrar, the name is available for registration of a company with that name or on a change of name for three months after the date stated in the notice.

**24. CHANGE OF NAME.**

(1) An application to change the name of a company—

- (a) shall be in the prescribed form; and
- (b) shall be accompanied by a notice reserving the name; and



(c) may only be made after the shareholders of the company approve the change of name by special resolution.

(2) Subject to its constitution, an application to change the name of a company is not an amendment of the constitution of the company for the purposes of this Act.

(3) After the Registrar receives a properly completed application to change the name of a company, the Registrar shall—

(a) enter the new name of the company on the register; and

(b) issue a certificate of incorporation in the prescribed form for the company recording the change of name of the company.

(4) A change of name of a company—

(a) takes effect on and from the date stated on the certificate issued under Subsection (3); and

(b) does not affect the identity of the company, or the 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.

## **25. DIRECTION TO CHANGE NAME.**

(1) Where the Registrar believes on reasonable grounds that the name under which a company is registered should not have been allowed, 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 one month after the date on which the notice is served.

(2) Where the company does not change its name within the period specified in the notice under Subsection (1), the Registrar may enter on the 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) Where the Registrar registers a new name under Subsection (2), the Registrar shall issue a certificate of incorporation in the prescribed form for the company recording the new name of the company, and Section 24(4) applies in relation to the registration of the new name as if the name of the company had been changed under that section.

## **26. USE OF COMPANY NAME.**

(1) A 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.

(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 where 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 155, a company may use any of the following abbreviations in its name:—

(a) “Co” or “Coy” instead of the word “Company”;

(b) “Ltd” instead of the word “Limited”;

(c) “&” instead of the word “and”.

(4) Where, 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) Where a company fails to comply with Subsection (1) or (4)—

(a) the company commits an offence and is liable on conviction to the penalty set out in Section 413(1); and

(b) every director of the company commits an offence and is liable on conviction to the penalty set out in Section 414(1).

**PART V. – COMPANY CONSTITUTION.**

**27. NO REQUIREMENT FOR COMPANY TO HAVE CONSTITUTION.**

A company may, but does not have to have a constitution.

**28. EFFECT OF ACT ON COMPANY HAVING CONSTITUTION.**

Where a company has a constitution, the company, the board, each director, and each 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.

**29. EFFECT OF ACT ON COMPANY NOT HAVING CONSTITUTION.**

Where a company does not have a constitution, the company, the board, each director, and each shareholder of the company have the rights, powers, duties, and obligations set out in this Act.

**30. FORM OF CONSTITUTION.**

The constitution of a company, where it has one, is–

- (a) in the case of a company registered under Part II, the certified copy of the company's constitution submitted to the Registrar under Section 13 or Section 442; or
- (b) a document that is adopted by the company as its constitution under Section 33; or
- (c) a document described in Section 34; or
- (d) a document described in Paragraph (a), (b) or (c) as altered by the company under Section 33 or varied by the Court under Section 35.

**31. CONTENTS OF CONSTITUTION.**

Subject to Section 17(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.

**32. EFFECT OF CONSTITUTION.**

(1) Subject to this Act, the constitution of a company is binding as a contract between–

- (a) the company and each shareholder; and
- (b) each shareholder,

in accordance with its terms.

(2) The constitution of a company has no effect to the extent that it contravenes, or is inconsistent with, this Act or any other Act.

### **33. ADOPTION, ALTERATION, AND REVOCATION OF CONSTITUTION.**

(1) The shareholders of a company that does not have a constitution may, by special resolution, adopt a constitution for the company.

(2) Without limiting Section 98 or Section 152, but subject to Section 55, the shareholders of a company may, by special resolution, alter or revoke the constitution of the company.

(3) Within one month of the adoption of a constitution by a company, or the alteration or revocation 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 constitution, or of the alteration or revocation of the constitution, is submitted to the Registrar for registration.

(4) Where the board of a company fails to comply with Subsection (3), every director of the company commits an offence and is liable, on conviction, to the penalty set out in Section 414(2).

### **34. NEW FORM OF CONSTITUTION.**

(1) A company may, from time to time, submit to the Registrar a single document that incorporates the provisions of a document referred to in Section 30(a) or (b) or (c) or (d), together with all amendments to it.

(2) The Registrar may, where the Registrar considers that by reason of the number of amendments 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 submit to the Registrar a single document that incorporates the provisions of a document referred to in Section 30(a) or (b) or (c), together with all amendments to it.

(3) Within one month of receipt by a company of a notice under Subsection (2), the board shall ensure that the document required by that subsection is submitted.

(4) The board shall ensure that a document submitted to the Registrar under this section is accompanied by a certificate signed by a director to the effect that the document complies with Subsection (1) or (2), as the case may be.

(5) After the Registrar receives a document certified in accordance with Subsection (4), the Registrar shall—

- (a) register the document; and
- (b) give written advice of the registration to the person from whom the document was received.

(6) Where the board of a company fails to comply with Subsection (3) or (4), every director of the company commits an offence and is liable on conviction to the penalty set out in Section 414(2).

**35. COURT MAY ALTER CONSTITUTION.**

(1) The Court may, on the application of a director or shareholder of a company, where 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 an order under Subsection (1) shall ensure that a certified copy of the order, together with a certified copy of the constitution as altered, is submitted to the Registrar for registration within one month.

(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 413(2).

**PART VI. – SHARES.**

***Division 1.***

***Attributes of Shares.***

**36. LEGAL NATURE OF SHARES.**

A share in a company is personal property.

**37. 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 or auditor; or
  - (ii) adopt a constitution; or
  - (iii) alter the company's constitution, where it has one; or
  - (iv) approve a major transaction; or
  - (v) approve an amalgamation of the company under Section 234; or
  - (vi) put the company into liquidation; and
- (b) the right to an equal share in dividends authorized by the board; and
- (c) the right to an equal share in the distribution of the surplus assets of the company.

(2) Subject to Section 51, the rights specified in Subsection (1) may be negated, altered, or added to by the constitution of the company.

**38. 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 within the meaning of Section 59; or
- (b) confer preferential rights to distributions of capital or income; or
- (c) confer special, limited, or conditional voting rights; or
- (d) not confer voting rights.

**39. 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.

**40. TRANSFERABILITY OF SHARES.**

(1) Subject to any limitation or restriction on the transfer of shares in the constitution of the company, a share in a company is transferable.

(2) A share is transferred—

- (a) by entry in the share register in accordance with Section 65; or
- (b) in accordance with the terms of any exemption given by the Registrar under Section 77.

(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.

**41. CONTRACTS FOR ISSUE OF SHARES.**

(1) 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 unlawful and void unless the board—

- (a) has authorized the issue of the shares under Section 43; and
- (b) has complied with Section 47.

(2) Nothing in Subsection (1) applies to a contract or deed which provides that the obligation of the company to issue shares is conditional on the board—

- (a) authorizing the issue of the shares under Section 43; and
- (b) complying with Section 47.

***Division 2.***

***Issue of Shares.***

**42. 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; and
- (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.

**43. ISSUE OF OTHER SHARES.**

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

(2) Where the board authorizes the issue of shares which confer rights other than those set out in Section 37(1), or which impose any obligation on the holder, the board shall approve terms of issue which set out the rights and obligations attached to the shares.

(3) Terms of issue approved by the board under Subsection (2)–

- (a) shall be consistent with the constitution of the company, and to the extent that they are not so consistent are invalid and of no effect; and
- (b) are deemed to form part of the constitution, and may be amended in accordance with Section 33.

#### **44. NOTICE OF SHARE ISSUE.**

(1) Except where shares are issued under Section 42(a), the board of a company shall submit to the Registrar for registration, within one month of the issue of shares, a notice in the prescribed form of the issue of the shares by the company stating–

- (a) the number of shares issued; and
- (b) the names and other prescribed details of the shareholders; and
- (c) the class of shares issued; and
- (d) the consideration for which the shares were issued.

(2) The requirement of Subsection (1)(b) need not be included in that notice of issue of shares where the company complies with Sections 67 and 68, and–

- (a) the number of shareholders who have been issued shares the subject of the notice of issue of shares exceeds 100; or
- (b) the company is subject to a listing agreement with a stock exchange.

(3) The notice of issue of shares shall have attached–

- (a) any terms of issue of the shares approved by the board under Section 43(2); and
- (b) where the shares were issued for a consideration (whether totally or partially) other than cash, a copy of the certificate required under Section 47(2).

(4) Where the board of a company fails to comply with Subsection (1) or (2) or (3), every director of the company commits an offence and is liable on conviction to the penalty set out in Section 414(2).

#### **45. 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 to the holders of the shares already



issued in a manner and on terms that would, if the offer were 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.

**46. 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.

**47. CONSIDERATION TO BE DECIDED BY BOARD.**

(1) Before the board of a company issues shares under Section 43, the board shall—

- (a) decide the consideration for which the shares will be issued; and
- (b) 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.

(2) The directors who vote in favour of a resolution required by Subsection (1) shall forthwith sign a certificate—

- (a) stating the consideration for the issue of the shares; and
- (b) stating that, in their opinion, the consideration for the issue is fair and reasonable to the company and to all existing shareholders.

**48. 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 authorized in writing does not consent in writing to becoming the holder of the share before it is issued.

**49. TIME OF ISSUE OF SHARES.**

Except as otherwise provided in any applicable exemption given by the Registrar under Section 77, a share is issued when the name of the holder is entered on the share register.

*Division 3.**Distributions to Shareholders.***50. BOARD MAY AUTHORIZE 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 51 and the constitution of the company, authorize 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 forthwith 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) Where, after a distribution is authorized 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 authorized.

(4) In applying the solvency test for the purposes of this section and Section 54—

- (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 authorization; and
- (b) “**liabilities**” includes the amount that would be required, if the company were to be removed from the register after the distribution, to repay all fixed preferential amounts payable by the company to shareholders, at that 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 413(1).

**51. DIVIDENDS.**

(1) A dividend is a distribution other than a distribution to which Section 56 or Section 63 applies.

(2) The board of a company shall not authorize 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.

## **52. 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 where—

- (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; and
- (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; and
- (c) the shareholders to whom the right is offered are afforded a reasonable opportunity of accepting it; and
- (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 47 are complied with by the board.

## **53. SHAREHOLDER DISCOUNTS.**

(1) The board of a company that is an issuer within the meaning of Section 173 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 where 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.

(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 54 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 authorized.

#### **54. 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; and
- (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) Where, in relation to a distribution made to shareholders—

- (a) the procedure set out in Section 50 or Section 63, 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 Section 50 or Section 63, as the case may be, did not exist at the time the relevant resolution was passed,

a director who—

- (c) failed to take reasonable steps to ensure the procedure was followed; or
- (d) voted for the resolution, 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) Where by virtue of Section 50(3) a distribution is deemed not to have been authorized, a director who—

- (a) ceased after authorization 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) Where, by virtue of Section 53(5), a distribution is deemed not to have been authorized, 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 not able to be recovered from shareholders.

(5) Where, 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.

#### **55. DISTRIBUTION INCLUDES REDUCTION OF SHAREHOLDER LIABILITY.**

(1) Where a company proposes to alter its constitution, or to acquire shares issued by it, or redeem shares under Section 60, 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 50, as if it were a distribution; and
- (b) for the purposes of Section 51(2) and (3), as if it were a dividend.

(2) Where a company has altered its constitution, or acquired shares, or redeemed shares under Section 60, 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 54 as a distribution of the amount by which that liability was reduced.

(3) Where 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 54(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.

#### ***Division 4.***

#### ***Company May Acquire Its Own Shares.***

#### **56. COMPANY MAY ACQUIRE OR REDEEM ITS OWN SHARES.**

(1) A company may purchase or otherwise acquire any of its own shares under Sections 57, 89 and 91 to 93 (inclusive), but not otherwise.

(2) A company may redeem a share which is a redeemable share in accordance with Section 59, but not otherwise.

(3) A share that is acquired or redeemed by a company is deemed to be cancelled immediately upon acquisition or redemption, as the case may be.

(4) Immediately following the acquisition or redemption of shares by a company, the company shall submit a notice in the prescribed form to the Registrar of the number and class of shares acquired or redeemed.

(5) Where a company fails to comply with Subsection (4) every director of the company commits an offence and is liable on conviction to the penalty set out in Section 414(2).

#### **57. OFFER TO PURCHASE SHARES.**

(1) A company may agree to purchase or otherwise acquire its own shares where it is authorized to do so by its constitution.

(2) Before a company offers or agrees to purchase its own shares the board shall resolve that—

- (a) the acquisition is in the best interests of the company; and
- (b) the terms of the offer or agreement and the consideration to be paid for the shares are fair and reasonable to the company; and
- (c) it is not aware of any information that has not been disclosed to shareholders which is material to an assessment of the value of the shares, and as a result of which the terms of an offer or the consideration offered for shares are unfair to shareholders accepting the offer.

(3) Before a company—

- (a) makes an offer to acquire shares other than in a manner which will, if it is accepted in full, leave unaffected the relative voting and distribution rights of all shareholders; or
- (b) agrees to acquire shares other than in a manner which leaves unaffected the relative voting and distribution rights of all shareholders,

the board shall resolve that the making of the offer or entry into the agreement, as the case may be, is fair to those to whom the offer is not made or with whom no agreement is entered into.

#### **58. ENFORCEABILITY OF CONTRACT TO PURCHASE 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, after performing the contract, fail to satisfy the solvency test.

(2) A company has the burden of proving that after performance of the contract it would be unable to satisfy the solvency test.

(3) Until a 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, in a liquidation, to be ranked subordinate to the rights of creditors but in priority to the other shareholders.

***Division 5.***

***Redemption of Shares.***

**59. MEANING OF “REDEEMABLE”.**

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

- (a) at the option of the company; or
- (b) at the option of the holder of the share; or
- (c) on a date specified in the constitution,

for a consideration that is—

- (d) specified; or
- (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.

**60. REDEMPTION AT OPTION OF COMPANY.**

A redemption of a share at the option of the company is—

- (a) an acquisition by the company of the share, for the purposes of Section 57(2) and (3); and
- (b) a distribution, for the purposes of Section 50.

**61. REDEMPTION AT OPTION OF SHAREHOLDER.**

(1) Subject to this section, where 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 where no date is specified, on the date of receipt of the notice; and
- (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—

- (a) is not a distribution for the purposes of Sections 50 and 51; but
- (b) is deemed to be a distribution for the purposes of Section 54(1) and (5).

**62. REDEMPTION ON FIXED DATE.**

(1) Subject to this section, where a share is redeemable on a specified date—

- (a) the company shall redeem the share on that date; and
- (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—

- (a) is not a distribution for the purposes of Sections 50 and 51; but
- (b) is deemed to be a distribution for the purposes of Section 54(1) and (5).

(3) Where a company—

- (a) has issued shares that are redeemable on a specified date; and
- (b) does not redeem those shares by that date,

the company shall, immediately after that date, submit a notice in the prescribed form to the Registrar of the number of shares that have not been redeemed.

(4) Where a company does not comply with Subsection (3), every director of the company commits an offence and is liable on conviction to the penalty set out in Section 414(2).

***Division 6.******Assistance by a Company in the Purchase of Its Own Shares.*****63. COMPANY MAY GIVE FINANCIAL ASSISTANCE.**

(1) A company may give financial assistance directly or indirectly for the purposes of or in connection with the acquisition of its own shares in accordance with this section, but not otherwise.

(2) Before a company gives financial assistance under this section, the board shall resolve that—

- (a) giving the assistance is in the interests of the company; and
- (b) the terms and conditions on which the assistance is given are fair and reasonable to the company and to any shareholders not receiving that assistance; and
- (c) immediately after giving the assistance, the company will satisfy the solvency test.

(3) The giving of financial assistance under this section is not a distribution for the purposes of Section 50.

(4) For the purposes of this section, the term

**“financial assistance”**—



- (a) includes giving a loan or guarantee, or the provision of security; but
- (b) does not include entering into a transaction (including a loan or guarantee, or the provision of security)–
  - (i) in good faith in the ordinary course of business and on usual terms and conditions; or
  - (ii) in which the company receives fair value.

***Division 7.***

***Cross-holdings.***

**64. 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) 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 good faith in the ordinary course of the business of lending money.

(6) This section applies to a nominee for a subsidiary in the same way as it applies to the subsidiary.

***Division 8.***

***Transfer of Shares.***

**65. 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 given to–

- (a) the company; or
- (b) an agent of the company who maintains the share register under Section 67(3).

(3) The form of transfer shall be signed by the transferee.

(4) On receipt of a form of transfer in accordance with Subsections (2) and (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 one month 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; and
- (b) notice of the resolution, including those reasons, is sent to the transferor and to the transferee within five 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 under Subsection (4) where 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) Following entry of the name or names of a transferee or transferees on the share register the company shall submit to the Registrar notice in the prescribed form of that entry unless—

- (a) the company is subject to a listing agreement with a stock exchange; or
- (b) the total number of shares transferred since the date of incorporation or the last annual return under Section 215 is less than 50% of the issued shares; or
- (c) the company submits to the Registrar its annual return under Section 215 within one month of the date of entry of the transfer.

(7) Where a company fails to comply with Subsection (4) or (6)—

- (a) the company commits an offence and is liable on conviction to the penalty set out in Section 413(1); and
- (b) every director of the company commits an offence and is liable on conviction to the penalty set out in Section 414(1).

## **66. TRANSFER OF SHARES BY OPERATION OF LAW.**

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

***Division 9.***  
***Share Register.***

**67. 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; and
- (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; or
  - (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 a company.

(4) Where a company fails to comply with Subsection (1) or (2)—

- (a) the company commits an offence and is liable on conviction to the penalty set out in Section 413(2); and
- (b) every director of the company commits an offence and is liable on conviction to the penalty set out in Section 414(2).

**68. PLACE OF SHARE REGISTER.**

(1) Subject to Subsection (2), a company shall have only one share register.

(2) The share register of a company whose shares are subject to a listing agreement with a stock exchange may, if expressly permitted by its constitution, be divided into two or more registers kept in different places.

(3) The principal register of a company shall be kept in the country.

(4) Where a share register is divided into two or more registers kept in different places—

- (a) notice in the prescribed form of the place where each register is kept shall be submitted to the Registrar for registration within one month after the share register is divided or any place where a register is kept is altered; and
- (b) a copy of every register shall be kept at the same place as the principal register; and
- (c) where an entry is made in a register other than the principal register, a corresponding entry shall be made within one month in the copy of that register kept with the principal register.

(5) In this section,

“**principal register**”, in relation to a company, means—

- (a) where the share register is not divided into two or more registers, the share register; and
- (b) where 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.

(6) Where a company fails to comply with Subsection (3) or (4)—

- (a) the company commits an offence and is liable on conviction to the penalty set out in Section 413(2); and
- (b) every director of the company commits an offence and is liable on conviction to the penalty set out in Section 414(2).

## **69. SHARE REGISTER AS EVIDENCE OF LEGAL TITLE.**

(1) Subject to Section 71, 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; and
- (b) receive notices; and
- (c) receive a distribution in respect of the share; and
- (d) exercise the other rights and powers attaching to the share.

## **70. DIRECTORS’ DUTY TO SUPERVISE SHARE REGISTER.**

(1) It is the duty of each director 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 Section 65.

(2) A director who fails to comply with Subsection (1) commits an offence and is liable on conviction to the penalty set out in Section 413(2).

**71. POWER TO RECTIFY SHARE REGISTER.**

(1) Where the name of a person, or other particulars, are wrongly entered in, or omitted from, the share register of a company, the person aggrieved, or a shareholder, may apply to the Court—

- (a) for rectification of the share register; or
- (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; or
- (b) payment of compensation by the company or a director 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) a question relating to the entitlement of a person who is a party to the application to have his name or other particulars entered in, or omitted from, the register; and
- (b) a question necessary or expedient to be decided for rectification of the register.

(4) Any clerical or minor error in a share register of a company may be corrected where either the Registrar or every shareholder of the company at the time of correction, has agreed in writing to the correction.

**72. TRUSTS NOT TO BE ENTERED ON REGISTER.**

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

**73. PERSONAL REPRESENTATIVE MAY BE REGISTERED.**

(1) Notwithstanding Section 72, 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 72, 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 personal representative pursuant to this section does not constitute notice of a trust.

**74. TRUSTEE OF BANKRUPT MAY BE REGISTERED.**

(1) Notwithstanding Section 72, 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 72, the trustee of the property of a bankrupt beneficially entitled to a share in a company, being a share registered in a 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 the trustee of the property of the bankrupt.

***Division 10.******Share Certificates.*****75. SHARE CERTIFICATES.**

(1) Subject to Subsection (2), every company shall, within one month after the issue, or registration of a transfer, of shares in the company, as the case may be, send to every holder of those shares—

- (a) a share certificate signed under the common seal of the company stating—
  - (i) the name of the company; and
  - (ii) the class of shares held by that person; and
  - (iii) the number of shares held by that person; and
- (b) a statement setting out—
  - (i) the rights, privileges, conditions, and limitations, including restrictions on transfer, attaching to the shares held by that person; and
  - (ii) the relationship of the shares held by that person to other classes of shares.

(2) Notwithstanding Section 65, 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, where required, an indemnity in a form required by the board.

(3) Subject to Subsection (1), 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.

(4) Where 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 413(1); and

- (b) every director of the company commits an offence and is liable on conviction to the penalty set out in Section 414(1).

**76. LOSS OR DESTRUCTION OF SHARE CERTIFICATES.**

(1) Where a share certificate is lost or destroyed the company shall, on payment of a reasonable fee, issue a duplicate share certificate in its place to the holder of the shares on the application of that person.

(2) The application referred to in Subsection (1) shall be accompanied by—

- (a) a statutory declaration that the share certificate—
  - (i) has been lost or destroyed; and
  - (ii) has not been pledged, sold, or otherwise disposed of; and
  - (iii) if lost, that proper searches have been made; and
- (b) a written undertaking that if the holder of the shares finds or receives the share certificate he will return it to the company.

***Division 11.***

***Exemption From Share Transfer Provisions.***

**77. EXEMPTIONS FROM SHARE TRANSFER PROVISIONS.**

(1) The Registrar may by notice in writing, and on such terms and conditions as the Registrar thinks fit, exempt from any or all of the provisions of Divisions 8, 9 and 10—

- (a) any company or class of companies; or
- (b) any transaction or class of transactions.

(2) Any person who breaches any term or condition imposed by the Registrar is guilty of an offence.

**PART VII. – SHAREHOLDERS AND THEIR RIGHTS AND OBLIGATIONS.*****Division 1.******Meaning of “Shareholder”.*****78. 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; or
- (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; or
- (c) until the person’s name is entered in the share register, a person who is entitled to have that person’s name entered in the share register under a registered amalgamation proposal as a shareholder in an amalgamated company.

***Division 2.******Liability of Shareholders.*****79. LIABILITY OF SHAREHOLDERS.**

(1) 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 any liability expressly provided for in this Act or in the constitution of the company.

(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.

**80. 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 liability provided for in the constitution of the company for which that former shareholder was liable to the company where the Court is satisfied that the shareholders of the company are unable to discharge that liability.

(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) 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.

(4) 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.

#### 81. **ADDITIONAL PROVISIONS RELATING TO LIABILITY OF SHAREHOLDERS AND FORMER SHAREHOLDERS.**

(1) Where—

- (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 adoption or alteration of the constitution, repurchase or redemption of the share, amalgamation, or registration under this Act in accordance with Section 442 or deemed registration under this Act in accordance with Section 443, or change of registration under the repealed Act; and
- (c) the company is, at the commencement of its liquidation, subject to liabilities incurred prior to the adoption or alteration of the constitution, repurchase or redemption of the share, amalgamation, or registration under this Act in accordance with Section 442 or deemed registration under this Act in accordance with Section 443, or change of registration under the repealed Act, 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; and
- (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 55 and recovered from that person by the company.

(4) The amount received by a person as a distribution under Section 55 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; and
- (b) a member of a company limited by guarantee registered under the repealed Act is to be treated as if the member was the holder of a share which rendered the member liable to calls not exceeding the amount of contribution specified in the memorandum of association as the amount undertaken to be contributed by that member in a winding up; and
- (c) a member of an unlimited company registered under the repealed Act is to be treated as if the member was the holder of a share which rendered the member liable to unlimited calls.

## **82. 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.

## **83. 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.

**84. 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 a personal representative.

**85. LIABILITY OF A TRUSTEE.**

(1) The liability of the trustee of the property of a bankrupt, 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.

(2) In this section, “**trustee**” means the trustee in whom the property of a bankrupt is vested pursuant to the *Insolvency Act 1951*.

***Division 3.******Powers of Shareholders.*****86. EXERCISE OF POWERS RESERVED TO SHAREHOLDERS.**

(1) Powers reserved to the shareholders of a company by this Act may be exercised only—

- (a) at a meeting of shareholders pursuant to Section 101 or Section 102; or
- (b) by a resolution in lieu of a meeting pursuant to Section 103.

(2) Powers reserved to the shareholders of a company by the constitution of the company may, subject to the constitution, be exercised—

- (a) at a meeting of shareholders pursuant to Section 101 or 102; or
- (b) by a resolution in lieu of a meeting pursuant to Section 103.

**87. 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 of the votes of those shareholders entitled to vote and voting on the question.

**88. POWERS EXERCISED BY SPECIAL RESOLUTION.**

(1) Notwithstanding the constitution of a company, when shareholders exercise a power to—

- (a) adopt a constitution or, if it has one, alter or revoke the company's constitution; or
- (b) approve a change in the company's name; or
- (c) approve a major transaction; or
- (d) approve an amalgamation of the company under Section 234; or
- (e) put the company into liquidation,

the power shall be exercised by special resolution.

(2) A special resolution pursuant to any of Subsections (1)(a) to (d) (inclusive) can be rescinded only by a special resolution.

(3) A special resolution pursuant to Subsection (1)(e) cannot be rescinded in any circumstances.

**89. UNANIMOUS AGREEMENT BY SHAREHOLDERS.**

(1) Where all the shareholders of a company agree to, or concur in, any action which has been taken or is to be taken by the company—

- (a) the taking of that action is deemed to be validly authorized by the company, notwithstanding any provision in the constitution of the company; and
- (b) the provisions of this Act referred to in Schedule 1 do not apply in relation to that action.

(2) Without limiting Subsection (1), that subsection shall apply where all the shareholders of a company agree to or concur in—

- (a) the issue of shares by the company; or
- (b) the making of a distribution by the company; or
- (c) the repurchase or redemption of shares in the company; or
- (d) the giving of financial assistance by a company for the purpose of, or in connection with, the purchase of shares in the company; or
- (e) the payment of remuneration to a director, or the making of a loan to a director, or the conferral of any other benefit on a director; or
- (f) the making of a contract between an interested director and the company.

(3) Where—

- (a) a distribution is made by a company under this section; and

- (b) as a consequence of the making of the distribution, the company fails to satisfy the solvency test,

the distribution is deemed not to have been validly made.

(4) A distribution made to a shareholder which is deemed not to have been validly made 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; and
- (b) the shareholder has altered his position in reliance on the validity of the distribution; and
- (c) it would be unfair to require repayment in full or at all.

(5) Where reasonable grounds did not exist for believing that the company would satisfy the solvency test after the making of a distribution which is deemed not to have been validly made, each shareholder who agreed to or concurred in the making of the distribution is personally liable to the company to repay to the company so much of the distribution as is not able to be recovered from the shareholders to whom the distribution was made.

(6) Where, in an action brought against a shareholder under Subsection (4) or (5), 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 shareholder from liability in respect of,

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

## **90. MANAGEMENT REVIEW BY SHAREHOLDERS.**

(1) Notwithstanding anything in this Act or the constitution of the company, the Chairman 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.

### ***Division 4.***

#### ***Minority Buy-out Rights.***

## **91. 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 88(1)(a), and the proposed alteration imposes or removes a restriction on the activities of the company; or
  - (ii) Section 88(1)(c) or (d); and
- (b) the shareholders resolved, pursuant to Section 88, to exercise the power; and
- (c) the shareholder—
  - (i) casts 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
  - (ii) where the resolution to exercise the power was passed under Section 103, did not sign the resolution, or refrained from signing it in respect of all the shares registered in the shareholder's name and having the same beneficial owner,

that shareholder is entitled to require the company to purchase those shares in accordance with Section 92.

## **92. NOTICE REQUIRING PURCHASE.**

(1) A shareholder of a company who is entitled to require the company to purchase shares by virtue of Section 91 or Section 99 may—

- (a) within one month of the passing of the resolution at a meeting of shareholders; or
- (b) where the resolution was passed under Section 103, before the expiration of one month 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 one month 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 95 or Section 96; or
- (d) arrange, before taking the action concerned, for the resolution to be rescinded in accordance with Section 88 or decide in the appropriate manner not to take the action concerned, as the case may be,

and give written notice to the shareholder of the board's decision under this subsection.

**93. PURCHASE BY COMPANY.**

(1) Where the board agrees under Section 92(2)(a) to the purchase of the shares by the company, it shall, on giving notice under that subsection or within seven days of doing so—

- (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) The shares are deemed to have been purchased by the company upon receipt by the shareholder of a notice under Subsection (1).

(4) Where, within one month of giving notice to a shareholder under Subsection (1), no objection to the price has been received by the company—

- (a) the company shall forthwith pay the nominated price to the shareholder; and
- (b) the shareholder shall forthwith deliver any share certificate in respect of the shares to the company.

(5) Where, within one month of giving notice to a shareholder under Subsection (1), an objection to the price has been received by the company, the company shall within seven days—

- (a) apply to the Court to appoint a person as arbitrator to determine what is a fair and reasonable price; and
- (b) pay a provisional price in respect of the shares equal to the price nominated by the board.

(6) Upon payment of the provisional price by the company, the shareholder shall forthwith deliver any share certificate in respect of the shares to the company.

(7) The person appointed by the Court as arbitrator shall expeditiously determine a fair and reasonable price for the shares to be purchased.

(8) Where the price determined under Subsection (7)—

- (a) exceeds the provisional price, the company shall forthwith pay the balance owing to the shareholder; or
- (b) is less than the provisional price paid, the shareholder shall forthwith repay the excess to the company.

(9) The arbitrator may award interest on any balance payable or excess to be repaid under Subsection (8) at such rate as he thinks fit, having regard to whether the provisional price paid or the reference to arbitration, as the case may be, was reasonable.

**94. PURCHASE OF SHARES BY THIRD PARTY.**

(1) Section 93 applies to the purchase of shares by a person with whom the company has entered into an arrangement for purchase in accordance with Section 92(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 is 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.

**95. COURT MAY GRANT EXEMPTION.**

(1) A company to which a notice has been given under Section 92 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; or
- (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; or
- (b) directing the company to take, or refrain from taking, any action specified in the order; or
- (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 Subsection (1)(a) or (b) unless it is satisfied that the company has made reasonable efforts to arrange for another person to purchase the shares in accordance with Section 92(2)(b).

**96. COURT MAY GRANT EXEMPTION WHERE COMPANY INSOLVENT.**

(1) Where—

- (a) a notice is given to a company under Section 92; and
- (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 92(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), where 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 92(2)(b),

make—

- (c) an order exempting the company from the obligation to purchase the shares; or
- (d) an order suspending the obligation to purchase the shares; or
- (e) such other order as it thinks fit, including any order referred to in Section 95(2).

#### *Division 5.*

#### *Interest Groups.*

### 97. MEANING OF “CLASSES” AND “INTEREST GROUPS”.

(1) In this Act, unless the contrary intention appears—

“**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; and
- (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) where—
  - (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.

#### **98. 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; and
- (b) pre-emptive rights arising under Section 45; and
- (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; and
- (d) the right that a procedure required by the constitution for the amendment or alteration of rights not be amended or altered.

(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 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 45 or under the constitution of the company.

#### **99. SHAREHOLDER MAY REQUIRE COMPANY TO PURCHASE SHARES.**

Where—

- (a) an interest group has, under Section 98, 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—
  - (i) casts all the votes attached to the shares registered in that shareholder's name and having the same beneficial owner against approving the action; or
  - (ii) where the resolution approving the taking of the action was passed under Section 103, did not sign the resolution,

that shareholder is entitled to require the company to purchase those shares in accordance with Section 92.

**100. 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 98.

***Division 6.******Meetings of Shareholders.*****101. 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; and
- (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 is not required to hold its first annual meeting in the calendar year in which it was first incorporated (whether or not under this Act), but shall hold that meeting within 18 months of such incorporation.

(3) The Registrar may, on the application of the company, and for any special reason the Registrar thinks fit, extend any of the periods referred to in Subsection (1) or (2) even if, as a result, the period is extended beyond the calendar year.

(4) The company shall hold an annual meeting of shareholders on the date on which it is called to be held.

**102. 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 authorized by the constitution to call the meeting; and
- (b) shall be called by the board on the written request of shareholders holding shares carrying together not less than 5% of the voting rights entitled to be exercised on the issue.

**103. RESOLUTION IN LIEU OF MEETING.**

(1) Subject to Subsections (2) and (3), a resolution in writing signed by not less than 75% of the shareholders who would be entitled to vote on that resolution at a meeting of shareholders who together hold not less than 75% 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 the shareholders referred to in Subsection (1).

(4) A person who is registered as the holder of parcels of shares having different beneficial owners may expressly sign a resolution under this section in respect of shares having one beneficial owner and refrain from signing the resolution in respect of shares having another beneficial owner.

(5) It shall not be necessary for a company to hold an annual meeting of shareholders under Section 101 where everything required to be done at that meeting (by resolution or otherwise) is done by resolution in accordance with Subsections (2) and (3).

(6) Within five 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 did not sign the resolution in respect of all the shares registered in that shareholder's name.

(7) A resolution may be signed under Subsection (1) or Subsection (2) without any prior notice being given to shareholders.

(8) Where 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 413(1); and

(b) every director of the company commits an offence and is liable on conviction to the penalty set out in Section 414(1).

#### **104. COURT MAY CALL MEETING OF SHAREHOLDERS.**

(1) Where the Court is satisfied that–

(a) it is impracticable to call or conduct a meeting of shareholders in the manner specified in 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, or 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.

**105. PROCEEDINGS AT MEETINGS.**

The provisions of Schedule 2 govern proceedings at meetings of shareholders of a company except to the extent that the constitution of the company makes provision for the matters that are expressed in that Schedule to be subject to the constitution of the company.

*Division 7.**Ascertaining Shareholders.***106. SHAREHOLDERS ENTITLED TO RECEIVE DISTRIBUTIONS, ATTEND MEETINGS, AND EXERCISE RIGHTS.**

(1) The shareholders who are—

- (a) entitled to receive distributions; or
- (b) entitled to exercise pre-emptive rights to acquire shares in accordance with Section 45; or
- (c) entitled to exercise any other right or receive any other benefit under this Act or the constitution,

are—

- (d) where the board fixes a date for the purpose, those shareholders whose names are registered in the share register on that date; and
- (e) where 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 one month 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) where the board fixes a date for the purpose, those shareholders whose names are registered in the share register on that date; and
- (b) where 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) The date fixed under Subsection (3) shall be—

- (a) within one month of the date on which the meeting is to be held; and
- (b) at least 14 days before the date on which the meeting is to be held.

**PART VIII. – DIRECTORS AND THEIR POWERS AND DUTIES.*****Division 1.******Meaning of “Director” and “Board”.*****107. 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 112 to 119 (inclusive), 123 to 127 (inclusive), 344 and 350–
  - (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; and
  - (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 Sections 112 to 127 (inclusive), 344, and 350, 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 123 to 127 (inclusive), a person in accordance with whose directions or instructions a person referred to in Paragraphs (a) to (c) (inclusive) may be required or is accustomed to act in respect of his duties and powers as a director.

(2) In this Act, “**director**”, in relation to a company, does not include a receiver.

(3) Where 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 112 to 116 (inclusive).

(4) Where 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 112 to 116.

(5) Subsections (1)(b) to (d) (inclusive) do not include a person to the extent that the person acts only in a professional capacity.

### 108. MEANING OF “BOARD”.

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

(a) directors of the company who number not less than the required quorum acting together as a board of directors; or

(b) where the company has only one director, that director.

### *Division 2.*

### *Powers of Management.*

### 109. 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.

### 110. 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 the value of which is more than half the value of the assets of the company before the acquisition; or

- (b) the disposition of, or an agreement to dispose of, whether contingent or not, assets of the company the value of which is more than half the value of the assets of the company before the disposition; 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 the value of which is more than half the value of the assets of the company before the transaction.

(3) Nothing in Paragraph (c) of the definition of the term “major transaction” in Subsection (2) applies by reason only of the company giving, or entering into an agreement to give, a floating charge secured over the assets of the company the value of which is more than half the value of the assets of the company for the purpose of securing the repayment of money or the performance of an obligation.

(4) 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.

#### **111. 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 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 set out in Schedule 3.

(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.

#### ***Division 3.***

#### ***Directors’ Duties.***

#### **112. DUTY OF DIRECTORS TO ACT IN GOOD FAITH AND IN BEST INTERESTS OF COMPANY.**

(1) Subject to this section, a director of a company, when exercising powers or performing duties, shall act in good faith and in what the director believes to be the best interests of the company.

(2) A director of a company that is a wholly owned subsidiary may, when exercising powers or performing duties as a director, where 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 of a company that is a subsidiary, but not a wholly owned subsidiary may, when exercising powers or performing duties as a director, where 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 or another company within the same group of companies even though it may not be in the best interests of the company.

(4) A director of a company incorporated to carry out a joint venture between the shareholders may, when exercising powers or performing duties as a director in connection with the carrying out of the joint venture, where 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.

(5) Subject to Section 113, a director who acts in contravention of this section commits an offence and is liable on conviction to the penalty set out in Section 413(4).

### **113. EXERCISE OF POWERS IN RELATION TO EMPLOYEES.**

(1) Nothing in Section 112 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.

### **114. DIRECTORS TO COMPLY WITH ACT AND CONSTITUTION.**

(1) A director 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.

(2) A director who acts in contravention of Subsection (1) commits an offence and is liable on conviction to the penalty set out in Section 413(2).

### **115. DIRECTOR'S DUTY OF CARE.**

(1) A director of a company, when exercising powers or performing duties as a director, shall exercise the care, diligence, and skill that a reasonable director would exercise in the same circumstances taking into account, but without limitation–

- (a) the nature of the company; and
- (b) the nature of the decision; and

- (c) the position of the director and the nature of the responsibilities undertaken by him.

(2) A director who acts in contravention of this section commits an offence and is liable on conviction to the penalty set out in Section 413(4).

#### **116. USE OF INFORMATION AND ADVICE.**

(1) Subject to Subsection (2), a director of a company, when exercising powers or performing duties as a director, 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) an employee of the company whom the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned;
- (b) a professional adviser or expert in relation to matters which the director believes on reasonable grounds to be within the person's professional or expert competence;
- (c) any other director or committee of directors upon which the director did not serve in relation to matters within the director's or committee's designated authority.

(2) Subsection (1) applies to a director only where the director—

- (a) acts in good faith; and
- (b) makes proper inquiry where the need for inquiry is indicated by the circumstances; and
- (c) has no knowledge that such reliance is unwarranted.

#### ***Division 4.***

#### ***Transactions Involving Self-Interest.***

#### **117. MEANING OF "INTERESTED".**

(1) Subject to Subsection (2), for the purposes of this Act, a director of a company is interested in a transaction to which the company is a party where, and only where, the director—

- (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, 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) is otherwise directly or indirectly materially interested in the transaction.

(2) For the purposes of this Act, a director of a company is not interested in a transaction to which the company is a party where the transaction comprises only the giving by the company of security to a third party which has no connection with the director, at the request of the third party, in respect of a debt or obligation of the company for which the director or another person has personally assumed responsibility in whole or in part under a guarantee, indemnity, or by the deposit of a security.

#### **118. DISCLOSURE OF INTEREST.**

(1) A director 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, where the company has more than one director, disclose to the board of the company—

- (a) where the monetary value of the director's interest is able to be quantified, the nature and monetary value of that interest; or
- (b) where the monetary value of the director's interest cannot be quantified, the nature and extent of that interest.

(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 is a shareholder, director, 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 to comply with Subsection (1) does not affect the validity of a transaction entered into by the company or the director.

(4) Every director who fails to comply with Subsection (1) commits an offence and is liable on conviction to the penalty set out in Section 413(2).

#### **119. AVOIDANCE OF TRANSACTIONS.**

(1) A transaction entered into by a company in which a director of the company is interested may be avoided by the company at any time before the expiration of three 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 where 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 at the time the transaction is entered into.

(4) Where a transaction is entered into by a company in good faith 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 Act—

- (a) a person seeking to uphold a transaction and who knew or ought to have known of the director'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 is interested can only be avoided on the ground of the director's interest in accordance with this section or the company's constitution.

#### **120. EFFECT ON THIRD PARTIES.**

The avoidance of a transaction under Section 119 does not affect the title or interest of a person in or to property which that person has acquired where the property was acquired—

- (a) from a person other than the company; and
- (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.

#### **121. SECTIONS 118 AND 119 DO NOT APPLY IN CERTAIN CASES.**

Nothing in Sections 118 and 119 applies in relation to—

- (a) remuneration or any other benefit given to a director in accordance with Section 139; or
- (b) an indemnity given or insurance provided in accordance with Section 140.

#### **122. INTERESTED DIRECTOR MAY VOTE.**

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) vote on a matter relating to the transaction; and
- (b) 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; and
- (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.

### **123. USE OF COMPANY INFORMATION.**

(1) A director or employee of a company who has information in his capacity as a director 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; or
- (b) as required by law; or
- (c) in accordance with Subsection (2) or (3); or
- (d) in complying with Section 118.

(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, where 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 of a company may disclose, make use of, or act on the information where—

- (a) particulars of the disclosure, use, or the act in question are entered in the interests register; and
- (b) the director is first authorized 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.

(4) A director who acts in contravention of Subsection (1) commits an offence and is liable on conviction to the penalty set out in Section 413(4).

**124. MEANING OF “RELEVANT INTEREST”.**

(1) For the purposes of Section 126, a director of a company has a relevant interest in a share issued by a company (whether or not the director is registered in the share register as the holder of it) where the director—

- (a) is a beneficial owner of the share; or
- (b) has the power to exercise any right to vote attached to the share; or
- (c) has the power to control the exercise of any right to vote attached to the share; or
- (d) has the power to acquire or dispose of the share; or
- (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 person is a party to it)—
  - (i) may at any time have the power to exercise any right to vote attached to the share; or
  - (ii) may at any time have the power to control the exercise of any right to vote attached to the share; or
  - (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 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 the directions, instructions, or wishes of a director of the company in relation to—
  - (i) the exercise of any right to vote attached to the share; or
  - (ii) the control of the exercise of any right to vote attached to the share; or
  - (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 of the company has the power to exercise any right to vote attached to 20% or more of the shares of that person; or
- (c) a director of the company has the power to control the exercise of any right to vote attached to 20% or more of the shares of that person; or

- (d) a director of the company has the power to acquire or dispose of 20% or more of the shares of that person; or
- (e) a director of the company has the power to control the acquisition or disposition of 20% or more of the shares of that person,

that director has a relevant interest in the share.

(3) A person who has, or may have, a power referred to in any of Subsection (1)(b) to (f) (inclusive), has a relevant interest in a share regardless of whether the power—

- (a) is expressed or implied; or
- (b) is direct or indirect; or
- (c) is legally enforceable or not; or
- (d) is related to a particular share or not; or
- (e) is subject to restraint or restriction or is capable of being made subject to restraint or restriction; or
- (f) is exercisable presently or in the future; or
- (g) is exercisable only on the fulfilment of a condition; or
- (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.

## **125. RELEVANT INTERESTS TO BE DISREGARDED IN CERTAIN CASES.**

(1) For the purposes of Section 126, no account shall be taken of a relevant interest of a person in a share where—

- (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 good faith in the ordinary course of the business of that person; or
- (b) that person has the relevant interest by reason only of acting for another person to acquire or dispose of that share on behalf of the other person in good faith in the ordinary course of business of a stockbroker and that person is a member of a stock exchange; or
- (c) 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 in accordance with Section 6(4) of Schedule 2 to this Act or by a time specified in the company's constitution, as the case may be; or

- (d) 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 good faith in the ordinary course of business of that trustee corporation or nominee company; or
- (e) that 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)(e), 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.

## **126. DISCLOSURE OF SHARE DEALING BY DIRECTORS.**

(1) A director 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; and
  - (ii) the nature of the relevant interest; and
  - (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) A director who acts in contravention of this section commits an offence and is liable on conviction to the penalty set out in Section 413(2).

## **127. RESTRICTIONS ON SHARE DEALING BY DIRECTORS AND EMPLOYEES.**

(1) Where a director or employee of a company has information in his capacity as a director 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 employee may acquire or dispose of those shares or securities only where—

- (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 employee 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 employee only as a nominee for the company or a related company.

(4) Where a director or employee acquires shares or securities in contravention of Subsection (1)(a), the director or employee 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 employee.

(5) Where a director or employee disposes of shares or securities in contravention of Subsection (1)(b), the director or employee 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 employee exceeds the fair value of the shares or securities.

(6) A person who acts in contravention of Subsection (1) commits an offence and is liable on conviction to the penalty set out in Section 413(4).

#### *Division 5.*

#### *Appointment and Removal of Directors.*

### **128. NUMBER OF DIRECTORS AND RESIDENCE.**

(1) A company shall have at least one director.

(2) At least one director of the company shall be ordinarily resident in the country.

### **129. 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 prohibited from being a director or promoter of or being concerned or taking part in the management of a company under Section 425, 426 or 428;

(c) a person who is or becomes of unsound mind;

(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.

### **130. DIRECTOR'S CONSENT REQUIRED.**

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

### **131. 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.

### **132. COURT MAY APPOINT DIRECTORS.**

(1) Where—

- (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 where it considers that it is in the interests of the company to do so.

(2) An appointment under Subsection (1) may be made on such terms and conditions as the Court thinks fit.

### **133. 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 where—

- (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 136.

(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.

#### **134. REMOVAL OF DIRECTORS.**

(1) Subject to the constitution of the company, a director of a 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 a meeting referred to in Subsection (1) shall state that the purpose or a purpose of the meeting is the removal of the director.

#### **135. DIRECTOR CEASING TO HOLD OFFICE.**

(1) The office of director of a company is vacated where the person holding that office—

- (a) resigns in accordance with Subsection (2); or
- (b) is removed from office in accordance with this Act or the constitution of the company; or
- (c) becomes disqualified from being a director pursuant to Section 129; or
- (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 sending it to the address for service of the company and such 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 and omissions and decisions made while that person was a director.

#### **136. 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.

#### **137. 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 address or the postal address of a director of a company,

is submitted to the Registrar for registration.

(2) A notice under Subsection (1) shall—

- (a) in the case of the appointment of a new director, have attached the form of consent and certificate required pursuant to Section 130; and
- (b) be submitted to the Registrar within one month 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, address, or postal address of a director.

(3) Where the board of a company fails to comply with this section, every director of the company commits an offence and is liable on conviction to the penalty set out in Section 414(2).

### ***Division 6.***

#### ***Miscellaneous Provisions Relating to Directors.***

#### **138. PROCEEDINGS OF BOARD.**

Subject to the constitution of the company, the provisions set out in Schedule 4 govern the proceedings of the board of a company.

#### **139. REMUNERATION AND OTHER BENEFITS.**

(1) The board of a company may, subject to any restrictions contained in the constitution of the company, authorize—

- (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; and
- (b) the payment by the company to a director or former director of compensation for loss of office; and
- (c) the making of loans by the company to a director; and
- (d) the giving of guarantees by the company for debts incurred by a director; and
- (e) the entering into of a contract to do any of the things set out in Paragraphs (a) to (d) (inclusive),

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

(2) The board shall ensure that, forthwith after authorizing 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 authorized under Subsection (1) need not be separately authorized under that subsection.

(4) Directors who vote in favour of authorizing a payment, benefit, loan, guarantee, or contract under Subsection (1) shall forthwith 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.

#### **140. INDEMNITY AND INSURANCE.**

(1) Except as provided in this section, a company shall not indemnify, or directly or indirectly effect insurance for, a director 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 or employee; or

(b) costs incurred by that director 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 authorized by its constitution, indemnify a director 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 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 authorized by its constitution, indemnify a director 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 or employee; or

(b) costs incurred by that director 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, of the duty specified in Section 112 or, in the case of an employee, of any fiduciary duty owed to the company or related company.

(5) A company may, if expressly authorized by its constitution and with the prior approval of the board, effect insurance for a director 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 capacity as a director or employee; or

(b) costs incurred by that director or employee in defending or settling any claim or proceeding relating to any such liability; or

(c) costs incurred by that director or employee in defending any criminal proceedings in which he is acquitted.

(6) The directors who vote in favour of authorizing the effecting of insurance under Subsection (5) shall forthwith 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 or employee of the company or a related company are forthwith entered in the interests register.

(8) Where insurance is effected for a director or employee of a company or a related company and—

(a) the provisions of either Subsection (5) or (6) have not been complied with; or

- (b) reasonable grounds did not exist for the opinion set out in the certificate given under Subsection (6),

the director 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—

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

**PART IX. – ENFORCEMENT.**

***Division 1.***

***Interpretation.***

**141. 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.

***Division 2.***

***Injunctions.***

**142. INJUNCTIONS.**

(1) The Court may, on an application under this section, make an order–

- (a) restraining a person who is engaging in or proposes to engage in conduct that is or would contravene the constitution of the company or this Act from engaging in that conduct; or
- (b) requiring a person who has refused or failed, is refusing or failing, or is proposing to refuse or fail, to do an act or thing that he is required to do by the constitution of the company or this Act, to do that act or thing.

(2) An application may be made by–

- (a) the company; or
- (b) a director or shareholder of the company; or
- (c) an entitled person; or
- (d) the Registrar.

(3) Where 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, at 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.

(6) Where an application is made to the Court under Subsection (1) for the grant of an injunction under this section, the Court shall not require the applicant, as a condition of granting an interim injunction, to give any undertakings as to damages.



***Division 3.***  
***Derivative Actions.***

**143. 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 proceedings succeeding; and
- (b) the costs of the proceedings in relation to the relief likely to be obtained; and
- (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 where the Court is satisfied that either—

- (a) the company or related company does not intend to bring, diligently continue or 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.

**144. 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 143 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 146, shall be met by the company unless the Court considers that it would be unjust or inequitable for the company to bear those costs.

**145. 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 143, and without limiting the generality of this section may—

- (a) make an order authorizing the shareholder or any other person to control the conduct of the proceedings; and
- (b) give directions for the conduct of the proceedings; and
- (c) make an order requiring the company or the directors to provide information or assistance in relation to the proceedings; and
- (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.

**146. 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 143, may be settled or compromised or discontinued without the approval of the Court.

***Division 4.******Personal Actions by Shareholders.*****147. PERSONAL ACTIONS BY SHAREHOLDERS AGAINST DIRECTORS.**

(1) A shareholder or former shareholder may bring an action against a director 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 set out in—

- (a) Section 70; and
- (b) Section 118; and
- (c) Section 126,

are duties owed to shareholders, while the duties of directors set out in—

- (d) Section 112; and
- (e) Section 115; and
- (f) Section 123,

are duties owed to the company and not to shareholders.

#### **148. ACTIONS BY SHAREHOLDERS TO REQUIRE DIRECTORS TO ACT.**

Notwithstanding Section 147, the Court may, on the application of a shareholder of a company, where it is satisfied it is just and equitable to do so, make an order requiring a director of the company to take any action that is required to be taken by the directors 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.

#### **149. 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.

#### **150. ACTIONS BY SHAREHOLDERS TO REQUIRE COMPANY TO ACT.**

Notwithstanding Section 149, the Court may, on the application of a shareholder of a company, where 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.

#### **151. REPRESENTATIVE ACTIONS.**

Where a shareholder of a company brings proceedings against the company or a director, 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, an order—

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

**152. 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) Where, 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; or
- (b) requiring the company or any other person to pay compensation to a person; or
- (c) regulating the future conduct of the company's affairs; or
- (d) altering or adding to the company's constitution; or
- (e) appointing a receiver of the company; or
- (f) directing the rectification of the records of the company; or
- (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.

(4) Failure to comply with any of the following sections is conduct which is unfairly prejudicial for the purposes of this section:—

- (a) Section 45;
- (b) Section 47;
- (c) Section 51;
- (d) Section 57;
- (e) Section 63;
- (f) Section 98;
- (g) Section 110.

(5) 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 it is conduct that is unfairly prejudicial for the purposes of this section.

**153. ALTERATION TO CONSTITUTION.**

(1) Where the Court makes an order under Section 152 altering or adding to the constitution of a company, the constitution, to the extent that it has been altered or added to by the Court, can only be altered or added to again—

- (a) in accordance with the terms of that order; or
- (b) with the leave of the Court.

(2) Any alteration or addition to the constitution of a company made by an order under Section 152 has the same effect as if it had been made by the shareholders of the company pursuant to Section 33 and the provisions of this Act shall apply to the constitution as altered or added to.

(3) Within one month of the making of an order under Section 152 altering or adding to the constitution of a company, the board of the company shall ensure that a certified copy of the order and the constitution as altered or added to is submitted to the Registrar for registration.

(4) Where the board of a company fails to comply with Subsection (3), every director of the company commits an offence and is liable on conviction to the penalty set out in Section 414(2).

***Division 5.***

***Ratification.***

**154. RATIFICATION OF CERTAIN ACTIONS OF DIRECTORS.**

(1) The purported exercise by a director or the board of a company of a power vested in the shareholders or any other person may be ratified or approved by those shareholders or that 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 or the board 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 or the board.

**PART X. – ADMINISTRATION OF COMPANIES.**

***Division 1.***

***Authority to Bind Company.***

**155. 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 common seal of the company; or
- (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; or
- (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.

(2) Subsection (1) applies to a contract or other obligation–

- (a) whether or not that contract or obligation was entered into in the country; and
- (b) whether or not the law governing the contract or obligation is the law of Papua New Guinea.

(3) A company may, if its constitution so authorizes, have for use in any place outside the country an official seal, which shall be a facsimile of the common seal of the company with the addition on its face of the name of every place where it is to be used, and the person affixing any such official seal shall certify on the instrument to which it is affixed the date on which and the place at which it is affixed.

**156. ATTORNEYS.**

(1) Subject to its constitution, a company may, by an instrument in writing executed in accordance with Section 155(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.

*Division 2.*

*Pre-incorporation Contracts.*

**157. PRE-INCORPORATION CONTRACTS MAY BE RATIFIED.**

(1) In this section and in Sections 158 to 160 (inclusive), 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 law, a pre-incorporation contract may be ratified within such period as may be specified in the contract, or where no period is specified, then within one month 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 as 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 155.

(5) Notwithstanding any law, where a pre-incorporation contract has not been ratified by a company, or validated by the Court under Section 159, the company may not enforce it or take the benefit of it.

**158. WARRANTIES IMPLIED IN PRE-INCORPORATION CONTRACTS.**

(1) Notwithstanding any 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 where 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 where 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) Where, 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 157), 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.

**159. 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; or
- (b) for any other relief in favour of that party relating to that property; or
- (c) validating the contract whether in whole or in part.

(2) The Court may, where 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 158(2).

**160. 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.

***Division 3.***

***Registered Office.***

**161. REGISTERED OFFICE.**

(1) A company shall always have a registered office in the country.

(2) The registered office shall be identifiable and easily accessible to the public.

(3) Subject to Section 162, the registered office of a company at a particular time is the place that is described as its registered office in the register at that time.

(4) The description of the registered office shall—

- (a) state the address of the registered office, including the suburb and street name and number or the allotment and section number or portion number; and
- (b) where—
  - (i) the registered office is at the offices of any firm, or any other person, state—
    - (A) that the registered office of the company is at the offices of that firm or person; and



- (B) particulars of the location in any building of those offices;  
or
- (ii) 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.

**162. CHANGE OF REGISTERED OFFICE.**

(1) Subject to the company's constitution, 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 shall be submitted to the Registrar for registration within one month of the change.

**163. REQUIREMENT TO CHANGE REGISTERED OFFICE.**

(1) Subject to this section, a company shall change its registered office where 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 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 being a date that is earlier than one month 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 408; and
- (d) be dated and signed by the Registrar.

(4) A copy of the notice shall also be sent to each director of the company.

(5) The company shall change its registered office—

- (a) by the date stated in the notice; or
- (b) where it appeals to the Court and the appeal is dismissed, within five days after the decision of the Court.

(6) Where a company fails to comply with this section, every director of the company commits an offence and is liable on conviction to the penalty set out in Section 414(1).

***Division 4.***  
***Company Records.***

**164. COMPANY RECORDS.**

(1) Subject to Subsection (3) and to Sections 68 and 189, 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 seven years;
- (c) an interests register;
- (d) minutes of all meetings and resolutions of directors and directors' committees within the last seven years;
- (e) certificates given by directors under this Act within the last seven years;
- (f) the full names, addresses, and postal addresses of the current directors and secretary;
- (g) copies of all written communications to all shareholders or all holders of the same class of shares during the last seven years, including annual reports made under Section 209;
- (h) copies of all financial statements and group financial statements required to be completed by this Act for the last seven completed accounting periods of the company;
- (i) the share register.

(2) The references in Subsection (1)(b), (d), (e), and (g) to seven years and the references in Paragraph (h) of that subsection to seven 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 Subsection (1)(a) to (h) (inclusive) may be kept at such other place as the board thinks proper, notice of which is submitted to the Registrar in accordance with Subsection (4).

(4) Where 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 one month of their first being kept elsewhere or moved, as the case may be, notice in the prescribed form is submitted to the Registrar for registration of the places where the records are kept.

(5) Where 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 413(2); and
- (b) every director of the company commits an offence and is liable on conviction to the penalty set out in Section 414(2).

**165. 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) Where the board fails to comply with Subsection (2), every director commits an offence and is liable on conviction to the penalty set out in Section 414(2).

**166. INSPECTION OF RECORDS BY DIRECTORS.**

(1) Subject to Subsection (2), every director of a company is entitled, on giving reasonable notice, to inspect the records of the company—

- (a) in written form; and
- (b) without charge; and
- (c) at a reasonable time specified by the director.

(2) The Court may, on application by the company, where it is satisfied that—

- (a) it would not be in the company's interests for a director to inspect the records; or
- (b) the proposed inspection is for a purpose that is not properly connected with the director'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.

***Division 5.******Address for Service.*****167. ADDRESS FOR SERVICE.**

(1) A company shall have an address for service in the country.

(2) The address for service may be the company's registered office or another place, but—

- (a) it shall have a readily identifiable street address; and
- (b) it shall be a place that is readily accessible during normal business hours.

(3) A company's address for service at any particular time is the place that is described as its address for service in the register at that time.

(4) The description of the place that is an address for service shall state the address of that place and where—

- (a) the place is at the premises of any firm or other person—
  - (i) that the address for service of the company is at the premises of that firm or person; and
  - (ii) particulars of the location in any building of those premises; or
- (b) the place is not at the premises of any firm or other person but is located in a building occupied by persons other than, or in addition to, the company, state particulars of its location in the building.

#### **168. 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 submitted to the Registrar for registration.

(3) A change of address for service takes effect on a date stated in the notice, not being a date that is earlier than five days after the notice is registered.

#### ***Division 6.***

#### ***Company Secretary.***

#### **169. SECRETARY.**

(1) A company may have a secretary.

(2) Every secretary of a company shall be a natural person ordinarily resident in the country.

(3) Where there is no secretary of a company, or the office of secretary is vacant, or for any reason the secretary is not capable of acting, anything required or authorized to be done by or in relation to the secretary may be done—

- (a) by or in relation to an assistant or deputy secretary; or
- (b) where there is no assistant or deputy secretary capable of acting, by or in relation to a person authorized generally or specifically for the purpose by the board of the company.

(4) A secretary of a company shall have only such rights, powers, and duties in relation to the company as are given to him by this Act or by the constitution or board of the company.

#### **170. APPOINTMENT AND REMOVAL OF SECRETARY.**

(1) The secretary of a company shall be appointed by the board of the company.

(2) A person shall not be appointed as secretary of a company unless he has consented in writing in the prescribed form to be the company's secretary.

(3) The board of a company shall ensure that notice in the prescribed form of—

- (a) the appointment of a secretary after incorporation of the company; or
- (b) a change in the secretary of the company; or
- (c) a change in the name or the address or the postal address of the secretary of the company,

is submitted to the Registrar for registration.

(4) A notice under Subsection (3) shall—

- (a) in the case of the appointment of a new secretary, have attached the form of consent required by Subsection (2); and
- (b) be submitted to the Registrar within one month of—
  - (i) the change occurring, in the case of a change in the secretary; or
  - (ii) the company first becoming aware of the change, in the case of a change in the name, address, or postal address of the secretary.

(5) Where the board of a company fails to comply with this section, every director of the company commits an offence and is liable on conviction to the penalty set out in Section 414(2).

**PART XI. – FINANCIAL REPORTING, ACCOUNTING RECORDS AND  
AUDIT.**

*Division 1.*

*Interpretation and Application.*

**171. INTERPRETATION.**

(1) In this Part, unless the contrary intention appears–

**“applicable financial reporting standard”**, in relation to a reporting company or a group and to an accounting period or to an interim accounting period of a reporting company, means an approved financial reporting standard that applies to that reporting company or to that group and to that accounting period or that interim accounting period in accordance with a determination of the board for the time being in force or any election made under Section 206;

**“approved financial reporting standard”** means a financial reporting standard approved by the Accounting Standards Board under Section 206, and includes an amendment to an approved financial reporting standard that is approved by the Accounting Standards Board under that section;

**“exempt company”** means–

- (a) a company that did not at any time during the accounting period for which financial statements are required have–
  - (i) total assets exceeding K5,000,000.00 or such other amount as is prescribed by Regulation for the purposes of this paragraph; or
  - (ii) more than 25 shareholders; or
  - (iii) more than 100 employees; or
- (b) a company–
  - (i) that complies with one or two (but not all three) of the conditions in Paragraph (a); and
  - (ii) each of whose shareholders has agreed that an auditor should not be appointed in respect of the financial statements required; or
- (c) a subsidiary of an exempt company,  
but does not mean–
  - (d) an issuer; or
  - (e) a subsidiary of an issuer; or
  - (f) a subsidiary of a company that is not an exempt company; or

- (g) a subsidiary of an overseas company; or
- (h) a subsidiary of any company or overseas company included in Paragraphs (d), (e), (f) or (g); or
- (i) a subsidiary of a subsidiary of any company or overseas company included in Paragraphs (d), (e), (f) or (g);

**“financial statements”** has the meaning given to it by Section 177;

**“generally accepted accounting practice”** has the meaning given to it by Section 172;

**“group”** or **“group of companies”** means a group comprising a reporting company and its subsidiaries (whether or not any or all of those subsidiaries are themselves exempt companies);

**“interim accounting period”**, in relation to a reporting company, means a period ending on a date other than the balance date of the reporting company;

**“issuer”** has the meaning given to it by Section 173;

**“reporting company”** means a company, other than an exempt company.

(2) The reference in Subsection (1) to an overseas company does not include an overseas company that is included in a class of overseas companies that the Registrar has declared by notice in the National Gazette to be a class of overseas companies to which Subsection (1) does not apply.

## 172. MEANING OF “GENERALLY ACCEPTED ACCOUNTING PRACTICE”.

For the purposes of this Act, financial statements and group financial statements comply with generally accepted accounting practice only where those statements comply with—

- (a) applicable financial reporting standards; and
- (b) in relation to matters for which no provision is made in applicable financial reporting standards and that are not subject to any applicable rule of law, accounting policies that—
  - (i) are appropriate to the circumstances of the reporting company; and
  - (ii) have authoritative support within the accounting profession in Papua New Guinea.

## 173. MEANING OF “ISSUER”.

In this Part, **“issuer”** means every company which has—

- (a) registered a prospectus with the Registrar pursuant to Part V of the repealed Act or the *Securities Act 1997*; and

- (b) allotted shares, debentures, or other interests pursuant to that prospectus,

being shares, debentures, or other interests that have not been cancelled, redeemed, or forfeited, or in respect of which the obligations of the company under them have not been fully discharged.

#### **174. COMPANIES CEASING TO BE ISSUERS DURING ACCOUNTING PERIOD.**

Where a company ceases to be an issuer during an accounting period, that company shall be deemed to continue to be an issuer in relation to that accounting period for the purposes of this Part.

#### **175. CERTAIN COMPANIES NOT ISSUERS.**

A company that does not have more than 25 shareholders and that would, but for this section, be an issuer by reason only of the allotment of any interest in or right to a share in the share capital of the company (including a preference share, and the renewal or variation of any such interest or right) is not an issuer for the purposes of this Part.

#### **176. MEANING OF “BALANCE DATE”.**

(1) In this Act, the term “**balance date**” in relation to a company, means the close of 31 December 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 formed or incorporated where its first balance date is in the following calendar year and is not later than 15 months after the date of its formation or incorporation.

(4) Where a company changes its balance date, it need not have a balance date in a calendar year where—

- (a) the period between any two 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) Where a company changes its balance date, the period between any two balance dates shall not exceed 18 months.

(7) The board of a reporting company (other than an issuer) 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) The board of an issuer shall ensure that the balance date of the issuer is the same as the balance date of its subsidiaries.

(9) Subject to Subsection (11), the Registrar may, by notice in writing and subject to such conditions as the Registrar thinks fit, exempt an issuer from Subsection (8) either completely or in relation to a subsidiary or a class of subsidiaries.

(10) The existence of an exemption under Subsection (9) shall be stated in a note to the consolidated balance sheet for the group concerned.

(11) Where the balance date of a subsidiary of a reporting company is not the same as that of the reporting 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 reporting company.

#### 177. MEANING OF “FINANCIAL STATEMENTS”.

In this Act, the term “**financial statements**”, in relation to a company and a balance date, means—

- (a) a balance sheet for the company as at the balance date; and
- (b) in the case of—
  - (i) a 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) a 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) where, in the case of a reporting company, an applicable financial reporting standard requires a statement of cash flows for the reporting company, a statement of cash flows for the reporting 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 or statement.

#### 178. MEANING OF “GROUP FINANCIAL STATEMENTS”.

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; and
- (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; and

- (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) where an applicable 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.

### *Division 2.*

#### *Preparation of Financial Statements.*

#### **179. OBLIGATION TO PREPARE FINANCIAL STATEMENTS.**

(1) The directors of every company shall ensure that, within five 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 Section 180 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, where the company has only one director, by that director.

(2) The Registrar may, on the application of the company and for any special reason the Registrar thinks fit, extend the period referred to in Subsection (1) even where, as a result, the period is extended beyond the calendar year.

#### **180. CONTENT OF FINANCIAL STATEMENTS.**

(1) The financial statements of a company shall comply with generally accepted accounting practice.

(2) Where, 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.

#### **181. OBLIGATION TO PREPARE GROUP FINANCIAL STATEMENTS.**

(1) Subject to Subsection (2), the directors of a reporting company that has, on the balance date of the company, one or more subsidiaries, shall, in addition to complying with Section 179, ensure that, within five months after that balance 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 Section 182 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, where the company has only one director, by that director.

(2) Group financial statements are not required in relation to a reporting company and a balance date where the only shareholders of the company at that balance date comprise—

- (a) a body corporate that is incorporated in the country or a nominee of such a body corporate; or
- (b) a body corporate that is incorporated in the country or a nominee of such a body corporate and a subsidiary of such a body corporate or a nominee of such a subsidiary.

(3) The Registrar may, on the application of the holding company of the group and for any special reason that the Registrar thinks fit, extend the period referred to in Subsection (1) even if, as a result, the period is extended beyond the calendar year.

## **182. CONTENT OF GROUP FINANCIAL STATEMENTS.**

(1) The financial statements of a group shall comply with generally accepted accounting practice.

(2) Where, 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 reporting 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 reporting 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, shall, unless any applicable 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 Subsection (3), where the balance date of a subsidiary of a reporting company is not the same as that of the reporting company, the group financial statements shall—

- (a) where the balance date of the subsidiary does not precede that of the reporting 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 reporting 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 reporting company.

(5) Subject to Subsection (3), group financial statements shall, except where otherwise required by an applicable financial reporting standard, incorporate the financial statements of every subsidiary of the reporting company.

### **183. REGISTRATION OF FINANCIAL STATEMENTS BY COMPANIES.**

The directors of a company which is required by Section 190 to be audited shall ensure that, within 14 days after the annual meeting of the company, copies of the financial statements of the company and any group financial statements, together with a copy of the auditor's report on those statements, are submitted to the Registrar for registration in accordance with Section 215(3).

### **184. ACCOUNTS COMPLYING WITH *BANKS AND FINANCIAL INSTITUTIONS ACT*.**

Notwithstanding Sections 179 to 183 (inclusive), where under the *Banks and Financial Institutions Act 2000* a company is required to prepare a balance sheet and profit and loss account annually a balance sheet and a profit and loss account each of which complies with that Act shall be deemed to comply with the provisions of this Act relating to the form and content of financial statements.

### **185. OFFENCES BY DIRECTORS OF REPORTING COMPANIES.**

(1) Where—

- (a) financial statements in relation to a reporting company are not completed and signed within the time specified in Section 179; or
- (b) group financial statements in relation to a group comprising a reporting company and its subsidiaries are not completed and signed within the time specified in Section 182,

every director of the reporting company commits an offence and is liable on conviction to the penalty set out in Section 414(3).

(2) Where the financial statements of a reporting company or group financial statements in relation to a group comprising a reporting company and its subsidiaries fail to comply with an applicable financial reporting standard, every director of the reporting company commits an offence and is liable on conviction to the penalty set out in Section 414(3).

### **186. OFFENCES BY DIRECTORS OF EXEMPT COMPANIES.**

Where—

- (a) financial statements in relation to an exempt company are not completed and signed within the time specified in Section 179; or
- (b) financial statements in relation to an exempt company do not comply with Section 180,

every director of the exempt company commits an offence and is liable on conviction to the penalty set out in Section 414(2).

### **187. OFFENCES BY DIRECTORS OF COMPANIES REQUIRED TO HAVE FINANCIAL STATEMENTS AUDITED.**

Where a company is required by Section 190 to have its financial statements and any group financial statements audited and the company fails to do so, every director of the company commits an offence and is liable on conviction to the penalty set out in Section 414(3).

### *Division 3.*

### *Accounting Records.*

### **188. 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; and
  - (b) will at any time enable the financial position of the company to be determined with reasonable accuracy; and
  - (c) will enable the directors to ensure that the financial statements of the company comply with Section 179 and any group financial statements comply with Section 182; 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; and
  - (b) a record of the assets and liabilities of the company; and
  - (c) where the company's business involves dealing in goods—
    - (i) a record of goods bought and sold, except goods sold for cash in good faith 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) where 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; or

(b) in a form or manner in which they are easily accessible and convertible into written form.

(4) The company shall keep accounting records for the current accounting period and for the last 10 completed accounting periods of the company.

(5) Where the board of a company fails to comply with the requirements of this section, every director of the company commits an offence and is liable on conviction to the penalty set out in Section 414(2).

### **189. PLACE ACCOUNTING RECORDS TO BE KEPT.**

(1) A company may keep the accounting records required by Section 188 at its registered office or at some other place.

(2) Where the accounting records are not kept at the registered office of the company, the company shall submit a notice to the Registrar—

(a) of the place where—

(i) the accounting records; and

(ii) the accounts and returns required under Subsection (2), if applicable,

are kept; and

(b) of any change in such place, within one month of that change.

(3) Where the records are not kept in the country, the company shall ensure that accounts and returns for the operations of the company that—

(a) disclose with reasonable accuracy the financial position of the company at intervals not exceeding six months; and

(b) will enable the preparation in accordance with this Part 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 the country.

(4) Where 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 413(2); and

(b) every director of the company commits an offence and is liable on conviction to the penalty set out in Section 414(2).

### ***Division 4.***

#### ***Auditors.***

### **190. APPOINTMENT OF AUDITORS.**

(1) Subject to Subsection (2), 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, where the company is required to complete group financial statements, those group financial statements, for the accounting period next after the meeting.

(2) None of the following companies need appoint an auditor:—

- (a) an exempt company;
- (b) a company that is, or is of a class that is, exempted from the requirements of this section by the Registrar by notice in the National Gazette.

(3) 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, may continue to act as auditor.

(4) Where—

- (a) at an annual meeting of a company that is required to appoint an auditor, no auditor is appointed or reappointed; 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, and where the Registrar appoints an auditor the company shall pay the fees and expenses of the auditor determined in accordance with Section 191.

(5) A company shall, within one month of the power becoming exercisable, submit a written notice to the Registrar of the fact that the Registrar is entitled to appoint an auditor under Subsection (4).

(6) Where 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 413(2); and
- (b) every director of the company commits an offence and is liable on conviction to the penalty set out in Section 414(2).

## **191. AUDITORS' FEES AND EXPENSES.**

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

- (a) where 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; and
- (b) where the auditor is appointed by the directors, by the directors; and
- (c) where the auditor is appointed by the Registrar, by the Registrar.

**192. APPOINTMENT OF PARTNERSHIP.**

(1) A partnership may be appointed by the firm name to be the auditor of a company where 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 by the firm name to be the auditor of a company is deemed, notwithstanding Section 193, to be the appointment of all the persons who are partners in the firm from time to time.

(3) Where a 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 shall not act as auditors of the company.

**193. QUALIFICATIONS OF AUDITORS.**

(1) A person shall not be appointed or act as auditor of a company unless the person is registered as a Registered Company Auditor under the *Accountants Act 1996*.

(2) None of the following persons may be appointed or act as auditor of a company:—

- (a) a director or employee of the company;
- (b) a person who is a partner, or in the employment, of a director 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;
- (e) a person who, by virtue of Paragraph (a) or (b), may not be appointed or act as auditor of a related company.

**194. AUTOMATIC REAPPOINTMENT.**

(1) An auditor of a company, other than an auditor appointed under Section 195(1), is automatically reappointed at an annual meeting of the company unless—

- (a) the auditor is not qualified for appointment; or
- (b) the company passes a resolution at the meeting appointing another person to replace him as auditor; or
- (c) the auditor has given notice to the company that he does not wish to be reappointed.

(2) An auditor is not automatically reappointed where the person who it is proposed will replace him dies, or is, or becomes incapable of, or disqualified from, appointment.



**195. 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, holds office until the conclusion of that meeting.

(2) Subject to Section 190(2), where the directors do not appoint an auditor under Subsection (1), the company shall appoint the first auditor at a meeting of the company.

**196. 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) at least one month's 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.

**197. AUDITOR NOT SEEKING REAPPOINTMENT.**

(1) Where an auditor gives the board of a company written notice that he does not wish to be reappointed, the board shall, where 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 stating or explaining to shareholders his reasons for wishing not to be reappointed.

**198. 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.

**199. 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 by Section 200 or Section 201, as the case may be.

## **200. AUDITOR'S REPORT ON REPORTING ENTITIES.**

(1) Where the financial statements of a reporting 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; and
- (b) the scope and limitations of the audit; and
- (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 reporting company or any of its subsidiaries; and
- (d) whether the auditor has obtained all information and explanations that he has required; and
- (e) whether, in the auditor's opinion, as far as appears from an examination of them, proper accounting records have been kept by the reporting company; and
- (f) whether, in the auditor's opinion, the financial statements and any group financial statements comply with generally accepted accounting practice, and where 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 reporting company pursuant to Section 180(2) or Section 182(2), the financial statements and any group financial statements give a true and fair view of the matters to which they relate, and, where they do not, the respects in which they fail to give such a view.

(2) Where the auditor's report indicates that the requirements have not been complied with, the auditor shall, within seven days after completing the report, submit 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 Accounting Standards Board.

## **201. AUDITOR'S REPORT ON EXEMPT COMPANIES.**

Where the financial statements of an exempt company are audited, the auditor's report on the financial statements shall state—

- (a) the work done by the auditor; and
- (b) the scope and limitations of the audit; and
- (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 exempt company; and

- (d) whether the auditor has obtained all information and explanations that he has required; and
- (e) whether, in the auditor's opinion, as far as appears from an examination of them, proper accounting records have been kept by the exempt company; and
- (f) whether the financial statements comply with Section 180, and where they do not, the respects in which they fail to comply.

**202. 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 is entitled to require from a director or employee of the company such information and explanations as he thinks necessary for the performance of his duties as auditor.

(3) Where the board of a company fails to comply with Subsection (1), every director commits an offence and is liable on conviction to the penalty set out in Section 414(2).

(4) A director or employee who fails to comply with Subsection (2) commits an offence and is liable on conviction to the penalty set out in Section 413(2).

(5) It is 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.

**203. 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; and
- (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) Where the board of a company fails to comply with Subsection (1), every director of the company commits an offence and is liable on conviction to the penalty set out in Section 414(2).

**Division 5.****Accounting Standards Board.****204. ACCOUNTING STANDARDS BOARD.**

(1) A body to be called the Accounting Standards Board is established.

(2) The Accounting Standards Board shall be a body corporate with perpetual succession and a common seal and shall be capable of acquiring, holding, and disposing of real and personal property, of entering into contracts, of suing and being sued, and of doing and suffering all such other acts and things as bodies corporate may lawfully do or suffer.

(3) The Accounting Standards Board shall consist of—

- (a) the Auditor-General; and
- (b) the Registrar; and
- (c) two representatives of the Papua New Guinea Institute of Accountants, Inc. appointed by the Minister by notice in the National Gazette acting on the advice of the Papua New Guinea Institute of Accountants, Inc.; and
- (d) one representative of the Accountants Registration Board established under the *Accountants Act 1996*, appointed by the Minister by notice in the National Gazette acting on the advice of the Accountants Registration Board; and
- (e) two persons appointed by the Minister by notice in the National Gazette.

(4) The Minister shall not appoint a person as a member of the Accounting Standards Board unless, in the opinion of the Minister, that person is qualified for appointment by reason of his knowledge of, or experience in, business, accounting, finance, economics, or law.

(5) The Registrar shall be the Chairman of the Accounting Standards Board.

(6) The provisions set out in Schedule 5 apply in respect of the Accounting Standards Board.

**205. FUNCTIONS AND POWERS OF ACCOUNTING STANDARDS BOARD.**

(1) The Accounting Standards Board has the following functions:—

- (a) to develop, approve, amend and revoke financial reporting standards for the purposes of this Act in respect of reporting companies, exempt companies, or all companies;
- (b) to make determinations on the application of any approved financial reporting standards;
- (c) to give directions as to the accounting policies that have authoritative support within the accounting profession in Papua New Guinea; and

(d) such other functions as it is given by this or any other Act.

(2) The Accounting Standards Board has such powers as are reasonably necessary to enable it to carry out its functions.

## **206. APPROVAL OF FINANCIAL REPORTING STANDARDS.**

(1) The Accounting Standards Board may develop and, where it thinks fit, approve financial reporting standards for the purposes of this Act.

(2) The Accounting Standards Board may at any time amend an approved financial reporting standard.

(3) Approved financial reporting standards may be expressed to apply in relation to—

- (a) all reporting companies or groups; or
- (b) specified reporting companies or groups; or
- (c) accounting periods or interim accounting periods.

(4) Approved financial reporting standards may—

- (a) have general or specific application; or
- (b) differ according to differences in time or circumstance.

(5) An approved financial reporting standard may classify a company as a subsidiary of another company where, although the company is not a subsidiary of that other company for the purposes of Section 5, the company is, in effect, controlled by that other company (irrespective of whether it is taken to be controlled by that other company for the purposes of Section 5), so as to render it, in substance, a subsidiary of that other company.

(6) The Accounting Standards Board may determine that—

- (a) an approved financial reporting standard that has not been approved for application to a particular company or category of companies shall apply to that company or category of companies; or
- (b) an approved financial reporting standard that applies to a particular company or category of companies shall cease to apply to that company or category of companies,

in relation to such accounting periods or interim accounting periods as the Accounting Standards Board may determine.

(7) In Subsection (5), the expression “**company**” includes an association of persons whether incorporated or not.

(8) An approved financial reporting standard or an amendment to an approved financial reporting standard or a determination by the Accounting Standards Board under Subsection (6), as the case may be, takes effect one month after the date of its publication in the National Gazette.

(9) An approved financial reporting standard or an amendment to an approved financial reporting standard or a determination under Subsection (6), as the case may be, shall commence to apply in relation to such accounting periods or interim accounting periods as the Accounting Standards Board specifies, which periods—

- (a) may be accounting periods or interim accounting periods that have commenced or that commence before the date on which the financial reporting standard or the amendment to the approved financial reporting standard takes effect; but
- (b) shall not be accounting periods or interim accounting periods that have ended or that end before the approved financial reporting standard or the amendment to the approved financial reporting standard takes effect.

#### **207. REVOCATION OF APPROVAL.**

(1) The Accounting Standards Board may revoke the approval of any approved financial reporting standard.

(2) Any revocation under Subsection (1) shall take effect one month after the date of the publication of the revocation in the National Gazette.

(3) The revocation of the approval of an approved financial reporting standard shall apply in relation to such accounting periods or interim accounting periods as the Accounting Standards Board specifies, which periods—

- (a) may be accounting periods or interim accounting periods that have commenced or that commence before the date on which the revocation takes effect; but
- (b) shall not be accounting periods or interim accounting periods that have ended or that end before the revocation takes effect.

#### **208. CERTIFICATES OF ACCOUNTING STANDARDS BOARD.**

(1) A certificate signed by the Chairman of the Accounting Standards Board as to—

- (a) the approval of a financial reporting standard or any amendment to an approved financial reporting standard; or
- (b) the making of a determination under Section 206(6); or
- (c) the revocation of the approval of an approved financial reporting standard; or
- (d) the accounting period or interim accounting period in relation to which an approved financial reporting standard or determination shall commence to apply; or
- (e) the accounting period or interim accounting period in relation to which an approved financial reporting standard or determination ceases to apply; or

(f) the accounting period or interim accounting period in relation to which an approved financial reporting standard or determination was in force, shall, in the absence of evidence to the contrary, be sufficient evidence of the matters stated in the certificate.

(2) All courts and all persons acting judicially shall take judicial notice of the signature of the Chairman appearing on a certificate given under Subsection (1).

**PART XII. – DISCLOSURE BY COMPANIES.*****Division 1.******Disclosure to Shareholders.*****209. OBLIGATION TO PREPARE ANNUAL REPORT.**

(1) Subject to Subsection (2), the board of every company shall, within five months after each balance date of the company, prepare an annual report on the affairs of the company during the accounting period ending on that date.

(2) The board of a company need not prepare an annual report for an accounting period where—

- (a) the financial statements of that company are not required to be audited under Section 190; and
- (b) every shareholder has given notice in writing to the company waiving the right to be sent a copy of the annual report or copies of annual reports of the company generally.

(3) Where the board of a company fails to comply with Subsection (1), every director of the company commits an offence and is liable on conviction to the penalty set out in Section 414(2).

(4) The Registrar may, on the application of the company and for any special reason that the Registrar thinks fit, extend the period referred to in Subsection (1) even if, as a result, the period is extended beyond the calendar year.

**210. SENDING OF ANNUAL REPORT TO SHAREHOLDERS.**

(1) Subject to Subsection (2), every board of a company that has prepared an annual report shall cause a copy of the annual report to be sent to every shareholder of the company not less than one month 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 where—

- (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; and
- (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 specified in Section 217.

(3) Where the board of a company fails to comply with Subsection (1), every director of the company commits an offence and is liable on conviction to the penalty set out in Section 414(2).



**211. 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 210(2), not less than one month before the annual meeting of shareholders—

- (a) financial statements for the most recently completed accounting period completed and signed in accordance with Section 179 and any group financial statements for the most recently completed accounting period completed and signed in accordance with Section 182; and
- (b) any auditor's report on those financial statements and any group financial statements required under Part XI.

(2) Where the board of a company fails to comply with Subsection (1), every director of the company commits an offence and is liable on conviction to the penalty set out in Section 414(2).

**212. CONTENTS OF ANNUAL REPORT.**

(1) Every annual report for a company shall be in writing and be dated and, subject to Subsection (3), 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 Section 179 and any group financial statements for the accounting period completed and signed in accordance with Section 182; and
- (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; and
- (d) describe any change in accounting policies made during the accounting period; and
- (e) state particulars of entries in the interests register made during the accounting period; and
- (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; and

- (g) state the number of employees or former employees of the company, not being directors 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 K100,000.00 per annum, and shall state the number of such employees or former employees in brackets of K10,000.00; and
- (h) state the total amount of donations made by the company and any subsidiary during the accounting period; and
- (i) state the names of the persons holding office as directors or secretary of the company as at the end of the accounting period and the names of any persons who ceased to hold office as directors or secretary of the company during the accounting period; and
- (j) 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
- (k) be signed on behalf of the board by two directors of the company or, where the company has only one director, by that director.

(2) A company that is required to include group financial statements in its annual report shall include, in relation to its subsidiaries, the information specified in Subsection (1)(d) to (j) (inclusive).

(3) The annual report of a company need not comply with any of Subsection (1)(a), and (d) to (j) (inclusive) where all shareholders agree that the report need not do so.

### **213. SHAREHOLDERS MAY ELECT NOT TO RECEIVE DOCUMENTS.**

Subject to Section 211, a shareholder of a company may from time to time, 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.

### **214. 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 where the failure to do so was accidental.

### **215. ANNUAL RETURN.**

(1) The board of a company shall ensure that there is submitted to the Registrar for registration at least once in each calendar year within 14 days after the annual meeting of the company, 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 (6), or as near to it as circumstances allow, and shall contain the information specified in Schedule 6 and any other prescribed information or matters.

(2) The annual return shall be made up to the date of the annual meeting of the company, or to a date not later than 14 days after the date of the annual meeting.

(3) Where a company is required by Section 190 to have its financial statements and any group financial statements audited, a certified copy of those financial statements and any group financial statements, and of the audit report, shall accompany the annual return submitted to the Registrar under Subsection (1).

(4) Notwithstanding Subsection (1)–

- (a) a company that is registered after submitting to the Registrar an application under Section 13 need not make an annual return in the calendar year of its registration; and
- (b) a subsidiary may, with the written approval of the Registrar, make an annual return within 14 days after the annual meeting of its holding company instead of within 14 days after its annual meeting; and
- (c) a company which complies with Sections 67 and 68 and–
  - (i) is subject to a listing agreement with a stock exchange; or
  - (ii) has more than 100 shareholders,

is not required to supply the information required under Schedule 6(k)(i), (ii) and (iv); and

- (d) a company to which Paragraph (c) of this subsection applies is to submit to the Registrar notice in the prescribed form of its shareholding with its annual return.

(5) For the purposes of this section, “**prescribed**” means prescribed by Regulation or by the Registrar by notice in the National Gazette and different forms of annual return may be prescribed in respect of different classes of companies.

(6) 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.

(7) An annual return in a form approved under Subsection (6) shall contain all the details and requirements as are contained in the prescribed form, or as near to it as circumstances allow.

(8) The Registrar may by notice in the National Gazette declare that any information submitted to the Registrar under this section shall not form part of the register.

(9) Where the board of a company fails to comply with Subsection (1) or Subsection (2), every director of the company commits an offence and is liable on conviction to the penalty set out in Section 414(2).

(10) Where the board of a company fails to comply with Subsection (3), every director of the company commits an offence and is liable on conviction to the penalty set out in Section 414(3).

*Division 2.*

*Inspection of Company Records.*

**216. INSPECTION OF COMPANY RECORDS BY SHAREHOLDERS.**

(1) A company shall keep the following records available for inspection in the manner prescribed in Section 217, by a shareholder of the company, or by a person authorized in writing for the purpose by a shareholder, who serves written notice of intention to inspect on the company and on payment of a fee prescribed by Regulation:—

- (a) the certificate of incorporation or registration of the company;
- (b) the constitution of the company, if it has one;
- (c) the share register;
- (d) the full names, addresses and postal addresses of the directors and secretary;
- (e) details of the registered office and address for service of the company;
- (f) minutes of all meetings and resolutions of shareholders within the last seven years;
- (g) copies of written communications to all shareholders or to all holders of a class of shares during the preceding seven years, including annual reports, financial statements, and group financial statements;
- (h) certificates given by directors under this Act;
- (i) the interests register of the company.

(2) Where 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 413(2); and
- (b) every director of the company commits an offence and is liable on conviction to the penalty set out in Section 414(2).

**217. MANNER OF INSPECTION.**

(1) Documents which may be inspected under Section 216 shall be available for inspection at the place at which the company's records are kept between the hours of 9:00a.m. and 5:00p.m. on each day during the inspection period.

(2) In this section, the term “**inspection period**” means the period commencing on the seventh day after the day on which notice of intention to inspect is served on the company by the shareholder or person concerned and ending with the 14th day after the day of service.

**218. COPIES OF DOCUMENTS.**

(1) A person may require a copy of, or extract from, a document which is available for inspection by him under Section 216 to be sent to him—

- (a) within five 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) Where 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 413(1); and
- (b) every director of the company commits an offence and is liable on conviction to the penalty set out in Section 414(1).

**219. INFORMATION FOR SHAREHOLDERS.**

(1) A shareholder may at any time make a written request to a company for information held by the company.

(2) A request under Subsection (1) shall specify the information sought in sufficient detail to enable it to be identified.

(3) Within one month of receiving a request under Subsection (1), the company shall—

- (a) provide the information; or
- (b) agree to provide the information within a specified period; or
- (c) agree to provide the information within a specified period where 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 where—

- (a) the disclosure of the information would or would be likely to prejudice the commercial position of the company; or
- (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) Where 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 one month of receiving notification of the charge, the shareholder pays the charge.

(6) The Court may, on the application of a shareholder who has made a request for information, where 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 shareholder who has made a request for information, where 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,

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.

## **220. INVESTIGATION OF RECORDS.**

(1) The Court may, on the application of a shareholder or creditor of a company, make an order authorizing 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 orders 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 where 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 qualified in accordance with Section 193.

(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 by the Court under Subsection (1), 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 (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 (5) commits an offence, and is liable on conviction to the penalty set out in Section 413(2).

**PART XIII. – REGISTRATION OF CHARGES.****221. APPLICATION OF THIS PART.**

A reference in this Part to a company includes a reference to an overseas company to which Part XX applies, but nothing in this Part applies to a charge on property of an overseas company which is located outside the country.

**222. REGISTRATION OF CHARGES.**

(1) Subject to this Part, where a company creates a charge to which this Part applies, the company shall submit to the Registrar for registration within two months after the creation of the charge—

- (a) a notice for registration of the charge in the prescribed form; and
- (b) a certified copy of the document creating or evidencing the charge.

(2) Where this section is not complied with in relation to a charge to which this Part applies, the charge is, so far as it confers any security on the company's property or undertaking, void against—

- (a) the liquidator of the company; and
- (b) any creditor of the company.

(3) This section does not prejudice any contract or obligation for repayment of the money secured by a charge, and when a charge becomes void under this section the money it secures becomes immediately payable.

(4) The charges to which this Part applies are—

- (a) charges (other than charges solely on land) to secure any issue of debentures; and
- (b) charges on uncalled share capital of a company; and
- (c) charges or assignments created or evidenced by instruments (including instruments creating or evidencing absolute bills of sale or absolute assignments or transfers of book debts) that, if executed by an individual, would be invalid or of limited effect if not registered under the *Instruments Act 1953*; and
- (d) floating charges on the undertaking or property of a company; and
- (e) charges on calls made but not paid; and
- (f) charges on a ship or aircraft, or on a share in a ship or aircraft; and
- (g) charges on goodwill, on a patent or licence under a patent, on a trade mark, or on a copyright or a licence under a copyright; and
- (h) charges on the book debts of a company.

(5) Where a charge created in the country affects property outside the country—

- (a) an application for registration of the charge in the prescribed form; and



(b) a certified copy of the document creating or evidencing the charge, may be submitted for registration under and in accordance with Subsection (1) notwithstanding that further proceedings are necessary to make the charge valid or effectual according to the law of the place in which the property is situated.

(6) Where a company creates a series of debentures containing or giving by reference to any other document a charge the benefit of which the debenture holders of that series are entitled to equally, the company shall submit to the Registrar for registration within two months after the execution of the document containing the charge, or, where there is no such document, after the execution of the first debenture of the series—

(a) a notice in the prescribed form of the following particulars:—

- (i) the total amount secured by the whole series;
- (ii) the dates of the resolutions authorizing the issue of the series and the date of the document (if any) by which the security is created or defined;
- (iii) a general description of the property charged;
- (iv) the names of the trustees (if any) for the debenture holders; and

(b) either—

- (i) a certified copy of the document creating or evidencing the charge; or
- (ii) where there is no such document, a copy of the first of the debentures of the series.

(7) For the purposes of Subsection (6), where more than one issue of debentures in the series is made, the company shall submit to the Registrar notice in the prescribed form of the date and amount of each issue within two months after the issue.

(8) Where a company has made or paid any commission, allowance or discount, directly or indirectly, to a person in consideration of that person either absolutely or conditionally subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions, absolute or conditional, for any debentures, the particulars required to be submitted under this section include particulars as to the amount or rate per cent of the commission, allowance, or discount.

(9) The deposit of any debentures as security for a debt of the company shall not be treated, for the purposes of Subsection (8), as the issue of the debentures at a discount.

(10) Failure to comply with Subsection (7) or (8) does not affect the validity of the debentures issued.

(11) A charge to which this section applies—

- (a) does not need to be registered under the *Instruments Act 1953*; and

- (b) is not subject to avoidance under that Act; and
- (c) on registration under this Part, has effect and is as valid, for all purposes, as if it had been duly registered under that Act.

(12) Where—

- (a) a charge requiring registration under this section is created before the expiration of two months after the creation of a prior unregistered charge; and
- (b) the charge comprises all or any part of the property comprised in the prior charge; and
- (c) the subsequent charge is given as a security for the same debt as is secured by the prior charge, or for any part of that debt,

then, to the extent to which the subsequent charge is a security for the same debt or part of the same debt and so far as respects the property comprised in the prior charge, the subsequent charge is not operative and has no validity unless it is proved to the satisfaction of the Court that it was given in good faith for the purpose of correcting a material error in the prior charge or under other proper circumstances and not for the purpose of avoiding or evading this Part.

(13) Where default is made in complying with this section each director of the company commits an offence and is liable on conviction to the penalty set out in Section 414(1).

## **223. REGISTRATION OF CHARGES ON PROPERTY ACQUIRED.**

(1) Where—

- (a) a company acquires any property that is subject to a charge of such a kind as would, if the company had created that charge after the acquisition of the property, have been required to be registered under this Part; or
- (b) an overseas company becomes registered in the country and has, before that registration, created a charge that, if the company had created it while it was registered in the country, would have been required to be registered under this Part; or
- (c) an overseas company becomes registered in the country and has, before that registration, acquired property that is subject to a charge of any kind that would, if the company had created it after the acquisition and while it was registered in the country, have been required to be registered under this Part,

the company shall submit to the Registrar within two months after the date on which the acquisition is completed or the date of the registration of the company in the country, as the case may be—

- (d) a notice in the prescribed form; and

(e) a certified copy of the document creating or evidencing the charge.

(2) Where default is made in complying with this section each director of the company commits an offence and is liable on conviction to the penalty set out in Section 414(1).

**224. ASSIGNMENT AND VARIATION OF CHARGES.**

(1) Where after the creation of a charge to which this Part applies, a person other than the original chargee becomes the holder of the charge, that person shall, within two months after he becomes the holder of the charge—

- (a) submit a notice in the prescribed form to the Registrar to the effect that he has become the holder of the charge; and
- (b) give to the company a copy of the notice.

(2) Where after the creation of a charge to which this Part applies, there is a variation in the terms of the charge having the effect of—

- (a) increasing the amount of the debt or increasing the liabilities (whether present or prospective) secured by the charge; or
- (b) prohibiting or restricting the creation of subsequent charges on the property,

the company shall, within two months after the variation occurs, ensure that there is submitted to the Registrar notice in the prescribed form setting out particulars of the variation and accompanied by a certified copy of the document (if any) effecting the variation.

(3) Where a charge created by a company secures a debt of an unspecified amount or secures a debt of a specified amount and further advances, a payment or advance made by the chargee to the company in accordance with the terms of the charge shall not be taken, for the purposes of Subsection (2), to be a variation in the terms of the charge having the effect of increasing the amount of the charge or the liabilities (whether present or prospective) secured by the charge.

(4) A reference in this section to the chargee in relation to a charge shall, where the charge is constituted by a debenture and debentures and there is a trustee for debenture holders, be construed as a reference to the trustee for debenture holders.

(5) Nothing in Section 222 requires the submission of a notice under that section in relation to a charge merely because of the fact that the terms of the charge are varied only in a manner mentioned in this section.

**225. REGISTER OF CHARGES.**

(1) The Registrar shall keep a register of all the charges registered under this Part.

(2) The Registrar shall enter in the register the following particulars with respect to each charge submitted for registration, the time and date on which it was entered in the register and of any assignment or variation and—

- (a) in the case of a charge where the holders of a series of debentures are entitled to the benefit of that charge, the particulars contained in the notice received under Section 222(6); and
- (b) in the case of any other charge, the following:—
  - (i) where the charge is a charge created by the company, the date of its creation;
  - (ii) where the charge was a charge existing on property acquired by the company, the date of the acquisition of the property;
  - (iii) the amount the charge secures;
  - (iv) a description sufficient to identify the property charged;
  - (v) the name of the person entitled to the charge;
  - (vi) the details of any assignment or variation.

(3) The Registrar shall issue a certificate in the prescribed form of every registration stating, where applicable, the amount the charge secures and the certificate is conclusive evidence that the requirements as to registration have been complied with.

(4) Where a notice is submitted to the Registrar under Section 222(6) (whether during or after the period within which it was required to be submitted) the Registrar shall enter in the register the time and date on which it was entered in the register and the particulars set out in the notice.

(5) Where—

- (a) a notice in respect of a charge to which this Part applies is submitted to the Registrar under Sections 222, 223 or 224; and
- (b) the notice is not accompanied by—
  - (i) a certificate in the prescribed form to the effect that all documents accompanying the notice have been duly stamped as required by the *Stamp Duties Act 1952* or are not required to be stamped pursuant to that Act; or
  - (ii) evidence that the documents accompanying the notice have been duly stamped as required by the *Stamp Duties Act 1952*,

the Registrar shall cause to be entered in the register the time and date when the notice was lodged and the particulars referred to in Section 225(2) but shall cause the word “provisional” to be entered in the register in relation to that entry specifying that time and date.

(6) Where, pursuant to Section 396(2), the Registrar refuses to register documents which are submitted to the Registrar under Sections 222, 223 or 224, the

Registrar may, at his discretion cause to be entered in the register the time and date when the notice was lodged and the particulars referred to in Section 225(2) and cause the word “provisional” to be entered in the register in relation to that entry specifying that time and date.

(7) Where the word “provisional” is entered in the register and within one month, or such further period as the Registrar allows—

- (a) the certificate or evidence referred to in Subsection (5)(b) has been submitted to the Registrar; or
- (b) the documents referred to in Subsection (6) are resubmitted to the Registrar and he registers the documents,

whichever is applicable, the Registrar shall delete the word “provisional” but where—

- (c) the certificate or evidence referred to in Subsection (5)(b) is not submitted; or
- (d) the documents referred to in Subsection (6) are not resubmitted to the Registrar and registered by the Registrar,

whichever is applicable, within the one month period, or the further allowed period, the Registrar shall delete from the register all the particulars that were entered in relation to the charge or variation or assignment, as the case may be.

(8) Where the word “provisional” is entered in the register in relation to an entry specifying a time and date, the charge or variation or assignment shall be deemed not to have been registered but where the word “provisional” is deleted from the register pursuant to Subsection (7) the charge or variation or assignment shall be deemed to be registered and to have been registered from and including the time and date specified in the register pursuant to Subsection (5) or (6), as the case may be.

## **226. ENDORSEMENT OF CERTIFICATE OF REGISTRATION ON DEBENTURES.**

(1) The company shall cause to be endorsed on every debenture forming one of a series of debentures, and on every certificate of debenture stock, that the company issues and the payment of which is secured by a charge registered under this Part—

- (a) a copy of the certificate of registration; or
- (b) a statement that registration has been effected and the date of such registration.

(2) Subsection (1) does not apply to a debenture or certificate of debenture stock that the company issues before the charge is registered.

(3) A person who knowingly authorizes or permits the giving of a debenture or certificate of debenture stock that is not endorsed as required by this section commits an offence and is liable on conviction to the penalty set out in Section 413(1).

**227. REGISTRATION OF SATISFACTION AND RELEASE.**

(1) Where, with respect to a registered charge—

- (a) the debt for which the charge was given has been paid or satisfied in whole or in part; or
- (b) the property or undertaking charged or any part of it—
  - (i) has been released from the charge; or
  - (ii) has ceased to form part of the property or undertaking of the company concerned,

any person who is interested in the debt or the property or undertaking may submit to the Registrar in the prescribed form a memorandum of satisfaction—

- (c) in whole or in part; or
- (d) of the fact that the property or undertaking or any part of it—
  - (i) has been released from the charge; or
  - (ii) has ceased to form part of the company's property or undertaking,

and the Registrar shall enter particulars of the memorandum in the register.

(2) The memorandum of satisfaction under Subsection (1) shall be supported by such evidence as the Registrar requires to satisfy the Registrar as to any relevant matter referred to in Subsection (1)(a) or (b).

**228. EXTENSION OF TIME AND RECTIFICATION OF REGISTER.**

(1) On being satisfied—

- (a) that an omission to submit for registration a charge or an assignment or variation of a charge within the time required or that an omission or misstatement of any particular in the register of charges or notice referred to in Section 227—
  - (i) was accidental or due to inadvertence or to some other sufficient cause; or
  - (ii) is not of a nature to prejudice the position of creditors or shareholders; or
- (b) that on other grounds it is just and equitable to grant relief,

the Registrar may, on the application of the company or a person interested, and on such conditions as the Registrar thinks fit grant relief, or rectify the register of charges or notice referred to in Section 227, as the case may be.

(2) A person who has made an application to the Registrar under this section and is dissatisfied with the decision of the Registrar may apply to the Court and the Court may upon being satisfied of the matters in Subsection (1), order the Registrar to grant relief, or rectify the register of charges or notice referred to in Section 227, as the case may be.

(3) Where a person makes an application to the Court under Subsection (2) no order for costs shall be made against the Registrar.

**229. DOCUMENTS MADE OUTSIDE PAPUA NEW GUINEA.**

Where under this Part an application or other document is required to be submitted to the Registrar within a specified time, the time so specified is, by force of this section, in relation to an instrument, deed, statement or other document executed or made in a place outside the country, extended by one month or such further period as the Registrar from time to time allows.

**230. INTERESTED PERSONS MAY REGISTER DOCUMENTS.**

Any person who is interested in a charge or other documents that are required to be registered under this Part may submit to the Registrar for registration any of these documents, or any particulars required by this Part, and that person is entitled to recover from the company the amount of any fees properly paid by him on registration.

**231. PRIORITIES OF CHARGES.**

(1) Subject to this section, the provisions of Schedule 15 have effect with respect to the priorities, in relation to each other, of charges to which this Part applies.

(2) The application, in relation to charges to which this Part applies, of the order of priorities of charges set out in Schedule 15, is subject to—

- (a) any consent (express or implied) that varies the priorities in relation to each other of those charges, being a consent given by the holder of one of those charges, being a charge that would otherwise be entitled to priority over the other charge; and
- (b) any agreement between those chargees that affects the priorities in relation to each other of the charges in relation to which those persons are the chargees.

(3) The holder of a registered charge, being a floating charge, on property of a company shall be deemed, for the purposes of Subsection (2), to have consented to that charge being postponed to a subsequent registered charge, being a fixed charge that is created before the floating charge becomes fixed, on any of that property unless—

- (a) the creation of the subsequent registered charge contravened a provision of the instrument or resolution creating or evidencing the floating charge; and
- (b) a notice in respect of the floating charge indicating the existence of the provision referred to in Paragraph (a) was submitted to the Registrar under this Part before the creation of the subsequent registered charge.

(4) Where a charge relates to property of a kind or kinds to which a particular paragraph or paragraphs of Section 222(4) applies or apply, and also relates to other property, the provisions of Schedule 15 apply so as to affect the priority of the charge only in so far as it relates to the first-mentioned property and does not affect the priority of the charge in so far as it relates to the other property.

(5) Schedule 15 does not apply so as to affect the operation of—

- (a) the *Insurance Act 1995*; or
- (b) the *Trade Marks Act 1978*.



**PART XIV. – AMALGAMATIONS.****232. 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.

**233. AMALGAMATION PROPOSAL.**

(1) An amalgamation proposal shall set out the terms of the amalgamation, and in particular–

- (a) the name of the amalgamated company, where it is the same as the name of one of the amalgamating companies; and
- (b) the registered office of the amalgamated company; and
- (c) the full name or names and address or addresses of the director or directors, and secretary (if any) of the amalgamated company; and
- (d) the address for service of the amalgamated company; and
- (e) the share structure of the amalgamated company, specifying–
  - (i) the number of shares of the company; and
  - (ii) the rights, privileges, limitations, and conditions attached to each share of the company, where different from those set out in Section 37; and
- (f) the manner in which the shares of each amalgamating company are to be converted into shares of the amalgamated company; and
- (g) where 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; and
- (h) any payment to be made to a shareholder or director or secretary of an amalgamating company, other than a payment of the kind described in Paragraph (g); and
- (i) details of any arrangement necessary to complete the amalgamation and to provide for the subsequent management and operation of the amalgamated company.

(2) The amalgamation proposal shall include the proposed constitution of the amalgamated company, if any.

(3) An amalgamation proposal may specify the date on which the amalgamation is intended to become effective.

(4) Where 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.

#### **234. APPROVAL OF AMALGAMATION PROPOSAL.**

(1) The board of each amalgamating company shall resolve that—

- (a) in its opinion the amalgamation is in the best interests 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 forthwith 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 one month before the amalgamation is proposed to take effect—

- (a) a copy of the amalgamation proposal; and
- (b) copies of the certificates given by the directors of each board; and
- (c) a summary of the principal provisions of the constitution of the amalgamated company, where it has one; and
- (d) a statement setting out the rights of shareholders under Section 91; and
- (e) a statement of any material interests of the directors in the proposal, whether in that capacity or otherwise; and
- (f) 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 one month 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 to 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 88; and
- (b) where 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 413(1).

### **235. 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 233 and 234 where—

- (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; and
  - (ii) the constitution of the amalgamated company, if it has one, will be the same as the constitution of the company first referred to, if it has one; 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 233 or 234 where—

- (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; and
- (ii) the constitution of the amalgamated company, if it has one, will be the same as the constitution of the amalgamating company whose shares are not cancelled, if it has one; and
- (iii) the board is satisfied on reasonable grounds that the amalgamated company will, immediately after the amalgamation becomes effective, satisfy the solvency test.

(3) The board of each amalgamating company shall, not less than one month 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 (2), as the case may be, shall forthwith sign a certificate stating that, in their opinion, the conditions set out in Subsection (1) or (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 413(1).

### **236. REGISTRATION OF AMALGAMATION PROPOSAL.**

For the purpose of effecting an amalgamation copies of the following documents, together with an application in the prescribed form shall be submitted to the Registrar for registration:—

- (a) the approved amalgamation proposal;
- (b) any certificates required under Section 234(2) or 235(5);
- (c) a certificate signed by the board of each amalgamating company stating that the amalgamation has been approved in accordance with this Act;
- (d) the constitution of the company, if it has one;
- (e) where the amalgamated company is a new company or the amalgamation proposal provides for a change of the name of the amalgamated company, the notice reserving the name of the company, if any;
- (f) a document in the prescribed form signed by each of the persons named in the amalgamation proposal as a director or secretary of the amalgamated company containing his consent to be a director or secretary and a certificate that he is not disqualified from being appointed or holding office as a director or secretary of a company.

**237. CERTIFICATE OF AMALGAMATION.**

(1) After receipt of the documents required under Section 236, the Registrar shall—

- (a) where the amalgamated company is the same as one of the amalgamating companies, issue a certificate of amalgamation in the prescribed form; or
- (b) where the amalgamated company is a new company—
  - (i) enter particulars of the company on the register; and
  - (ii) issue a certificate of amalgamation in the prescribed form together with a certificate of incorporation.

(2) Where 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 shall be expressed to have effect on the date specified in the amalgamation proposal.

**238. EFFECT OF CERTIFICATE OF AMALGAMATION.**

On the date shown in a certificate of amalgamation—

- (a) the amalgamation is effective; and
- (b) where it is the same as a name of one of the amalgamating companies, the amalgamated company has the name specified in the amalgamation proposal; and
- (c) the Registrar shall remove the amalgamating companies, other than the amalgamated company, from the register, and otherwise give effect to the amalgamation; and
- (d) the amalgamated company succeeds to all the property, rights, powers, and privileges of each of the amalgamating companies; and
- (e) the amalgamated company succeeds to all the liabilities and obligations of each of the amalgamating companies; and
- (f) proceedings pending by, or against, an amalgamating company may be continued by, or against, the amalgamated company; and
- (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 tenor.

**239. EFFECT ON REGISTERS.**

(1) Where an amalgamation becomes effective, no person charged with the keeping of any books or registers shall be obliged, solely by reason of the amalgamation becoming effective, to change the name of an amalgamating company to that of the amalgamated company in those books or registers or in any documents.

(2) The presentation to any person of any instrument (whether or not comprising an instrument of transfer) by the amalgamated company—

- (a) executed or purporting to be executed by the amalgamated company; and
- (b) relating to any property held immediately before the amalgamation by an amalgamating company; and
- (c) stating that the property has become the property of the amalgamated company by virtue of this Part,

shall, in the absence of evidence to the contrary, be sufficient evidence that the property has become the property of the amalgamated company.

(3) Without limiting Subsection (1) or (2), where any security issued by any person or any rights or interests in property of any person become, by virtue of this Part, the property of an amalgamated company, that person, on the presentation of a certificate signed on behalf of the board of the amalgamated company, stating that that security or any such rights or interests have, by virtue of this Part, become the property of the amalgamated company, shall, notwithstanding any other law or the provisions of any instrument, register the amalgamated company as the holder of that security or as the person entitled to such rights or interests, as the case may be.

(4) Except as provided in this section, nothing in this Part derogates from the provisions of the *Land Registration Act 1981*.

**240. POWERS OF COURT IN OTHER CASES.**

(1) Where 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, made at any time before the date on which the amalgamation becomes effective, of that person or the Registrar, make any order it thinks fit in relation to the proposal, and may, without limiting the generality of this subsection, order any one or more of the following:—

- (a) that effect shall not be given to the proposal;
- (b) that the proposal be modified in such manner as may be specified in the order;
- (c) that the company or its board 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 XV. – COMPROMISES WITH CREDITORS.**

**241. 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; or
- (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) a person who, in a liquidation, would be entitled to claim in accordance with Section 351 that a debt is owing to that person by the company; and
- (b) a secured creditor;

“**proponent**” means a person referred to in Section 242 who proposed a compromise in accordance with this Part.

**242. COMPROMISE PROPOSAL.**

(1) Any of the following persons may propose a compromise under this Part where that person has reason to believe that a company is or will be unable to pay its debts as they become due in the ordinary course of business within the meaning of Section 335:—

- (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;
- (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.

**243. 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—

- (a) notice, in accordance with Schedule 7 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; and
- (b) a statement—
  - (i) containing the name and address of the proponent and the capacity in which the proponent is acting; and
  - (ii) containing the address and telephone number to which inquiries may be directed during normal business hours; and
  - (iii) setting out the terms of the proposed compromise and the reasons for it; and
  - (iv) setting out the reasonably foreseeable consequences for creditors of the company of the compromise being approved; and
  - (v) setting out the extent of any interest of a director in the proposed compromise; and
  - (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, where approved in accordance with Section 244; 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).

(3) The proponent shall submit to the Registrar a certified copy of the notice and statement given under Subsection (2) within one month of their being so given.

#### **244. EFFECT OF COMPROMISE.**

(1) A compromise, including any amendment proposed at the meeting, is approved by creditors, or a class of creditors, where, at a meeting of creditors or that class of creditors conducted in accordance with Schedule 7, the compromise, including any amendment, is adopted in accordance with Section 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) where there is more than one class of creditors, on all creditors of that class,

to whom notice of the proposal was given under Section 243.

(3) Where 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 submit a notice in the prescribed form of the result of the voting to the Registrar and give a copy of that notice to each known creditor, the company, and any receiver or liquidator.

#### **245. VARIATION OF COMPROMISE.**

(1) A compromise approved under Section 244 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.

#### **246. 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, where 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 one month 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) Where 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 243 was given to that creditor; or
- (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 is not 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 one month after the date on which notice of the result of the voting was given to the creditor.

#### **247. EFFECT OF COMPROMISE IN LIQUIDATION OF COMPANY.**

(1) Where a compromise is approved under Section 244, the Court may, on the application of—

- (a) the company; or
- (b) a receiver appointed in relation to the whole or substantially the whole of the assets and undertaking 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 244 and the company is subsequently put into liquidation, the Court may, on the application of—

- (a) the liquidator; or
- (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.

#### **248. 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; or
- (b) where incurred by a receiver or a liquidator, are a cost of the receivership or liquidation; or

- (c) where 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 Schedule 9.

**PART XVI. – APPROVAL OF ARRANGEMENTS, AMALGAMATIONS, AND  
COMPROMISES BY COURT.**

**249. 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; or
- (b) an overseas company that is registered on the register;

“**creditor**” includes—

- (a) a person who, in a liquidation, would be entitled to claim in accordance with Section 351 that a debt is owing to that person by the company; and
- (b) a secured creditor.

**250. APPROVAL OF ARRANGEMENTS, AMALGAMATIONS, AND  
COMPROMISES.**

(1) Notwithstanding the provisions of this Act or the constitution of a company, the Court may, on the application of a company or any shareholder or creditor of a 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 a 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 a 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 a company or to any other person who appears to the Court to be interested;
- (d) an order as to the payment of the costs incurred in the preparation of any such report;
- (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 one month of an order being made by the Court, the board of the company shall ensure that a certified copy of the order is submitted to the Registrar.

(5) Where the board of a company fails to comply with Subsection (4), every director of the company commits an offence and is liable on conviction to the penalty set out in Section 414(2).

## **251. COURT MAY MAKE ADDITIONAL ORDERS.**

(1) Without limiting Section 250, 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; and
- (b) the issue of shares, securities, or policies of any kind; and
- (c) the continuation of legal proceedings; and
- (d) the liquidation of any company; and
- (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 Section 250(2)(b) or who appeared before the Court in opposition to the application to approve the arrangement or amalgamation or compromise;
- (f) such other matters that are necessary or desirable to give effect to the arrangement or amalgamation or compromise.

(2) Within one month of an order being made by the Court, the board of the company shall ensure that a certified copy of the order is submitted to the Registrar.

(3) Where the board of a company fails to comply with Subsection (2), every director of the company commits an offence and is liable on conviction to the penalty set out in Section 414(2).

**252. PARTS XIV AND XV NOT AFFECTED.**

The Court shall not approve an arrangement or amalgamation or compromise that could be effected under Part XIV or XV of this Act, unless the Court is satisfied that it is not reasonably practicable to effect the arrangement or amalgamation or compromise under those Parts.

**253. APPLICATION OF SECTION 247.**

The provisions of Section 247 shall apply with such modifications as may be necessary in relation to any compromise approved under Section 250.

## PART XVII. – RECEIVERSHIPS.

## 254. INTERPRETATION.

(1) In this Part, unless the contrary intention appears–

“**company**” means–

- (a) a company within the meaning of Section 2; or
- (b) an overseas company that is registered on the register;

“**creditor**” includes a person who, in a liquidation, would be entitled to claim in accordance with Section 351 that a debt is owing to that person by the company;

“**director**”, in relation to–

- (a) a company (other than an overseas company) includes–
  - (i) any person occupying the position of director of the company by whatever name called; and
  - (ii) a person in accordance with whose directions or instructions a person referred to in Subparagraph (i) may be required or is accustomed to act; and
  - (iii) a person in accordance with whose directions or instructions the board of the company may be required or is accustomed to act;
- (b) an overseas company, includes an agent, officer, or employee responsible in the country for the business of the overseas company,

but does not include a receiver;

“**liquidator**” means a liquidator appointed under Part XVIII, and “**liquidation**” has a corresponding meaning;

“**mortgage**” includes a charge on property for securing money or money’s worth;

“**mortgagee**” includes a person from time to time deriving title under the original mortgagee, but does not include a receiver;

“**preferential claims**” means the claims referred to in Schedule 9 (except Section 1 of that Schedule);

“**property**” includes–

- (a) real and personal property; and
- (b) an estate or interest in real or personal property; and
- (c) a debt; and
- (d) any thing in action; and

(e) any other right or interest;

**“property in receivership”** means property in respect of which a receiver is appointed;

**“receiver”** means a receiver, or a manager, or a receiver and manager in respect of any property appointed—

(a) by or under any deed or agreement; or

(b) by the Court in the exercise of a power conferred on the Court or in the exercise of its inherent jurisdiction,

whether or not the person appointed is empowered to sell any of the property in receivership, but does not include—

(c) a mortgagee who, whether personally or through an agent, exercises a power—

(i) to receive income from mortgaged property; or

(ii) to enter into possession or assume control of mortgaged property; or

(iii) to sell or otherwise alienate mortgaged property; or

(d) an agent of any such mortgagee.

(2) In this Act, unless the contrary intention appears, a reference to a person by whom, or in whose interests, a receiver was appointed, as the case may be, includes a reference to a person to whom the rights and interests under any deed or agreement by or under which the receiver was appointed have been transferred or assigned.

## **255. APPLICATION OF THIS PART.**

(1) This Part applies—

(a) to a receiver appointed after the coming into force of this Act; and

(b) with the exceptions and modifications specified in Subsection (2), to a receiver holding office on the coming into force of this Act.

(2) In the application of this Part to a receiver holding office on the coming into force of this Act—

(a) Section 256 (except Subsections (1)(e) and (2)) does not apply; and

(b) Section 273 does not apply; and

(c) Section 278 does not apply in respect of a receivership that ended before the commencement of this Act; and

(d) Section 279 does not apply; and

(e) Subsections (1)(b) and (c) and Section 281(5) and (6) do not apply.



**256. QUALIFICATIONS OF RECEIVERS.**

(1) Unless the Court orders otherwise, none of the following persons may be appointed or act as a receiver:—

- (a) a person who is under 18 years of age;
- (b) a mortgagee of the property in receivership;
- (c) a person who is, or who has within the period of two years immediately preceding the commencement of the receivership been—
  - (i) a director of the company; or
  - (ii) a director of the mortgagee of the property in receivership;
- (d) a person who has, or who has had within the period of two years preceding the commencement of the receivership, an interest, whether direct or indirect, in—
  - (i) a share issued by the company; or
  - (ii) 5% or more of any class of shares issued by the mortgagee of the property in receivership;
- (e) a person who is an undischarged bankrupt;
- (f) a person who is of unsound mind or otherwise incapable of managing his own affairs;
- (g) a person in respect of whom an order has been made under Section 334(5);
- (h) a person in respect of whom an order has been made under Section 286(6);
- (i) a person who would be prohibited from being a director or promoter of, or being concerned or taking part in the management of a company under Section 142 of the repealed Act, but for the repeal of that Act;
- (j) 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 425, 426 or 428;
- (k) a person who is disqualified from acting as a receiver by the instrument that confers the power to appoint a receiver.

(2) A body corporate shall not be appointed or act as a receiver.

(3) A person who contravenes Subsection (1) or (2) commits an offence and is liable on conviction to the penalty set out in Section 413(2).

**257. APPOINTMENT OF RECEIVERS UNDER DEEDS AND AGREEMENTS.**

(1) A receiver may be appointed in respect of the property of a company by, or in the exercise of a power conferred by, a deed or agreement to which that company is a party.

(2) The appointment of a receiver in the exercise of a power referred to in Subsection (1) shall be in writing.

(3) A receiver appointed by, or under a power conferred by, a deed or agreement is the agent of the company unless it is expressly provided otherwise in the deed or agreement or the instrument by or under which the receiver was appointed.

**258. EXTENT OF POWER TO APPOINT RECEIVER.**

(1) A power conferred by a deed or an agreement to appoint a receiver includes the power to appoint—

- (a) two or more receivers; or
- (b) a receiver additional to one or more presently in office; or
- (c) a receiver to succeed a receiver whose office has become vacant unless the deed or agreement expressly provides otherwise.

(2) Two or more receivers may act jointly or severally to the extent that they have the same powers unless the deed or agreement under which, or the order of the Court by which, they are appointed expressly provides otherwise.

**259. NOTICE OF APPOINTMENT.**

(1) A receiver shall, within seven days of being appointed—

- (a) give written notice of his appointment to the company; and
- (b) give public notice of his appointment, including—
  - (i) the receiver's full name; and
  - (ii) the date of the appointment; and
  - (iii) the receiver's office address; and
  - (iv) a brief description of the property in receivership; and
- (c) submit a notice of appointment in the prescribed form to the Registrar.

(2) Where the appointment of the receiver is in addition to a receiver who already holds office or is in place of a person who has vacated office as receiver, as the case may be, every notice under this section shall state that fact.

(3) Every receiver who contravenes this section commits an offence and is liable on conviction to the penalty set out in Section 413(2).

**260. NOTICE OF RECEIVERSHIP.**

(1) Where a receiver is appointed in relation to a specific asset or specific assets, every deed or agreement entered into, and every document issued, by or on behalf of the company or the receiver that relates to the asset or assets and on which the name of the company appears shall state that a receiver has been appointed.

(2) Where a receiver is appointed in any other case, every deed or agreement entered into, and every document issued, by or on behalf of the company or the receiver and on which the name of the company appears shall state that a receiver has been appointed.

(3) A failure to comply with Subsection (1) or (2) does not affect the validity of the deed or agreement or document.

(4) Every person who—

(a) contravenes Subsection (1) or (2); or

(b) knowingly or wilfully authorizes or permits a contravention of Subsection (1) or (2),

commits an offence and is liable on conviction to the penalty set out in Section 413(1).

**261. VACANCY IN OFFICE OF RECEIVER.**

(1) The office of receiver becomes vacant if the person holding office resigns, dies, or becomes disqualified under Section 256.

(2) A receiver may resign office by giving not less than 14 days written notice of his intention to resign to the person by whom the receiver was appointed.

(3) Where a vacancy in the office of receiver occurs as a result of the disqualification of the person holding office as receiver, that person shall forthwith give written notice of the vacancy to the person by whom the receiver was appointed.

(4) Where a vacancy in the office of receiver occurs as the result of the resignation or disqualification of the person holding office as receiver, that person shall, within 14 days of the vacancy occurring, submit a written notice in the prescribed form of the vacancy to the Registrar.

(5) A receiver appointed by the Court may resign office by submitting not less than 14 days notice of his intention to resign to the Registrar of the Court that made the appointment.

(6) A person vacating the office of receiver shall, where practicable, provide such information and give such assistance in the conduct of the receivership to his successor as that person reasonably requires.

(7) On the application of a person appointed to fill a vacancy in the office of receiver, the Court may make any order that it considers necessary or desirable to facilitate the performance of the receiver's duties.

(8) Every person who fails to comply with Subsection (3) or (4) commits an offence and is liable on conviction to the penalty set out in Section 413(1).

**262. POWER TO OBTAIN DOCUMENTS AND INFORMATION.**

(1) A company and every director of the company, shall—

- (a) make available to the receiver all books, documents, and information relating to the property in receivership in the company's possession or under the company's control; and
- (b) where required to do so by the receiver, verify, by statutory declaration, that the books, documents, and information are complete and correct; and
- (c) give the receiver such assistance as he may reasonably require.

(2) On the application of the receiver, the Court may make an order requiring the company or a director of the company to comply with Subsection (1).

**263. EXECUTION OF DOCUMENTS.**

(1) A receiver may execute in the name and on behalf of the company all documents necessary or incidental to the exercise of the receiver's powers.

(2) A document signed by a receiver shall be deemed to have been properly executed for the purposes of Section 155.

**264. POWERS OF RECEIVERS.**

(1) A receiver has the powers and authorities expressly or impliedly conferred by the deed or agreement or the order of the Court by or under which the appointment was made.

(2) Subject to the deed or agreement or the order of the Court by or under which the appointment was made, a receiver may—

- (a) demand and recover, by action or otherwise, income of the property in receivership; and
- (b) issue receipts for income recovered; and
- (c) manage the property in receivership; and
- (d) insure the property in receivership; and
- (e) repair and maintain the property in receivership; and
- (f) inspect at any reasonable time documents that relate to the property in receivership and that are in the possession or under the control of the company; and
- (g) exercise, on behalf of the company, a right to inspect documents that relate to the property in receivership and that are in the possession or under the control of a person other than the company; and
- (h) in a case where the receiver is appointed in respect of all or substantially all of the assets and undertaking of a company, change the registered office or address for service of the company.

**265. POWER TO MAKE CALLS ON SHARES.**

(1) A receiver has the same powers as the directors of a company have or, where the company is being wound up or in liquidation, as the directors would have if it was not being wound up or in liquidation, to make calls on the members or shareholders of the company in respect of uncalled capital that is charged under the deed or agreement by or under which the receiver was appointed and to charge interest on, and enforce payment of, calls.

(2) For the purposes of Subsection (1), the expression “**uncalled capital**” includes the amount of any unpaid premium payable in respect of the issue of shares.

(3) The making of a call or the exercise of a power under Subsection (1) is, as between the members or shareholders of the company affected and the company, deemed to be a proper call or power made or exercised by the directors of the company.

**266. VALIDITY OF ACTS OF RECEIVERS.**

(1) Subject to Subsection (2), no act of a receiver is invalid merely because the receiver was not validly appointed or is disqualified from acting as a receiver or is not authorized to do the act.

(2) No transaction entered into by a receiver is invalid merely because the receiver was not validly appointed or is disqualified from acting as a receiver or is not authorized to enter into the transaction unless the person dealing with the receiver has, or ought to have, by reason of his relationship with the receiver or the person by whom the receiver was appointed, knowledge that the receiver was not validly appointed or was disqualified from acting as a receiver or did not have authority to enter into the transaction.

**267. CONSENT OF MORTGAGEE TO SALE OF PROPERTY.**

(1) Where the consent of a mortgagee is required to the sale of property in receivership and the receiver is unable to obtain that consent, the receiver may apply to the Court for an order authorizing the sale of the property, either by itself or together with other assets.

(2) The Court may, on an application under Subsection (1), make such order as it thinks fit authorizing the sale of the property by the receiver where satisfied that—

- (a) the receiver has made reasonable efforts to obtain the mortgagee’s consent; and
- (b) the sale—
  - (i) is in the interests of the company and the company’s creditors; and
  - (ii) will not substantially prejudice the interests of the mortgagee.

(3) An order under this section may be made on such terms and conditions as the Court thinks fit.

**268. GENERAL DUTIES OF RECEIVERS.**

(1) A receiver shall exercise his powers in good faith.

(2) A receiver shall exercise his powers in a manner he believes on reasonable grounds to be in the best interests of the person in whose interests he was appointed.

(3) To the extent consistent with Subsections (1) and (2), a receiver shall exercise his powers with reasonable regard to the interests of—

- (a) the company; and
- (b) persons claiming, through the company, interests in the property in receivership; and
- (c) unsecured creditors of the company; and
- (d) sureties who may be called upon to fulfil obligations of the company.

(4) Where a receiver appointed under a deed or agreement acts or refrains from acting in accordance with any directions given by the person in whose interests he was appointed, the receiver—

- (a) is not in breach of the duty referred to in Subsection (2); but
- (b) is still liable for any breach of the duty referred to in Subsection (1) and the duty referred to in Subsection (3).

(5) Nothing in this section limits or affects Section 269.

**269. DUTY OF RECEIVER SELLING PROPERTY.**

A receiver who exercises a power of sale of property in receivership owes a duty to—

- (a) the company; and
- (b) persons claiming, through the company, interests in the property in receivership; and
- (c) unsecured creditors of the company; and
- (d) sureties who may be called upon to fulfil obligations of the company,

to obtain the best price reasonably obtainable as at the time of sale.

**270. NO DEFENCE OR INDEMNITY.**

Notwithstanding any law or anything contained in the deed or agreement by or under which a receiver is appointed—

- (a) it is not a defence to proceedings against a receiver for a breach of the duty imposed by Section 269 that the receiver was acting as the company's agent or under a power of attorney from the company; and
- (b) a receiver is not entitled to compensation or indemnity from the property in receivership or the company in respect of any liability

incurred by the receiver arising from a breach of the duty imposed by Section 269.

**271. DUTY IN RELATION TO MONEY.**

A receiver shall keep money relating to the property in receivership separate from other money received in the course of, but not relating to, the receivership and from other money held by or under the control of the receiver.

**272. ACCOUNTING RECORDS.**

(1) A receiver shall at all times keep accounting records that correctly record and explain the receipts, expenditure, and other transactions relating to the property in receivership.

(2) The accounting records shall be retained for not less than seven years after the receivership ends.

**273. FIRST REPORT BY RECEIVER.**

(1) Not later than two months after his appointment, a receiver shall prepare a report on the state of affairs with respect to the property in receivership including—

- (a) particulars of the assets comprising the property in receivership; and
- (b) particulars of the debts and liabilities to be satisfied from the property in receivership; and
- (c) the names and addresses of the creditors with an interest in the property in receivership; and
- (d) particulars of any encumbrance over the property in receivership held by any creditor including the date on which it was created; and
- (e) particulars of any default by the company in making relevant information available; and
- (f) such other information as may be prescribed.

(2) The report under Subsection (1) shall also include details of—

- (a) the events leading up to the appointment of the receiver, so far as the receiver is aware of them; and
- (b) property disposed of and any proposals for the disposal of property in receivership; and
- (c) amounts owing, as at the date of appointment, to any person in whose interests the receiver was appointed; and
- (d) amounts owing, as at the date of appointment, to creditors of the company having preferential claims; and
- (e) amounts likely to be available for payment to creditors other than those referred to in Paragraph (c) or (d).

(3) A receiver may omit from the report details of any proposals for disposal of the property in receivership if he considers that their inclusion would materially prejudice the exercise of his functions.

(4) A receiver who fails to comply with this section commits an offence and is liable on conviction to the penalty set out in Section 413(2).

#### **274. FURTHER REPORTS BY RECEIVER.**

(1) Not later than two months after—

- (a) the end of each period of six months after his appointment as receiver; and
- (b) the date on which the receivership ends,

a receiver or a person who was a receiver at the end of the receivership, as the case may be, shall prepare a further report summarising the state of affairs with respect to the property in receivership as at those dates, and the conduct of the receivership, including all amounts received and paid, during the period to which the report relates.

(2) The report under Subsection (1) shall include details of—

- (a) property disposed of since the date of any previous report and any proposals for the disposal of property in receivership; and
- (b) amounts owing, as at the date of the report, to any person in whose interests the receiver was appointed; and
- (c) amounts owing, as at the date of the report, to creditors of the company having preferential claims; and
- (d) amounts likely to be available as at the date of the report for payment to creditors other than those referred to in Paragraph (b) or (c).

(3) A receiver may omit from the report required to be prepared in accordance with Subsection (1)(a) details of any proposals for disposal of property in receivership where he considers that their inclusion would materially prejudice the exercise of his functions.

(4) Every person who fails to comply with this section commits an offence and is liable on conviction to the penalty set out in Section 413(2).

#### **275. EXTENSION OF TIME FOR PREPARING REPORTS.**

A period of time within which a person is required to prepare a report referred to in Section 273 or 274 may be extended, on the application of that person, by—

- (a) the Court, where the person was appointed a receiver by the Court;
- (b) the Registrar, where the person was appointed a receiver by or under a deed or agreement.



**276. PERSONS ENTITLED TO RECEIVE REPORTS.**

(1) A copy of every report prepared under Section 273 or 274 shall be sent by the person required to prepare it to—

- (a) the company; and
- (b) every person in whose interests the receiver was appointed.

(2) Where the person was appointed a receiver by the Court, he shall file a copy of every report prepared under Section 273 or 274 in the office of the Court.

(3) Not later than 21 days after receiving a written request for a copy of any report prepared under Section 273 or 274 from—

- (a) a creditor, director, or surety of the company; or
- (b) any other person with an interest in any of the property in receivership;  
or
- (c) the authorized agent of any of them,

and on payment of the reasonable costs of making and sending the copy, the person who prepared the report shall send a copy of the report to the person requesting it.

(4) Within seven days after preparing a report under Section 273 or 274, the person who prepared the report shall submit a certified copy of the report to the Registrar.

(5) Every person who fails to comply with this section commits an offence and is liable on conviction to the penalty set out in Section 413(2).

**277. DUTY TO NOTIFY BREACHES OF ACT.**

(1) A receiver who considers that the company or any person has—

- (a) committed an offence in relation to the company; or
- (b) been guilty of any negligence, default, breach of duty or trust in relation to the company,

shall as soon as practicable submit a written report of that fact to the Registrar and give to the Registrar such information or documents, and such assistance, including further reports, and access to and facilities for inspecting and taking copies of any documents, as the Registrar requires.

(2) A receiver who fails to comply with Subsection (1) commits an offence and is liable on conviction to the penalty set out in Section 413(2).

**278. NOTICE OF END OF RECEIVERSHIP.**

(1) Not later than 14 days after the receivership of a company ceases, the person who held office as receiver at the end of the receivership shall submit to the Registrar notice in the prescribed form of that fact.

(2) Every person who fails to comply with Subsection (1) commits an offence and is liable on conviction to the penalty set out in Section 413(2).

### **279. PREFERENTIAL CLAIMS.**

(1) This section applies to a receiver of the property of a company, other than a company in liquidation at the time of the receiver's appointment, and who was appointed under—

- (a) a floating charge; or
- (b) a fixed or specific charge that conferred a floating security at the time it was created.

(2) A receiver to whom this section applies shall apply property that is subject to the charge—

- (a) firstly, to reimburse the receiver for his expenses and remuneration; and
- (b) secondly, to pay preferential claims to the extent and in the order of priority specified in Schedule 9 (except Sections 1 and 7(b)),

before paying any claim of the person entitled to the security.

(3) In the application of Schedule 9 in accordance with Subsection (2)—

- (a) references to a liquidator are to be read as references to a receiver; and
- (b) references to the commencement of the liquidation are to be read as references to the appointment of the receiver; and
- (c) references to a company being put into or being in liquidation are to be read as references to the company being put into or being in receivership.

### **280. POWERS OF RECEIVER ON LIQUIDATION.**

(1) Subject to Subsection (2), a receiver may be appointed or continue to act as a receiver and exercise all the powers of a receiver in respect of property of a company that is being wound up or that has been put into liquidation unless the Court orders otherwise.

(2) A receiver holding office in respect of property referred to in Subsection (1) may act as the agent of the company only—

- (a) with the approval of the Court; or
- (b) with the written consent of the liquidator.

(3) A receiver who, by reason of Subsection (2), is not able to act as the agent of the company does not, by reason only of that fact, become the agent of a person by whom or in whose interests the receiver was appointed.

(4) A debt or liability incurred by a company through the acts of a receiver who is acting as the agent of the company in accordance with Subsection (2) is not a cost, charge, or expense of the liquidation.

**281. LIABILITIES OF RECEIVER.**

(1) Subject to Subsections (2) and (3), a receiver is personally liable—

- (a) on a contract entered into by the receiver in the exercise of any of the receiver's powers; and
- (b) for payment of wages or salary that, during the receivership, accrue under a contract of employment relating to the property in receivership and entered into before the appointment of the receiver where notice of the termination of the contract is not lawfully given within 14 days after the date of appointment; and
- (c) for payment of remuneration under any contract with a director of a company where the receiver has expressly confirmed the contract.

(2) The terms of a contract referred to in Subsection (1)(a) may exclude or limit the personal liability of a receiver other than a receiver appointed by the Court.

(3) The Court may, on the application of a receiver, extend the period within which notice of the termination of a contract is required to be given under Subsection (1)(b) and may extend that period on such terms and conditions as the Court thinks fit.

(4) Every application under Subsection (3) shall be made before the expiry of the period referred to.

(5) Subject to Subsection (7), a receiver is personally liable, to the extent specified in Subsection (6), for rent and any other payments becoming due under an agreement subsisting at the date of the appointment of the receiver relating to the use, possession, or occupation by the company of property in receivership.

(6) The liability of a receiver under Subsection (5) is limited to that portion of the rent or other payments which accrue in the period commencing 14 days after the date of the appointment of the receiver and ending on—

- (a) the date on which the receivership ends; or
- (b) the date on which the company ceases to use, possess, or occupy the property,

whichever is the earlier.

(7) The Court may, on the application of a receiver—

- (a) limit the liability of the receiver to a greater extent than that specified in Subsection (6); or
- (b) excuse the receiver from liability under Subsection (5).

(8) Nothing in Subsection (5) or (6)—

- (a) is to be taken as giving rise to an adoption by a receiver of an agreement referred to in Subsection (5); or
- (b) renders a receiver liable to perform any other obligation under the agreement.

(9) A receiver is entitled to an indemnity out of the property in receivership in respect of personal liability under this section.

(10) Nothing in this section—

- (a) limits any other right of indemnity to which a receiver may be entitled; or
- (b) limits the liability of a receiver on a contract entered into without authority; or
- (c) confers on a receiver a right to an indemnity in respect of liability on a contract entered into without authority.

## **282. RELIEF FROM LIABILITY.**

(1) The Court may relieve a person who has acted as a receiver from all or any personal liability incurred in the course of the receivership where it is satisfied that—

- (a) the liability was incurred solely by reason of a defect in the appointment of the receiver or in the deed or agreement or order of the Court by or under which the receiver was appointed; and
- (b) the receiver acted honestly and reasonably and ought, in the circumstances, to be excused.

(2) The Court may exercise its powers under Subsection (1) subject to such terms and conditions as it thinks fit.

(3) A person in whose interests a receiver was appointed is liable, subject to such terms and conditions as the Court thinks fit, to the extent to which the receiver is relieved from liability.

(4) The Court may give such directions as it thinks fit for the purposes of Subsection (3).

## **283. COURT SUPERVISION OF RECEIVER.**

(1) The Court may, on the application of a receiver—

- (a) give directions in relation to any matter arising in connection with the performance of the functions of the receiver; and
- (b) revoke or vary any such directions.

(2) The Court may, on the application of a person referred to in Subsection (3)—

- (a) in respect of any period, review or fix the remuneration of a receiver at a level which is reasonable in the circumstances; and

- (b) to the extent that an amount retained by a receiver as remuneration is found by the Court to be unreasonable in the circumstances, order the receiver to refund the amount; and
- (c) declare whether or not a receiver was validly appointed in respect of any property or validly entered into possession or assumed control of any property.

(3) Any of the following persons may apply to the Court under Subsection (2):–

- (a) the receiver;
- (b) the company;
- (c) a creditor of the company;
- (d) a person claiming, through the company, an interest in the property in receivership;
- (e) the board of directors of the company or, in the case of a company that is in liquidation, the board of the company at the time the liquidator was appointed;
- (f) a liquidator of the company;
- (g) the Registrar.

(4) The powers given by Subsections (1) and (2)–

- (a) are in addition to any other powers the Court may exercise under this Act, any other Act, or in its inherent jurisdiction; and
- (b) may be exercised in relation to a matter occurring either before or after the commencement of this Act and whether or not the receiver has ceased to act as receiver when the application is made.

(5) The Court may, on the application of a person referred to in Subsection (3), revoke or vary an order made under Subsection (2).

(6) Subject to Subsection (7), it is a defence to a claim against a receiver in relation to any act or omission by the receiver that he acted or omitted to act in accordance with a direction given under Subsection (1).

(7) The Court may, on the application of a person referred to in Subsection (3), order that, by reason of the circumstances in which a direction was obtained under Subsection (1), a receiver is not entitled to the protection given by Subsection (6).

#### **284. COURT MAY TERMINATE OR LIMIT RECEIVERSHIP.**

(1) The Court may, on the application of a person referred to in Subsection (2)–

- (a) order that a receiver shall cease to act as such as from a specified date, and prohibit the appointment of any other receiver in respect of the property in receivership; or
- (b) order that a receiver shall, as from a specified date, act only in respect of specified assets forming part of the property in receivership.

(2) Any of the following persons may apply to the Court under Subsection (1):–

- (a) the company;
- (b) a liquidator of the company.

(3) An order may be made under Subsection (1) only where the Court is satisfied that–

- (a) the purpose of the receivership has been satisfied so far as possible; or
- (b) circumstances no longer justify its continuation.

(4) Unless the Court orders otherwise, a copy of an application under this section shall be served on the receiver not less than seven days before the hearing of the application, and the receiver may appear and be heard at the hearing.

(5) An order under Subsection (1) may be made on such terms and conditions as the Court thinks fit.

(6) In making an order under Subsection (1), the Court may prohibit a person in whose interests the receiver was appointed from taking possession or assuming control of the property in receivership.

(7) Except as provided by Subsection (6), an order under this section does not affect a security or charge over the property in respect of which the order is made.

(8) The Court may, on the application of any person who applied for or is affected by the order, rescind or amend an order made under this section.

## **285. MEANING OF “FAILURE TO COMPLY”.**

In Section 286, “**failure to comply**” in relation to a receiver means a failure by a receiver to comply with a relevant duty arising–

- (a) under the deed or agreement or the order of the Court by or under which the receiver was appointed; or
- (b) under this or any other Act or rule of law or the rules of any court; or
- (c) under any order or direction of a court other than an order to comply made under Section 286,

and “**comply**”, “**compliance**”, and “**failed to comply**” have corresponding meanings.

## **286. ORDERS TO ENFORCE RECEIVER’S DUTIES.**

(1) An application for an order under this section may be made by–

- (a) the Registrar; or
- (b) a receiver; or
- (c) a person seeking appointment as a receiver; or
- (d) the company; or

- (e) a person with an interest in the property in receivership; or
- (f) a creditor of the company; or
- (g) a guarantor of an obligation of the company; or
- (h) a liquidator of the company.

(2) An application for an order under this section may be made by a receiver of the property of a company in relation to a failure to comply by another receiver of the property of the company.

(3) No application may be made to the Court in relation to a failure to comply unless notice of the failure to comply has been served on the receiver not less than seven days before the date of the application and, as at the date of the application, there is a continuing failure to comply.

(4) Where the Court is satisfied that there is, or has been, a failure to comply, the Court may—

- (a) relieve the receiver of the duty to comply, wholly or in part; or
- (b) without prejudice to any other remedy that may be available in relation to a breach of duty by the receiver, order the receiver to comply to the extent specified in the order.

(5) The Court may, in respect of a person who fails to comply with an order made under Subsection (4)(b), or is or becomes disqualified under Section 256 to become or remain a receiver—

- (a) remove the receiver from office, or
- (b) order that the person may be appointed and act or may continue to act as a receiver, notwithstanding the provisions of Section 256.

(6) Where it is shown to the satisfaction of the Court that a person is unfit to act as a receiver 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.

(7) A person to whom a prohibition order applies shall not—

- (a) act as a receiver in any current or other receivership; or
- (b) act as a liquidator in any current or other liquidation.

(8) In making an order under this section the Court may, if it thinks fit—

- (a) make an order extending the time for compliance; and
- (b) impose a term or condition; and
- (c) make an ancillary order.

(9) A certified copy of every order made under Subsection (6) shall, within one month of the order being made, be submitted by the applicant to the Registrar who shall keep it on a public register indexed by reference to the name of the receiver concerned.

## **287. SPECIAL PROVISIONS RELATING TO EVIDENCE.**

(1) Evidence that, within the preceding five years while a person was acting as a receiver or as a liquidator, as the case may be—

- (a) the Court has, in relation to that person, on two or more occasions made an order to comply under Section 286; or
- (b) the Court has, in relation to that person, on two or more occasions made an order to comply under Section 334; or
- (c) the Court has, in relation to that person, made one or more orders to comply under Section 286 and has also made one or more orders to comply under Section 334,

is, in the absence of special reasons to the contrary, evidence of persistent failures to comply for the purposes of Section 286(6)(a).

(2) Evidence that, within the preceding five years while a person was acting as a receiver or as a liquidator, as the case may be—

- (a) two or more applications for an order to comply under Section 286 were made in relation to that person; or
- (b) two or more applications for an order to comply under Section 334 were made in relation to that person; or
- (c) one or more applications for an order to comply under Section 286 and one or more applications for an order to comply under Section 334 were made in relation to that person,

and, 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 Section 286(6)(a).

## **288. ORDERS PROTECTING PROPERTY IN RECEIVERSHIP.**

The Court may, on making an order that removes, or has the effect of removing, a receiver from office, make such orders as it thinks fit—

- (a) for preserving property in receivership and
- (b) requiring the receiver for that purpose to make available to any person specified in the order any information and documents in the possession or under the control of the receiver.

## **289. REFUSAL TO SUPPLY ESSENTIAL SERVICES PROHIBITED.**

(1) For the purposes of this section, an “essential service” means—



- (a) the retail supply of electricity; or
- (b) the supply of water; or
- (c) telecommunications services.

(2) For the purposes of this section, “**telecommunications services**” means the conveyance from one device to another by any line, radio frequency, or other medium of any 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 receiver or to the owner of property in receivership by reason of the company’s default in paying charges due for the service in relation to a period before the date of the appointment of the receiver; or
- (b) make it a condition of the further supply of the service to a receiver or to the owner of property in receivership that payment be made of outstanding charges due for the service in relation to a period before the date of the appointment of the receiver.

**PART XVIII. – LIQUIDATIONS.*****Division 1.******The Process of Liquidation.*****290. INTERPRETATION.**

(1) In this Part, unless the contrary intention appears—

“**creditor**” means a person who, in a liquidation, would be entitled to claim in accordance with Section 351 that a debt is owing to that person by the company, and includes a secured creditor only—

(a) for the purposes of Sections 291(2)(c), 297, 300, and 337; or

(b) to the extent of the amount of any debt owing to the secured creditor in respect of which the secured creditor claims under Section 353 as an unsecured creditor;

“**liquidation committee**” means a liquidation committee appointed under Section 362;

“**liquidator**” includes an interim liquidator;

“**statutory demand**” has the meaning set out in Section 337.

(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.

**291. COMMENCEMENT OF LIQUIDATION.**

(1) A company may be put into liquidation by the appointment as liquidator of a named person.

(2) A liquidator may be appointed by—

(a) special resolution of those shareholders entitled to vote and voting on the question; or

(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 or shareholder, or other entitled person, or a creditor of the company (including any contingent or prospective creditor), or the Registrar.

(3) The Court may appoint a liquidator where it is satisfied that—

(a) the company is unable to pay its debts as they become due in the ordinary course of business; or

(b) the company or the board has persistently or seriously failed to comply with this Act; or

(c) the company does not comply with Section 11; or

(d) it is just and equitable that the company be put into liquidation.

(4) The liquidation of a company commences on the date on which the liquidator is appointed.

## **292. 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.

## **293. LIQUIDATOR TO SUMMON MEETING OF CREDITORS.**

(1) Subject to Section 295 and to Subsection (8), the liquidator of a company shall call a meeting of the creditors of the company for the purpose—

- (a) in the case of a liquidator appointed pursuant to Section 291(2)(a) or (b), of resolving whether to appoint another liquidator in place of the liquidator so appointed; and
- (b) in the case of a liquidator appointed pursuant to Section 291(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 308(1)(b).

(2) Notice in writing of a meeting of creditors shall be given to every known creditor and—

- (a) where Section 305(2)(c) applies, shall be given together with the report and notice referred to in that section; and
- (b) where the liquidator receives a notice under Section 295(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 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 291(2)(a) or (b), within one month of the liquidator's appointment; or
- (b) in the case of a liquidator appointed under Section 291(2)(c), within one month 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 Schedule 7.

(6) Where 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 291(2)(a) or (b), the person who it is resolved to appoint as liquidator shall, subject to Section 330, be the liquidator of the company.

(7) Where 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 291(2)(c), the liquidator of the company shall 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 291(2)(a) or (b) where, within one month before the appointment of the liquidator, the board of the company resolved that the company would, on the appointment of a liquidator under either Paragraph (a) or (b) of that section, be able to pay its debts as they become due in the ordinary course of business and a copy of the resolution is submitted to the Registrar for registration.

(9) The directors who vote in favour of a resolution referred to in Subsection (8) shall forthwith sign a certificate stating that, in their opinion, the company would, on the appointment of a liquidator under Section 291(2)(a) or (b), be able to pay its debts as they become due in the ordinary course of business, 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 413(1).

#### **294. LIQUIDATOR TO SUMMON MEETING OF CREDITORS IN OTHER CASES.**

Subject to Section 295, the liquidator of a company who was not, by reason of Section 293(8), required to call a meeting of creditors of the company shall—

- (a) where the liquidator is satisfied that the directors who voted in favour of a resolution referred to in that section did not have reasonable grounds to believe that the company would, on the appointment of a liquidator under Section 291(2)(a) or (b) be able to pay its debts as they become due in the ordinary course of business; or
- (b) where the liquidator is satisfied that the company is not able to pay its debts as they become due in the ordinary course of business,

forthwith call a meeting of the creditors of the company for the purpose specified in Section 293(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.

#### **295. LIQUIDATOR MAY DISPENSE WITH MEETINGS OF CREDITORS.**

(1) A liquidator is not required to call a meeting of creditors under Section 293 or Section 294, as the case may be, where—

- (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 one month 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) where Section 305(2)(c) applies, together with the report and notice referred to in that paragraph; or
  - (b) where Section 305(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.

#### **296. INTERIM LIQUIDATOR.**

(1) Where 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 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.

#### **297. POWER TO STAY OR RESTRAIN CERTAIN PROCEEDINGS AGAINST COMPANY.**

At any time after the making of an application to the Court under Section 291(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 the Supreme Court, apply to the Court or the Supreme Court, as the case may be, for a stay of the application or proceeding; or
- (b) in the case of any other application or proceeding pending against the company in any court or tribunal, apply to the Court to restrain the application or proceeding,

and the Court or the Supreme Court, as the case may be, may stay or restrain the application or proceeding on such terms and conditions as it thinks fit.

**298. 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; and
- (b) the directors remain in office but cease to have powers, functions, or duties other than those required or permitted to be exercised by this Part; and
- (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; and
- (d) unless the Court orders otherwise, a share in the company shall not be transferred; and
- (e) an alteration shall not be made to the rights or liabilities of a shareholder of the company; and
- (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 353, to take possession of, and realise or otherwise deal with, property of the company over which that creditor has a charge.

**299. COMPLETION OF LIQUIDATION.**

The liquidation of a company is completed when the liquidator—

- (a) complies with Section 307(1)(b); or
- (b) submits to the Registrar for registration—
  - (i) a certified copy of any order made by the Court under Section 307(2)(a); or
  - (ii) a certified copy of any order made by the Court under Section 307(2)(b) together with any documents required to comply with the order,

as the case may be.

**300. 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 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 one month after the order was made, submit a certified copy of the order to the Registrar for registration.

(6) Where the Court makes an order under Subsection (1) the company ceases to be in liquidation and the liquidator ceases 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 413(2).

### *Division 2.*

#### *Provisions Relating to Prior Execution Process.*

### **301. 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 291(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; or
- (b) the passing of a resolution by the board of a company under Section 291(2)(b) 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; or
- (c) the making of an application to the Court under Section 291(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; and
- (b) an attachment of a debt is completed by receipt of the debt; and
- (c) an execution against land is completed by sale, and, in the case of an equitable interest, by the appointment of a receiver.

(5) Nothing in this section limits or affects Section 340.

### **302. 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, give or transfer the property and any money received in satisfaction or partial satisfaction of the execution or 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 given or transferred to the liquidator under Subsection (1) and the liquidator may sell all or some of the property to 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 K500.00, or such other amount as may be prescribed; 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 one month.

(4) Subject to Subsection (6), where—

- (a) within the period of one month, the officer has notice of—
  - (i) the calling of a meeting at which a special resolution is proposed to appoint a liquidator pursuant to Section 291(2)(a); or
  - (ii) the calling of a meeting of the board at which a resolution is proposed to appoint a liquidator pursuant to Section 291(2)(b); or



(iii) the making of an application to the Court to appoint a liquidator pursuant to Section 291(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 to such extent and on such terms and conditions as it thinks fit.

### *Division 3.*

#### *Duties, Rights, and Powers of Liquidators.*

#### **303. PRINCIPAL DUTY OF LIQUIDATOR.**

Subject to Section 304, 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) where there are surplus assets remaining, to distribute them, or the proceeds of the realisation of the surplus assets, in accordance with Section 361(4),

in a reasonable and efficient manner.

#### **304. 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 353, 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; and

(b) where—

(i) a company is put into liquidation under Section 291(2)(c); and

(ii) the company has no assets available for distribution to creditors of the company,

the liquidator shall not be required, without the consent of the Registrar to carry out any duty or exercise any power in connection with the liquidation where, to do so, would or would be likely to involve incurring any expense.

#### **305. OTHER DUTIES OF LIQUIDATOR.**

(1) Without limiting Section 303, a liquidator has the other functions and duties specified in this Act.

- (2) Without limiting Subsection (1), a liquidator shall—
- (a) within seven days of being appointed or being notified of his appointment, give public notice of—
    - (i) the liquidator’s appointment; and
    - (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 a creditor or shareholder; and
  - (b) within seven days of being appointed or being notified of his appointment, submit to the Registrar a notice in the prescribed form of his 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 submit to the Registrar a report containing the prescribed details, including a statement of the company’s affairs, proposals for conducting the liquidation, and, where practicable, the estimated date of its completion; and
    - (iii) send a copy of the report and a notice in the prescribed form explaining the right of a creditor or shareholder to require the liquidator to call a meeting of creditors under Section 362 to every known creditor and every shareholder; and
  - (d) within one month of the end of each period of six months following the commencement of the liquidation, prepare and send to every known creditor and every shareholder, and submit to the Registrar, a report—
    - (i) on the conduct of the liquidation during the preceding six months; and
    - (ii) containing the prescribed details; and
    - (iii) 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 291(2)(a) or (b), 14 days after the liquidator’s appointment; or
  - (b) in the case of a liquidator appointed under Section 291(2)(c), one month 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) where 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 Schedule 9, is not likely to exceed 20 toea, or such other sum as may be prescribed, in every kina owed to such creditors.

(6) A liquidator who considers that the company or any person has—

- (a) committed an offence in relation to the company; or
- (b) been guilty of any negligence, default, breach of duty or trust in relation to the company,

shall as soon as practicable submit a written report of that fact to the Registrar and give to the Registrar such information or documents, and such assistance, including further reports, and access to and facilities for inspecting and taking copies of any documents, as the Registrar requires.

(7) A liquidator who fails to comply with Subsection (6) commits an offence and is liable on conviction to the penalty set out in Section 413(2).

### **306. 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 362, unless the liquidator believes on reasonable grounds that inspection would be prejudicial to the liquidation; and
  - (ii) where 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 seven years after completion of the liquidation.

(2) The Registrar may, whether before or after the completion of the liquidation—

- (a) authorize the disposal of any accounts and records; and
- (b) require accounts or records to be retained for longer than seven years after the completion of the liquidation.

### **307. 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; and
    - (B) all proceeds of realisation have been distributed; and
    - (C) the company is ready to be removed from the register; and
  - (iii) a statement that a person may apply to the Registrar or the Court objecting to the removal of the company from the register under Section 370 or 371; and
- (b) submit 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.

### **308. 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 291(2)(a) set out in a resolution passed at that meeting; and
- (b) the views of creditors set out in any resolution passed at a meeting held for the purposes of Section 293; and
- (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 views 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 291(2)(a); and

- (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 293; and
- (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% of the total amount paid up on all shares issued by the company; and
- (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% 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 shareholders or creditors shall call such a meeting in accordance with Schedule 2 or, if applicable, Schedule 7, 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.

### **309. 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.

### **310. 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 Schedule 8.

### **311. POWER TO OBTAIN DOCUMENTS AND INFORMATION.**

(1) A liquidator may, from time to time, by notice in writing, require a director or shareholder of the company or any other person to give to the liquidator such 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, from time to time, by notice in writing require—
  - (a) a director or former director of the company; or
  - (b) a shareholder of the company; or

- (c) a person who was involved in the promotion or formation of the company; or
- (d) a person who is, or has been, an employee of the company; or
- (e) a receiver, accountant, auditor, bank officer, or other person having knowledge of the affairs of the company; or
- (f) a person who is acting or who has at any time acted as a lawyer 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; and
- (b) to provide the liquidator with such information about the business, accounts, or affairs of the company as the liquidator requests; and
- (c) assist in the liquidation to the best of the person's ability.

(4) Without limiting Subsection (3), a person may be required to attend on the liquidator under that subsection at a meeting of creditors of the company.

(5) Without limiting Subsection (6), the liquidator may pay to a person referred to in Subsection (2)(d), (e) or (f), not being an employee of the company, reasonable travelling and other expenses in complying with a requirement of the liquidator under Subsection (3).

(6) The Court may, on the application of the liquidator or a person referred to in Subsection (2)(d), (e) or (f), not being an employee of the company, order that that person is entitled to receive reasonable remuneration and travelling and other expenses in complying with a requirement of the liquidator under Subsection (3).

(7) A person referred to in Subsection (2)(d), (e) or (f), 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 or other expenses has not been made or determined; or
- (b) remuneration or travelling or 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.

(8) Nothing in this section limits or affects Section 310.

### **312. DOCUMENTS IN POSSESSION OF RECEIVER.**

(1) A receiver is not required to give to a liquidator under Section 311 any 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 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 records and documents or extracts from them.

(3) The liquidator may take copies of such 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).

**313. 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 records or documents of the company.

(2) Where 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 360 to the extent of K500.00, or such other amount that 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 291(2)(a) or (b) where—

- (a) the board of the company passed a resolution of the kind referred to in Section 293(8); and
- (b) Section 294 does not apply in relation to the company.

**314. GIVING OF DOCUMENT CREATING CHARGE OVER PROPERTY.**

(1) A person is required to give a document to a liquidator under Section 311 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 shall make the document available to the person entitled to it for the purpose of dealing with or realising the charge or the secured property.

**315. POWERS OF COURT.**

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 311 to comply with that requirement.

**316. EXAMINATION BEFORE COURT.**

(1) The Court may, on the application of the liquidator, order a person to whom Section 311 applies to—

(a) attend before the Court and be examined on oath or affirmation by the Court or the liquidator or a lawyer acting on behalf of the liquidator on any matter relating to the business, accounts, or affairs of the company; and

(b) produce any records or documents relating to the business, accounts, or affairs of the company in that person's possession or under that person's control.

(2) 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.

(3) 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 426.

### **317. SELF INCRIMINATION.**

(1) A person is not excused from answering a question in the course of being examined under Section 316 on the ground that the answer might incriminate or tend to incriminate that person.

(2) The testimony of the person examined is not admissible as evidence in criminal proceedings against that person except on a charge of perjury in relation to that testimony.

### **318. POWER OF LIQUIDATOR TO ENFORCE LIABILITY OF SHAREHOLDERS AND FORMER SHAREHOLDERS.**

(1) The liquidator may–

(a) where a shareholder is liable to calls, make calls on the shares held by that shareholder; and

(b) where 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.

### **319. POWER TO DISCLAIM ONEROUS PROPERTY.**

(1) Subject to Section 320, 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 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, but 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 one month 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); or
- (b) apply to the Court for an order that the disclaimed property be given to or vested in that person.

(6) The Court may make an order under Subsection (5)(b) where it is satisfied that it is just that the property should be vested in the applicant.

### **320. LIQUIDATOR MAY BE REQUIRED TO ELECT WHETHER TO DISCLAIM ONEROUS PROPERTY.**

Where 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, not being a date that is less than one month 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.

### **321. CERTAIN CONDUCT PROHIBITED.**

(1) Where 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 the country with the intention of—
  - (i) avoiding payment of money due to the company; or
  - (ii) avoiding examination in relation to the affairs of the company; or
  - (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) 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 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 413(3).

### **322. DUTY TO IDENTIFY AND GIVE PROPERTY.**

(1) A present or former director 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, give 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 413(3).

### **323. REFUSAL TO SUPPLY ESSENTIAL SERVICES PROHIBITED.**

(1) For the purposes of this section, an “**essential service**” means—

(a) the retail supply of electricity; or

(b) the supply of water; or

(c) 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; or

(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.

(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 Schedule 9.

**324. REMUNERATION OF LIQUIDATORS.**

(1) Subject to Section 332(1)(e), every liquidator appointed under Section 291(2)(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 liquidator appointed under Section 291(2)(c) shall charge remuneration either—

- (a) of an amount equal to the amount fixed under Section 325; or
- (b) at, or in accordance with, such rate or rates as may be prescribed under that section.

**325. RATES OF REMUNERATION.**

(1) The Regulations may, for the purposes of Section 324, prescribe a fixed amount or, a rate or rates in respect of the remuneration of liquidators to which that section 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 persons; and
- (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; and
- (c) prescribe a rate or rates in respect of the exercise of a particular function or power; and
- (d) prescribe a rate or rates by reference to such other criteria as may be specified.

**326. 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.

**327. LIQUIDATOR CEASES TO HOLD OFFICE ON COMPLETION OF LIQUIDATION.**

(1) A liquidator ceases to hold office on the completion of the liquidation in accordance with Section 299.

(2) Subsection (1) does not limit Section 332 or Section 334.

**Division 4.****Qualifications and Supervision of Liquidators.****328. QUALIFICATIONS OF LIQUIDATORS.**

(1) A person shall not be appointed or act as a liquidator of a company unless the person is registered as a Registered Liquidator under the *Accountants Act 1996*.

(2) 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 two years immediately preceding the commencement of the liquidation, been a shareholder, director, auditor, or receiver of the company or of a related company;
- (d) a person who is an undischarged bankrupt;
- (e) a person who is of unsound mind or is unable to manage his affairs;
- (g) a person in respect of whom an order has been made under Section 334(5);
- (h) a person in respect of whom an order has been made under Section 286(6);
- (i) a person who would be prohibited from being a director or promoter of or being concerned or taking part in the management of a company under Section 142 of the repealed Act but for the repeal of that Act;
- (j) 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 425, 426 or 428.

(3) A body corporate shall not be appointed or act as a liquidator.

(4) A person who contravenes Subsection (1), (2) or (3) commits an offence and is liable on conviction to the penalty set out in Section 413(2).

**329. 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.

**330. CONSENT TO APPOINTMENT.**

The appointment of a person as liquidator, other than on the order of the Court, is of no effect unless that person has consented in writing to the appointment.

**331. VACANCIES IN OFFICE OF LIQUIDATOR.**

(1) The office of liquidator becomes vacant if the person holding office resigns, dies, or becomes disqualified under Section 328.

(2) A person, other than a person appointed by the Court, may resign from the office of liquidator by appointing another such person as his successor and submitting a notice in the prescribed form of the appointment of his successor to the Registrar.

(3) With the approval of the Court, a person appointed as a liquidator by the Court may resign from the office of liquidator.

(4) The Court may, on the application of the company, or a shareholder or other entitled person, or a director or creditor of the company, review the appointment of a successor to a liquidator and may appoint any person who could be appointed as a liquidator under Section 291(2)(a), (b) or (c), as the case may be, to be the liquidator of the company.

(5) Where, for any reason other than resignation, a vacancy occurs in the office of liquidator, notice in the prescribed form of the vacancy shall be submitted to the Registrar within seven days by the person vacating office or, where that person is unable to act, by his personal representative.

(6) Where, as the result of the vacation of office by a liquidator, other than a liquidator appointed by the Court, no person is acting as liquidator, the Registrar may appoint a person to act as liquidator until a successor is appointed under this section.

(7) Where a vacancy occurs in the office of the liquidator, or a liquidator has been appointed under Subsection (6), as the case may be, the Court may, on the application of the company, or a shareholder or other entitled person, or a director or creditor of the company, or the Registrar, appoint any person who could be appointed as a liquidator under Section 291(2)(a), (b) or (c), as the case may be, to be the liquidator of the company.

(8) 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.

**332. COURT SUPERVISION OF LIQUIDATION.**

(1) On the application of the liquidator, a liquidation committee, the Registrar, or, with the leave of the Court, a creditor, shareholder, other entitled person, or director of a company in liquidation, the Court may—

- (a) give directions in relation to any matter arising in connection with the liquidation; and
- (b) confirm, reverse, or modify an act or decision of the liquidator; and
- (c) order an audit of the accounts of the liquidation; and

- (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; and
- (e) in respect of any period, review or fix the remuneration of the liquidator at a level which is reasonable in the circumstances; and
- (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; and
- (g) declare whether or not the liquidator was validly appointed or validly assumed custody or control of property; and
- (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 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).

### **333. MEANING OF “FAILURE TO COMPLY”.**

In Section 334 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 the rules of any 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.

### **334. ORDERS TO ENFORCE LIQUIDATOR’S DUTIES.**

- (1) An application for an order under this section may be made by—

- (a) a liquidator; or
- (b) a person seeking appointment as a liquidator; or
- (c) a liquidation committee; or
- (d) a creditor, shareholder, other entitled person, or a director of the company in liquidation; or
- (e) a receiver appointed in relation to property of the company in liquidation; or
- (f) 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 five days before the date of the application and, as at the date of the application, there is a continuing failure to comply.

(3) Where 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 328 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 328.

(5) Where 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 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; or
- (b) impose a term or condition; or
- (c) make an ancillary order.

(9) A copy of every order made under Subsection (5) shall, within one month of the order being made, be given by the applicant to the Registrar who shall keep it on a public register indexed by reference to the name of the liquidator concerned.

#### *Division 5.*

#### *Company Unable to Pay Its Debts.*

### **335. MEANING OF “INABILITY TO PAY DEBTS”.**

Unless the contrary is proved, and subject to Section 336, a company is presumed to be unable to pay its debts as they become due in the ordinary course of business where—

- (a) the company has failed to comply with a statutory demand; or
- (b) execution issued against the company in respect of a judgment debt has been returned unsatisfied in whole or in part; or
- (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 XV but has not been approved.

### **336. 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 as they become due in the ordinary course of business unless the application is made within one month after the last date for compliance with the demand.

(2) Section 335 does not prevent proof by other means that a company is unable to pay its debts as they become due in the ordinary course of business.

(3) Information or records acquired under Section 219 or, where the Court so orders, under Section 220, may be received as evidence that a company is unable to pay its debts as they become due in the ordinary course of business.



(4) In determining whether a company is unable to pay its debts as they become due in the ordinary course of business, 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 as they become due in the ordinary course of business may be made by a contingent or prospective creditor only with the leave of the Court, and the Court may give such leave, with or without conditions, only if it is satisfied that a *prima facie* case has been made out that the company is unable to pay its debts as they become due in the ordinary course of business.

### **337. 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; and
- (b) be in the prescribed form; and
- (c) be served on the company; and
- (d) require the company to pay the debt, or enter into a compromise under Part XV, 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 one month of the date of service, or such longer period as the Court may order.

### **338. 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 made, and served on the creditor, within one month of the date of service of the demand.

(3) No extension of time may 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 where it is satisfied that—

- (a) there is a substantial dispute whether or not the debt is owing or is due; or
- (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 an immaterial misstatement of the amount due to the creditor and an immaterial misdescription of the debt referred to in the demand.

(7) An order under this section may be made subject to conditions.

### **339. ADDITIONAL POWERS OF COURT ON APPLICATION TO SET ASIDE STATUTORY DEMAND.**

(1) Where, on the hearing of an application under Section 338, 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 291(3) putting the company into liquidation,

on the grounds that the company is unable to pay its debts as they become due in the ordinary course of business.

(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 as they become due in the ordinary course of business where it failed to pay the debt within the specified period.

### ***Division 6.***

#### ***Voidable Transactions.***

### **340. TRANSACTIONS HAVING PREFERENTIAL EFFECT.**

(1) In this section, “**transaction**”, in relation to a company, means—

- (a) a conveyance, transfer, or other disposition of property by the company; or
- (b) the giving of a security or charge over the property of the company; or
- (c) the incurring of an obligation by the company; or
- (d) the acceptance by the company of execution under a judicial proceeding; or
- (e) the giving of a release or waiver by the company; or

- (f) the payment of money by the company, including the payment of money under a judgment or order of a court,

and includes a transaction that is entered into, given effect to, or required to be given effect to because of an 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 debts as they became due in the ordinary course of business; 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 person entered into the transaction with the company in good faith in the ordinary course of business and had no reasonable grounds for suspecting that the company was unable to pay its debts as they became due 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 at a time when the company was unable to pay its debts as they became due in the ordinary course of business.

(4) For the purposes of this section, in determining whether a transaction took place in good faith, 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; or
- (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.

(5) For the purposes of Subsection (2)(a)(ii), “**specified 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 six 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 was made.

(6) For the purposes of Subsection (3), “**restricted period**” means—

- (a) the period of one month 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 month 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.

### **341. SETTING ASIDE VOIDABLE TRANSACTIONS.**

Where, on the application of a liquidator, the Court is satisfied that a transaction is voidable under Section 340, the Court may make any 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 such sums as fairly represent those benefits;
- (b) an order requiring a person to pay to the company an amount equal to some or all of the money that the company has paid under the transaction;
- (c) an order requiring property transferred as part of the transaction to be restored to the company;
- (d) an order requiring property to be vested in the company where it represents in a person's hands the application, either of the proceeds of sale of property, or of money, so transferred;
- (e) an order releasing or discharging, in whole or in part, a debt incurred or a charge, security, or guarantee given by the company;
- (f) an order declaring an agreement constituting, forming part of, or relating to the transaction or specified provisions of such an agreement, to have been void at and after the time when the agreement was made, or at and after a specified later time;
- (g) an order varying such an agreement in the manner specified in the order and, where the Court thinks fit, declaring the agreement to have had effect as so varied at and after the time when the agreement was made, or at and after a specified later time;
- (h) an order declaring such an agreement, or specified provisions of such an agreement, to be unenforceable;
- (i) an order requiring security to be given for the discharge of an order made under this section;
- (j) 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.

**342. ADDITIONAL PROVISIONS RELATING TO SETTING ASIDE TRANSACTIONS.**

(1) The setting aside of a transaction, or an order made under Section 341 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; and
- (b) for valuable consideration; and
- (c) in good faith.

(2) Recovery by the liquidator of property or its equivalent value, whether under Section 341 or any other section, or under any other law, or in equity or otherwise, may be denied wholly or in part where—

- (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.

(3) Nothing in the *Land Registration Act 1981* restricts the operation of Section 340 or 341.

***Division 7.******Recovery in Other Cases.*****343. UNCOMMERCIAL TRANSACTIONS.**

(1) A transaction by a company is voidable on the application of the liquidator where—

- (a) the transaction took place within the specified period; and
- (b) the transaction was an uncommercial transaction; and
- (c) when the transaction took place, the company—
  - (i) was unable to pay its debts as they became due in the ordinary course of business; or
  - (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.

(2) For the purposes of this section—

- (a) a transaction is an uncommercial transaction where, and only where, a reasonable person in the company's circumstances would not have entered into the transaction, having regard to—

- (i) the benefits (if any) to the company of entering into the transaction; and
  - (ii) the detriment to the company of entering into the transaction; and
  - (iii) the respective benefits to other parties to the transaction of entering into the transaction; and
  - (iv) any other relevant matters; and
- (b) **“specified period”** means—
- (i) the period of a 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 a 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; and
- (c) **“transaction”** has the meaning set out in Section 340(1).

**344. TRANSACTIONS FOR INADEQUATE OR EXCESSIVE CONSIDERATION WITH DIRECTORS 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 of the company, or a nominee or relative of or a trustee for, or a trustee for a relative of, a director of the company; or
- (b) a person, or a relative of a person, who, at the time of the acquisition, had control of the company; or
- (c) another company that was, at the time of the acquisition, controlled by a director of the company, or a nominee or relative of or a trustee for, or a trustee for a relative of, a director 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 of the company, or a nominee or relative of or a trustee for, or a trustee for a relative of, a director of the company; or
- (b) a person, or a relative of a person, who, at the time of the disposition, provision, or issue, had control of the company; or
- (c) another company that was, at the time of the disposition, provision, or issue, controlled by a director of the company, or a nominee or relative of or a trustee for, or a trustee for a relative of, a director 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; and
- (b) the provisions of Section 6 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 five 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 five 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.

### **345. CHARGES IN FAVOUR OF CERTAIN PERSONS VOID IN CERTAIN CASES.**

(1) Where—

- (a) a company creates a charge on property of the company in favour of a person who is, or in favour of persons at least one of whom is, a relevant person in relation to the charge; and
- (b) within six months after the creation of the charge, the chargee purports to take a step in the enforcement of the charge without the Court having, under Subsection (3), given leave for the charge to be enforced,

the charge, and any powers purported to be conferred by an instrument creating or evidencing the charge, are, and shall be deemed always to have been, void.

(2) Without limiting the generality of Subsection (1), a person who—

- (a) appoints a receiver of property of a company under powers conferred by an instrument creating or evidencing a charge created by the company; or
- (b) whether directly or by an agent, enters into possession or assumes control of property of a company for the purposes of enforcing a charge created by the company,

shall be taken, for the purposes of Subsection (1), to take a step in the enforcement of the charge.

(3) On application by the chargee under a charge, the Court may, where it is satisfied that—

- (a) immediately after the creation of the charge, the company that created the charge was able to pay its debts as they became due in the ordinary course of business; and
- (b) in all the circumstances of the case, it is just and equitable for the Court to do so,

give leave for the charge to be enforced.

(4) Nothing in Subsection (1) affects a debt, liability or obligation of a company that would, if that Subsection had not been enacted, have been secured by a charge created by the company.

(5) Nothing in Subsection (1) operates to affect the title of a person to property (other than the charge concerned or an interest in the charge concerned) purchased for value from a chargee under a charge, from an agent of a chargee under a charge, or from a receiver appointed by a chargee under a charge in the exercise of powers conferred by the charge or implied by law, if that person purchased the property in good faith and without notice that the charge was created in favour of a person who is, or in favour of persons at least one of whom is, as the case may be, a relevant person in relation to the charge.

(6) The onus of proving that a person purchased property in good faith and without notice that a charge was created as mentioned in Subsection (5) is on the person asserting that the property was so purchased.

(7) In this section—

“**chargee**”, in relation to a charge, means—

- (a) in any case the holder, or all or any of the holders, of the charge; or
- (b) in the case of a charge that is an agreement to give or execute a charge in favour of a person or persons, whether upon demand or otherwise—that person, or all or any of those persons;

“**officer**”, in relation to a company, includes, in the case of a registered overseas company, an agent of the overseas company;

“**receiver**”, has the same meaning as in Section 254;



**“relevant person”**, in relation to a charge created by a company, means—

- (a) a person who is at the time when the charge is created, or who has been at any time during the period of six months ending at that time, an officer of the company; or
- (b) a person associated, in relation to the creation of the charge, with a person of a kind referred to in Paragraph (a).

**346. LIQUIDATOR MAY RECOVER FROM RELATED ENTITY BENEFIT RESULTING FROM VOIDABLE TRANSACTION.**

(1) This section applies where a company is in liquidation and a transaction of the company—

- (a) is voidable under Section 340; and
- (b) has had the effect of discharging, to the extent of a particular amount, a liability (whether under a guarantee or otherwise and whether contingent or otherwise) of a related entity of the company.

(2) The company’s liquidator may, by proceedings in a court of competent jurisdiction, recover from the related entity, as a debt due to the company, an amount equal to the amount referred to in Subsection (1)(b).

(3) In deciding what orders (if any) to make under Section 341 on an application relating to the transaction, the Court shall take into account any amount recovered under Subsection (2).

(4) Where the liquidator recovers an amount under Subsection (2) from the related entity, the related entity has the same rights—

- (a) whether by way of indemnity, subrogation, contribution or otherwise; and
- (b) against the company or anyone else,

as if the related entity had paid the amount in discharging, to the extent of that amount, the liability referred to in Subsection (1)(b).

(5) In this section, **“related entity”** in relation to a company means—

- (a) a person who was, at the time when the transaction was entered into, a director of the company, or a nominee or relative of or a trustee for, or a trustee for a relative of, a director of the company; or
- (b) a person, or a relative of a person, who, at the time when the transaction was entered into, had control of the company; or
- (c) another company that was, at the time when the transaction was entered into, controlled by a director of the company, or a nominee or relative of or a trustee for, or a trustee for a relative of, a director of the company; or
- (d) another company, that at the time when the transaction was entered into, was a related company.

**347. FLOATING CHARGE CREATED WITHIN SIX MONTHS BEFORE COMMENCEMENT OF LIQUIDATION.**

(1) This section applies where a company which is in liquidation created a floating charge on property of the company at a particular time that is at or after the commencement of this Act and during the six months ending on the commencement of the liquidation.

(2) The charge is void, as against the company's liquidator, except so far as it secures—

- (a) an advance paid to the company, or at its direction, at or after that time and as consideration for the charge; or
- (b) interest on such an advance; or
- (c) the amount of a liability under a guarantee or other obligation undertaken at or after that time on behalf of, or for the benefit of, the company; or
- (d) an amount payable for property or services supplied to the company at or after that time; or
- (e) interest on an amount so payable.

(3) Subsection (2) does not apply where it is proved that the company was able to pay its debts as they became due in the ordinary course of business immediately after that time.

(4) Subsection (2)(a) and (b) do not apply in relation to an advance so far as it was applied to discharge, directly or indirectly, an unsecured debt, whether contingent or otherwise, that the company owed to—

- (a) the chargee; or
- (b) where the chargee was a body corporate—a related entity of the body.

(5) Subsection (2)(d) and (e) do not apply in relation to an amount payable as mentioned in Subsection 2(d) in so far as the amount exceeds the market value of the property or services when supplied to the company.

(6) Where during the six months ending on the commencement of the liquidation, a debt secured by the charge was discharged, out of the company's money or property, to the extent of a particular amount (in this subsection called the "**realised amount**"), the liquidator may, by proceedings in a court of competent jurisdiction, recover from the chargee, as a debt due to the company, the amount worked out in accordance with the formula—

**Unsecured amount less Realisation costs,**

where—

**"Unsecured amount"** means so much of the realised amount as does not exceed so much of the debt as would, if the debt had not been so

discharged, have been unsecured, as against the liquidator, because of Subsection (2); and

“**Realisation costs**” means so much (if any) of the costs and expenses of enforcing the charge as is attributable to realising the realised amount.

(7) In this section, “**related entity**” has the same meaning as in Section 346(5).

### **348. LIABILITY WHERE FAILURE TO PREVENT INSOLVENT TRADING.**

(1) This section applies where a director of a company agrees to the company incurring a debt or permits the company to incur a debt at a time when—

- (a) the company does not satisfy the solvency test, or becomes unable to satisfy the solvency test as a result of incurring that debt or debts including that debt; or
- (b) there are reasonable grounds for believing that the company does not satisfy the solvency test, or will so become unable to satisfy the solvency test, as the case may be,

and the director is aware that there are reasonable grounds for so believing, or a reasonable person in a like position would be so aware.

(2) Where, on the application of a liquidator of a company or the person to whom the debt is owed, the Court is satisfied that—

- (a) this section applies to a director or former director in relation to a debt owed by the company; and
- (b) the person to whom the debt is owed has suffered loss or damage in relation to the debt because of the liquidation of the company; and
- (c) the debt was wholly or partly unsecured when the loss or damage was suffered,

the Court may declare that an amount equal to the amount of loss or damage may be recovered from the director or former director as a debt due to the company or person as the case may be.

### **349. LIABILITY OF COMPANY FOR INSOLVENT TRADING OF SUBSIDIARY.**

(1) This section applies to a company where—

- (a) a subsidiary of the company incurs a debt; and
- (b) at the time of incurring the debt, the subsidiary does not satisfy the solvency test, or becomes unable to satisfy the solvency test as a result of incurring that debt or debts including that debt; and
- (c) at the time of incurring the debt, there are reasonable grounds for believing that the subsidiary is unable to satisfy the solvency test, or

will so become unable to satisfy the solvency test, as the case may be; and

- (d) either—
- (i) the company, or one or more of its directors, is or are aware at the time of incurring the debt that there are grounds for so believing; or
  - (ii) having regard to the nature and extent of the company's control over the affairs of the subsidiary, and to any other relevant circumstances, it is reasonable to expect that—
    - (A) a company in the company's circumstances would be so aware; or
    - (B) one or more of such a company's directors would be so aware.

(2) Where, on the application of a liquidator of a subsidiary of a company or the person to whom the debt is owed, the Court is satisfied that—

- (a) this section applies to the company in relation to the incurring of a debt by the subsidiary; and
- (b) the person to whom the debt is owed has suffered loss or damage in relation to the debt because of the liquidation of the subsidiary; and
- (c) the debt was wholly or partly unsecured when the loss or damage was suffered,

the Court may declare that an amount equal to the amount of loss or damage may be recovered from the company as a debt due to the subsidiary or person, as the case may be.

### **350. POWER OF COURT TO REQUIRE PERSONS TO REPAY MONEY OR RETURN PROPERTY.**

(1) Where, 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, 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, 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) where the application is made by 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 an Act of Insolvency within the meaning of Section 21(1) of the *Insolvency Act 1951*.

### *Division 8.*

### *Creditors' Claims.*

#### **351. ADMISSIBLE CLAIMS.**

(1) Subject to Subsection (2), 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.

(2) Fines, monetary penalties, and costs to which Section 356 applies are not claims that may be admitted against a company in liquidation.

#### **352. 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 where 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) Where 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 authorizes 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 authorizes 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 413(4).

### **353. RIGHTS AND DUTIES OF SECURED CREDITORS.**

(1) A secured creditor may—

- (a) realise property subject to a charge, if entitled to do so; or
- (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 Subsection (1)(a) whether or not the secured creditor has exercised the power referred to in Subsection (1)(b).

(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; and
- (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) Where 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 shall—

- (a) contain full particulars of the valuation and any claim; and
- (b) contain full particulars of the charge including the date on which it was created; and
- (c) identify any documents that substantiate the claim and the charge.

(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 one month 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); or
- (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 one month after receipt of the notice, to—

- (a) elect which of the powers referred to in Subsection (1) the creditor wishes to exercise; and
- (b) where the creditor elects to exercise the power referred to in Subsection (1)(b) or (c), 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 authorizes 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 authorizes 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 413(4).

**354. 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 Papua New Guinea currency shall be converted into Papua New Guinea 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.

**355. CLAIM NOT OF AN ASCERTAINED AMOUNT.**

(1) Where 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.

**356. 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; or
- (b) a monetary penalty payable to the State imposed on a company by a court, whether before or after the commencement of the liquidation of the company, for the breach of any law; or
- (c) costs ordered to be paid by the company in relation to proceedings for the offence or breach.

**357. CLAIMS RELATING TO DEBTS PAYABLE AFTER COMMENCEMENT OF LIQUIDATION.**

(1) A claim in respect of a debt that, but for the liquidation, would not be payable until a date that is six months, or later than six 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 (within the meaning of the *Judicial Proceedings (Interest on Debts and Damages) Act 1962*) for the period from the date on which the company is put into liquidation to the date when the debt is due.



**358. 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; and
- (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 they became due in the ordinary course of business.

(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 in the ordinary course of business.

(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 of the company in liquidation.

(6) For the purposes of Subsection (2), “**specified 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 six 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 two 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 two 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.

### 359. 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) Where 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 where the amount of the surplus assets is insufficient to pay interest in full on all claims, payment shall abate rateably among all claims.

(3) Where 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 a rate equal to the excess between the prescribed rate and the rate referred to in Subsection (1)(a) or (b), as the case may be, and, where the amount of the surplus assets is insufficient to pay interest in full on all claims, payment shall abate rateably among all claims.

(4) For the purposes of this section, “**prescribed rate**” has the same meaning as in the *Judicial Proceedings (Interest on Debts and Damages) Act 1962*.

### 360. PREFERENTIAL CLAIMS.

(1) The liquidator shall pay out of the assets of the company the expenses, fees, and claims set out in Schedule 9 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 tenor.

(2) Without limiting Section 7(b) of Schedule 9, the term “assets” in Subsection (1) does not include assets subject to a charge unless the charge is surrendered or taken to be surrendered or redeemed under Section 353.

### **361. CLAIMS OF OTHER CREDITORS AND DISTRIBUTION OF SURPLUS ASSETS.**

(1) After paying preferential claims in accordance with Section 360, 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 rateably 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 359, 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) where the company’s constitution does not contain provisions for the distribution of surplus assets or, where the company does not have a constitution, in accordance with this Act.

(5) The provisions of Schedule 10 shall apply in relation to the payment of claims referred to in Subsection (1).

#### *Division 9.*

#### *Liquidation Committees.*

### **362. MEETINGS OF CREDITORS OR SHAREHOLDERS.**

(1) At any time in the course of the liquidation, the liquidator shall, at the request in writing of any creditor or shareholder or on the liquidator’s own motion, call a meeting of creditors or shareholders—

- (a) to vote on a proposal that a liquidation committee be appointed to act with the liquidator; and
- (b) where 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 grounds that—

- (a) the request is frivolous or vexatious; or

- (b) the request was not made in good faith; or
- (c) except where a creditor or shareholder agrees to meet the costs, 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 Schedule 2 or, if applicable, Schedule 7 as the case may be.

(5) The members of a liquidation committee chosen by a meeting of creditors or of shareholders take office forthwith, but where 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.

### **363. LIQUIDATION COMMITTEES.**

(1) A liquidation committee shall consist of not less than three persons who are—

- (a) creditors or shareholders; or
- (b) persons holding general powers of attorney from creditors or shareholders; or
- (c) authorized directors 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; and
- (b) call a meeting of creditors or of shareholders; and
- (c) apply to the Court under Section 332 or 334; and
- (d) assist the liquidator as appropriate in the conduct of the liquidation.

(3) The provisions set out in Schedule 11 govern proceedings at meetings of liquidation committees.

(4) A meeting of creditors called under Subsection (2)(b) shall be held in accordance with Schedule 7.

(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 305(2)(d).

***Division 10.***

***Liquidation Surplus Account.***

**364. ESTABLISHMENT OF LIQUIDATION SURPLUS ACCOUNT.**

(1) Money representing unclaimed assets of a company standing to the credit of a liquidator appointed by the Court shall, after completion of the liquidation, be paid to the Registrar.

(2) At the expiration of a period of one year after the date on which the money is paid, the Registrar 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 in banks approved under the *Banks and Financial Institutions Act 2000*, and 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 credited to the Account; or
- (b) paid, subject to such conditions as the Registrar may impose, in meeting the claims of the creditors of a company in the liquidation of which any 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 Registrar is satisfied that it is fair and reasonable for those costs to be met out of the Account.

(5) Nothing in the *Unclaimed Moneys Act 1963* applies in relation to money to which this section applies.

**PART XIX. – REMOVAL FROM THE REGISTER.****365. REMOVAL FROM REGISTER.**

A company is removed from the register when a notice signed by the Registrar stating that the company is removed from the register is registered.

**366. GROUNDS FOR REMOVAL FROM REGISTER.**

(1) Subject to this section, the Registrar may register a notice under Section 365 removing a company from the register where–

- (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 237; or
- (b) the Registrar is satisfied that–
  - (i) the company has ceased to carry on business; and
  - (ii) there is no other reason for the company to continue in existence; or
- (c) the company has been put into liquidation, and–
  - (i) no liquidator is acting; or
  - (ii) the documents referred to in Section 307(1)(a) have not been submitted to the Registrar within six months after the liquidation of the company is completed; or
- (d) a request in the prescribed form made by–
  - (i) a shareholder authorized to make the request by a special resolution of shareholders entitled to vote and voting on the question; or
  - (ii) a director authorized by the board of directors or any other person, where the constitution of the company so requires or permits,

is submitted to the Registrar requesting that the company be removed from the register on either of the grounds specified in Subsection (2); or

- (e) a liquidator submits to the Registrar the documents referred to in Section 307(1)(a); or
- (f) the company's annual return is at least six months late; or
- (g) the company has failed to submit to the Registrar any document required to be submitted under this Act, within 18 months of the time required for submission.

(2) A request that a company be removed from the register under Subsection (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 291 for an order putting the company into liquidation.

(3) A request that a company be removed from the register under Subsection (1)(d) shall, unless the Registrar agrees otherwise, be accompanied by a written notice from the Commissioner General of Internal Revenue stating that the Commissioner has no objection to the company being removed from the register.

(4) The Registrar may register a notice under Section 365 removing a company from the register under Subsection (1)(b) only where—

- (a) the Registrar has complied with Section 367; and
- (b) the company has not satisfied the Registrar that it is carrying on business or that reason exists for the company to continue in existence.

(5) The Registrar may register a notice under Section 365 removing a company from the register under Subsection (1)(c), (d), (f), (g) or (e) only where notice has been given in accordance with Section 368.

### **367. NOTICE OF INTENTION TO REMOVE WHERE COMPANY HAS CEASED TO CARRY ON BUSINESS.**

(1) Before the Registrar registers a notice under Section 365 removing a company from the register under Section 366(1)(b), the Registrar shall—

- (a) give notice to the company in accordance with Subsection (2); and
- (b) give notice of the matters set out in Subsection (3) to any person who is entitled to a charge registered under Part XIII; and
- (c) give public notice of the matters set out in Subsection (3).

(2) The notice to be given under Subsection (1)(a) shall specify—

- (a) the section under, and the grounds on which, it is intended to remove the company from the register; and
- (b) that the company will be removed from the register unless by the date specified in the notice, which shall not be less than one month after the date of the notice, the company satisfies the Registrar by notice in writing that it is still carrying on business or there is other reason for it to continue in existence; and
- (c) the date on which the Registrar intends to remove the company from the register.

(3) The notice to be given under Subsection (1)(b) and (c) shall specify—

- (a) the name of the company and its registered office; and

- (b) the section under, and the grounds on which, it is intended to remove the company from the register; and
- (c) the date on which the Registrar intends to remove the company from the register.

**368. NOTICE OF INTENTION TO REMOVE IN OTHER CASES.**

(1) Where a company is to be removed from the register under Section 366(1)(c), (f) or (g), the Registrar shall give notice in the National Gazette of the matters set out in Subsection (4).

(2) Where a company is to be removed from the register under Section 366(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) Where a company is to be removed from the register under Section 366(1)(c), (f) or (g) the Registrar, or, where it is to be removed from the register under Section 366(1)(d), the applicant, as the case may be, shall also give notice of the matters set out in Subsection (4) to—

- (a) the company; and
- (b) every person who is entitled to a charge registered under Part XIII.

(4) The notice to be given under this section shall specify—

- (a) the name of the company; and
- (b) the section under, and the grounds on which, it is intended to remove the company from the register; and
- (c) that the company will be removed from the register unless by the date specified in the notice, which shall not be less than one month after the date of the notice, the Registrar is satisfied by notice in writing that Section 366(1)(c), (d), (f), (g) or (e) is not applicable to the company; and
- (d) the date on which the Registrar intends to remove the company from the register.

**369. PROCEEDING TO REMOVAL FROM REGISTER.**

Where a notice in writing, referred to in Section 367(2)(b) or 368(4)(c) is submitted to the Registrar, the Registrar shall not proceed to register a notice under Section 365 removing the company from the register unless—

- (a) the notice in writing has been withdrawn; or
- (b) any facts on which the notice in writing is based are not, or are no longer, correct, or have not been proved to the satisfaction of the Registrar; or
- (c) the Registrar is of the opinion that the notice in writing is frivolous.



**370. REGISTRAR NOT TO REMOVE COMPANY FROM THE REGISTER.**

The Registrar shall not register a notice under Section 365 where—

- (a) a certified copy of an order made by the Court under Section 371(2) is submitted to the Registrar; or
- (b) it is proved to the satisfaction of the Registrar that reasonable grounds exist for the company not to be removed from the register.

**371. POWERS OF COURT.**

(1) A person who objects to the removal of a company from the register may apply to the Court for an order that the company not be removed from the register.

(2) On an application for an order under Subsection (1), the Court may, if it is satisfied that it is just and equitable that the company should not be removed from the register, make an order that the company is not to be removed from the register, and such other orders as it thinks fit.

**372. REGISTRAR AS REPRESENTATIVE OF DEFUNCT COMPANY.**

(1) Where, after a company has been removed from the register, it is proved to the satisfaction of the Registrar—

- (a) that the company, if it still existed, would be legally or equitably bound to carry out, complete, or give effect to some dealing, transaction or matter; and
- (b) that, in order to carry out, complete or give effect to the dealing, transaction, or matter, some purely administrative act, not being of a discretionary kind, should have been done by or on behalf of the company, or if the company still existed should be done by or on behalf of the company,

the Registrar may, as representing the company or its liquidator under the provisions of this section, do or cause to be done any such act.

(2) The Registrar may execute or sign any relevant instrument or document adding a memorandum stating that he has done so under this section, and the execution or signature has the same force, validity and effect as if the company, if it still existed, had duly executed the instrument or document.

**373. PROPERTY OF COMPANY REMOVED FROM REGISTER.**

(1) Property of a company that, immediately before the removal of a company from the register, had not been distributed or disclaimed, vests in the Registrar with effect from the removal of the company from the register.

(2) For the purposes of this Act, property of a company includes leasehold property and all other rights vested in or held on trust for the company, but does not include property held by the company on trust for any other person, or any money to which Section 364 applies.

(3) Where property vested in the Registrar was held by the company on trust, the Registrar may—

- (a) continue to act as trustee; or
- (b) apply to the Court for the appointment of a new trustee.

(4) On proof to the satisfaction of the Registrar that there is vested in him by virtue of Subsection (1) any estate or interest in property, whether solely or together with any other person, of a beneficial nature and not merely held in trust, the Registrar may sell or otherwise dispose of, or deal with, the estate or interest or any part of it as he thinks fit.

(5) The Registrar may sell or otherwise dispose of, or deal with, property referred to in Subsection (1), either solely or in concurrence with any other person, by public auction, public tender or private contract and in such manner, for such consideration and on such terms and conditions as the Registrar thinks proper, with power to rescind any contract and resell or otherwise dispose of or deal with the property as the Registrar thinks expedient, and may make, execute, sign and give such contracts, instruments and documents as the Registrar thinks necessary.

(6) The Registrar shall be remunerated by such commission, whether by way of percentage or otherwise, as may be prescribed in respect of the exercise of any powers conferred on him under this section.

(7) The directors of the company immediately before the removal of the company from the register shall keep the company books and records, including accounting records for three years after the removal from the register, but this does not apply to any books and records, including accounting records required to be kept by a receiver or liquidator under this Act.

(8) Where property is vested in the Registrar 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 register, or any other person claiming through that person, may, within six years of the removal of the company from the register, or such longer period as allowed by the Court, 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 Registrar of an amount, not to include interest or damages, for the person's interest or estate in the property, but the amount shall not be greater than a proportional amount, in accordance with the person's interest or estate in the property, received by the Registrar under Subsection (4) or (5) less any commission payable under Subsection (6) and any other expenses.

(9) On an application made under Subsection (8) the Court may—

- (a) decide any question concerning the value of the property, the entitlement of any applicant to the property or to the payment of an

amount, and the apportionment of the property or compensation among two or more applicants; or

- (b) order that the hearing of two or more applications be consolidated; or
- (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 any ancillary orders.

(10) All moneys that vest in the Registrar under this section, or that are the proceeds of realisation of property that so vests, less the costs and expenses of and incidental to the exercise of the power and in making payments authorized by this section, shall be paid into an account established by the Registrar for the purpose of holding moneys received by the Registrar under this section, and shall be forfeited to the Registrar 12 months after the date on which the moneys were paid into the account.

(11) Compensation ordered to be paid under Subsection (8) shall be paid out of the account referred to in Subsection (10) without further appropriation.

### **374. DISCLAIMER OF PROPERTY BY THE REGISTRAR.**

(1) The Registrar may disclaim the Registrar's title to property vesting in the Registrar under Section 373 where the property is onerous property within the meaning of Section 319.

(2) The Registrar shall forthwith give public notice of a disclaimer under Subsection (1).

(3) Property that is disclaimed under this section shall be deemed not to have vested in the Registrar under Section 373.

(4) Sections 319(3), (5), and (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 register.

(5) Subject to any order of the Court, the Registrar is not entitled to disclaim property unless—

- (a) the property is disclaimed within one year after the vesting of the property in the Registrar first comes to the notice of the Registrar; or
- (b) where any person submits a notice in writing to the Registrar requiring the Registrar to elect, before the close of such date as is stated in the notice, not being a date that is less than one month after the date on which the notice is received by the Registrar, whether to disclaim the property, the property is disclaimed before the close of that date,

whichever occurs first.

(6) A statement by the Registrar disclaiming property under this section that the vesting of the property in the Registrar first came to the notice of the Registrar

on a specified date shall, in the absence of proof to the contrary, be evidence of the fact stated.

**375. LIABILITY AS TO PROPERTY VESTED IN REGISTRAR.**

Property vested in the Registrar by virtue of Section 373 is liable and subject to all charges, claims and liabilities imposed on it or affecting it by reason of any Act or rule of law as to rates, taxes, charges or any other matter or thing to which the property would have been liable or subject had the property continued in the possession, ownership or occupation of the company, but no duty, obligation, claim or liability is imposed on the Registrar or the State to do or suffer any act or thing required by any Act or rule of law to be done or suffered by the owner or occupier other than the satisfaction or payment of any such charges, claims or liabilities out of the assets of the company so far as they are, in the opinion of the Registrar, properly available for and applicable to such payment.

**376. LIABILITY OF DIRECTORS, SHAREHOLDERS, AND OTHERS TO CONTINUE.**

(1) The removal of a company from the register does not affect the liability of any former director 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.

(2) A person may recover from the insurer of a company that has been removed from the register an amount that was payable to the company under the insurance contract where—

- (a) the company had a liability to the person; and
- (b) the insurance contract covered that liability.

**377. LIQUIDATION OF COMPANY REMOVED FROM REGISTER.**

(1) Notwithstanding the fact that a company has been removed from the register, the Court may, without first restoring the company to the register appoint a liquidator under Section 291 as if the company continued in existence.

(2) Where a liquidator is appointed under Subsection (1)—

- (a) Part XVIII applies to the liquidation with such modifications as may be necessary; and
- (b) the provisions of Section 381 shall apply, with such modifications as may be necessary, to property of the company that is vested in the Registrar under Section 373 as if the company had been restored to the register.

**378. REGISTRAR MAY RESTORE COMPANY TO 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 to the register a company that has been removed from it during the previous six years where the Registrar is satisfied that, at the time the company was removed from the register—

- (a) the company was still carrying on business or other reason existed for the company to continue in existence; or
- (b) the company was a party to legal proceedings; or
- (c) the company was in receivership, or liquidation, or both; or
- (d) the company should not have been removed from the register.

(2) Any person who, at the time the company was removed from the register, was—

- (a) a shareholder or director of the company; or
- (b) a creditor of the company; or
- (c) a liquidator, or a receiver of the property, of the company; or
- (d) any aggrieved person,

may make an application under Subsection (1).

(3) Before the Registrar restores a company to the register, the applicant in Subsection (2), or where there is no applicant, the Registrar, shall give public notice, in a format approved by the Registrar setting out—

- (a) the name of the company; and
- (b) the name and address of the applicant; and
- (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 submitted to the Registrar, not being less than one month after the date of the notice; and
- (e) any other matter or statement required by the Registrar.

(4) The Registrar shall not restore a company to the register where the Registrar receives an objection to the restoration within the period stated in the notice.

(5) Before the Registrar restores a company to the register under this section, the Registrar may require any of the provisions of 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 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 379.

### **379. COURT MAY RESTORE COMPANY TO 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 register be restored to the register where it is satisfied that—

- (a) at the time the company was removed from the register—
  - (i) the company was still carrying on business or other reason existed for the company to continue in existence; or
  - (ii) the company was a party to legal proceedings; or
  - (iii) the company was in receivership, or liquidation, or both; or
  - (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 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 register—
  - (i) was a shareholder or director of the company; or
  - (ii) was a creditor of the company; or
  - (iii) was a party to any legal proceedings against the company; or
  - (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, any other person.

(3) Before the Court makes an order restoring a company to the register under this section, it shall require any provisions of 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 it thinks fit for the purpose of placing the company and any other persons as nearly as possible in the same position as if the company had not been removed from the register.

**380. RESTORATION TO REGISTER.**

(1) A company is restored to the register when a notice signed by the Registrar stating that the company is restored to the register is registered.

(2) A company that is restored to the register is deemed to have continued in existence as if it had not been removed from the register.

**381. 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 register, vested in the Registrar pursuant to Section 373, shall, on the restoration of the company to the register, revert 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 Registrar pursuant to Section 373 where the Court has made an order for the payment of an amount to any person pursuant to Section 373(8)(b) in respect of that property.

(3) Nothing in Subsection (1) applies to land or any estate or interest in land that has vested in the Registrar pursuant to Section 373 where transmission to the Registrar of the land or that estate or interest in land has been registered under the *Land Registration Act 1981*.

(4) Where transmission to the Registrar of land or any estate or interest in land that has vested in the Registrar pursuant to Section 373 has been registered under the *Land Registration Act 1981*, the Court may, on the application of the company, make an order—

- (a) for the transfer of the land or the estate or interest to the company; or
- (b) for the payment by the Registrar to the company of—
  - (i) an amount not greater than the value of the company's interest in the land or the estate or interest as at the date of registration of the transmission; or
  - (ii) where the land or the estate or interest has been sold or contracted to be sold, of an amount equal to that part of the net amount received or receivable from the sale which represents the company's interest in the land or the estate or interest.

(5) On an application under Subsection (4), the Court may decide any question concerning the value of the land or the estate or interest.

(6) An amount ordered to be paid under Subsection (4) shall be paid out of the account referred to in Section 373(10) without further appropriation.

**PART XX. – OVERSEAS COMPANIES.****382. MEANING OF “CARRYING ON BUSINESS”.**

For the purposes of this Part–

- (a) a reference to an overseas company carrying on business in the country includes a reference to the overseas company–
  - (i) establishing or using a share transfer office or a share registration office in the country; or
  - (ii) administering, renting, managing, or otherwise dealing with property in the country as an owner, agent, legal personal representative, or trustee, whether by a servant or agent or otherwise; or
  - (iii) maintaining an agent, employee, or officer for the purpose of soliciting or procuring or entering into orders, arrangements, agreements, or contracts (whether conditional or not), whether or not the agent, employee, or officer is continuously resident in the country; or
  - (iv) maintaining an office, agency, or branch (however described), whether or not the office, agency, or branch is also used for one of those purposes by another enterprise; or
  - (v) making an application for, or being issued, any permit, licence, lease or authority issued for commercial purposes by the State or by–
    - (A) the National Government; or
    - (B) a Provincial Government or any other level of government; or
    - (C) a unit, department, agency or instrumentality of the State or of a Provincial Government; or
    - (D) any body, authority or instrumentality established by the State or under an Act;
- (b) an overseas company does not carry on business in the country merely because in the country it–
  - (i) is or becomes a party to a legal proceeding or settles a legal proceeding or a claim or dispute; or
  - (ii) holds meetings of its directors or shareholders or carries on other activities concerning its internal affairs; or
  - (iii) maintains a bank account; or
  - (iv) effects a sale of property through an independent contractor; or



- (v) solicits or procures an order that becomes a binding contract only if the order is accepted outside the country; or
- (vi) creates evidence of a debt or creates a charge on property; or
- (vii) secures or collects any of its debts or enforces its rights in relation to securities relating to those debts; or
- (viii) conducts an isolated transaction that is completed within a period of one month, not being one of a number of similar transactions repeated from time to time; or
- (ix) invests its funds or holds property.

**383. 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 the country shall apply for registration under this Part in accordance with Section 386 within one month of commencing to carry on business.

(2) An overseas company that—

- (a) immediately before the commencement of this Act—
  - (i) was carrying on business in the country; and
  - (ii) was not registered under Part XII of the repealed Act; and
- (b) on the commencement of this Act, continues to carry on business in the country,

shall apply for registration under this Part in accordance with Section 386 within one month of the commencement of this Act.

(3) Where 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 413(2); and
- (b) every director of the overseas company and every person in default commits an offence and is liable on conviction to the penalty set out in Section 414(2).

**384. OVERSEAS COMPANIES MAY REGISTER FOR NAME PROTECTION PURPOSES.**

(1) An overseas company that is not carrying on business in the country may apply for registration under this Part in accordance with Section 386.

(2) This Part shall apply to an overseas company registered under this Part that is not carrying on business in the country, subject to the following modifications:—

- (a) the words “seek removal from the register” shall be substituted for the words “cease to carry on business in the country” in Sections 392 and 393;
- (b) Section 1(c) of Schedule 12 shall not apply.

**385. VALIDITY OF TRANSACTIONS NOT AFFECTED.**

A failure by an overseas company to comply with Section 383 does not affect the validity or enforceability of any transaction entered into by the overseas company.

**386. APPLICATION FOR REGISTRATION.**

(1) An application for registration of an overseas company under this Part shall be submitted to the Registrar in the prescribed form.

(2) Without limiting Subsection (1), the application shall—

- (a) state the name of the overseas company; and
- (b) state the full names and addresses of the directors of the overseas company at the date of the application; and
- (c) where the overseas company has a place of business in the country, state—
  - (i) the full address of the place of business in the country of the overseas company or, where the overseas company has more than one place of business in the country, the full address of the principal place of business in the country of the overseas company; and
  - (ii) the postal address of the overseas company’s place of business, or principal place of business, as the case may be; and
- (d) have attached evidence of incorporation of the overseas company and a copy of the instrument constituting or defining the constitution (if any) of the company, and, if not in English, a translation of such documents certified in accordance with Regulations made under this Act; and
- (e) state the full name, residential address and postal address of one or more persons resident or incorporated in the country who are authorized to accept service in the country of documents on behalf of the overseas company and who are responsible for submitting to the Registrar the documents required by this Act to be submitted in respect of the overseas company; and
- (f) state whether the overseas company is carrying on or intends to carry on business in the country; and
- (g) any other prescribed details.

**387. REGISTRATION OF OVERSEAS COMPANY.**

(1) Subject to Subsection (3), after the Registrar receives a properly completed application for registration under this Part of an overseas company, the Registrar shall—

- (a) register the application on the register; and
- (b) issue a certificate of registration in the prescribed form.

(2) Subject to Subsection (3), where the Registrar receives a notice of a change of name or other particulars of an overseas company in accordance with Section 388(2), or 389(1), the Registrar shall enter the new name or particulars on the register and (where appropriate) issue a new certificate of registration in the prescribed form for the company recording the change of name or other particulars.

(3) Section 22(2) and (3) apply, subject to any necessary modifications, to the registration of overseas companies in the same way as it applies to the registration of companies under this Act.

**388. NAME OF OVERSEAS COMPANY.**

(1) Every overseas company registered under this Part shall ensure that its full name, and the name of the country where it was incorporated, are clearly stated in—

- (a) written 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) An overseas company that changes its name shall submit a notice to the Registrar in the prescribed form of the change of name.

**389. ALTERATION OF CONSTITUTION OR OTHER DETAILS.**

(1) An overseas company registered under this Part shall ensure that, within one month of the change or alteration, notice in the prescribed form is submitted to the Registrar of—

- (a) an alteration to the instrument constituting or defining the constitution of the overseas company; or
- (b) a change in the directors, or in the names or residential addresses of the directors, of the overseas company; or
- (c) a change in the address of the place of business or principal place of business of the overseas company; or
- (d) a change in any person, or the address of any person, authorized to accept service in the country of documents on behalf of the overseas company or who is responsible for submitting to the Registrar documents required under this Act.

(2) Where 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 413(2); and
- (b) every director and every resident agent of the overseas company, and every person in default commits an offence and is liable on conviction to the penalty set out in Section 414(2).

### 390. FINANCIAL REPORTING BY OVERSEAS COMPANIES.

(1) Subject to this section, the provisions of Divisions XI.1 and XI.2 shall apply to every overseas company carrying on business in the country as if that company were a reporting company within the meaning of those Divisions.

(2) In the application of Divisions XI.1 and XI.2 to overseas companies, the term “**financial statements**” includes, in addition to the financial statements of the overseas company, financial statements referred to in Section 177 for its business in Papua New Guinea as if that business were conducted by a company formed and registered in the country.

(3) Where the Registrar notifies an overseas company that the Registrar is satisfied that the financial statements of the overseas company that comply with Section 177 comply with Subsection (2), those financial statements shall be taken to comply with Subsection (2).

(4) In the application of Divisions XI.1 and XI.2 to overseas companies, the term “**group financial statements**” includes, in addition to the financial statements of the group, financial statements referred to in Section 178 for the group’s Papua New Guinea business prepared as if the members of the group were companies formed and registered in the country.

(5) Where the Registrar notifies an overseas company that the Registrar is satisfied that the financial statements of the group that comply with Section 178 comply with Subsection (4), those financial statements shall be taken to comply with Subsection (4).

(6) In the application of Section 180 to overseas companies, where the Registrar notifies an overseas company that the Registrar 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 Act,

those financial statements shall be taken to comply with Section 180 and every applicable financial reporting standard.

(7) In the application of Section 182 to an overseas company, where the Registrar notifies an overseas company that the Registrar is satisfied that—

- (a) the group financial statements of the group that comprises the overseas company and its subsidiaries comply with the requirements of the law in force in the country where the overseas company is incorporated; and

(b) those requirements are substantially the same as those of this Act, those financial statements shall be taken to comply with Section 182 and every applicable financial reporting standard.

(8) This section does not apply to an overseas company that is included in a class of overseas companies that the Registrar has declared, by notice in the National Gazette, to be a class of overseas companies to which this section does not apply.

### **391. ANNUAL RETURN OF OVERSEAS COMPANY.**

(1) Every overseas company registered under this Part shall submit to the Registrar within six months of the end of its financial year, and in any case within 15 months of the date of its previous annual return under this section, an annual return in the prescribed form—

- (a) confirming that the information on the register in respect of the overseas company referred to in the return is correct at the date of the return; and
- (b) containing such other information as Regulations may prescribe.

(2) The annual return shall be dated as at a day within six months of the end of the financial year of the overseas company.

(3) Where an overseas company is carrying on business in the country, a copy of the financial statements and any group financial statements of the overseas company prepared in accordance with Section 390 shall accompany the annual return submitted to the Registrar under Subsection (1).

(4) Notwithstanding Subsection (1), an overseas company, not being an overseas company that is deemed to be registered under this Part by Section 445, need not make an annual return in the calendar year of its registration under this Part.

(5) Where an overseas company fails to comply with Subsection (1) or Subsection (2) or Subsection (3)—

- (a) the company commits an offence and is liable on conviction to the penalty set out in Section 413(2); and
- (b) every director and every resident agent of the overseas company and every person in default commits an offence and is liable on conviction to the penalty set out in Section 414(2).

### **392. OVERSEAS COMPANY CEASING TO CARRY ON BUSINESS IN PAPUA NEW GUINEA.**

(1) An overseas company registered under this Part that intends to cease to carry on business in the country shall—

- (a) give public notice of that intention; and

(b) not earlier than three months after giving notice in accordance with Paragraph (a), submit a notice to the Registrar in the prescribed form stating the date on which it will cease to carry on business in the country.

(2) Where an overseas company is—

(a) dissolved or deregistered or ceases to be a corporate body; or

(b) placed into liquidation,

in its place of incorporation the resident agent of the overseas company shall submit to the Registrar notice of that in the prescribed form.

(3) The Registrar shall remove an overseas company from the register as soon as practicable after—

(a) the date specified in the notice submitted in accordance with Subsection (1)(b); or

(b) the date specified in the notice submitted in accordance with Subsection (2); or

(c) receipt of a notice given by a liquidator in accordance with the provisions of Schedule 12.

### **393. LIQUIDATION OF ASSETS IN PAPUA NEW GUINEA.**

(1) An application may be made to the Court for the liquidation of the assets in the country of an overseas company in accordance with Part XVIII, subject to the modifications and exclusions set out in Schedule 12.

(2) An application may be made under Subsection (1) whether or not the overseas company—

(a) is registered under this Part; or

(b) has given public notice of an intention to cease to carry on business in the country in accordance with Section 392(1)(a); or

(c) has submitted a notice to the Registrar of the date on which it will cease to carry on business in the country in accordance with Section 392(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.

**PART XXI. – REGISTRAR OF COMPANIES.*****Division 1.******The Registrar.*****394. REGISTRAR AND DEPUTY REGISTRARS OF COMPANIES.**

(1) There shall be–

- (a) a Registrar of Companies; and
- (b) as many Deputy Registrars of Companies as may be necessary for the purposes of this Act,

each of whom shall be appointed by the Minister by notice in the National Gazette.

(2) The Registrar and each Deputy Registrar hold office until the earlier of–

- (a) the cessation of his employment; or
- (b) the revocation of his appointment by the Minister.

(3) Subject to the direction of the Registrar, a Deputy Registrar has and may exercise the powers, duties, and functions of the Registrar under this Act.

(4) The fact that a Deputy Registrar exercises the powers, duties, or functions of the Registrar is conclusive evidence of his authority to do so.

**395. REGISTER.**

(1) The Registrar shall ensure that a register of companies registered or deemed to be registered under Part II and a register of overseas companies registered or deemed to be registered under Part XX is kept in the country.

(2) The 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 useable form.

**396. REGISTRATION OF DOCUMENTS.**

(1) On receipt of a document for registration under this Act, the Registrar shall, subject to Subsection (2), register the document in the register.

(2) Where a document submitted to the Registrar for registration under this Act–

- (a) is not in the prescribed form, if any; or
- (b) does not comply with this Act; or
- (c) contains any matter contrary to law; or

- (d) where the register is kept wholly or partly by means of a device or facility referred to in Section 395(2), is not in a form that enables particulars to be entered directly by electronic or other means in the device or facility; or
- (e) has not been properly completed; or
- (f) contains an error, alteration, or erasure; or
- (g) contains material that is not clearly legible; or
- (h) is not accompanied by the prescribed fee,

the Registrar may refuse to register the document, and in that event, shall request either—

- (i) that the document be appropriately amended or completed and submitted for registration again; or
- (j) that a fresh document be submitted in its place.

(3) For the purposes of this Act, a document is registered when—

- (a) the document complies with all the requirements of this Act; and
- (b) the document itself is constituted part of the register; and
- (c) particulars of the document are entered in any device or facility referred to in Section 395(2).

(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.

(5) The Registrar may destroy or give to the National Archivist the following documents, where in the Registrar's opinion it is no longer necessary or desirable to retain those documents:—

- (a) in the case of any company—
  - (i) any notice of issue of shares that has been registered for not less than two years;
  - (ii) any annual return or financial statements that have been registered for not less than seven years;
  - (iii) any document creating or evidencing a charge, or the complete or partial satisfaction of a charge, where a memorandum of satisfaction of the charge has been registered for not less than seven years;
  - (iv) any other document that has been registered for not less than 10 years, other than the constitution or any other document affecting the constitution;
- (b) in the case of a company that has been removed from the register for not less than 10 years, any document registered;



- (c) in the case of any documents that are entered on the register in electronic form, any hard copy of any such document that has been registered for not less than six months.

**397. REREGISTRATION OF LOST DOCUMENTS.**

(1) Where a document which was registered under this Act or the repealed Act is lost or destroyed—

- (a) a person may apply to the Registrar for leave to submit for registration a certified copy of that document as originally registered; or
- (b) the Registrar may, by notice in writing require any person to provide to him within a specified time a certified copy of any such document.

(2) On application under Subsection (1)(a), the Registrar may direct that notice is to be given to such persons and in such manner and form as the Registrar thinks proper.

(3) On being satisfied—

- (a) that the original document has been lost or destroyed; and
- (b) of the date of the lodging or submitting of it to the Registrar; and
- (c) that the copy of it produced to the Registrar is a correct copy,

the Registrar shall certify on the copy that the Registrar is so satisfied and direct that the copy be registered in the manner required by this Act in respect of the original.

(4) On registration, the copy has, from the date mentioned in the certificate as the date of registration of the original, the same force and effect for all purposes as the original.

(5) On application by a person aggrieved and after notice to any other person as directed by the Court, the Court may, by order, confirm, vary, or rescind the certificate of the Registrar, and such order can be submitted to the Registrar and, if so, shall be registered, but no payment, contract, dealing, act, or thing made, had, or done in good faith before the registration of the order, and on the faith of and in reliance on the certificate of the Registrar, is invalidated or affected by the variation or rescission.

(6) A fee is not payable for the registration of a document under this section.

(7) A person who fails to comply with a requirement of the Registrar under Subsection (1)(b) commits an offence and is liable on conviction to the penalty set out in Section 413(2).

**398. INSPECTION AND EVIDENCE OF REGISTERS.**

(1) A person may, on the payment of any fee that may be prescribed, inspect—

- (a) any document that constitutes part of the register; and

- (b) particulars of any registered document that have been entered on any device or facility referred to in Section 395(2),

during the hours when the office of the Registrar is open to the public for the transaction of business.

(2) A person may, on payment of any fees that are prescribed, require the Registrar to give or certify—

- (a) a copy of the certificate of incorporation of a company; or
- (b) a copy of, or extract from, a document that constitutes part of the register; or
- (c) particulars of any registered document that have been entered in any device or facility referred to in Section 395(2).

(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 395(2),

shall only issue from the Court—

- (c) with the leave of the Court; and
- (d) with a statement attached to it that it is issued with the leave of the Court,

and shall be accompanied by the prescribed fee that is payable for the inspection, production or certification of the document under this section.

(4) A copy of, or extract from, a registered document that constitutes part of the register, certified to be a true copy or extract by the Registrar, is admissible in evidence in any 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 395(2) is, in the absence of proof to the contrary, conclusive evidence of the entry of those particulars.

(6) In any proceedings, a certificate of the Registrar that a requirement of this Act specified in the certificate—

- (a) had or had not been complied with at a date or within a period specified in the certificate; or
- (b) had been complied with on a date specified in the certificate but not before that date,

is, in the absence of proof to the contrary, conclusive evidence of the matters specified in the certificate.

(7) The Registrar may—

- (a) permit a person to inspect the register or any part of it; or

- (b) give or certify copies of documents or particulars from the register for the purposes of this Act,

by means of any electronic or other device.

### **399. NOTICE BY REGISTRAR.**

(1) Where this Act requires the Registrar to give a notice or document to a natural person that notice or document shall be given in writing and in such manner as the Registrar considers appropriate in the circumstances.

(2) Without limiting Subsection (1), the Registrar may give a notice or document in writing to a natural person by—

- (a) having it delivered to the person; or
- (b) posting it to the person at the postal address stated in the register in relation to that person, or, where no address is so stated, to his last known postal address; or
- (c) delivering it to the person at the address stated in the register in relation to the person, or where no address is so stated, to his last known address; or
- (d) sending it by any means, including by a facsimile machine, telex, computer or other electronic device that provides that notice or document, or a copy of that notice or document, to a person in a permanent form or image, including an electronic or magnetic form or image, to his last known facsimile, telex, computer or other electronic device address, as the case may be; or
- (e) having it published in a newspaper, or on a radio, television or any other publication in circulation in the area where the person lives or is believed to live.

(3) Section 436 shall apply, with such modifications as may be necessary, in respect of the giving of notices or documents 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 as having been derived from a facsimile machine, telex, computer or other electronic device that provides that notice or document, or a copy of that notice or document, to a person in a permanent form or image, including an electronic or magnetic form or image,

is admissible in any proceedings as a copy of the notice.

*Division 2.**Inspection and Investigation.***400. REGISTRAR'S POWERS OF INSPECTION.**

(1) The Registrar or a person authorized by the Registrar may—

(a) for the purpose of—

- (i) ascertaining whether any person is complying, or has complied, with this Act or the *Securities Act 1997*; or
- (ii) the performance or exercise of any of the Registrar's functions and powers; or
- (iii) ascertaining whether the Registrar should exercise any of his rights or powers under this Act or the *Securities Act 1997*; or
- (iv) in relation to an alleged or suspected contravention—
  - (A) of this Act or the *Securities Act 1997*; or
  - (B) any other Act, being a contravention that concerns the management or affairs of a company, or involves fraud or dishonesty, and relates to a company; or
- (v) dealing with or answering a request from a securities commission or exchange, or other body or person in any other country with functions corresponding to those of the Securities Commission of Papua New Guinea or the Registrar and the request is to conduct an investigation or inquiry into any company or into any matter related to the functions of that securities commission or exchange, or other body or person; or
- (vi) prosecuting offences against this Act or the *Securities Act 1997*,

do any of the following:—

- (b) require by notice in writing, any person, including a person carrying on the business of banking, to produce to a specified person at a specified place and time a specified relevant document in that person's possession or control;
- (c) without charge inspect and copy a relevant document.

(2) The Registrar or a person authorized by the Registrar who obtained a relevant document under Subsection (1)(b) may retain it for a period which is in all the circumstances reasonable.

(3) A person shall not obstruct or hinder the Registrar or a person authorized by the Registrar while exercising a power conferred by Subsection (1).

(4) Any person who—

- (a) fails to comply with a requirement under Subsection (1)(b); or
- (b) acts in contravention of Subsection (3),

commits an offence and is liable on conviction to the penalty set out in Section 413(3).

(5) In this Division—

“**company**” includes—

- (a) an overseas company; and
- (b) the following within the meaning of the *Securities Act 1997*:—
  - (i) an approved stock exchange;
  - (ii) a stockbroker;
  - (iii) a trustee;
  - (iv) manager;
  - (v) unit trust;

“**relevant document**” means a document required for a purpose under Subsection (1).

#### **401. EXPLANATION OF ANY MATTER IN RELEVANT DOCUMENT.**

(1) The Registrar may require—

- (a) a person who produced to the Registrar any relevant document under this Division; or
- (b) a person who was a party to the compilation of any relevant document,

to explain in writing, by a specified time to the best of his knowledge and belief any matter concerning the compilation of, or contents of the relevant document.

(2) A person who fails to comply with a requirement under Subsection (1) commits an offence and is liable on conviction to the penalty set out in Section 413(3).

#### **402. POWERS WHERE RELEVANT DOCUMENT NOT PRODUCED.**

Where a person fails to produce a relevant document in compliance with a requirement under this Division, the Registrar, or a person authorized in writing by the Registrar may require that person to state to the best of his knowledge and belief—

- (a) where the relevant document may be found; and
- (b) who last had possession, custody or control of the relevant document and where that person may be found.

#### **403. EXAMINATION OF PERSONS.**

(1) The Registrar, or a person authorized in writing by the Registrar may by notice in writing require any person to appear for examination on oath or affirmation, at a specified place and time, for any purpose referred to in Section 400(1)(a) and answer any question put to him, and provide any reasonable assistance requested of him.

(2) A person required to appear for examination under Subsection (1) is entitled to be represented by a lawyer.

(3) Where a person, other than the examinee is attempting to obstruct an examination the Registrar, or a person authorized in writing by the Registrar may exclude that person from the examination.

(4) A person who fails to comply with a requirement under Subsection (1) or (3) commits an offence and is liable on conviction to the penalty set out in Section 413(3).

#### **404. SELF INCRIMINATION.**

(1) For the purposes of Sections 400(1)(b), 403(1) and 406(2) it is not a reasonable excuse for a person to refuse or fail—

- (a) to answer any question; or
- (b) to provide any assistance; or
- (c) to produce a relevant document; or
- (d) to sign a record,

in accordance with a requirement made of the person that the answers given, the assistance provided, the production of relevant document or the signing of a record, as the case may be might tend to incriminate the person.

(2) The giving of an answer, or the signing of a record, as the case may be is not admissible in evidence against the person in criminal proceedings other than the giving of a false answer or the signing of a false statement in a record, if before the giving of an answer or the signing of a record the person claims that the answer or the signing of the record might tend to incriminate him, and the answer given or the signing of the record, as the case may be might in fact tend to incriminate the person.

#### **405. EXAMINATION TO TAKE PLACE IN PRIVATE.**

An examination shall take place in private and the Registrar, or a person authorized in writing by the Registrar may give directions about who may be present during it, or during a part of it.

#### **406. RECORD OF EXAMINATION.**

(1) Where a person is examined under this Part, the examination may be recorded.

(2) Where a record of examination under Subsection (1) is in writing or reduced to writing the examinee shall sign the record if requested to do so by the Registrar, or a person authorized in writing by the Registrar.

(3) A person who fails to comply with a requirement of the Registrar, or a person authorized in writing by the Registrar under Subsection (2) commits an offence and is liable on conviction to the penalty set out in Section 413(2).

**407. DISCLOSURE OF RELEVANT DOCUMENTS AND RECORDS OF EXAMINATION.**

(1) The Registrar may, or a person authorized by the Registrar shall if directed to do so by the Registrar, give a relevant document, or a record of an examination to—

- (a) a liquidator for the purposes of the liquidation of a company or the assets of an overseas company; or
- (b) a receiver for the purposes of a receivership of a company or assets of a company; or
- (c) any person authorized by the Registrar, for the purposes of detecting or prosecuting offences against any Act; or
- (d) a securities commission or exchange, or other body or person in any other country with functions corresponding to those of the Securities Commission of Papua New Guinea or the Registrar which has requested the Registrar to conduct an investigation into any company or inquire into any matter related to the functions of that securities commission or exchange, or other body or person; or
- (e) any other person, and for any purpose at the discretion of the Registrar.

(2) The Registrar or a person authorized by the Registrar may use or apply a relevant document, or a record of an examination taken or retained by the Registrar, or by a person authorized by the Registrar for any purpose under Section 400(1)(a).

***Division 3.******Appeals.*****408. APPEALS FROM REGISTRAR'S DECISIONS.**

(1) A person who is aggrieved by an act or decision of the Registrar under this Act may appeal to the Court within one month 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.

**409. EXERCISE OF POWERS NOT AFFECTED BY APPEAL.**

(1) Subject to Subsection (2), but notwithstanding any other provision of any 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 authorized by the Registrar under Division 2, until a decision on the appeal or application is given—

- (a) the Registrar, or that person, may continue to exercise the powers under that Division as if no such appeal or application had been made; and
- (b) no person is excused from fulfilling an obligation under that Division by reason of that appeal or application.

- (2) Where the appeal or application is allowed or granted, as the case may be—
- (a) the Registrar shall ensure that after the decision of the Court is given, any relevant document obtained by the Registrar, or a person authorized by the Registrar is returned to the person who produced it and any copy of a relevant document taken or retained by the Registrar, or by a person authorized by the Registrar in respect of that act or decision, is destroyed, unless within seven days the Registrar appeals or applies for a review of the decision of the Court; and
  - (b) no evidence of any answer to any question, or any assistance provided, or any relevant document produced, or any signed record acquired or obtained under Division 2 in relation to that act or decision is admissible in any proceedings unless the Court hearing the proceedings in which it is sought to adduce the evidence is satisfied it was obtained fairly.

***Division 4.***

***Miscellaneous.***

**410. LIABILITY OF REGISTRAR.**

The Registrar or a Deputy Registrar and any person appointed or authorized by the Registrar or employed in the office of the Registrar is not liable to an action or other proceeding for damages for or in relation to an act done or omitted in good faith in performance or purported performance of any function, or in the exercise or purported exercise of any power, conferred or expressed to be conferred by or under this Act or the *Securities Act 1997*.

**411. FEES.**

- (1) The Regulations made under this Act may prescribe—
- (a) fees or other amounts payable to the Registrar in respect of the performance of functions and the exercise of powers under this Act; and
  - (b) amounts payable to the Registrar by way of penalty for failure to submit 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 register a document, perform a function, or exercise a power until the prescribed fee or amount is paid.
- (3) Any Regulations made under this Act may authorize the Registrar to waive, in whole or in part and on such terms and conditions as may be prescribed by the Regulations or the Registrar, payment of any fees or amounts referred to in Subsection (1) by any person or class of persons.



(4) Where the Registrar declines to reserve a name or revokes the reservation of a name under Section 23, the Registrar may remit the fee payable in respect of a subsequent application on behalf of the company to reserve a name.

(5) Where the Registrar, under Section 25(1), requires a company to change its name, no fee is payable in respect of an application for the reservation of a name or an application to change the name of the company.

(6) 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 Registrar.

#### **412. RELIEF FROM FEES FOR CERTAIN COMPANIES.**

(1) Without limiting Section 411(3), where the Registrar is satisfied that a company or proposed company is a company to which this section applies—

- (a) the payment of fees required on or in conjunction with the incorporation of the company, subject to such terms and conditions as the Registrar considers appropriate, is suspended while the company remains such a company; and
- (b) the Registrar may suspend, in whole or in part and, on such terms and conditions as the Registrar from time to time considers appropriate, payment by the company of any or all of the other fees or amounts prescribed under Section 411 while the company remains such a company.

(2) The Registrar may revoke any suspension under Subsection (1)(b) at any time.

(3) This section applies to a company or proposed company that is or will be an exempt company within the meaning of Section 171 and—

- (a) every shareholder is one of the following:—
  - (i) a citizen of the country who is ordinarily resident in the country;
  - (ii) a company to which this section applies;
  - (iii) a business group incorporated under the *Business Groups Incorporation Act 1974*;
  - (iv) the State or a statutory authority or instrumentality of the State; and
- (b) every director is a citizen of the country who is ordinarily resident in the country.

**PART XXII. – OFFENCES AND PENALTIES.****413. PENALTY FOR FAILURE TO COMPLY WITH ACT.**

(1) A person convicted of an offence against any of the sections listed in Part 1 of Schedule 13 is liable to a fine not exceeding K5,000.00.

(2) A person convicted of an offence against any of the sections listed in Part 2 of Schedule 13 is liable to a fine not exceeding K10,000.00.

(3) A person convicted of an offence against any of the sections listed in Part 3 of Schedule 13 is liable to a fine not exceeding K50,000.00 or imprisonment for a term not exceeding two years, or both.

(4) A person convicted of an offence against any of the sections listed in Part 4 of Schedule 13 is liable to a fine not exceeding K200,000.00 or imprisonment for a term not exceeding five years, or both.

**414. PENALTIES THAT MAY BE IMPOSED ON DIRECTORS OR OTHER PERSONS IN CASES OF FAILURE BY BOARD OR COMPANY TO COMPLY WITH ACT.**

(1) A director of a company who is convicted of an offence against any of the sections listed in Part 5 of Schedule 13 is liable to a fine not exceeding K5,000.00.

(2) A person who is convicted of an offence against any of the sections listed in Part 6 of Schedule 13 is liable to a fine not exceeding K10,000.00.

(3) A director of a company who is convicted of an offence against any of the sections listed in Part 7 of Schedule 13 is liable to a fine not exceeding K100,000.00.

**415. ADDITIONAL PENALTY WHERE OFFENCE COMMITTED TO DERIVE BENEFITS.**

(1) Where the Court is satisfied that a person–

- (a) committed an offence against the provisions of this Act with the intention of deriving benefits; and
- (b) derived benefits from committing that offence; and
- (c) has been convicted of that offence,

the Court may order that person to pay an additional pecuniary penalty.

(2) In determining the amount of any pecuniary penalty under Subsection (1), the Court shall have regard to–

- (a) the value of the benefits the person derived from committing the offence; and
- (b) the amount of any pecuniary penalty that has already been imposed on that person for committing that offence; and

- (c) any non-pecuniary penalty that has been imposed on that person for committing that offence,

but in no case shall the pecuniary penalty exceed the value of the benefits the person derived from committing the offence.

(3) The Court shall assess the value of the benefits a person derived from committing an offence having regard to the evidence before the Court about all or any of the following matters:—

- (a) the money, or the value of the property other than money, that came into possession or otherwise under the control of—
  - (i) the person who committed the offence; or
  - (ii) another person at the request or direction of the person who committed the offence,

by reason of the commission of the offence;

- (b) the value of any other benefit provided to—
  - (i) the person who committed the offence; or
  - (ii) another person at the request or direction of the person who committed the offence,

by reason of the commission of the offence;

- (c) the value of the property of the person who committed the offence before and after the commission of the offence.

(4) Any expenses or outgoings of any person incurred in connection with committing an offence against this Act shall be disregarded in calculating the value of the benefits that person derived from committing the offence.

(5) For the purposes of Subsection (3), the Court may—

- (a) treat as property of a person any property that the Court is satisfied is subject to the effective control of that person, whether or not that person has—
  - (i) any legal or equitable estate or interest in the property; or
  - (ii) any right, power, or privilege in connection with the property; and
- (b) where it treats particular property as a person's property under Paragraph (a) and where the Public Prosecutor or the Registrar so requests, make an order declaring that that property is available to satisfy any pecuniary penalty the Court imposes under this section.

#### **416. GENERAL PENALTY PROVISIONS.**

(1) A person who—

- (a) does an act or thing that the person is prohibited to do by or under a provision of this Act; or

(b) does not do an act or thing that the person is required or directed to do by or under a provision of this Act; or

(c) otherwise contravenes a provision of this Act,

is guilty of an offence by virtue of this Subsection, unless that or another provision of this Act provides that the person—

(d) is guilty of an offence; or

(e) is not guilty of an offence.

(2) A person who is guilty of an offence against this Act, whether by virtue of Subsection (1) or otherwise, is punishable, on conviction, by a penalty not exceeding the penalty applicable to the offence.

(3) Where a provision of this Act (other than this section) provides that the penalty applicable to a contravention of a particular provision of this Act is a specified penalty, pecuniary or otherwise, the penalty applicable to an offence constituted by a contravention of the particular provision is the specified penalty.

(4) Except as provided in Subsection (3) or in a provision of this Act (other than this section), a person who commits an offence is liable on conviction to a fine not exceeding K5,000.00.

#### **417. PROCEEDINGS FOR OFFENCES.**

(1) The offences—

(a) specified in Section 413(1), (2), and (3); and

(b) specified in Section 414(1) and (2); and

(c) to which Section 416(4) is applicable,

are triable summarily.

(2) The offences specified in Section 413(4) and Section 414(3) are triable on indictment.

(3) Notwithstanding anything to the contrary in any other Act, any information for an offence referred to in Subsection (1) or (2) may be laid at any time within seven years after the commission of the offence or, with the written consent of the Minister, at any later time.

(4) Nothing in Sections 420 to 423 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.

#### **418. PROSECUTIONS.**

(1) The Registrar, or a person with the written consent of the Registrar may prosecute any offence against this Act.

(2) In any action or proceeding brought under this Act by the Registrar or against the Registrar the Court may award costs against any party or claimant other

than the Registrar, which costs the Registrar may recover as a debt due to the Registrar.

(3) Any fine or penalty to be paid by any person as a result of an action brought by the Registrar shall be paid to the Registrar and, in addition to any other remedy, the Registrar may recover such fine or penalty as a debt due to the Registrar.

#### **419. DEFENCES.**

(1) It is a defence to a director charged with an offence in relation to a duty imposed on the board of a company where the director proves that—

- (a) the board took all reasonable and proper steps to ensure that the requirements would be complied with; or
- (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.

(2) It is a defence to a director charged with an offence in relation to a duty imposed on the company where the director proves that—

- (a) the company took all reasonable and proper steps to ensure that the requirements would be complied with; or
- (b) he took all reasonable steps to ensure that the company complied with the requirements; or
- (c) in the circumstances he could not reasonably have been expected to take steps to ensure that the company complied with the requirements.

#### **420. FALSE STATEMENTS.**

(1) Every person who, with respect to a document required by or for the purposes of this Act—

- (a) makes, or authorizes 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 authorizes the omission from it 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 to the penalty set out in Section 413(4).

(2) Every director or employee of a company who makes or furnishes, or authorizes or permits the making or furnishing of, a statement or report that relates to the affairs of the company and that is false or misleading in a material particular, to—

- (a) a director, employee, auditor, shareholder, or debenture holder of the company; or
- (b) a liquidator, liquidation committee, or receiver or manager of property of the company; or
- (c) where the company is a subsidiary, a director, employee, or auditor of its holding company; or
- (d) a stock exchange or an officer of a stock exchange; or
- (e) the Registrar,

knowing it to be false or misleading, commits an offence, and is liable on conviction to the penalty set out in Section 413(4).

(3) For the purposes of this Act, a person who voted in favour of the making of a statement at a meeting is deemed to have authorized the making of the statement.

#### **421. FRAUDULENT USE OR DESTRUCTION OF PROPERTY.**

Every director, 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 413(4).

#### **422. FALSIFICATION OF RECORDS.**

(1) Every director, 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, mutilation, alteration, or falsification of any register, accounting records, or 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, or document belonging or relating to the company,

commits an offence, and is liable on conviction to the penalty set out in Section 413(4).

(2) Every person who, in relation to a mechanical, electronic, or other device used in connection with the keeping or preparation of any register, accounting records, or 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, 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 records, or 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 413(4).

#### **423. 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 a fraudulent purpose commits an offence and is liable on conviction to the penalty set out in Section 413(4).

(2) Every director 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; or
  - (ii) causes property to be given or transferred to any person; or
  - (iii) caused or was 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 413(4).

#### **424. 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 an abbreviation or imitation of that word is the last word, commits an offence and is liable on conviction to the penalty set out in Section 413(2).

#### **425. PERSONS PROHIBITED FROM MANAGING COMPANIES.**

(1) Where—

- (a) a person has been convicted on indictment of any offence in connection with the promotion, formation, or management of a company; or
- (b) a person has been convicted of an offence under any of Sections 420 to 423 or of any crime involving dishonesty, whether within the country or outside the country; or
- (c) a person is an undischarged bankrupt,

that person shall not—

(d) where the person was sentenced to imprisonment, during the period of imprisonment and during the period of five years after release from prison; or

(e) during the period of five years after the judgement or the conviction,

be a director or promoter 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 submit to the Registrar not less than one month's notice of that person's 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 413(4).

(5) In this section—

**“company”** includes an overseas company;

**“crime involving dishonesty”** means a crime involving theft, conversion, robbery, burglary, fraud, receiving stolen property, or forgery.

#### 426. COURT MAY DISQUALIFY PERSONS FROM MANAGING COMPANIES.

(1) Where—

(a) a person has been convicted on indictment of an offence in connection with the promotion, formation, or management of a company, or has been convicted of a crime involving dishonesty, whether within the country or outside the country; or

(b) a person has committed an offence for which the person is liable (whether convicted or not) under this Part; or

(c) a person has, while a director of a company and whether convicted or not—

(i) persistently failed to comply with this Act or, where the company has failed to so comply, persistently failed to take all reasonable steps to obtain such compliance; or

(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

(d) a person 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 or promoter 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 one month's 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, or by the liquidator of the company, or by 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 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, or the liquidator,

the Registrar 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 the ground of 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, submit a notice to the Registrar that the order has been made and the Registrar shall give notice in the National 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 413(4).

(7) In this section—

**“company”** includes an overseas company;

**“crime involving dishonesty”** means a crime involving theft, conversion, robbery, burglary, fraud, receiving stolen property, or forgery.

#### **427. LIABILITY FOR CONTRAVENING SECTIONS 425 AND 426.**

A person who acts in contravention of Section 425 or an order made under Section 426 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,

for the period of the contravention.

**428. 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 they became due in the ordinary course of business; or
- (b) that has ceased to carry on business because of inability to pay its debts as they became due in the ordinary course of business; or
- (c) in respect of which execution is returned unsatisfied in whole or in part; or
- (d) in respect of the property of which a receiver has been appointed; or
- (e) 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 register.

(3) The Registrar may, by notice in writing given to a person, prohibit that person from being a director or promoter 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 and every such notice shall be published in the National 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 of, or concerned in, or a person who took part in, the management of, a company in relation to which this section applies where 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 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 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 not less than one month's 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.

(6) No person to whom a notice under Subsection (3) applies shall be a director or promoter of a company, or be concerned or take part, whether directly or indirectly, in the management of a company.

(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,

and every such notice shall be published in the National 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 penalty set out in Section 413(4).

(10) In this section, “**company**” includes an overseas company.

#### **429. LIABILITY FOR CONTRAVENING SECTION 428.**

A person who acts in contravention of a notice under Section 428 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,

for the period of the contravention.

**PART XXIII. – MISCELLANEOUS.*****Division 1.******Miscellaneous.*****430. NOTICES ETC., TO BE IN ENGLISH.**

(1) Every notice, report or other document required by this Act to be submitted to the Registrar shall—

- (a) be in English; or
- (b) be accompanied by a certified translation of that notice, report or other document into English.

(2) Every record, accounting record or other document that a company is required to keep under this Act shall be in English.

**431. SERVICE OF DOCUMENTS ON COMPANIES IN LEGAL PROCEEDINGS.**

(1) Notwithstanding the provisions of any other Act, a document, including a writ, summons, notice, or order in any legal proceedings may be served on a company as follows:—

- (a) by delivery to a person named as a director or the secretary of the company on the 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 posting it to the company's registered office, or address for service, or postal address;
- (e) by serving it in accordance with any directions as to service given by the court having jurisdiction in the proceedings;
- (f) 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 a company in the country.

**432. SERVICE OF OTHER DOCUMENTS ON COMPANIES.**

Notwithstanding the provisions of any other Act, 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 431(1)(a), (b), (c), (d) or (f);
- (b) by sending it by any means, including a facsimile machine, telex, computer or other electronic device, that provides that document, or a copy of that document, to that person in a permanent form or image, including an electronic or magnetic form or image.

**433. SERVICE OF DOCUMENTS ON OVERSEAS COMPANIES IN LEGAL PROCEEDINGS.**

(1) A document, including a writ, summons, notice, or order, in any legal proceedings may be served on an overseas company in the country as follows:—

- (a) by delivery to a person named in the register as a director of the overseas company and who is resident in the country;
- (b) by delivery to a person named in the register as being authorized to accept service in the country 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 the country or, where the overseas company has more than one place of business in the country, at the overseas company's principal place of business in the country;
- (d) by posting it to the address of the overseas company's principal place of business in the country, or the overseas company's postal address;
- (e) by serving it in accordance with any directions as to service given by the court having jurisdiction in the proceedings;
- (f) 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 the country.

**434. 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 433(1)(a), (b), (c), (d) or (f);
- (b) by sending it, to the principal place of business in the country of the overseas company, by any means, including a facsimile machine, telex, computer or other electronic device that provides that document, or a copy of that document, to that person in a permanent form or image, including an electronic or magnetic form or image.

**435. SERVICE OF DOCUMENTS ON SHAREHOLDERS AND CREDITORS.**

(1) A notice, statement, report, accounts, or other document to be sent to a shareholder or creditor who is a natural person may be—

- (a) given to that person; or
- (b) posted to that person's address or postal address; or
- (c) sent to that person by any means, including a facsimile machine, telex, computer or other electronic device that provides that document, or a

copy of that document, to that person in a permanent form or image, including an electronic or magnetic form or image.

(2) A notice, statement, report, accounts, 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 432 or Section 434, as the case may be.

(3) A notice, statement, report, accounts, 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; or
- (b) delivered to an employee of the body corporate at the principal office or principal place of business of the body corporate; or
- (c) delivered in such manner as the Court directs; or
- (d) delivered in accordance with an agreement made with the body corporate; or
- (e) posted to the address of the principal office of the body corporate; or
- (f) sent, to the principal office or principal place of business of the body corporate, by any means, including a facsimile machine, telex, computer or other electronic device that provides that document, or a copy of that document, to that person in a permanent form or image, including an electronic or magnetic form or image.

(4) Where a liquidator sends documents—

- (a) to the last known address or postal 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.

#### **436. ADDITIONAL PROVISIONS RELATING TO SERVICE.**

(1) Subject to Subsection (2), for the purposes of Sections 431 to 435—

- (a) where a document is to be served by delivery to a natural person, service shall be made—
  - (i) by handing the document to the person; or
  - (ii) where the person refuses to accept the document, by bringing it to the attention of, and leaving it in a place accessible to, the person; and

- (b) a document posted is deemed to be received five days, or any shorter period as the Court may determine in a particular case, after it is posted; and
- (c) a document sent by means of a facsimile machine, telex, computer or other electronic device that provides that document, or a copy of that document, to that person in a permanent form or image, including an electronic or magnetic form or image is deemed to have been received on the day following the day on which it was sent; and
- (d) in proving service of a document by post, it is sufficient to prove that—
  - (i) the document was properly addressed; and
  - (ii) all postal charges were paid; and
  - (iii) the document was posted; and
- (e) in proving service of a document sent by means of a facsimile machine, telex, computer or other electronic device that provides that document, or a copy of that document, to that person in a permanent form or image, including an electronic or magnetic form or image, it is sufficient to prove that the document was properly transmitted to the person concerned.

(2) A document is not to be deemed to have been served or sent or delivered to a person where the person proves that, through no fault on the person's part, the document was not received within the time specified.

#### **437. PRIVILEGED COMMUNICATIONS.**

(1) Subject to Subsection (2) and unless the contrary intention appears, nothing in this Act requires any person to disclose a privileged communication.

(2) Nothing in Subsection (1) applies to a communication made to or by a person referred to in Section 311(2)(f) while acting or having acted as a lawyer for a company to which that section applies and which that person is required to disclose under Section 311(3).

(3) For the purposes of this Act, a communication is a privileged communication only where—

- (a) it is a confidential communication, whether oral or written, passing between—
  - (i) a lawyer in his professional capacity and another lawyer in that capacity; or
  - (ii) a lawyer 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) Where the information or document consists wholly of payments, income, expenditure, or financial transactions of a specified person (whether a lawyer, his client, or any other person), it is not a privileged communication where it is contained in, or comprises the whole or part of, a book, account, statement or other record prepared or kept by the lawyer in connection with a trust account of the lawyer within the meaning of the *Lawyer (Trust Account) Regulation* made under the *Lawyers Act 1986*.

(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 Act, the term “**lawyer**” has the same meaning as in the *Lawyers Act 1986*, and references to a lawyer include a firm in which he is a partner or is held out to be a partner.

#### **438. DIRECTORS’ CERTIFICATES.**

A requirement imposed by any provision that directors of a company shall sign a certificate is complied with where the directors who are required to sign the certificate—

- (a) sign the same certificate; or
- (b) sign separate certificates in the same terms.

#### **439. REGULATIONS.**

The Head of State, acting on advice, may from time to time, 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; and
  - (ii) forms to be signed by specified persons;
- (b) prescribing requirements, not inconsistent with this Act, with which documents submitted for registration shall comply;
- (c) prescribing the methods by which copies of documents may be certified for the purposes of this Act;
- (d) regulating, in a manner not inconsistent with this Act, the conduct of liquidations;
- (e) supplementing or modifying the transitional provisions set out in Part XXIV or the provisions of Schedule 14;



- (f) 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.

***Division 2.***

***Repeals and Amendments.***

**440. REPEALS.**

(1) The following Acts are hereby repealed:–

- (a) *Companies Act* (Chapter 146);
- (b) *Companies (Amendment) Act 1985*;
- (c) *Companies (Amendment) Act 1986*;
- (d) *Companies (Amendment) Act 1988*;
- (e) *Companies (Budget Provisions) Act 1989*;
- (f) *Companies (Amendment) Act 1990*;
- (g) *Companies (Amendment) Act 1994*.

(2) The *Companies Regulation* is hereby repealed.

(3) For the removal of doubt, it is hereby declared that the *Companies Rules* remain in force and are not repealed by this section.

**PART XXIV. – TRANSITIONAL PROVISIONS.****441. TRANSITIONAL PROVISIONS FOR EXISTING COMPANIES.**

The provisions of the repealed Act, and of any Rules and Regulations made under that Act that have been repealed by this Act, shall continue to apply to an existing company as if that Act and those Rules and Regulations had not been repealed, until either–

- (a) the existing company registers as a company under this Act in accordance with Section 442; or
- (b) the existing company is deemed to be registered as a company under this Act in accordance with Section 443.

**442. ELECTION TO REGISTER AS COMPANY UNDER THIS ACT.**

(1) The board of an existing company may at any time resolve to submit to members a registration proposal.

(2) The registration proposal shall have attached to it the application for registration which the directors propose to submit to the Registrar under Subsection (6).

(3) The board of an existing company shall, before submitting a registration proposal to members, resolve that the registration proposal is not unfairly prejudicial to and does not unfairly discriminate against any member.

(4) The directors who vote in favour of a resolution required by Subsection (3) shall forthwith sign a certificate that, in their opinion, the registration proposal is not unfairly prejudicial to and does not unfairly discriminate against any member.

(5) At any time after the resolution required by Subsection (1) has been passed, the directors may call meetings of the holders of each class of shares in the existing company to consider the registration proposal.

(6) The directors of an existing company may submit to the Registrar an application for registration in the prescribed form, and where the company is to have a constitution, such application shall be accompanied by a certified copy of the company's constitution, at any time within one month after all the meetings held under Subsection (5) have, by special resolution, approved the registration proposal.

(7) Every director who–

- (a) fails to comply with Subsection (4); or
- (b) signs a certificate under that Subsection while believing that the registration proposal is unfairly prejudicial to or does unfairly discriminate against any member,

commits an offence and is liable on conviction to the penalty set out in Section 414 (1).

**443. DEEMED REGISTRATION OF EXISTING COMPANIES.**

(1) An existing company which has not registered as a company under this Act under Section 442 is deemed, on and from the day that is six months after the commencement of this Act, to be registered as a company under Part II on the terms and conditions set out in Schedule 14 as supplemented or modified by any Regulations made under Section 439, and the Registrar shall issue a certificate of incorporation accordingly.

(2) Where the deemed registration of an existing company under Subsection (1) is prejudicial to a member of the existing company, that member may apply to the Court within one year of the deemed registration for an order requiring the directors of the company at the time of deemed registration to pay such compensation to the member as is fair and reasonable, having regard to—

- (a) the extent of the loss or damage suffered by the member as a result of the deemed registration; and
- (b) the extent to which the directors are responsible for the failure of the company to submit an application for registration to the Registrar.

**444. EFFECT OF REGISTRATION OF EXISTING COMPANIES.**

(1) The registration or deemed registration of an existing company as a company under this Act does not—

- (a) create a new legal entity; or
- (b) prejudice or affect the identity of the body corporate constituted by the company or its continuity as a legal entity; or
- (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 registration or deemed registration as a company under this Act may be commenced or continued by or against the company after registration or deemed registration.

**445. TRANSITIONAL PROVISIONS FOR OVERSEAS COMPANIES.**

(1) A foreign company registered under Part XII of the repealed Act immediately before the date of commencement of this Act is, on and from that date, deemed to be registered as an overseas company under Part XX of this Act instead of under Part XII of the repealed Act.

(2) A declaration made by the Minister under Section 360(5) of the repealed Act and in force immediately before the date of commencement of this Act, shall be deemed to be a declaration made under Section 390(8) of this Act.

**446. EXISTING DOCUMENTS ETC., TO CONTINUE.**

(1) All documents lodged or registered (or both), under the repealed Act and in existence immediately before the commencement of this Act shall, to the extent they could have been submitted, or registered (or both) under this Act, if this Act had been in force, be deemed to have been submitted or registered (or both) under this Act.

(2) A register kept under the repealed Act shall, to the extent it could have been kept under this Act, if this Act had been in force, be deemed to be part of the register kept under the corresponding provision of this Act.

(3) Every appointment under the repealed Act in force immediately before the commencement of this Act shall, to the extent that it could have been made under this Act, if this Act had been in force, be deemed to have been made under this Act.

(4) All declarations, consents, or exemptions, or directions by the Minister, made under the repealed Act and in existence immediately before the commencement of this Act shall, to the extent they could have been made under this Act, if this Act had been in force, be deemed to have been made under this Act.

(5) Subsections (1) to (4) shall be read subject to any express provisions of this Act to the company.

**447. RESERVATION OF NAMES UNDER THE REPEALED ACT.**

A reservation of a name under Section 22 of the repealed Act that, immediately before the commencement of this Act, has not expired or been revoked, shall—

- (a) be deemed to have been reserved under Section 21; and
- (b) continue to be available for the purpose of registering a company under this Act in the period during which that name would have been available for the registration of a company under the repealed Act.

**448. APPLICATION OF ACT TO RECEIVERS HOLDING OFFICE AT COMMENCEMENT.**

Part XVII applies to a receiver holding office immediately before the commencement of this Act, subject to the following modifications and exceptions:—

- (a) Section 256 (except Subsections (1)(e) and (2)) does not apply;
- (b) Section 273 does not apply;
- (c) Section 278 does not apply in respect of a receivership that ended before the commencement of this Act;
- (d) Section 279 does not apply;
- (e) Sections 281(1)(b) and (c), (5) and (6) do not apply.

**449. TRANSITIONAL PROVISIONS APPLYING TO LIQUIDATION OF COMPANIES.**

(1) Nothing in Part XVIII applies to or affects—

- (a) any application to the Court for the winding up of an existing company made before that company is registered or deemed to be registered as a company under this Act; or
- (b) any resolution of an existing company to be wound up by the Court passed before that company is registered or deemed to be registered as a company under this Act; or
- (c) any resolution of an existing company for voluntary winding up passed before that company is registered or deemed to be registered as a company under this Act; or
- (d) any order made by the Court under Part XI of the repealed Act in respect of an existing company before that company is registered or deemed to be registered as a company under this Act,

and the provisions of Part XI of the repealed Act shall continue to apply in respect of any such application, resolution, order, winding up, dissolution or other consequence resulting from it as if the repealed Act had not been repealed.

(2) Nothing in Part XVIII applies to or affects any existing company on which a demand under Section 240(2)(a) of the repealed Act has been served before that company has registered or been deemed to be registered as a company under this Act, and the provisions of Part XI of the repealed Act shall continue to apply in respect of the winding up of that company as if that Act had not been repealed.

(3) Section 319 of the repealed Act shall continue in force in respect of—

- (a) the striking of a company off the register in any case where the Registrar sent a letter or gave a notice in respect of that company before that company was registered or deemed to be registered as a company under this Act; or
- (b) any company struck off the register under that section before that company was registered or deemed to be registered as a company under this Act,

as if the repealed Act had not been repealed and as if the expression “six years” was substituted for the expression “15 years” in Section 319 (6).

(4) Sections 321, 322, 323 and 329 of the repealed Act shall continue in force in respect of any company dissolved before that company was registered or deemed to be registered as a company under this Act as if the repealed Act had not been repealed.

(5) The *Companies Rules*, to the extent that they apply to the winding up of companies, and all Regulations made under the repealed Act prescribing fees payable in relation to the winding up of companies shall continue in force in relation to the

winding up of any company commenced before that company was registered or deemed to be registered as a company under this Act.

#### **450. TRANSITIONAL PROVISIONS IN RELATION TO VOIDABLE TRANSACTIONS.**

Sections 311, 312 and 313 of the repealed Act shall continue to apply in relation to any transaction entered into by a company, or any matter that arose, before that company was registered or deemed to be registered as a company under this Act as if the repealed Act had not been repealed, and nothing in Sections 340 to 345 shall apply in relation to any such transaction or matter.

#### **451. PROCEEDINGS UNDER REPEALED ACT.**

All applications, actions, appeals, proceedings and other matters under the repealed Act which have been commenced in relation to any existing company before that company was registered or deemed to be registered as a company under this Act shall be heard and determined as if the repealed Act had not been repealed.

#### **452. EXISTING CAUSES OF ACTION.**

(1) Subject to the *Frauds and Limitations Act 1988*, the repeal of the repealed Act shall not extinguish any existing cause of action.

(2) Where—

- (a) any cause of action arose under any of the provisions of the repealed Act in relation to an existing company before that company was registered or deemed to be registered as a company under this Act; and
- (b) no proceedings have been initiated in respect of that cause of action at the date that company was registered or deemed to be registered under this Act,

the repealed Act shall continue to apply to any proceedings commenced in respect of that cause of action as if it had not been repealed, and Part IX shall not apply to such proceedings.

#### **453. TRANSITIONAL PROVISIONS IN RELATION TO COMPANY CHARGES.**

(1) Part XIII applies to any charge relating to a company that, immediately before that company was registered or deemed to be registered under this Act, was registrable under the repealed Act but that at that time was not registered under that Act.

(2) The register of charges, and all charges registered on that register, kept by the Registrar under Section 112 of the repealed Act in relation to—

- (a) an existing company which registers or which is deemed to be registered under this Act; or

- (b) a foreign company deemed to be registered as an overseas company under this Act,

shall from the date of such registration be deemed to be part of and included in the register of charges kept by the Registrar under Section 225.

**454. TRANSITIONAL PROVISIONS FOR COMPANIES IN OFFICIAL MANAGEMENT.**

(1) The provisions of Part X of the repealed Act shall continue to apply to an existing company placed under official management before that company is registered or deemed to be registered under this Act as if the repealed Act had not been repealed.

(2) Where—

- (a) official management of a company under Part X of the repealed Act ceases or terminates, other than on the appointment of a liquidator under the repealed Act; and
- (b) but for Subsection (1), that company would have been deemed registered as a company under this Act,

that company is deemed to be registered as a company under this Act on the terms and conditions set out in Schedule 14.

**455. TRANSITIONAL PROVISIONS FOR REGISTRAR.**

The person holding office as Registrar of Companies under the repealed Act and every person holding office as a Deputy 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 Registrar of Companies, as the case may be, in accordance with Section 394.

**456. TRANSITIONAL PROVISIONS FOR INSPECTIONS.**

The provisions of Part VII of the repealed Act shall continue to apply to an investigation commenced under that Part in regard to a company or an overseas company before that company or overseas company is registered or deemed to be registered under this Act as if the repealed Act had not been repealed.

**457. FURTHER TRANSITIONAL PROVISIONS.**

Regulations made under this Act may supplement or modify the transitional provisions set out in this Part.

**SCHEDULE 1 – PROVISIONS OF ACT THAT DO NOT APPLY WHERE  
THERE IS UNANIMOUS AGREEMENT BY SHAREHOLDERS.**

Sec. 89.

The following provisions of the Act do not apply where there is unanimous shareholder agreement in accordance with Section 89:–

- (a) in relation to issues of shares, Sections 43 and 45;
- (b) in relation to making a distribution, Division VI.3;
- (c) in relation to a company acquiring its own shares, Section 57;
- (d) in relation to the redemption of shares, Section 60;
- (e) in relation to the giving of financial assistance for the purpose of or in connection with the purchase of shares, Division VI.6;
- (f) in relation to the company entering into a contract in which a director is interested, Sections 118 and 119;
- (g) in relation to the payment of remuneration or provision of other benefits to directors, Section 139.



**SCHEDULE 2 – PROCEEDINGS AT MEETINGS OF SHAREHOLDERS.**

Sec. 105.

**Sch. 2.1. Chairman.**

(1) Where the directors have elected a Chairman of the board, and the Chairman of the board is present at a meeting of shareholders, he shall chair the meeting.

(2) Where no Chairman of the board has been elected or where, at any meeting of shareholders, the Chairman 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 Chairman of the meeting.

(3) Subsections (1) and (2) are subject to the constitution of the company.

**Sch. 2.2. 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 and an auditor of the company not less than 14 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 where all the shareholders entitled to attend and vote at the meeting attend the meeting without protest as to the irregularity, or where all such shareholders agree to the waiver.

(4) Subject to the constitution of a company, the accidental omission to give notice of a meeting to, or the failure to receive notice of a meeting by, a shareholder does not invalidate the proceedings at that meeting.

(5) Subject to the constitution of the company, where a meeting of shareholders is adjourned for less than one month, 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.

**Sch. 2.3. 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) subject to the constitution of the company, 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.

**Sch. 2.4.Quorum.**

(1) Subject to Subsection (3), no business may be transacted at a meeting of shareholders if a quorum is not present.

(2) Subject to the constitution of the company, a quorum for a meeting of shareholders is present if shareholders or their proxies are present 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) Where a quorum is not present within 30 minutes after the time appointed for the meeting—

- (a) in the case of a meeting called under Section 102(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, subject to the constitution of the company, where, 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.

**Sch. 2.5.Voting.**

(1) In the case of a meeting of shareholders held under Section 3(a) of Schedule 2, unless a poll is demanded, voting at the meeting shall be by whichever of the following methods is determined by the Chairman of the meeting:—

- (a) voting by voice;
- (b) voting by show of hands.

(2) In the case of a meeting of shareholders held under Section 3(b) of Schedule 2, 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 Chairman 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 Subsection (4).

(4) At a meeting of shareholders a poll may be demanded by—

- (a) not less than five shareholders having the right to vote at the meeting; or
- (b) a shareholder or shareholders representing not less than 10% 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% 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) Where a poll is taken, votes shall be counted according to the votes attached to the shares of each shareholder present in person or by proxy and voting.

(7) Subject to the constitution of the company, the Chairman of a shareholders' meeting is not entitled to a casting vote.

(8) For the purposes of this Act, the instrument appointing a proxy to vote at a meeting of a 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.

#### **Sch. 2.6. 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 one year.

(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.

(5) The constitution of a company may provide that a proxy is not effective unless it is produced by a specified time before the start of a meeting if the time specified is not earlier than 48 hours before the start of the meeting.

#### **Sch. 2.7. 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 Chairman of the meeting are *prima facie* evidence of the proceedings.

#### **Sch. 2.8. 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) Where the notice is received by the board not less than one month 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) Where the notice is received by the board not less than seven days and not more than one month 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) Where the notice is received by the board less than seven 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) Where the directors intend that shareholders may vote on the proposal by proxy, 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 1,000 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.

### **Sch. 2.9. Corporations may act by representatives.**

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 could appoint a proxy.

### **Sch. 2.10. Votes of joint holders.**

Where two 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.

### **Sch. 2.11. Loss of voting right where calls unpaid.**

Subject to the constitution of a company, where a sum due to a company in respect of a share has not been paid, that share may not be voted at a shareholders' meeting other than a meeting of an interest group.

**Sch. 2.12. Other proceedings.**

Except as provided in this Schedule, and subject to the constitution of the company, a meeting of shareholders may regulate its own procedure.

**SCHEDULE 3 – SECTIONS THAT CONFER POWERS ON DIRECTORS  
THAT CANNOT BE DELEGATED.**

Sec. 111.

- (a) Section 43;
- (b) Section 47;
- (c) Section 50;
- (d) Section 52;
- (e) Section 53;
- (f) Section 57;
- (g) Section 63;
- (h) Section 65(4);
- (i) Section 162;
- (j) Section 168;
- (k) Section 234;
- (l) Section 235.

**SCHEDULE 4 – PROCEEDINGS OF THE BOARD OF A COMPANY.**

Sec. 138.

**Sch. 4.1. Chairman.**

(1) The directors may elect one of their number as Chairman of the board.

(2) The director elected as Chairman holds that office until he dies, resigns, is prohibited from being a director of a company under Section 425, 426 or 428 or the directors elect a Chairman in his place.

(3) Where no Chairman is elected, or where at a meeting of the board the Chairman is not present within five minutes after the time appointed for the commencement of the meeting, the directors present may choose one of their number to be Chairman of the meeting.

**Sch. 4.2. Notice of meeting.**

(1) A director or, where requested by a director to do so, an employee of the company, may convene a meeting of the board by giving notice in accordance with this section.

(2) Not less than two days notice of a meeting of the board shall be sent to every director who is in the country, 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 where all directors entitled to receive notice of the meeting attend the meeting without protest as to the irregularity or where all directors entitled to receive notice of the meeting agree to the waiver.

**Sch. 4.3. Methods of holding meetings.**

A meeting of the board may be held either—

- (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.

**Sch. 4.4. 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 where a quorum is not present.

**Sch. 4.5. Voting.**

(1) Every director has one vote.

(2) The Chairman does not have a casting vote.

(3) A resolution of the board is passed where it is agreed to by all directors present without dissent or where 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.

**Sch. 4.6.Minutes.**

The board shall ensure that minutes are kept of all proceedings at meetings of the board.

**Sch. 4.7.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 a document sent or received by facsimile machine, telex, computer or other electronic device that provides that document, or a copy of that document, to a person in a permanent form or image, including an electronic or magnetic form or image) 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.

**Sch. 4.8.Other proceedings.**

Except as provided in this Schedule, the board may regulate its own procedure.



**SCHEDULE 5 – PROVISIONS APPLYING TO ACCOUNTING STANDARDS BOARD.**

Sec. 204(6).

**Sch. 5.1. Term of office.**

(1) Every member of the Accounting Standards Board appointed by Papua New Guinea Institute of Accountants, Inc. and by the Minister by notice in the National Gazette (in this Schedule referred to as an “appointed member”) shall be appointed for the term specified in the notice, being a term not exceeding five years.

(2) An appointed member may from time to time be reappointed.

**Sch. 5.2. Continuation in office after term expires.**

Notwithstanding Section 1 of this Schedule, every appointed member whose term of office has expired shall, unless sooner vacating office under Section 3 of this Schedule, continue to hold office by virtue of the appointment for the term that has expired, until—

- (a) that member is reappointed; or
- (b) a successor to that member is appointed.

**Sch. 5.3. Extraordinary vacancies.**

(1) An appointed member may at any time be removed from office by the Minister for disability affecting the performance of his duties as a member, bankruptcy, neglect of duty, or misconduct, proved to the satisfaction of the Minister.

(2) An appointed member may at any time resign office by giving written notice to that effect to the Minister.

(3) Where an appointed member dies, or resigns, or is removed from office, the vacancy created shall be deemed to be an extraordinary vacancy.

(4) An extraordinary vacancy may be filled by the appointment of a person by the Minister and—

- (a) where the vacating member was appointed under Section 204(3)(c), shall be appointed on the recommendation of the Papua New Guinea Institute of Accountants, Inc.; and
- (b) where the vacating member was appointed under Section 204(3)(d), shall be appointed on the recommendation of the Accountants Registration Board established under the *Accountants Act 1996*.

(5) A person appointed to fill an extraordinary vacancy shall be appointed for the residue of the term for which the vacating member was appointed.

(6) The powers of the Accounting Standards Board are not affected by a vacancy in its membership.

**Sch. 5.4.Meetings of Accounting Standards Board.**

(1) The Chairman shall convene such meetings of the Accounting Standards Board as he thinks necessary for the efficient performance of the functions of the Accounting Standards Board.

(2) Meetings of the Accounting Standards Board shall be held at such times and places as the Chairman determines.

(3) The quorum at any meeting of the Accounting Standards Board shall be four.

**Sch. 5.5.Chairman.**

(1) The Chairman shall preside at every meeting of the Accounting Standards Board at which he is present.

(2) Where the Chairman is incapable of acting by reason of illness, absence, or other sufficient cause, or where the Chairman considers it not proper or desirable to participate personally in relation to a determination, the members of the Accounting Standards Board shall, by resolution, appoint one of their number to act as Chairman for the period or purpose stated in the appointment.

(3) No appointment of a member of the Accounting Standards Board to act as Chairman under Section 2 of this Schedule, and no act done by that member as such, and no act done by the Accounting Standards Board while any member is acting as such, shall, in any proceedings, be questioned on the ground that the occasion for the appointment had not arisen or had ceased.

**Sch. 5.6.Voting at meetings.**

(1) All questions arising at a meeting of the Accounting Standards Board as to—

- (a) the approval of a financial reporting standard; or
- (b) the approval of an amendment to an approved financial reporting standard; or
- (c) the revocation of the approval of an approved financial reporting standard,

shall be decided by a majority of the votes cast by the members of the Accounting Standards Board.

(2) All other questions arising at a meeting of the Accounting Standards Board shall be decided by a majority of the votes cast by the members present.

(3) A resolution in writing signed, or assented to by letter or telegram or a transmission by any other means, including a facsimile machine, telex, computer or other electronic device that provides a document, or a copy of a document, to a person in a permanent form or image, including an electronic or magnetic form or image, by all members of the Accounting Standards Board, shall be as valid and effectual as if

it had been passed at a meeting of the Accounting Standards Board duly called and constituted.

**Sch. 5.7.Procedure.**

Subject to this Act, the Accounting Standards Board may regulate its procedure in such manner as it thinks fit.

**Sch. 5.8.Members not personally liable.**

No member of the Accounting Standards Board is personally liable for an act or default done or made by the Accounting Standards Board or by any member of the Accounting Standards Board in good faith in the course of the operations of the Accounting Standards Board.

**Sch. 5.9.Remuneration and travelling allowances.**

The members of the Accounting Standards Board shall be paid fees and allowances in accordance with the *Boards (Fees and Allowances) Act 1955*.

**SCHEDULE 6 – INFORMATION TO BE CONTAINED IN ANNUAL RETURN.**

Sec. 215.

An annual return shall contain the following information:–

- (a) the name and registration number of the company;
- (b) the year to which the annual return relates;
- (c) the date of the annual meeting;
- (d) the address of the registered office of the company;
- (e) the address for service of the company;
- (f) the postal address of the company;
- (g) details of registered charges;
- (h) where any records are not kept at the company's registered office under Section 164(1), details of those records and of the place or places where they are kept; and
- (i) the following information relating to the shares in the company:–
  - (i) the number of shares issued and, where 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 the 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;
- (j) the full names, nationality, residential addresses, postal addresses and dates of birth of the directors and any secretary of the company;
- (k) the following information relating to shareholders of the company:–
  - (i) the names and residential addresses of all the shareholders of the company;
  - (ii) the number of shares held by each shareholder;

- (iii) the number of shares transferred by existing shareholders or past shareholders—
  - (A) since the last annual return; or
  - (B) in the case of the first annual return of a company incorporated under this Act, since the date of registration;
- (iv) the nationality of the shareholders;
- (l) a statement whether, at any time—
  - (i) since the last annual return; or
  - (ii) in the case of the first annual return of a company incorporated under this Act, since the date of registration,

the company's financial statements were required by this Act to be audited;

- (m) the date of the last annual meeting of the company held under this Act or, where 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 103, the date on which the resolution was passed;
- (n) in the case of a company deemed registered under this Act that has not been required to hold an annual meeting under this Act—
  - (i) the date of the last annual general meeting held under the repealed Act; or
  - (ii) where the company avoided the need for an annual general meeting by doing everything required to be done at that meeting by entry in its minute book under Section 149(6) of the repealed Act, the date on which the last thing required to be done at that meeting was done under Section 149(6) of the repealed Act;
- (o) whether the company undertook any activities, and the date of commencement of the activity;
- (p) the principal activities of the company;
- (q) particulars of the ultimate holding company including—
  - (i) its name and registered number; and
  - (ii) place of incorporation;
- (r) the total value of the assets and liabilities of the company;
- (s) the number of part time and full time employees of the company;
- (t) a declaration by a director or secretary that the company satisfies the solvency test, that the declaration is made under a resolution by the company's board of directors to adopt the contents of the annual return and all the information in the return is true and correct;

- (u) in relation to the declaration in Paragraph (t) the name of the director or secretary, the capacity of the person who made the declaration and the date of signing;
- (v) any other prescribed information, if any.

**SCHEDULE 7 – PROCEEDINGS AT MEETINGS OF CREDITORS.**

Sec. 243(2), 244(1), 293(5), 362(4), 363(4).

**Sch. 7.1. Methods 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 at 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.

**Sch. 7.2. Notice of meeting.**

(1) Written notice of—

- (a) the time and place of every meeting to be held under Section 1(a) of this Schedule; or
- (b) the time and method of communication for every meeting to be held under Section 1(b) of this Schedule; or
- (c) the time and address for the return of voting papers for every meeting to be held under Section 1(a) or (b) of this Schedule,

shall be sent to every creditor entitled to attend the meeting, and to any liquidator not less than five 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; and
- (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 a meeting of creditors does not invalidate anything done by a meeting of creditors where—

- (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 or failure.

(4) Where the meeting of creditors agrees, the Chairman 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) Where a meeting of creditors under Section 1(a) or (b) of this Schedule is adjourned for less than one month, 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.

### **Sch. 7.3.Chairman.**

(1) Where a liquidator has been appointed and is present, or where the liquidator has appointed a nominee and the nominee is present, he shall act as Chairman of a meeting held in accordance with Section 1(a) or (b) of this Schedule.

(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 Chairman of the meeting.

### **Sch. 7.4.Quorum.**

(1) A quorum for a meeting of creditors is present where—

- (a) three creditors who are entitled to vote or their proxies are present; or
- (b) where the number of creditors entitled to vote does not exceed three, the creditors who are entitled to vote or their proxies are present.

(2) Where 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 Chairman 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.

### **Sch. 7.5.Voting.**

(1) At any meeting of creditors or a class of creditors, not being a meeting held for the purposes of Section 244, a resolution is adopted where 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 244, a resolution is adopted where a majority in number representing 75% 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.

### **Sch. 7.6.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 shall state whether the appointment is for a particular meeting or a specified term not exceeding one year.

(4) No proxy is effective in relation to a meeting unless a copy of the notice of appointment is given to the liquidator or, where no liquidator is acting, to the person by whom the notice convening the meeting was given, not later than 48 hours before the start of the meeting.

#### **Sch. 7.7.Minutes.**

(1) The person chairing a meeting of creditors, or in the case of a meeting held under Section 1(c) of this Schedule, 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 the meeting are *prima facie* evidence of the proceedings.

#### **Sch. 7.8.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.

#### **Sch. 7.9.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.

**SCHEDULE 8 – POWERS OF LIQUIDATORS.**

Sec. 310(2).

The liquidator of a company has power to do all or any of the following:–

- (a) commence, continue, discontinue, and defend legal proceedings;
- (b) carry on the business of the company, to the extent necessary for the liquidation;
- (c) appoint a lawyer;
- (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 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 shareholders for–

- (i) the purpose of informing creditors or shareholders of progress in the liquidation; and
  - (ii) the purpose of ascertaining the views of creditors or shareholders on any matter arising in the liquidation; and
  - (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.

**SCHEDULE 9 – PREFERENTIAL CLAIMS.**

Sec. 248, 254, 279, 305(5), 360.

**Sch. 9.1. Fees, expenses and costs.**

The liquidator shall 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; and
- (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; and
- (c) the actual out-of-pocket expenses necessarily incurred by a liquidation committee.

**Sch. 9.2. Employee entitlements.**

After paying the claims referred to in Section 1 of this Schedule, the liquidator shall next pay the following claims:–

- (a) subject to Section 5 of this Schedule, 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 Section 5 of this Schedule, all amounts due in respect of workers' compensation under any law relating to workers' compensation that accrued before the commencement of the liquidation;
- (c) subject to Section 5 of this Schedule, all remuneration becoming payable to an employee in respect of annual leave or long service leave (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;
- (d) subject to Section 5 of this Schedule, amounts deducted by the company from the wages or salary of an employee in order to satisfy obligations of the employee;
- (e) amounts that are preferential claims under Section 313(2).
- (f)<sup>1</sup> Subject to Section 5 of this Schedule, all mandatory and voluntary employee and employer contributions made, or which should have been made, in accordance with the provisions of the Superannuation (General Provisions) Act 2000.

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<sup>1</sup> Schedule 9 Amended by No. 90 of 2006, Sched. 1.

**Sch. 9.3. Costs of compromise.**

After paying the claims referred to in Section 2 of this Schedule, the liquidator shall next pay the amount of any costs referred to in Section 248(c).

**Sch. 9.4. Government charges etc.**

After paying the sums referred to in Section 3 of this Schedule, the liquidator shall next pay the amount of—

- (a) all rates that are or are in the nature of municipal or other local rates, due from the company at the date of the commencement of the liquidation and having become due and payable within the one year before that date; and
- (b) assessed income tax, or income tax and social services contribution, being tax or tax and contribution assessed under any Act before the date of commencement of the liquidation and not exceeding in the whole one year's assessment; and
- (c) any amount due and payable by way of repayment of any advance made to the company, or in payment of any amount owing by the company for goods supplied or services rendered to it, under any Act, relating to or providing for the improvement, development, or settlement of land or the aid, development, or encouragement of mining.

**Sch. 9.5. Limitation on employee entitlements.**

The total sum to which priority is to be given under Section 2(a), (b), (c) or (d) of this Schedule shall not, in the case of any one employee exceed K20,000.00 or such greater amount as may be prescribed at the commencement of the liquidation.

**Sch. 9.6. Right of priority of person advancing payment.**

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 annual leave or long service leave,

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.

**Sch. 9.7. Insufficient assets.**

The claims listed in each of Sections 1, 2, 3, and 4 of this Schedule—

- (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 between themselves; 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,

and for the purposes of this section, 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.

**Sch. 9.8. Payments under Section 7 of this Schedule are an unsecured debt owed by the company.**

To the extent that the claims to which Section 7 of this Schedule applies are paid out of assets referred to in Paragraph (b) of that Section, the amount so paid is an unsecured debt due by the company to the secured party.

**Sch. 9.9. Distrain on goods or effects of company.**

Where 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.

**Sch. 9.10. Payments received by company under contract of insurance.**

Where the company is insured under a contract of insurance, entered into before the commencement of the liquidation, against liability to any third parties, then, where—

- (a) the company incurs or has incurred any such liability (whether before or after the commencement of the liquidation); and
- (b) the company or the liquidator has received an amount in respect of that liability from the insurer,

the liquidator shall, after deducting any expenses of or incidental to getting it in, pay that amount to the third party in respect of whom the liability was incurred to the extent necessary to discharge the liability, or any part of the liability remaining undischarged, in priority to all payments in respect of debts referred to in Sections 1, 2, 3 and 4 of this Schedule.

**Sch. 9.11. Liability of company is greater than liability of insurer.**

Where the liability of the insurer to the company is less than the liability of the company to the third party, Section 10 of this Schedule does not limit the rights of the third party in respect of the balance.

**Sch. 9.12. Effect of Sections 10 and 11 of this Schedule where agreement entered into.**

The provisions of Sections 10 and 11 of this Schedule have effect notwithstanding any agreement to the contrary entered into after the commencement of the liquidation.

**Sch. 9.13. Treatment of annual, long service and sickness leave.**

For the purposes of this Schedule, remuneration in respect of a period of annual leave or long service leave 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.

**SCHEDULE 10 – PAYMENT OF CLAIMS IN LIQUIDATION.**

Sec. 361(5).

**Sch. 10.1. Distribution of funds by liquidator.**

The liquidator may from time to time distribute such amount of the funds held by him as he thinks fit to creditors who have made a claim in the liquidation.

**Sch. 10.2. List of claimants and amounts to be paid by liquidator.**

Before making any payment to creditors, the liquidator shall prepare a list showing all claims received, the amount of the claim, and the amount to be paid to each person who has made a claim.

**Sch. 10.3. Steps that may be taken by the liquidator prior to payment.**

Before making a payment the liquidator may—

- (a) fix a date before which any creditor who wishes to participate in the payment shall make a claim; and
- (b) give public notice that a payment is to be made, and of the date fixed under Paragraph (a).

**Sch. 10.4.<sup>2</sup> Date by which claim to be made.**

<sup>3</sup>A date fixed for the purpose of Section 3(a) of this Schedule shall not be less than one month after the date of the public notice given under Section 3(b) of this Schedule or more than one month before the date of the proposed payment.

**Sch. 10.5. Exclusion of creditor that does not make a claim by specified date.**

The liquidator may exclude from a payment any creditor who does not make a claim before the date specified in a notice given under Section 3 of this Schedule.

**Sch. 10.6. Inspection of list of creditors.**

The list prepared by the liquidator under Section 2 of this Schedule shall be available for inspection by any creditor who has made a claim or any shareholder of the company on each working day which is less than 14 days before the date of the payment.

**Sch. 10.7. Payment by liquidator.**

The liquidator shall make the payment on the date specified in the public notice given under Section 3 of this Schedule to each creditor shown on the list, unless notice of an application under Section 332 for an order reversing or modifying the

<sup>2</sup> Schedule 10 Amended by No. 90 of 2006, Sched. 1.

<sup>3</sup> Schedule 10 Amended by No. 90 of 2006, Sched. 1.



decision of the liquidator to accept the claim of that creditor has been served on the liquidator before that date and no payment made in accordance with this section shall be liable to be disturbed as a consequence of any subsequent challenge to the liquidator's acceptance of a claim.

**Sch. 10.8.Claim by creditor after payment made by liquidator.**

Where a creditor makes a claim after one or more payments have been made to creditors by the liquidator—

- (a) that creditor shall be paid at the same rate in respect of his claim as all other creditors with equal ranking claims that have previously been paid, to the extent that the assets of the company are sufficient to do so; and
- (b) any payments which have already been made to other creditors shall not be disturbed; and
- (c) that creditor shall be entitled to participate in the same manner as other creditors with equal ranking claims in any further payments to such creditors.

**Sch. 10.9.Application under Section 332.**

Where, at the time a payment is made to creditors, a claim by any creditor—

- (a) has been rejected by the liquidator, and the creditor has applied to the court under Section 332 for an order reversing or modifying the decision of the liquidator; or
- (b) has been allowed by the liquidator, but notice of an application under Section 332 for an order reversing or modifying the decision of the liquidator has been served on the liquidator,

the liquidator—

- (c) shall not make a payment to that creditor in respect of that claim; and
- (d) may if he thinks fit make provision for the payment that would be made in respect of that claim, and for the probable cost of the application, where the claim is admitted, before making any payment to the other creditors.

**Sch. 10.10.Guarantors.**

(1) A guarantor of any debt or obligation of the company who has paid or discharged the debt or obligation in whole or in part, whether before or after the commencement of the liquidation, may, subject to any agreement with the creditor concerned to the contrary—

- (a) where the creditor concerned has made a claim in the liquidation in respect of the amount which has been paid or discharged, stand in the

place of the creditor so far as the claim in respect of that amount is concerned; or

- (b) otherwise, make a claim in respect of the amount of the debt or obligation paid or discharged.

(2) In this section “**creditor concerned**” means a creditor or creditors of the company who has had the debt or debts of the company owed to that creditor or creditors guaranteed by another person.

**SCHEDULE 11 – PROCEEDINGS AT MEETINGS OF LIQUIDATION  
COMMITTEES.**

Sec. 363(3).

**Sch. 11.1. 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.

**Sch. 11.2. 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.

**Sch. 11.3. Resignation.**

A member of the committee may resign by notice in writing signed by him and given to the liquidator.

**Sch. 11.4. Office becoming vacant.**

Where 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 or shareholders, as the case may be, the office of that member becomes vacant.

**Sch. 11.5. Removal of a member.**

A member of the committee may be removed by a resolution carried at a meeting of creditors where the member represents creditors, or of shareholders where the member represents shareholders, of which five days notice has been given, stating the object of the meeting.

**Sch. 11.6. 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 authorized director or representative of, a company which is a creditor or shareholder, as the case may be.

**Sch. 11.7. Committee with vacancy may act.**

The continuing members of the committee, if not less than two, may act even though a vacancy exists in the committee.

**SCHEDULE 12 – LIQUIDATION OF ASSETS OF OVERSEAS COMPANIES.**

Sec. 392(3), 393(1).

**Sch. 12.1. Modified application of Part XVIII.**

Part XVIII applies to the liquidation of the assets in the country of an overseas company, with the following modifications and exclusions:–

- (a) references to assets are to be taken as references to assets in the country;
- (b) references to a company are to be taken as references to an overseas company;
- (c) references to removal from the register are to be taken as references to ceasing to carry on business in the country;
- (d) the following provisions of that Part do not apply to such a liquidation:–
  - (i) Section 298(1)(d), (e), (f), and (g);
  - (ii) Section 318;
- (e) Section 298(1)(b) does not affect the tenure of directors of an overseas company, but the overseas company and its directors cease to have any powers, functions, or duties in relation to the company's assets in the country, other than those required or permitted to be exercised by Part XVIII;
- (f) Section 307 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 the country and is ready to be removed from the overseas register.

**Sch. 12.2. 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 the country 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 the country in relation to the balance of a debt remaining unpaid after the completion of a liquidation.

**SCHEDULE 13 – PENALTIES FOR OFFENCES AGAINST THIS ACT.**

Sec. 413, 414.

**PART 1 – SECTIONS WHICH CARRY A FINE NOT EXCEEDING K5,000.00.**

Section 26(5)(a);  
Section 50(5);  
Section 65(7)(a);  
Section 75(5)(a);  
Section 103(8)(a);  
Section 218(2)(a);  
Section 226(3);  
Section 234(6);  
Section 235(6);  
Section 260(4);  
Section 261(8);  
Section 293(10).

**PART 2 – SECTIONS WHICH CARRY A FINE NOT EXCEEDING K10,000.00.**

Section 35(3);  
Section 67(4)(a);  
Section 68(6)(a);  
Section 70(2);  
Section 114(2);  
Section 118(4);  
Section 126(2);  
Section 164(5)(a);  
Section 189(4)(a);  
Section 190(6)(a);  
Section 202(4);  
Section 216(2)(a);  
Section 220(8);  
Section 256(3);

Section 259(3);  
Section 273(4);  
Section 274(4);  
Section 276(5);  
Section 277(2);  
Section 278(2);  
Section 300(7);  
Section 305(7);  
Section 328(4);  
Section 383(3)(a);  
Section 389(2)(a);  
Section 391(5)(a);  
Section 397(7);  
Section 406(3);  
Section 424.

**PART 3 – SECTIONS WHICH CARRY A FINE NOT EXCEEDING K50,000.00 OR IMPRISONMENT FOR A TERM NOT EXCEEDING TWO YEARS, OR BOTH.**

Section 321(2);  
Section 322(2);  
Section 400(4);  
Section 401(2);  
Section 403(4).

**PART 4 – SECTIONS WHICH CARRY A FINE NOT EXCEEDING K200,000.00 OR IMPRISONMENT FOR A TERM NOT EXCEEDING FIVE YEARS, OR BOTH.**

Section 112(5);  
Section 115(2);  
Section 123(4);  
Section 127(6);  
Section 352(6);  
Section 353(11);  
Section 420(1) and (2);

Section 421;  
Section 422;  
Section 423;  
Section 425(4);  
Section 426(6);  
Section 428(9).

**PART 5 – SECTIONS WHICH CARRY A FINE FOR DIRECTORS NOT EXCEEDING  
K5,000.00.**

Section 26(5)(b);  
Section 65(7)(b);  
Section 75(5)(b);  
Section 103(8)(b);  
Section 163(6);  
Section 218(2)(b);  
Section 222(13);  
Section 223(2).

**PART 6 – SECTIONS WHICH CARRY A FINE FOR PERSONS NOT EXCEEDING  
K10,000.00.**

Section 33(4);  
Section 34(6);  
Section 44(4);  
Section 56(5);  
Section 62(4);  
Section 67(4)(b);  
Section 68(6)(b);  
Section 137(3);  
Section 153(4);  
Section 164(5)(b);  
Section 165(3);  
Section 170(5);  
Section 186;

Section 188(5);  
Section 189(4)(b);  
Section 190(6)(b);  
Section 202(3);  
Section 203(2);  
Section 209(3);  
Section 210(3);  
Section 211(2);  
Section 215(9);  
Section 216(2)(b);  
Section 250(5);  
Section 251(3);  
Section 383(3)(b);  
Section 389(2)(b);  
Section 391(5)(b).

**PART 7 – SECTIONS CARRYING A FINE FOR DIRECTORS NOT EXCEEDING  
K100,000.00.**

Section 185(1);  
Section 185(2);  
Section 187;  
Section 215(10).



**SCHEDULE 14 – PROVISIONS APPLYING TO COMPANIES DEEMED TO BE REGISTERED UNDER COMPANIES ACT 1997.**

Sec. 442, 443, 454.

In any case where a company is deemed to be registered under this Act pursuant to Section 443 or is registered after submitting an application under Section 442, in this Schedule referred to as deemed to be registered—

- (a) the memorandum and articles, if any, of the company cease to have effect; and
- (b) the persons holding office as directors of the company immediately before the company was deemed to be registered are the directors of the company; and
- (c) the particulars of the directors of the company shown in—
  - (i) the latest return furnished by the company under Section 141(6) of the repealed Act; or
  - (ii) the latest annual return filed by the company under Section 166 or Section 167 of the repealed Act,

whichever is later, shall be treated as entered on the register under Section 395; and

- (d) in the case of any company, other than a company of the kind referred to in Paragraph (e) or (f)—
  - (i) the number of shares in the company on deemed registration is the number of shares in the company immediately before that deemed registration; and
  - (ii) those shares have attached to them the same liability to make payments as the shares had immediately before the company was deemed to be registered; and
- (e) in the case of an unlimited company or a company limited by guarantee, which does not have a share capital—
  - (i) the number of shares in the company on deemed registration is equal to the number of persons who were members of the company immediately before the deemed registration; and
  - (ii) every member of the company is the holder of one share in the company with no further consideration for the issue of that share being payable by that person; and
  - (iii) the shares are subject to the conditions that—
    - (A) the holder agrees to contribute to the assets of the company in the event of its being liquidated while he is a member, or within one year thereafter, for payment of the debts and liabilities contracted before he ceases or ceased to be a

- member, and the costs, charges, and expenses of liquidation, and for the adjustment of the rights of members among themselves, such amount as may be required but not exceeding, in the case of a limited company, the sum specified in the memorandum of association; and
- (B) the holder may at any time surrender a share to the company by notice in writing to the company without any payment by the company, and, without affecting any liability of that member to the company under Subparagraph (A), such share surrendered is to be treated as cancelled; and
- (C) the board may not issue other shares in the company; and
- (f) in the case of an unlimited company or a company limited by guarantee, which has a share capital—
- (i) the company has two classes of shares, class A shares and class B shares; and
  - (ii) the number of A shares in the company on deemed registration is equal to the number of persons who were members of the company immediately before the deemed registration, other than by reason only of holding a share in the company; and
  - (iii) the number of B shares in the company on deemed registration is equal to the number of shares in the company immediately before the deemed registration; and
  - (iv) every person who was a member of the company other than by reason only of holding a share in the company immediately before the deemed registration is the holder of one A share in the company with no further consideration for the issue of that share payable by that person; and
  - (v) every share in the company immediately before the deemed registration is a B share; and
  - (vi) the A shares are subject to the conditions that—
    - (A) the holder agrees to contribute to the assets of the company in the event of its being liquidated while he is a member, or within one year thereafter, for payment of the debts and liabilities contracted before he ceases or ceased to be a member, and the costs, charges, and expenses of liquidation, and for the adjustment of the rights of members among themselves, such amount as may be required but not exceeding, in the case of a limited company, the sum specified in the memorandum of association; and

- (B) the holder may at any time surrender a share to the company by notice in writing to the company without any payment by the company, and, without affecting any liability of that member to the company under Subparagraph (A), such share surrendered is to be treated as cancelled; and
- (C) the board may not issue other A shares in the company; and
- (vii) the B shares have attached to them the same liability to make payments as the shares had immediately before the company was deemed to be registered; and
- (g) the registered office of the company is the same as the registered office of the company immediately before the company was deemed to be registered; and
- (h) the address for service of the company is at the registered office of the company.

**SCHEDULE 15 – ORDER OF PRIORITY OF REGISTRABLE CHARGES.**

Sec. 231.

**Sch. 15.1. Priority of registered charges.**

- (1) A registered charge on property of a company has priority over—
  - (a) a subsequent registered charge on the property, unless the subsequent registered charge was created before the creation of the prior registered charge and the chargee in relation to the subsequent registered charge proves that the chargee in relation to the prior registered charge had notice of the subsequent registered charge at the time when the prior registered charge was created; and
  - (b) an unregistered charge on the property created before the creation of the registered charge, unless the chargee in relation to the unregistered charge proves that the chargee in relation to the registered charge had notice of the unregistered charge at the time when the registered charge was created; and
  - (c) an unregistered charge on the property created after the creation of the registered charge.
- (2) A registered charge on property of a company is postponed to—
  - (a) a subsequent registered charge on the property, where the subsequent registered charge was created before the creation of the prior registered charge and the chargee in relation to the subsequent registered charge proves that the chargee in relation to the prior registered charge had notice of the subsequent registered charge at the time when the prior registered charge was created; and
  - (b) an unregistered charge on the property created before the creation of the registered charge, where the chargee in relation to the unregistered charge proves that the chargee in relation to the registered charge had notice of the unregistered charge at the time when the registered charge was created.

**Sch. 15.2. Priority of unregistered charges.**

- (1) An unregistered charge on the property of a company has priority over—
  - (a) a registered charge on the property that was created after the creation of the unregistered charge and does not have priority over the unregistered charge under Section 1(1) of this Schedule; and
  - (b) another unregistered charge on the property created after the first-mentioned unregistered charge.
- (2) Except as provided by this section, any priority accorded by this Schedule to a charge over another charge does not extend to any liability that, at the priority time in relation to the first-mentioned charge, is not a present liability.

(3) Where a registered charge on property of a company secures—

- (a) a present liability and a prospective liability of an unspecified amount; or
- (b) a prospective liability of an unspecified amount,

any priority accorded by this Schedule to the charge over another charge of which the chargee in relation to the first-mentioned charge does not have actual knowledge extends to the prospective liability, whether the prospective liability became a present liability before or after the registration of the first-mentioned charge.

(4) Where a registered charge on property of a company secures—

- (a) a present liability and a prospective liability up to a specified maximum amount; or
- (b) a prospective liability up to a specified maximum amount,

and the notice submitted to the Registrar under Section 222 or 223 in relation to the charge sets out the nature of the prospective liability and the amount so specified, then any priority accorded by this Schedule to the charge over another charge extends to any prospective liability secured by the first-mentioned charge to the extent of the maximum amount so specified, whether the prospective liability became a present liability before or after the registration of the first-mentioned charge and notwithstanding that the chargee in relation to the first-mentioned charge had actual knowledge of the other charge at the time when the prospective liability became a present liability.

(5) Where—

- (a) a registered charge on property of a company secures—
  - (i) a present liability and a prospective liability up to a specified maximum amount; or
  - (ii) a prospective liability up to a specified maximum amount,

but the notice submitted to the Registrar under Section 222 or 223 in relation to the charge does not set out the nature of the prospective liability or the maximum amount so specified; or

- (b) a registered charge on property of a company secures a prospective liability of an unspecified amount,

the following paragraphs have effect—

- (c) any priority accorded by this Schedule to the charge over another charge of which the chargee in relation to the first-mentioned charge has actual knowledge extends to any prospective liability secured by the first-mentioned charge that had become a present liability at the time when the chargee in relation to the first-mentioned charge first obtained actual knowledge of the other charge; and
- (d) any priority accorded by this Schedule to the charge over another charge of which the chargee in relation to the first-mentioned charge has actual

knowledge extends to any prospective liability secured by the first-mentioned charge that became a present liability, as the result of the making of an advance, after the time when the chargee in relation to the first-mentioned charge first obtained actual knowledge of the other charge if, at that time, the terms of the first-mentioned charge required the chargee in relation to that charge to make the advance after that time, and so extends to that prospective liability whether the advance was made before or after the registration of the first-mentioned charge and notwithstanding that the chargee in relation to the first-mentioned charge had actual knowledge of the other charge at the time when the advance was made.

**Sch. 15.3. Two or more priority times.**

Where, by virtue of the definition of “priority time” in Section 6 of this Schedule, a registered charge has two or more priority times each of which relates to a particular liability secured by the charge, each of those liabilities shall, for the purposes of this Schedule, be deemed to be secured by a separate registered charge the priority time of which is the priority time of the first-mentioned registered charge that relates to the liability concerned.

**Sch. 15.4. Notice of charge includes constructive notice.**

A reference in this Schedule to a person having notice of a charge includes a reference to the person having constructive notice of the charge.

**Sch. 15.5. Prior and subsequent registered charges.**

In this Schedule and in Section 231—

- (a) a reference to a prior registered charge in relation to another registered charge is a reference to a charge the priority time of which is earlier than the priority time of the other charge; and
- (b) a reference to a subsequent registered charge in relation to another registered charge is a reference to a charge the priority time of which is later than the priority time of the other registered charge.

**Sch. 15.6. Interpretation.**

In this Schedule—

“**priority time**” in relation to a charge to which Part XIII applies, means—

- (a) except as provided by Paragraph (b) and (c), the time and date appearing in the register in relation to the charge, being a time and date entered in the register pursuant to Section 225;
- (b) where a notice has been submitted to the Registrar under Section 223 in relation to a charge on property, being a charge that, at the time when the notice was submitted, was already registered

under Part XIII, the earlier or earliest time and date appearing in the register in relation to the charge, being a time and date entered in the register pursuant to Section 225; and

- (c) to the extent that the charge has effect as varied by a variation notice of which was required to be submitted under Section 224(2), the time and date entered in the register in relation to the charge pursuant to Section 225;

**“register”** means the register kept under Section 225;

**“registrable”** means a charge to which Part XIII applies;

**“registered charge”** means a charge that is registered under Part XIII;

**“unregistered charge”** means a charge that is not registered under Part XIII, but does not include a charge that is not registrable.

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