Companies Act 2017

Detailed Analysis of the Law

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1.0 Introduction

The Memorandum contains a section-by-section examination of the Cook Islands Company Act 2017 (the "Act"). It is intended to provide a detailed analysis of the Act both from a legal and practical perspective. This preparation of this Memorandum was overseen by the Cook Islands Ministry of Justice, with assistance from the Private Sector Development Initiative, Asian Development Bank. For a more general overview of the Companies Act, including a discussion of the new online registry that implements the Act, please see the companion memorandum titled "Companies Act 2017 and Online Registry: Overview of Reform" that is posted on the MOJ registry website.

The former statutory basis of company law in Cook Islands was the Companies Act 1970-1971. That statute merely applied the New Zealand Companies Act 1955 to the Cook Islands with some minor modifications. Numerous amendments were made to that law making it difficult to read and particularly hard for non-lawyers to sort through. The result was that not only did the Cook Islands lack a company law statute drafted specifically for the Cook Islands, but worse, the law was disjointed and not completely current with modern trends. New Zealand began a process of reforming its company legislation in the late 1980s and in 1993 enacted a new Companies Act. The new Cook Islands Companies Act 2017 is based upon the New Zealand 1993 Act, but streamlined and customised for a jurisdiction the size of the Cook Islands.

The new Companies Act 2017 is part of a three-pronged package of legislative reform aimed at improving the overall business environment in the Cook Islands. Just as important as company law reform is the modernisation of the law relating to securing charges over personal property (that is, property other than land). The newly enacted Personal Property Securities Act 2017 (PPSA) and its online, electronic registry will facilitate increased access to credit in the Cook Islands. The third element of the reform package is an amendment to the Incorporated Societies Act 1994. This amendment is not a rewrite of that Act, but is largely confined to providing the legislative context for an online register of incorporated societies. Summaries of the PPSA and incorporated societies reforms are available on the registry website maintained by MOJ.

This Memorandum is not to be interpreted as providing legal advice. This Memorandum has been prepared solely for general informational purposes, and no person should rely on the information contained herein when making decisions on how the Act may apply to a given situation. No person should proceed with any corporate action that might be covered by the Act without the advice of local counsel. Further, given that this Act is new, no Cook Islands court has interpreted the law. The Act is based upon provisions and principals from the New Zealand Company Act. Practitioners may be well served to look to interpretations of that legislation for guidance.

2.0 Detailed Analysis of the Company Act 2017

The following is the section-by-section analysis of the Company Act 2017, with commentary on practical considerations where appropriate.

Clause 1 states the Title of the Act.

Clause 2 is the commencement clause and provides that the Act comes into force on a date to be determined by by the Queen's Representative by Order in Executive Council. The date is December 10, 2017.

Part 1
Preliminary matters

Clause 3 sets out the purpose of the Act.

Clause 4 provides that the Act must be interpreted in accordance with the definitions and other interpretative provisions set out in Schedule 1. A term that is used once only or that is specific to a group of provisions only is usually defined in that context and is not repeated in Schedule 1.

Clause 5 provides that the Act binds the Crown.

Part 2
Incorporation

Clause 6 sets out the essential requirements for a company.

a) The company must have a name, and the rules governing company names are found in clauses 11-14.

b) The company must have a constitution. The constitution replaces what were previously known as the memorandum and articles of association. Clause 15 provides further information about the constitution.

c) The company must have 1 or more shares.

d) The company must have at least 1 shareholder. Note that the previous distinction between private and public companies is not carried forward: there is a single form of company only and, other than requiring at least 1 shareholder, the Act does not prescribe a minimum or maximum number of shareholders.

e) A company must have at least 1 director. Under clause 6(e) there is a residency requirement for directors. The director (in the case of a single director company) or at least 1 director (if there are more than 1) must live in the Cook Islands or in New Zealand. If New Zealand, the director must also be a director of a domestic New Zealand company.

Clause 7 sets out the minimum requirements for registration as a company. The information that must be provided has been mapped to the new online company registry so that the online form gathers the information required by this Clause 7.

Clause 8 requires the Registrar to issue a certificate of incorporation when all filing requirements have been met.

Clause 9 states that the certificate of incorporation is conclusive evidence that the incorporation is valid.

Clause 10 states the essential nature of a company. It is a legal entity in its own right separate from its shareholders. The effect of clause 10(2) is to do away with the ultra vires doctrine in relation to companies. A company has full capacity to carry on or undertake any business or activity, do any act, or enter into any transaction.

Part 3
Company name

Under clause 11, the name of a company must end with the word "Limited" or "Ltd". The Registrar of Companies may refuse to register a company with a name that is inappropriate on 1 of the grounds set out in clause 11(2)(a)-(c), including that the name is already in use of is offensive. There is no provision, as there is in larger jurisdictions, for reservation of a company name prior to an application for registration being made. Given the availability of a searchable online register of companies, it is left to the applicants for incorporation to satisfy themselves that a proposed name is not likely to violate clause 11.

A company may change its name once registered (clause 12) and must change its name if the Registrar requires it do so (clause 13). Clause 14 requires a company to ensure that its name is clearly stated in written communications and documents creating a legal obligation of the company. The purpose of this provision is to alert persons dealing with an entity to its corporate nature.

Part 4
Company constitution

Overview Part 4 relates to the constitution of a company. The constitution is the document that regulates the structure of the company and its internal relationships. The Act sets out three default or "model" constitutions that can be adopted by a company, with the number of shareholders determining which default constitution applies. A company may instead adopts its own customised constitution, in which case it must provide a copy to the Registrar.

Clause 15 provides that every company must have a constitution (clause 15(1)). A company may be incorporated with a constitution specific to the company. When the application for incorporation is made the company can either elect to adopt the applicable model constitution or provide a copy of its own. A third option is that a default constitution may apply but with modifications specific to the company in question.

The Act sets out 3 default constitutions of increasing complexity (clause 15(3)). Which constitution applies by default depends upon the size of the company. For a single shareholder, the default constitution set out in Schedule 2 applies; for 2 to 9 shareholders, the

default constitution set out in Schedule 3 applies; for 10 or more shareholders, the default constitution set out in Schedule 3 applies. Accordingly, for a company that does not have a constitution specific to it but takes a default constitution, that constitution may change according to an increase or decrease in the number of shareholders over the life of the company.

Clause 16 provides for the substitution, adoption, or amendment of a company constitution after incorporation. So, for example, a company that begins life with a default constitution may later adopt a constitution specific to it, and this may be particularly important if the company is liable, by a change in shareholder numbers, to move from 1 default constitution to another.

Clause 17 sets out the effect of the constitution. In particular, it is of no effect to the extent that it contravenes, or is inconsistent with, the Act (clause 17(2)).

Part 5
Shares

Subpart 1—General, contains a number of general provisions relating to shares in a company.

Clause 18 states that a share in a company is personal property.

Clause 19 represents a departure from the old 1970-1971 Act, clause 19(1) provides that a share must not have a nominal or par value. Thus, the concept of nominal capital is redundant under the Act.

Clause 20 states that a company must have at least 1 issued share.

Clause 21(1) sets out the core rights that attach to a share: the rights to vote at company meetings, to an equal share in dividends, and to an equal share in distribution on liquidation. But these rights may be varied or excluded by the constitution or the terms of issue of shares (clause 21(2)).

Clause 22 prohibits a company from issuing a partly paid share (clauses 22(2)).

Subpart 2—Issue of shares provides for the initial and subsequent issue of shares by a company.

Clause 23 requires a newly incorporated company to immediately issue shares to persons named as shareholders in the application to incorporate.

Clause 24 allows a company to issue new shares throuout its life so long as the issuance is completed in accordance with the Constitution or the approval of existing shareholders. Any new issuance must be reported to the Registrar within 10 working days else the directors will suffer a serious penalty.

Clause 25 sets out the standard rule that a share is issued wen the name of the shareholder is entered on the company's share register.

Clause 26 creates a statutory pre-emptive right in favour of existing shareholders when new shares are issued that rank equally with existing shares. This means that the company must offer the existing shareholders the opportunity to participate in the new issue to the extent of maintaining the existing voting or distribution rights or both, as the case may be. Importantly, this clause 26 can be varied or negated by the company constitution.

Clause 27 provides that the company can accept various forms of payment for new shares, including cash, other property or bartered services. The directors are to set the payment terms.

Clause 28 does not allow an issuance to a person that would result in an increase in that person's liability without their consent.

Subpart 3—Distributions to shareholders makes clear that distributions to shareholders include dividends, but the term is broadly defined in clause 30 to include a benefit that passes from the company to a shareholder that is linked to the shares held by that person.

Clause 29 establishes that in order for a distribution to shareholders to be made, there must be reasonable grounds for believing that, after the distribution is made, the company will satisfy the solvency test (clause 29(1)). The solvency test is a benchmark that recurs in various contexts in the Act and is defined in clause 5 of Schedule 1, which reads:

> For the purposes of this Act, a company satisfies the solvency test if—
> (a) the company is able to pay its debts as they become due in the normal course of business; and
> (b) the value of the company's assets is not less than the value of its liabilities, including its contingent liabilities.

Clause 30 defines the term "distribution" to mean any form of payment to a shareholder. The term includes dividends, but is broader.

Clause 31 provides for recovery from a shareholder of a distribution that has been made in breach of compliance with the solvency test set out in clause 29.

Subpart 4—Dividends are a category of shareholder distribution.

Clause 32 says that dividends must not be paid without compliance with the solvency test referenced in clause 29. It also states that dividends must be paid out equally to all shareholders that are in the same class, though this rule can be modified by the Constitution.

Subpart 5—Company may acquire its own shares

Clause 33 makes provision for the acquisition by a company of its own shares. The acquisition is a distribution and subject to the solvency test, but is not a dividend and so not subject to the presumptive rule in clause 32(4) against selective or unequal dividends.

Clause 34 requires a company to notify the Registrar when it acquires its own shares. It must also notify other shareholders of the acquisition unless the offer to acquire was made to all shareholders.

Clause 35 says that a when a company acquires its own shares they must be treated as immediately cancelled. However, there is an exception to this rule found in clause 37.

Clause 36 says that a contract with a company under which the company is required to acquire its own shares is enforceable unless the purchase would violate the solvency test referenced in clause 29.

Subpart 6—Treasury stock

Treasury stock refers to the shares in itself that are acquired by a company and continue to be held by it. Under clause 35(1), the general rule is that that the shares in itself acquired by a company must be treated as immediately cancelled.

Clause 37 sets out an exception to the cancellation requirement in clause 35. Clause 37 allows a company to hold its own shares if the constitution allows and the directors resolved not to cancel the shares.

Clause 38 provides that shares in itself held by the company have no rights for as long as they are held as treasury stock: they cannot be voted nor are any distributions payable to their benefit.

Clause 39 allows a company to transfer shares held as treasury stock, at which time right re-attach to them.

Subpart 7—Redeemable shares

Clause 40 allows for the redemption by a company of its shares. A shareholder or a company can enforce a redemption.

Clause 41 applies the solvency test to a share redemption. However, given that a redemption is not a dividend, and the rule in clause 32(4) that dividends are to be paid to all shareholders equally does not apply.

Clause 42 states that shares that are redeemed are deemed immediately cancelled unless the constitution states otherwise. However, the company may reissue the share.

Clause 43 requires the company to notify the Registrar within 10 working days of a redemption. Severe penalties apply for the failure to provide this notice.

Subpart 8—Financial assistance by company for purchase of its own shares

Clause 44 allows a company to give financial assistance to a person for the purchase of its shares. This is not a shareholder distribution, since by definition the purpose of the provision includes enabling a person to become a shareholder. It is nonetheless subject to solvency test compliance and other procedural safeguards.

Subpart 9—Cross-holdings

Clause 45 states the long-recognized rule that a subsidiary may not hold shares in its holding company.

Clause 46 sets forth a limited exception to this rule in the event a company that holds shares in another company later becomes a subsidiary.

Subpart 10—Transfer of shares

Clauses 47 and 48 set out largely procedural provisions for the transfer of share which reflect long settled company practice and do not require detailed explanation.

Subpart 11—Share Register

Clauses 49-51 set out the requirement that a company must maintain its own internal share register that identifies all shareholders and the rights and obligations around this register. These principals s are long established in company law.

Clause 52 is new to the Cook Islands. It provides that a company must keep information about any beneficial owners of shares and disclose this information to the Registrar upon request. A "beneficial owner" is defined to be the "person who ultimately owns or controls the share." It is a criminal offence to fail to comply with this requirement that can subject directors to prison. This requirement arises from international anti-money laundering standards and also will help prevent foreign-nationals from using locals as "fronts" for businesses that they ultimately own, something seen in neighboring Pacific jurisdictions

Clause 53 allows a personal representative of a deceased shareholder to be registered as such in the company share register.

Subpart 12—Share certificates

Clause 54 speaks to how a share certificate is to be issued and how to handle the issue of lost certificates.

Clause 55 discusses how to register a share transfer, including the requirement that the Registrar be notified of any transfer within 10 working days.

Part 6
Shareholders

Subpart 1—General

Clause 56 sets out the rule that a company must have at least 1 shareholder.

Clause 57 sets out the long-time rule that shareholders do not have any personal liability by reason only of being a shareholder.

Subpart 2—Powers of shareholders

This subpart contains important innovations strengthening the position of shareholders of a company and otherwise allowing for expedited decision-making by shareholders.

Clause 58 reserves certain powers exclusively to the shareholders. These are the power to vary the constitution, to approve a major transaction, and to appoint a liquidator. There is a minor carve-out in relation to the power to appoint a liquidator: the directors may appoint a liquidator on the occurrence of an event specified in the constitution (clause 204(1)(a)). Similarly, unless the constitution provides otherwise, the power to appoint or remove a director, or to appoint an auditor, are exclusive shareholder powers.

Clause 59 details how shareholder power is actually exercised, which is usually via a special resolution or unanimous consent (under clause 62).

Clause 60 indicates the types of shareholder resolutions that are recognized, and states that an ordinary resolution requires over 50% approval whereas a special resolution must be passed by a minimum of 75% of the shareholders (can be higher per the constitution).

Clause 61 prohibits a company from entering into a major transaction without shareholder approval in the form of a special resolution or in the form of unanimous shareholder approval under clause 62. **Major transaction** is defined in clause 62(3). Broadly, it means a transaction in value above 50% of the value of the company's assets before the transaction. The intention is that a change in the nature or direction of the business of the company on this scale should first be approved by the shareholders.

Clause 62 deals with cases where the shareholders give unanimous consent to a corporate action. The rule is that if all the shareholders approve a decision or course of action by the company or a director, that decision or course of action must be treated as validly authorised, *even if it is contrary to the constitution* or there is no express authority in the constitution for it. In this context, approval or assent need not be formally given. It is sufficient that all the shareholders consent to, or concur in, the action. There is a proviso: the unanimous approval of shareholders to making a shareholder distribution cannot circumvent solvency test compliance (clause 62(3)).

Subpart 3—Alteration of shareholder rights

Clause 63 protects shareholders from arbitrary alteration of shareholder rights. Actions affecting the rights attached to shares must be approved by a special resolution of the relevant "interest groups" or by the unanimous approval of the shareholders under clause 62.

Clause 64 defines the concept of interest group. This collective of shareholders reflects a constituency of shareholders whose rights are identical and are affected by the proposed action in the same way, whether the shareholders are all members of the same class of shareholder (clause 64(1)).

Clause 65 gives a shareholder who dissents on certain fundamental decisions the right to require the company to purchase, or arrange for the purchase, of the dissenting shareholder's shares. The procedure to be followed is set out in Schedule 5 (Procedure for minority buy-out).

Clause 66 defines what it means to dissent: unsurprisingly, the shareholder must vote "no" on a proposed action.

Subpart 4—Meetings of shareholders

Clause 67 states that shareholder meetings must be held in accordance with the constitution, and the constitution must provide for meetings and include procedures to govern them.

Clause 68 provides the rule that a company must hold an annual shareholder meeting and sets out the range of dates when the meeting must occur. However, there are some exceptions, including that a company need not hold its first meeting in the calendar year of its registration.

Clause 69 provides for special meetings of shareholders. These may be called at any time by a director, or by the shareholders representing not less than 10% of the voting shares.

Clause 70 allows for a written resolution to be used in lieu of a meeting where 75% of the voting shares assent to the resolution. The company constitution may set a higher percentage than 75%.

Clause 71 sets out the procedure for a written resolution in lieu of a shareholder meeting.

Clause 72 states that a court may call a meeting of the shareholders. This court order can be sought by a director, shareholder or creditor. This can be a valuable avenue where either the directors refuse to call a meeting or where a company is being non-responsive to creditor demands.

Part 7
Directors

Subpart 1—Appointment and removal of directors

Clause 73 sets out the definition of a "director," and makes clear it includes "shadow directors" for purposes of assessing liability (see Sections 96 and 97).

Clause 74 provides that a company must have 1 or more directors. This basic requirement should be cross-referenced with clause 81 that discusses how a sole director of a company may resign.

Clause 75 sets out who is qualified to be appointed and hold office as a director. A director must be a natural person and not a legal entity, must be at least 18 years old, not an undischarged bankrupt, and not subject to a prohibition order preventing them from serving as a director.

Clause 76 states that a director must consent in writing to occupy that position. The consent form is set out in the Regulations. It need not be filed with the Registrar but rather kept with the company records and available for inspection by the Registrar if requested.

Clause 77 says that persons named in the Application for Incorporation are deemed the initial directors of the company. All subsequent directors must be appointed by an ordinary resolution unless the constitution provides otherwise.

Clause 78 sets out how directors can be removed.

Clauses 79-81 pertain to when a director ceases to hold office. While a director may resign by giving written notice to the company (clause 80), the Act imposes restrictions on resignation by the sole director of a company, in order to ensure that there is an orderly succession in the office of director (clause 81).

Clause 82 requires that any changes in directors, or a change in the details of an existing director (name, address) must be filed with the Registrar. Penalties apply if the notice of change of director is filed more than 20 working days after the change.

Clause 83 discusses how to set director compensation.

Clause 84 requires the company constitution to include procedures for director meeting.

Subpart 2—Management of company

Clause 85 states the fundamental rule that applies to every company: the business and affairs of the company must be managed by, or under the direction or supervision of, its directors. However, the directors have the ability to delegate their powers, with some exceptions in the case of key powers (clause 85(3)).

Subpart 3—Directors' duties

Clauses 86 to 92 set out the fundamental duties of a director. In part, these are a restatement of a director's common law duties (the duty to act in good faith and in the best interests of the company, for example) but in other cases a modification of the common law duty or a purely statutory innovation.

Clause 86 states the long-standing duty imposed upon all directors to act in good faith and in the best interests of their company

Clause 87 requires a director to comply with the Act and with the company's constitution.

Clause 88 prohibits a director from engaging in reckless trading, which is defined as taking actions that "create a substantial risk of serious loss to the company's creditors."

Clause 89 prohibits a director from allowing a company to take on obligations (contracts) that it has no reasonable chance of fulfilling

Clause 90 ssets out how to deal with conflicts of interest. A director that has a conflict of interest must not vote on the matter when it comes before the board, and must disclose their interest. The failure to disclose can result in the company being able to cancel the transaction at a later date when the conflict is discovered.

Clause 91 states that a director must keep internal company information confidential and not use it for their own benefit.

Clause 92 states the longstanding rule that a director must exercise diligence when carrying out their duties.

Clause 93 allows directors to rely on experts (like accountants and lawyers) when carrying out their duties.

Clause 94 sets out that a director can be held criminally liable for acting "in bad faith toward the company and believing that the conduct is not in the best interests of the company" and "knowing that the conduct will cause serious loss to the company." Note that this is a high standard: mere negligent acts will not give rise to criminal liability. However, for truly bad actors a $100,000 fine and up to 7 years in jail awaits. The criminalisation of director misconduct in Commonwealth company law reflects an increasing trend towards stricter regulation of directors.

Clause 95 provides that if the shareholders unanimously vote to approve an action then a director acting in accord with that vote is deemed to be proceeding in accordance with the constitution, acting in good faith, and consistent with their duty of care as a director. This provision could be used in the event the company wishes to take an action that is counter to the constitution without having to amend the constitution first.

Subpart 4—Liability of directors

Under clauses 96 to 99, liability as a director may be imposed on a person who, although she or he does not fall within the standard definition of a director under the Act.

Clause 96 states that a person who exercises control or influence over the actual directors, or controls or exercises director powers, or is the delegate of a director, may be subject to the duties and liabilities of a regularly-named director. These persons may be a "shadow director" or a "controller of director powers."

Clause 97 defines a "shadow director" is not named in the registry or the company records as a director, but "is a person in accordance with whose directions or instructions a director (the director) is required or is accustomed to act."

Clause 98 defines a "controller of director powers" as "a person who exercises, or who is entitled to exercise, or who controls or is entitled to control the exercise, of powers that, apart from the constitution of the company, would be powers exercised by the directors." For example, tf the constitution actually conferred the authority to manage day-to-day operations upon a shareholder, that shareholders could be deemed a controller of director powers and hence subject to director duties and liabilities. Additionally, it is conceivable that a lender that has the ability to control operations could find itself subject to this status.

Clause 99 states that any person acting as a delegate of a director power is also subject to director duties and liabilities.

Clause 100 states that a unanimous shareholder vote on a matter does not, by itself, subject the shareholder to liability as a director.

Clause 101 prohibits a company from indemnifying a director for any criminal liability.

Clause 102 allows a company to indemnify or purchase insurance for a director in accordance with the constitution or upon the unanimous consent of the shareholders/

Clause 103 provides defences to directors to charges of criminal liability. Basically, if a director can show that he or she "took all reasonable and proper steps to ensure that the requirements of this Act would be complied with" then there will be no criminal liability.

Subpart 5—Prohibition and disqualification of directors

Clauses 104-108 provides that a person who commits certain offences is prohibited from being a director or a promoter of a company, or being concerned or taking part in the management of a company. for a period of 3 years from date of conviction. The offences that lead to prohibition are set out in clause 104(3). Prohibition is automatic and breaching the prohibition is itself a criminal offence. But a person who is subject to a term of prohibition may apply to the Court for a waiver. More serious still is disqualification from being a director, etc, under clause 106. Disqualification is the result of an order of the Court, and may be for up to 5 years. The grounds for prohibition include criminal conduct, but are broader: they include breach of a director duty, for example, or the mental incapacity of a person.

Part 8
Enforcement

Part 8 of the Act provides for various mechanisms for remedying, preventing, or investigating wrongdoing in relation to a company. Overseas experience shows that in practice the most useful remedy is the procedure set out in Subpart 4 of Part 8 which gives a remedy to prejudiced shareholders, usually minority shareholders, who complain that the affairs of the company are being conducted in a manner that is oppressive, unfairly discriminatory, or unfairly prejudicial to them.

Subpart 1—Injunctions

Clause 109 provides that a Court may issue an injunction against a company or a director to stop conduct that would breach the constitution or the Act. The court action may be brought by a director, shareholder, the Registrar or an entitled person. An "entitled person" is one whom the constitution confers any of the rights and powers of a shareholder upon.

Subpart 2—Derivative proceedings
Generally, a derivative suit is a lawsuit brought by a shareholder or director on behalf of a corporation against a third party. This type of case is usually brought when the company itself refuses to bring the action. Often, this is because third party is an insider of the corporation, such as an executive officer or director.

Clause 110 defines that a derivative proceeding is a court action brought with the leave of the Court under section 111 by a director or shareholder of a company in the name and on behalf of the company.

Clause 111 states that the court may—or may not—grant leave to bring a derivative action.

Clause 112 provides that a director or shareholder may bring a derivative action.

Clause 113 sets out what a court should consider when deciding whether to allow a derivative proceeding to go forward, including whether the underlying case is likely to succeed.

Clause 114 provides that a court may allows the proceeding only if the court is satisfied that: i) the company does not intend to diligently pursue the underlying action itself; or ii) it is in the interests of the company that the matter not be left to the directors alone.

Clause 115 sets out procedural details for a derivative proceeding.

Clause 116 lists the powers of the court in a derivative proceeding, which are broad.

Clause 117 provides that the court must order the company to pay the costs of the person bringing the derivative action if it would be just and equitable to do so.

Subpart 3—Personal proceedings by shareholder

Clause 118 allows a shareholder or former shareholder to sue a director or former director for breach of a director duty owed to the shareholder in that capacity.

Clause 119 gives a shareholder the right to seek an order compelling a director to take any action required to be taken by the directors under the constitution.

Clause 120 permits a shareholder to sue a company for breach of duty.

Clause 121 authorizes a shareholder to seek a court order to compel a company to take any action required of it by the constitution.

Clause 122 gives a court the ability to manage shareholder litigation by appointing one shareholder to represent other shareholder who would be bringing a similar claim against their company or a director.

Subpart 4—Prejudiced shareholders

Clause 123 presents the general right of a shareholder (or former shareholder) to seek a court order against "oppressive, unfairly discriminatory, or unfairly prejudicial" actions by the company against the shareholder(s). The court in response can make any order it sees fit.

Clause 124 lists breaches of certain provisions of the Act that are deemed to be unfairly prejudicial conduct. Usually, the outcome of a successful minority oppression proceeding is a Court order for the purchase by the majority shareholders or the controllers of the company of the complainant's shares.

Clause 125 addresses what would be a very rare case where a court orders an alteration to the constitution. Any such alteration must be reported to the Registrar within 10 working days.

Subpart 5—Investigation

Clause 126 allows a shareholder, creditor, or entitled person to seek a court order authorizing an independent inspection of company records. Such an order must not be issued unless the court is satisfied that the applicant: i) is acting in good faith; and ii) the inspection is for a proper purpose; and iii) the person to be appointed inspector is the right person for the job.

Clause 127 requires a person appointed to conduct an inspection under Clause 126 to make a report to the court of their findings.

Part 9
Administration of companies

Subpart 1—Company transactions

Clause 128 sets out how a company complies with the formal requirements of a transaction: how, for example, a company satisfies the requirement that an obligation be entered into by deed, or in writing, and who must sign certain types of documents to make them binding. There is no requirement under the Act that a company have a seal, but a company that does have one may still use it, although the absence of a seal of a seal does not affect the enforceability of the obligation in question, whatever the constitution may say.

Clause 129 allows a company to appoint an attorney, and states that the ac of the attorney in accordance with their written appointment binds the company.

Clauses 130 to 133 are primarily concerned with the validity of a company transaction from the perspective of the other party, that, that is the person transacting with the company. At arm's length, a counterparty may be unaware of internal procedural requirements or limitations that apply to the company when entering into a transaction.

Clause 130 provides that the validity of a transaction entered into by a company is unaffected by specified defects, such as the failure by the company to comply with its own constitution.

Clause 131 further strengthens the position of the other party by listing assumptions the other party is entitled to make, for example, that a person held out by a company as a director has been properly appointed and has the usual authority of a director of a company carrying on the same kind of business as the company in question. However, an assumption falls away if the outsider in fact knows it to be incorrect, or ought to know it, based on the outsider's position with, or relationship to, the company.

Clause 132 disallows the company or other company-related person from claiming that a third party made an incorrect assumption under Clause 131, though there are some technical exceptions.

Clause 133 states the legalistic rule that no one is deemed to have constructive notice of the contents of a company's constitution just because it is filed with the Registrar or otherwise available for inspection.

Clauses 134 generally allows a company to cancel a transaction in which a director has an undisclosed conflict of interest 3 months of discovering the interest. See also **Clause 90**. However, the company not cancel if the company receives fair value under the transaction.

Clause 135 says that a company may, depending upon the identity of the counterparty, cancel a company transaction entered into as the result of a breach certain director duties.

Clause 136 discusses the impact of cancellation of contracts on third parties. If title to property was already acquired by the third party in the transaction then there are circumstances in which the third party can retain that title.

Subpart 2—Pre-incorporation contracts

Clauses 137-141 deal with the case that it may be commercially expedient for a company to enter contract even before the company actually comes into existence. For example, a person planning to incorporate may find the perfect wholesale supply contract and execute in the name of the company before the Application to Incorporate has been approved by the Registrar. **Clause 138** allows a company to ratify a pre-incorporation purported to have been made by it or on its behalf within a "reasonable time" after incorporation. Statutory warranties under **Clause 139** protects the other party to the pre-incorporation contract if either the company is not incorporated as planned or, even if incorporated, it fails to ratify. **Clause 140** then provides for damages to the other party for breaches of the warranties set out in Clause 139. Clause 141 allows the third party to seek relief in court when a company fails to ratify a pre-incorporation contract.

Subpart 3—Registered office

Clause 142 sets out the long-standing rule that a company must always have a registered office and postal address in the Cook Islands.

Clause 143 requires a company to notify the Registrar whenever its registered office or postal address changes. The notice to the Registrar becomes effective no less than 5 days after filing, which is intended to give the public advance notice of any intended change.

Subpart 4—Company records

Clause 144 prescribes 3 categories of company records, called A, B, and C, that a company must keep. The categories reflect the different nature and functions of the records in each category, how long they must be kept, and who has access to them. Class A records include core documents such as the certificate of incorporation, the constitution, the share register, and the names of directors and officers. Class B and C records cover shareholder and director meeting minutes, votes, etc.

Clause 145 requires a company to keep the company records at its registered office or, if at another location, to provide that information to the Registrar.

Clause 146 allows a company to keep its records in writing or in electronic format.

Clause 147 provides for the inspection of company records. Any person may inspect Class A records, and certain eligible persons may see Class B and C records.

Clause 148 further defines the right of the public to view Company A records.

Clause 149 further defines the right of a shareholder to inspect company records. If the company believes such inspection might prejudice the company, the shareholder may apply to the court to seek relief.

Clause 150 contains details around the manner of inspection of company records.

Clause 151 allows for copying of company documents in certain cases.

Clause 152 provides that directors are entitled to inspect all company documents. The company may seek a court order to limit a specific director's ability to inspect records if the inspection would not be in the company's best interests.

Subpart 5—Annual return

Clause 153 requires each company to file an annual return in the month allocated by the Registrar for making its return. No annual return is due in the calendar year that a company is created or re-registered. The month in which a re-registration is filed will become the month in which future annual returns are due.

The failure to file an annual return has a serious consequence: under clause 338(a), the Registrar must remove a company from the Cook Islands register if it fails to file its annual return within the period of 6 months after the month allocated for filing the return.

Clause 154 contains further details about the due date for an annual return and allows the company to request that the month its annual return is due be changed.

Clause 155 pertains to the mechanics of how annual returns are filed. The online registry will be present the current information for the company. If all is correct the filer need only confirm this fact. If information is out-of-date the filer will be directed to submit the proper filing to update the registry and then return to complete the annual return. In this way the registry can maintain a proper chronological record of all changes to a company's information.

Clause 156 contains a limited exception to clause 155: a company may update its registered office and postal address as part of the annual return process.

Clause 157 sets out the other updating notices that, under provisions spread across the Act, a company must file with the Registrar. Given that the registry is online, basically any information that has been supplied by a filer can be updated.

Part 10
Accounting records and financial reporting

Part 10 of the Act contains standard provisions regarding the necessity for a company to keep accounting records which largely speaks for themselves.

Subpart 2 relates to financial statements. Under **clause 160(1)**, a company must prepare financial statements <u>only</u> if it has 10 or more shareholders. A company that is required to prepare financial statements must ensure that they are audited (**clause 162**). Even then, the company can opt out of this requirement from year to year under **clause 163** if the constitution allows it to opt out and opting out is approved by the shareholders at the annual meeting.

Subpart 3 of Part 10 sets out the requirements of the Act relating to the auditor's appointment and the role that the auditor, which may be required if the company is required to prepare financial statements. The process starts with the appointment of an auditor under **clause 164**. These are all standard provisions and are self-explanatory.

Part 11
Disclosure to shareholders

There are 3 paths of disclosure by a company to its shareholders. They are: i) an annual report; ii) miscellaneous documents that must be sent to the shareholders throughout the life-cycle of a company; and iii) when a shareholder requests information from the company.

Subpart 1—Annual report to the shareholders

Clause 174 provides that if a company is required to prepare financial statements (has 10 or more shareholders) then it must prepare an annual report "on the affairs of the company" for the shareholders. However, the constitution may override this requirement.

Clause 175 sets out other required content of the annual report, including financial statement and an auditor's report (if there is an auditor).

Subpart 2—Other documents that company must send to shareholders

Clause 176 lists other documents that must be sent to shareholders over the course of the company's life:

(a) any document that is required by the constitution to be sent to shareholders:
(b) a notice of acquisition of the company's own shares (*see* section 34(2)):
(c) a disclosure document for the purposes of an offer of financial assistance for the purchase of the company's own shares (*see* section 44(4)):
(d) a copy of a written resolution approved under section 70 (*see* section 71(3)):
(e) an auditor's written statement of reasons for resigning (*see* section 168(a)).

Subpart 3—Shareholder may request information held by company

Clauses 177-181 gives a shareholder the right to request information held by the company. The company must respond to the request with 10 working days of receiving the shareholder's request, although that response may be a refusal to disclose the information. Grounds for refusing disclosure include commercial prejudice to the company or another person (**clause 179**). In the last resort, a shareholder may seek a Court order for disclosure (**clause 181**). The Court will consider if there is a reason to withhold the information requested, or if the company is dragging its feet in providing it, or if the company is demanding an excessive fee to provide it.

Part 12
Company reorganisations

Part 12 covers company reorganisations in 2 forms. First, amalgamations of 2 or more companies can occur without any interference by a court (**clause 182**). The details and procedures for an amalgamation are largely set out on **Schedule 6.**

Second, **clauses 183-187** deal with a Court approved amalgamation, arrangement, or compromise. The provisions apply when it is not practicable to complete an amalgamation, arrangement, or compromise without Court intervention, that is, an amalgamation using the procedure set out in Schedule 6 or an arrangement or compromise under Part 13. These clauses would usually be used by a creditor seeking assistance in dealing with a defunct company.

Part 13
Compromises with creditors

Clauses 188-199 provide a formal mechanism for a company to reach a compromise between itself and its creditors. The compromise usually includes a settlement of the company's debt for less than the full amount. It usually arises from a proposal put forward by a party with an interest in avoiding the company's liquidation. If approved, the compromise has the effect of binding all creditors who had notice of the proposal and of the meeting to approve it, including any creditor who may actually oppose the compromise. Part 13 comprises mostly technical procedural provisions.

Part 14
Liquidations

Subpart 1—General

The Act provides for a single regime of the liquidation of companies. This is a departure from the previous distinction between compulsory and voluntary winding up.

Subpart 2—Appointment of liquidator

Liquidation begins with the appointment of the liquidator (**clause 202**). The liquidator must be a named person and must consent to the appointment. **Clause 203** sets out the persons who are disqualified from being appointed or acting as the liquidator. The liquidator may be appointed by the directors, the shareholders, or the Court. Appointment by the directors is possible only on the occurrence of an event specified in the constitution. Appointment by the shareholders must be by special resolution. The appointment of a liquidator by the Court is made on the application of any or the following: the company itself, a director, shareholder, or creditor of the company, or the Registrar (**clause 204**). Most commonly, the application is made by a creditor seeking the liquidation of an insolvent company.

Subpart 3—Court appointment of liquidator

Clause 205 sets out the grounds on which the Court may appoint a liquidator, which include:

(a) the company is insolvent; or

(b) the company or its directors have persistently or seriously failed to comply with this Act; or
(c) the company does not comply with section 6 (which sets out the essential element of a company, such as that it must always have a director); or
(d) it is just and equitable that a liquidator be appointed.

Note that (d) includes the ground that it is just and equitable that a liquidator be appointed. Historically, this was used to break a deadlock between shareholders who could not agree on the direction of the company but the development of the remedy for prejudiced shareholders (**clause 123**) now allows a more sophisticated outcome than mere break-up of the company.

Clause 206 sets out how to determine if a company is in fact insolvent.

Clause 207 sets out a list of items that allows a presumption to be made that a company is insolvent, Insolvency must be proved, but if any of these events have occurred then insolvency is presumed. Of these, failure by the company to comply with a statutory demand made by a creditor is the most significant. A statutory demand must comply with the requirements listed in **clause 208**.

Clause 208 details the statutory demand. The essence of the statutory demand procedure is a claim by a creditor that the company owes the creditor a debt (which must be above a prescribed minimum) that is due and payable, and a demand that the company pay it. If the company fails to do so within the permitted period, the company's insolvency is proved. The Act provides the usual procedure for the company to apply to a court to set the demand aside, for example, because the company disputes that the debt is in fact owing or because it has a counter-claim (**clause 209**). Futher details around the court action are found in **clauses 210-211.**

Clause 212 allows a Court to appoint an interim liquidator. The necessity for an interim liquidator arises if an application for the appointment of a liquidator has been made but not yet determined, and the assets of the company are at risk in the meantime. **Clause 213** sets out the powers of an interim liquidator.

Subpart 4—Process of liquidation

Subpart 4 follows a liquidation through its various stages.

Clause 214 requires the liquidator to provide public notice of their appointment and file a notice of their appointment with the Registrar. **Clause 215** then requires all company documents to note the company is in liquidation.

Clause 216 provides a list of immediate consequences once liquidation commences, including that the liquidator takes custody and control of the assets.

Clause 217 requires the providers of "essential services" (like electricity, gas, or water) to continue to supply them during liquidation.

Clause 218 states that a director or employee of the company, including a former director or employee, must brief the liquidator with details of company property that the director or

employee has in his or her possession or control, and deliver that property to the liquidator or dispose of it as the liquidator directs.

Clauses 219-228 provide the framework for the liquidator to communicate with creditors, including providing creditors with periodic. The timeframe for the first report to creditors depends on whether the liquidator is appointed by the directors or shareholders (within 5 working days after appointment) or the Court (within 25 working days after appointment) (**clause 219)**. Subsequent reporting to creditors and creditors is at 6-monthly intervals (**clause 224**). Similarly, the liquidator must call a first meeting of creditors within 10 or 30 working days of appointment (**clause 220)**. Subsequently, the liquidator may call a meeting of creditors or shareholder at his or her discretion, but can be compelled to call a meeting of creditor or shareholders at other times by notice (**clause 227**). Although the Act does not distinguish between a creditors' (compulsory) liquidation and a shareholders' (voluntary) liquidation, it relaxes some of the liquidator's reporting and meeting obligations to reflect that the company is solvent or that the expense of a report or meeting would be out of all proportion to the company's assets. The procedure for a creditors' meeting in liquidation is set out in **Schedule 7**.

Clauses 231-233 deals with creditor claims and requires claim be paid in accordance with the priority regime set out on **Schedule 9**. The Act follows the usual division of preferential and non-preferential claims, that is, the claims that must be paid before anything is paid to the general (unsecured) creditors.

After recovering and realising the assets of the company available for distribution among the unsecured creditors and paying the proceeds in accordance with Schedule 9, the liquidator is ready to distribute to creditors and shareholders, and file with the Registrar, the liquidator's final report and statement of realisation and distribution (**clause 234**). This marks the end of the liquidation and all that remains is for the company to be removed from the Cook Islands register. **Clause 238** governs the final steps to conclude a liquidation that has run its full course and includes a requirement to file with the Registrar.

Clause 236 provides for an alternative conclusion to a liquidation: the termination of a liquidation by order of the Court if the Court considers that it is just and equitable. This is not the completion of the liquidation; rather, for whatever reason, the Court considers that the liquidation should not continue. The effect of the order is that company ceases to be in liquidation and the liquidator ceases to hold office.

The liquidation of an insolvent overseas company will usually occur in its home jurisdiction. However, if there are assets in the Cook Islands, the Court may order the liquidation of those assets under **clause 240**.

Finally, **clause 241** recognises that that a related company should be required to pay part or all of the claims made in the liquidation of the company in liquidation. This typically arises where the related company has engaged in asset-stripping, leaving the denuded company in liquidation with insufficient assets to meet it liabilities to creditors. The second scenario to which clause 241 applies is the intermingling of the affairs of related companies to such extent that it is difficult to disentangle them; in that case the liquidations of each related company proceeds as if they were company. Clause 242 sets out the guidelines for making an order under clause 241.

Subpart 5—Office of liquidator

Clause 243 discusses when the office of the liquidator becomes vacant. To ensure continuity, a liquidator may resign only by appointing another person as his or her successor (**clause 244**). The appointment is subject to review by the Court under **clause 245** with the power vested in the Court to appoint another person instead. The Court has a general power under **clause 246** to appoint a successor when a vacancy has occurred, for example, through the death of the liquidator, and the vacancy has not been filled. A liquidator that has resigned has a duty to help their successor (**clause 247**).

Clause 248 provides for payment of remuneration to a liquidator. A liquidator appointed by the directors or shareholders is entitled to reasonable remuneration; the remuneration of a Court-appointed liquidator is set by regulations.

Subpart 6—Duties of liquidator

Clauses 249-255 set out the duties of a liquidator. These are self-explanatory and consist largely in the liquidator taking control of company assets. Notet that **clause 251** carves out any responsibility by the liquidator in relation to property that is subject to a charge or security interest. This is because it is the responsibility of the secured creditor to enforce their own security and apply the proceeds to the debt that the security secures.

Subpart 7—Powers of liquidator

Clause 256 is a general statement of a liquidator's powers: a liquidator has the powers necessary to carry out his or her functions and duties under the Act, and has the powers conferred on him or her by the Act. Under **clause 258** a liquidator also has the specific powers set out in **Schedule 11**.

Clauses 259-263 confer extensive powers of investigation and information gathering upon a liquidator. These are necessary to enable a liquidator to trace and identity the assets of the company, but also to investigate director or shareholder conduct that may lead to liability to repay funds to the company or restore company assets. In addition, a liquidator may set aside various company transactions if they have had the effect of unfairly preferring a creditor over others. The power of investigation includes the authority to require the production of company documents or records (**clause 259**) and may by notice require certain individuals to provide specified information or to be questioned on oath or affirmation (**clause 260**). Failure to comply with a liquidator's demand under clause 259 or 260 is enforceable by an order of Court (**clause 262**).

Clause 265-266 discusses the interplay between a receiver (which has been appointed by a secured creditor) and a liquidator.

Clause 270, grants the liquidator the power to disclaim onerous property of the company. "Onerous property" is defined in **clause 269** to mean an unprofitable contract or property that is unsaleable, or not readily saleable, or may give rise to a liability to pay money or perform an onerous act. Disclaimer may cause loss or damage to another person, for example the other party to an unprofitable contract. Such a person has a claim against the company as an unsecured creditor (**clause 271**).

Subpart 8—Court supervision

A liquidation is conducted subject to the supervision of the Court. Accordingly, the Court has wide powers to intervene in the conduct of the liquidation. These are set out in **clause 273** and include the power to give directions in relation to any matter arising in the liquidation, and to confirm, reverse, or modify an act or decision of the liquidator.

Further, the Court has extensive powers in relation to the person acting as liquidator. Under **clause 275**, the Court may remove a liquidator for failure to comply with a compliance order. A compliance order is an order made by the Court requiring the liquidator to comply with a relevant duty arising under the Act or any other enactment of law, or arising under any order or direction of the Court. If the Court is satisfied that a person is unfit to act as a liquidator because of persistent or serious non-compliance, the Court must, on the application of specified persons such as a creditor, director, or shareholder of a company in liquidation, prohibit the person in respect of whom the application is made from acting as a liquidator in a current or other liquidation (**clause 276**). The period of prohibition must not exceed 5 years.

Subpart 9—Voidable transactions

Clauses 278-290 confer on the liquidator the power to set aside or undo certain transactions made by a company in an extended period before commencement of the liquidation. The underlying principle is that the general unsecured creditors should be treated equally and that no single creditor should be preferred over the others. In addition, the liquidator has claw-back powers where the true value of a transaction is disguised. For these purposes, the periods before commencement of liquidation of 3 years, 2 years, 1 year, and 6 months are key and are defined in **clause 278**. In the case of a Court-ordered liquidation, each period is extended by the lapse of time between the filing of the application and the making of the order.

First, the liquidator may set aside an insolvent transaction (**clause 279**). An insolvent transaction is a transaction made at a time when the company was unable to pay its debts and having the effect of enabling a person to receive more towards satisfaction of a debt owed by the company than the person would recover in a liquidation. The liquidator may set it aside if it was within the 2-year period and was not made in the ordinary course of business. A common example is payment in full of a debt subject to a personal guarantee by a director or shareholder while other debts remain unpaid. If the transaction is made within the 6-month period, it is presumed that the company was insolvent at the relevant time and that the transaction was not in the ordinary course of business (**clause 279**).

Second, under **clause 282**, the liquidator may set aside a security given by the company if the security is given within the 1-year period and immediately afterwards the company was unable to pay its debts. Insolvency is presumed if the security is given within the 6-month period (**clause 282**). There are exceptions to voidability under clause 282, since giving the security may well be legitimate, as it will be if, for example, it is given to secure new value advanced to the company (**clause 283**) or is given in substitution for an existing security (**clause 284**).

Third, under **clause 288**, the liquidator may recover the negative value resulting to the company from a company transaction if the transaction was entered into within the 2-year period and the company was insolvent at the time or became insolvent as a result.

Fourth, under **clause 289**, the liquidator may recover the negative value resulting to the company from an acquisition for excessive consideration if the acquisition was made within the 3-year period and the acquisition was acquired from specified persons with a connection to the company, such as a director or controller or their nominees, relatives, or trustees. "Relative" is defined in clause 1(1) of Schedule 1 and broadly refers to family members within the circle of spouse, parent, child, sibling, and spouses of a parent, child, or sibling. **Clause 290** applies to the reverse situation, where the company disposes of a business, property or services at less than its value.

Finally, under **clause 291** the Court has a broad power to set aside a security given by a company to a specified person if the company is unable to meet all its debts and the Court considers that it is just and equitable that the security by set aside.

Subpart 10—Liability of directors and others

Clause 293 provides for the liability of directors and former directors if the failure of an insolvent company to keep accounting records or prepare financial statements as required by the Act has had an adverse solvency result, for example, has contributed to the company's inability to pay all its debts. On the application of the liquidator, the Court may make an order fixing a past or former director with personal responsibility for the company's debts and other liabilities. **Clause 294** sets out a defence for directors facing an assertion of liability under clause 293.

Clause 295 provides a mechanism for obtaining a contribution to the assets of the company as compensation or the recovery of company money or property in circumstances where a company insider has misapplied or is otherwise accountable for company assets or has acted improperly in relation to the company.

Part 15
Company receiverships

Subpart 1—General

Clause 296 makes perfectly clear that the following provisions relate to company receiverships, not receiverships generally.

Clause 297 states that a receiver may be appointed by a secured creditor to take control of the property subject to the secured party's charge.

Subpart 2—Appointment of receiver

Clause 298 sets out who may be appointed a receiver. With some minor modification, this provision mirrors the requirements in the Act for the appointment of a liquidator. Unless appointed by the Court, the appointment of a receiver is made by, or in the exercise of a power under, a document to which the company is a party and must be in writing (**clause 299**).

Clause 301 states that a receiver must, within 5 working days after appointment, notify the appointment to the company, to the public, and file a notice with the Registrar. Notice of the receivership must be stated on documents issued by the company or receiver (**clause 302**).

Subpart 3—Vacancy

Clause 303 tells when the office of the receiver becomes empty, including after a resignation, death, or removal by the court.

Clause 304 sets out the procedure around the resignation of a receiver.

Clause 305 notes that a vacancy occurring through disqualification or resignation must be publicly notified.

Clause 306 requires a receiver to assist subsequent receivers.

Subpart 4—Duties of receiver

Clause 307 lists the primary duties of a receiver. Although a receiver must exercise his or her powers in the best interests of the person in whose interests he or she was appointed (clause 307(2)), there will be other interests at play. To the extent consistent with the receiver's primary duties, a receiver must have reasonable regard to the interests of the company, persons claiming an interest in the property in receivership, unsecured creditors, and guarantors of the company's obligations. These are parties who are likely to be affected by the conduct of the receivership, whether a shortfall or surplus results.

Clause 308 further defines the duty imposed on the are receiver with regard to other parties: the receiver must act in a commercially reasonable manner. This guards against the possibility of an unconscientious receiver holding a fire sale of assets if that is all that is required to realise assets sufficient to repay the secured creditor that had the receiver appointed.

Clauses 310-314 list other duties of the receiver. These include: the duty to keep receivership proceeds separate from other monies (**clause 310**), the duty to keep accounting records for the conduct of the receivership (**clause 311**), and the duty to notify the Registrar of suspected criminal or other wrongdoing in relation to the company in receivership (**clause 312**). A receiver must make reports of the receivership activities (**clause 313**), and provide them to the persons who are entitled to receive and inspect a receiver's reports, which include the Registrar (**clause 314**).

Subpart 5—Powers of receiver

Clause 315 states that a receiver has the powers expressly or impliedly conferred by the terms of the appointment.

Clause 316 sets out the powers of the receiver, all of which are subject to the terms of appointment. The powers generally include the ability to manage the property in receivership and to receive any income derived from it. A receiver has the power to execute documents in the name and on behalf of the company in receivership (**clause 317**).

Clause 318 allows a receiver to apply for a court order to sell real property without the consent of a mortgagee. The court has broad powers to make such order as it sees fit if the court is satisfied that the sale is in the best interests of the company and "will not substantially prejudice the interests of the mortgagee."

Clause 319 allows a receiver to be appoints or continue to act even if the company is put into liquidation. This makes sense as the receiver is dealing with property subject to a secured creditor claim.

Clause 320 preserves the validity of a receiver's acts despite any of the following defects: invalid appointment, disqualification, or lack of authority. This does not apply where the other party to a transaction with the receiver knows or ought to know of the defect.

Subpart 6—Liability of receiver

Clauses 321-327 set out the circumstances in which a receiver could incur personal liability for their actions as a receivership and the limitations to liability. This includes personal liability for any contract entered, but the contract may exclude or limit personal liability of a receiver who is not appointed by the court (**clause 321**).

Clause 322 states that a receiver is personally liable for payment of wages or salary that accrue under a contract of employment entered into before the receiver's appointment if the payment relates to the property in receivership. Importantly, the receiver can avoid this liability if, within 10 working days of appointment, the receiver terminated the contract of employment. A similar rule applies for director's pay (**clause 323**). There are also rules around when a receiver is liable for rents (**clause 324**) and other contracts (**clause 325**),

Clause 326 allows a receiver to be indemnified out of the receivership property for personal liability under the clauses mentioned above. However, indemnification will not be available if the receiver has entered into a contract without authority. The Court has the power in the case of personal liability arising out of a defect of appointment to excuse a receiver from all or part of that liability, but the Court must be satisfied that the receiver has acted honestly and reasonably and that the receiver ought to be excused (**clause 327**).

Subpart 7—Court supervision

Clauses 328-336 discuss how a court supervises receivers. The Court supervision of receivers largely mirrors that of the Court supervision of liquidators. The Court may give directions in relation to the receivership (**clause 328**), may make orders in relation to the remuneration of a receiver, including ordering a refund of remuneration if excessive (**clause 329**), and make declarations as to the validity of appointment of a receiver or validity of entering into possession or assuming control of property (**clause 329**). As with liquidation, the Court may make compliance and prohibition orders in respect of receivers (**clauses 331 and 332**). The term of a prohibition order must not exceed 5 years. Ancillary to an order removing a receiver from office or an order having that effect, the Court may make orders for protecting the property in receivership (**clause 334**). Finally, the Court may make an order terminating a receivership or limiting the receivership to specified assets (**clause 335**).

Subpart 8—Supply of essential services

Clause 336 ensures that the supply to a receiver or company in receivership of an essential service is not refused on the ground of the company's past default in paying for the service. **Essential service** is defined in clause 336(2) to include supply of gas, electricity, water, and telecommunications.

Part 16
Removal from Cook Islands register

Removal of a company from the Cook Islands register is the final step in the life of a company. Once removed, it ceases to exist and any of its remaining assets vest in the Crown. Removal from the register is a mandatory procedure by the Registrar, although the Act makes provision for public notice of removal and an opportunity to object. Objection is by way of an application to the Court for an order that the company not be removed from the register.

Subpart 1—Removal from register

Clause 337 states the procedural rule that a company is removed from the register when a notice of removal is filed by the Registrar.

Clause 338 establishes the grounds that trigger the removal of a company from the register. The Act says that the Registrar *must* remove a company from the register if it fails to file its annual return within the period of 6 months after the month allocated for filing the return (clause 338(a)). The failure to file annual return is a good indication of corporate inactivity and the mandatory removal of companies from the register for failure to file ensures that the register is not cluttered with companies which are in reality defunct. The Act treats this cause for removal differently from the rest of the reasons for removal found in subclauses 338(b) to (e) in that no objection can be made to removal for a failure to file an annual return. Therefore, there is no requirement that removal for annual return default be publicly notified (clause 340(2)). The Act compensates by providing (in clause 350) that the Registrar must restore to the register a company removed for annual return default if an application for restoration is made within 2 years after removal and outstanding annual returns and associated filing fees are brought up to date.

In all other cases, notice of removal is required (clause 340(1)(a)) and any person may object to removal on 1 or more of the grounds set out in clause 340(3). The Registrar must not complete a removal for which public notice is required until the period for objecting has elapsed.

Clause 339 allows certain persons to request removal from the register, including a shareholder or a director if the constitution allows. A request for removal can be made upon the grounds that: i) the company has ceased doing business; ii) paid its debts; and iii) distributed its surplus assets. In other words, clause 339 embodies the proper way to close a business. The request for removal is filed with the Registrar. Prior public notice is required for this voluntary removal. See clauses 338(e) and 340(1)(a)(iii).

Subpart 2—Procedure for removal from register

Clause 340 explains when a public notice of a pending removal is required. Basically, it is required in all circumstance other than the removal for the failure to file an annual return.

Clause 341 allows for third parties to file objections against the removal of the company from the register. There are various grounds upon which to object, including that the person objecting has an "undischarged claim" against the company.

Clause 342 defines the term "undischarged claim" as, amongst other things, a claim that has not been paid in full.

Clause 343 sets out the procedure for filing an objection, which requires a court action.

Subpart 3—Effect of removal from register

The primary effect of removal is that the property of the former company vests in the Crown (**clause 344**). **Clause 345** allows any person who would otherwise be entitled to the property to file an application in Court for the property or to for payment out of its proceeds. The Court may order that the property of the former company or part of it, vest in the applicant or that the Crown compensate the applicant (clause 345(2)).

Subpart 4—Crown's disclaimer of property vesting on removal from register

Clauses 347-349 allow the Crown to disclaim as onerous property any property vested in it on removal of a company and this procedure is much the same as for disclaimer by a liquidator (see clauses 269 to 272).

Subpart 5—Restoration of company to register

Clause 350 allows for the Registrar to restore a company to the register without the need for any court action. If the removal was due to the failure to file an annual return, all that needs to occur is for an application to restore be filed with the Registrar together with back due annual returns and all fees and late filing fees. However, the Registrar may only restore a company without court action if the application for restoration is filed within 2 years of the removal. Various persons can seek a restoration, including shareholders, directors and creditors.

Clause 351 governs when court actions are required to complete a restoration. If the removal was for a reason other than the failure to file an annual return, or if it has been more than 2 years since a removal for failure to file an annual return, then the party seeking restoration must seek a court order.

Clause 352 states the procedural rule that a company is restored to the register when a notice of removal is filed by the Registrar. A company restored is treated as having continue din existence as if it had not been removed. All property re-vests in the company upon restoration unless it is land that been sold by the Crown (**clause 353**). Even if land has been sold, the company make apply to the court to have the land re-transferred back to the company (**clause 354**).

Part 17
Overseas companies

Clauses 355-367 regulate the actions of overseas companies. Generally, any overseas company that is carrying on business in the Cook Islands must register as an overseas company. There are no specific requirements for registration other than the name it uses in the Cook Islands must comply with local rules (**clause 357**) and it must supply evidence of the company's compliance with Part V of the Development Investment Act 1995-96, commonly known as the "BTIB Certificate (**clause 360**).

Clause 355 clarifies the term "carrying on business" by supplying a list of activities that do not constitute carrying on business. In other words, if an overseas company is only undertaking the activities listed in clause 355 then it need not register. The most important of these activities is probably that found in clause 335(2)(h) which states that a company is not "carrying on business" if it only "[c]onducts an isolated transaction that is completed with a period of 30 working days, not being one of a number of similar transactions repeated from time to time."

Clause 360 sets out the procedure for registration with the Registrar. It must be filed within 20 working days of the overseas company commencing to carry on business in the Cook Islands (**clause 358**).

There are other requirements. An overseas company must make an annual return or be removed (**clause 362**), it must file a notice of changes in directors (**clause 364**), and it must give notice of its intention to cease carrying on business in the Cook Islands (**clause 365**).

Part 18
Registrar of Companies

Subpart 1—Registrar

Clauses 368-370 provide for the appointment of a Registrar of Companies and Deputy Registrars.

Subpart 2—Cook Islands register

Clauses 371-377 deal with managing the Cook Islands register of companies. It is the duty of the Registrar to keep and maintain the register, which may be kept in any form that the Registrar thinks fit and this includes keeping the register in a digital form (**clause 371**).

Clauses 372 to 374 set out the procedure for registration by the Registrar and the circumstances in which the Registrar may reject a document that has been filed for registration.

Clause 375 states the legal rule that the registration or refusal to register a document does not create any presumption as to its validity or to the accuracy of the information in the document. In other words, the register is a sort of notice board.

Clause 376 allows any person may inspect the register (on the payment of whatever fees might apply) and, under **clause 377**, obtain copies of documents held in the register.

Subpart 3—Changes to register

Clause 378 gives the Registrar the power to rectify and/or correct errors in the registry. There is a process set out depending upon the type of error involved. If the error relates solely to the person seeking the correction (such as a shareholder with a typo in their address) the Registrar may correct the error straight away. For other errors (such as a typo in the name of the company) there is a notice procedure that must be followed before the correction can proceed.

Clause 379 empowers the Registrar to require a company to provide corrected or updated information on any matters entered into the register, and **clause 380** then allows the Registrar to update the registry based upon this information.

Subpart 4—Inspection by Registrar

Clause 381 gives the Registrar wide powers to obtain documents from any company to enable the Registrar to monitor compliance with the Act by the company and directors. **Clauses 382 and 383** relate to the use, and the restrictions on use, that the Registrar may make of documents and information obtained under the Registrar's inspection power.

Subpart 5—Appeals

Clauses 385 allows any person aggrieved by an act or decision of the Registrar to appeal the Court. The Court has broad powers to decide the appeal: the Court may approve the Registrar's act or decision, or give any direction, or make any determination in the matter. An appeal does not affect the Registrar's ability to carry out inspections until the appeal is ruled upon (**clause 386**). If the appeal is successful the Registrar may be ordered to destroy any documents it came by during an inspection (**clause 387**).

Subpart 6—Notices by Registrar

Clauses 388-390 provide for the method of giving notices by the Registrar. Clause 388 includes a cross reference to Schedule 15, clause 8, which contains additional provisions regarding service.

Clause 389 contains the new rule that when the Registrar seeks to provide notice to an individual, sending it to their email address is a valid means of providing notice. Any notice sent from the Registrar is admissible in court (**clause 390**).

Part 19
Offences

Subpart 1—Dishonesty offences

Clauses 391-396 create a number of offences related to dishonesty or fraud. These include:

- **Clause 391**: making false statements in documents that are required by the Act (which would include filing submitted to the registry);
- **Clause 392**: fraudulently using, destroying or concealing company property;
- **Clause 393**: falsification of records with an intent to deceived;
- **Clause 394**: carrying on business fraudulently (especially with an intent to defraud creditors);
- **Clause 395**: where a director with an intent to defraud does any thing that causes a material loss to creditors;
- **Clause 396**: where a director allows a company to incur a debt when the director knows that the company is insolvent or will become insolvent as a result of incurring the debt

Conviction of any of these offences can result in the imposition of large fines and jail time.

Subpart 2—Offence in relation to offer of securities to the public

Clause 397 creates an offence of misleading or deceptive conduct in relation to the offer of securities to the public. This needs to be put into context.

The 2013 Amendment to the old Cook Islands Companies Act contained restrictions on the ability of a private company to raise additional funds. For example, a private company was prohibited from offering shares to or borrowing money from the public, or from circulating an invitation or prospectus to a prospective member. See clause 360, 2013 Amendment (which has never come into force). This is the traditional approach and is intended to protect the public from fraud. The trade-off is that it severely restricts the ability of SMEs to grow.

The new Companies Act adopts a more modern approach to raising capital, and the types of restrictions on specific activities found in the 2013 amendment to the old company act are not present in the new law. Instead, a company may seek to raise capital through the sale of shares so long as there is no "reckless conduct" or misleading or deceptive statements in relation to an "advertisement" or an offer to sell a share or a debt instrument. Put another way, the Act does not regulate or prohibit the offer of securities to the public but rather provides a serious deterrent to misconduct by criminalising conduct in relation to the offer of securities to the public if the conduct is reckless and misleading or deceptive (or likely to mislead or deceive) in relation to the offer of securities to the public.

Clause 398 contain definitions relevant to clause 397.

Subpart 3—Liquidation Offences

Clauses 399-400 prohibit actions which would hinder a liquidation proceeding. Importantly, clause 399 states that a person must not leave the Cook Islands with the intent to avoid payment of money, or try to hide or remove company property. Clause 400 makes it a crime to file a false or misleading claim in liquidation.

for offences

Clause 401 provides for a 3-year statute of limitation for offences under the Companies Act.

Part 20
Miscellaneous

Subpart 1—Service of documents

Clause 402 states that service of documents may be completed as set out on Schedule 15.

Clause 403 allows companies to communicate with their shareholders electronically if the shareholder as provided an email address and requested that the company send communications via that delivery method.

Subpart 2—Privileged communications

Clause 404 protects the rule of attorney-client privilege.

Subpart 3—Regulations

Clause 405 grants the Queen's Representative, i.e., Government, sweeping powers to issue regulations to implement the Act. Of particular importance is subclause 405(1)(c) which allows Government to prescribe the information that must be provided for the proper completion of a prescribed form.

Clause 406 allows Government to issue regulation pertaining to the transition from the old law to the new Act. This clause should be cross-referenced with clause 407.

Subpart 4—Re-registration

Clause 407 calls for the re-registration of existing companies and existing overseas companies to bring them within the new Act. There is no absolute requirement to do so, but not applying for re-registration results in being struck off the register. For both existing companies and existing overseas companies, the application to re-register must be filed within 1 year after the commencement of the Act to avoid de-registration. Re-registration is free, and there will be no annual return required during the year in which the re-registration occurs, and once a company is re-registered, all of its future annual returns will be due in the calendar month in which it re-registered (**clause 410**). However, if this month is inconvenient then the company may request a different month be assigned to it.

Clause 408 provides that if a company fails to re-register and is struck off the register, it is treated as if it were struck off under Part 16. Amongst other things, this means that property owned by the company vests in the Crown upon de-registration, and that interested persons may seek restoration.

Clause 409 applies the re-registration requirement to overseas companies.

Clause 410 details the Registrar's responsibilities in the re-registration process, including issuing a new Certificate of Re-registration. The new online registry will manage this process. Additionally, clause 410 makes clear that a re-registration does not create a new legal entity and does not affect any existing legal rights concerning the company.

Clause 411 defines "existing company."

Subpart 5—Transitional provisions

Clause 412 deals with the highly unlikely scenario of a company that is engaged in a formal liquidation proceeding or amalgamation at the time of commencement of the new Act.

Subpart 6—Repeal and revocation

Clause 413 repeals the existing Companies Act 1970-1971 1 year after the commencement of the new Act. Accordingly, for the period of 1 year, both new and old Acts will be in force to allow existing companies to re-register. Clause 413 repeals the Companies Amendment Act 2013 which has never come into force

Subpart 7—Amendments to other enactments

Clause 414 refers to Schedule 16 for consequential amendments to other Acts.

Subpart 7—Company charges

Clause 415 keeps alive the provisions of the 1970-1971 Act relating to the registration of company charges until the enactment of a personal property securities regime which will cover all person property securities, including those granted by companies. The PPSA has been passed and will commence on the same day as the new Companies Act, rendering clause 415 a nullity.