Companies Act 2017
And
Online Registry Implementation

Highlights of the Reform

Prepared Under the Direction of

Cook Islands Ministry of Justice

With Assistance from

Private Sector Development Initiative
Asian Development Bank

December 10, 2019

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1.0 Introduction

The Ministry of Justice (MOJ) is pleased to announce the beginning of a new era for business in the Cooks Islands. The new Cooks Islands Companies Act 2017 will commence December 10, 2019. The new Act and registry will make it far easier to start a company and to maintain it during its entire lifecycle. The new Companies Act 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) will help to increase access to credit in the Cook Islands by making it easier to pledge movable assets to stand good for a loan. 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 will provide the legislative authority for an online register of incorporated societies. Summaries of the PPSA and incorporated societies reforms are available on this website.

One significant benefit of the law reform is the introduction of a fully electronic registry system for company filings. This means that starting December 9 all filings submitted to the Registrar will be done online and the Registrar will no longer accept paper filings. Experience in other jurisdictions (most notably New Zealand) provides ample evidence that online filing promotes significant efficiencies with regard to turnaround time to complete filings, keeping information in the registry current, and monitoring compliance. To that end, many "routine" filings such as changes of address will be able to be completed at no charge. Thus, there is no reason for companies to neglect keeping their entity record current.

One important feature of the new Act is the requirement that all companies must re-register in the online system within the first year that the law is commenced. The failure to re-register has serious consequences, including being struck off the active roll. Please see Section 10 of this paper for details.

In order to file in the registry, one must first establish a client account. This is done online: a web form is completed and sent to the Registrar. Once approved the account holder may then obtain filing authority over the company (or companies) for which they are authorized to submit filings. All of this is detailed under another link on the company registry website discussing how to establish "Client Accounts."

The remainder of this paper provides a summary of the main features of the new Companies Act. For further details on the law please see the document titled "Company Act: Detailed Section-by-Section Analysis" that is also posted on this MOJ website. That document will likely be most useful for legal practitioners and other parties that require more detailed information about the new Act.

2.0 Starting a company and maintaining its information

Starting a company should be quick and easy. This encourages people to enter the formal sector and cuts down on expenses to start a business. For this reason, the new Act adopts a modern approach to company incorporation by doing away with many outdated formalities, including the need to submit lengthy additional documents to the registry such as a memorandum of association, articles of association, and declaration of compliance. Under the new Act all that needs to be completed is on online Application to Incorporate that collects basic biographical information about the proposed company. Each company is required to have a constitution, but the Act sets out model constitutions that can be adopted by the company without having to obtain an individualized one. However, the company is free to provide its own constitution should it choose to do so.

2.1 New Act dispenses with "public" and "private" company distinction

Older companies acts made a distinction between different types of companies. The main divide was between public and private companies, with further corporate subtypes under each of these main categories. There were then highly technical rules around each of these subtypes regarding prerequisites for formation, liability of shareholders, and the manner in which the entity interacts with the world. Following this approach, much of the old Cooks Islands Companies Act pertained to public companies, yet *there was not a single public company in the country*. In other words, a large percentage of the current law had no practical effect.

New Zealand faced this exact same situation when undertaking reform of its companies act in 1993. The upshot of its analysis was to do away with the old distinctions between public and private companies and to instead institute a "one size fits all" corporate form that makes it easy for the public to understand exactly how to manage a company under one standard set of rules. This greatly simplified not only company formation in New Zealand, but also such things as director governance, shareholder rights and liabilities.

The new Companies Act 2017 follows this modern approach, with only one basic form of company. This will allow a much easier to understand Companies Act and also dispel any possible confusion in the public over what sort of entity it might be dealing with.

2.2 Simplified requirements for corporate formation

Under the old Cooks Islands law company formation was complicated in that it required submission of numerous ancillary documents including:

- Memorandum of Association
- Articles of Association
- Registration of Registered office
- Particulars of Directors and Secretaries
- Declaration of compliance

The new Companies Act 2017 does away with these other documents. Instead, all that is required to be submitted is a company "constitution." The constitution sets out the rules for the internal governance of the company, such as how a quorum of directors is to be established, when shareholder meetings are to occur, and whether super-majority votes are required for any corporate action.

Each company is allowed to draft its own constitution. Conversely, the Act sets out standard constitutions that a company may adopt by simply ticking a box on the Application form. There are three standard constitutions based upon the number of shareholders in the company: i) a sole shareholder constitution; ii) one for companies with between 2 and 9 shareholders; and iii) one for companies with more than 10 shareholders. This makes it easy for new companies to comply with the requirement without having to draft their own constitution. However, as noted, companies are free to create their own constitution if they choose. If a company elects to create its own constitution it must submit it to the registry as part of the application to incorporate.

Filing an Application to Incorporate is simple. The applicant completes an online form on which is collected all the information pertinent to establish the biographical identity of the company to be formed and its directors and shareholders. The Application is reviewed by the Registrar's office and, if accepted, an email is returned to the Applicant together with a link to the Certificate of Incorporation.

2.3 Number of shareholders

The Companies Act 2017 does not place in limits on the number of shareholders a company may have. So, sole shareholder companies are permitted as would be a company with hundreds of shareholders.

2.4 Residency requirements for company 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 in New Zealand, the director must also be a director of a domestic New Zealand company. This residency requirement follows recent international trends in company law reform and closely follows a similar requirement under the New Zealand law, where companies must have at least one director who is either living in New Zealand or who is living in an "enforcement country" and is a director of a registered company in that enforcement country (currently only Australia).

Note that this residency requirement pertains to directors, not to shareholders. See the discussion below regarding companies with foreign shareholders.

2.5 Director consents

Each person who will serve as a director of a company must sign a consent form indicating their agreement to fill that role. The one-page consent form is set out in the regulations. However,

this consent does not need to be filed with the Registrar. Instead, it should be kept with the company records and made available to the Registrar only upon request.

2.6 Companies with foreign shareholders

Currently the law governing foreign investment registration[1] provides that any business in which 33.3% or more of the shares are controlled by non-Cook Islanders must obtain BTIB approval before commencing business within the Cook IslaUnds. Thus, in order to register as a local Cook Islands company, any company with more than one-third foreign shareholdings must present the BTIB certificate as part of their Application to Incorporate.

2.7 Ongoing maintenance of a company: compliance

Once incorporated, the ongoing obligations that a company must satisfy are easy-to-understand and not overly burdensome. Generally, a company must file its annual returns and otherwise keeping certain information up-to-date through periodic filings with the registry.

2.7.1. Compliance: annual returns

Under Section 153(1), each company must file an annual return in the month allocated by the Registrar for making its return. The failure to file an annual return has a serious consequence: under Section 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. The same rule applies for overseas companies. Sections 361-363.

No one can object to the removal of a company for failure to file an annual return under Section 338(a), and accordingly there is no requirement that removal for an annual return default first be publicly notified (Section 340(2)). However, the Act makes it easy to restore a company to the register after being struck off for failure to file an annual return. Section 350 provides that the Registrar must restore a company removed for failure to file an annual return if an application for restoration is made within 2 years after removal and outstanding annual returns and associated filing fees and penalties are brought up to date. Further, a shareholder, director, creditor, adverse litigant, receiver or liquidator may all bring an action to restore a company. If the person seeking to restore the company is not able to complete back due annual return the Registrar can waive this requirement. Section 350(4).

2.7.2. Ongoing obligation to update company registry

The new Act specifically requires that companies keep their information in the registry current. This is easy with the new online registry: simply navigate to the filing to be submitted and provide the new information. Further, many of these required "routine" filings are free to encourage compliance. So, for example, if there is a change in directors or in the information about an existing director (Section 82), a change in the constitution (Section 16), a transfer of shares (Section 55), etc., then the appropriate filing must be made, usually within 10 working

[1] Development Investment Act 1995-1996 and the Development Investment Code Order 2003.

days of the change. If the filing comes in late then a late filing fee will apply and, in some cases, hefty penalties may be imposed. See, for example, Section 82(3) which provides that the failure to update the company record in the registry when new directors are appointed or old ones resign is an offence that can result in a $4,000 fine.

There is a special rule in the event a company changes its registered office or postal address. Section 143 provides that the new address takes effect on a date in the future selected by the filer which cannot be less than 5 working days after the filing is registered. This way the registry always has a legally valid address for presentation to the public.

3.0 Directors

3.1 Director duties: background

There has always been a generalised duty imposed on company directors to act in good faith and in the best interests of the company. Following the path taken in New Zealand, the new Companies Act 2017 directly spells out the specific duties of directors in a robust fashion. Sections 86 to 92 set out the fundamental duties of a director, and the following subsections discusses each of these specific statutory sections.

3.1.1 Director's general duty

Section 86 restates the traditional common law requirements that a director act in good faith and in the best interests of the company.

3.1.2 Compliance with Act and constitution

Section 87 provides that a director of a company must not act, or agree to the company acting, in a manner that contravenes this Act or the constitution of the company. The requirement that a director must comply with the constitution will give shareholders the power to seek a court order if they believe a director is violating the constitution under Section 109.

3.1.3 Avoid "reckless trading"

Section 88 says that a director must not—

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

This section 88 dovetails with a new "solvency test" set out in Section 5, which provides, in part:

> (1) For the purposes of this Act, a company satisfies the solvency test if—

(i) the company is able to pay its debts as they become due in the normal course of business; and

(ii) the value of its assets is greater than the value of its liabilities, including its contingent liabilities.

If a company satisfies the solvency test that would serve as a strong indicator that a director has not engaged in reckless trading.

3.1.4 Contractual obligations must be fulfilled

Section 89 provides that a director "must not agree to the company incurring an obligation unless the director believes at that time on reasonable grounds that the company will be able to perform the obligation when it is required to do so."

3.1.5 No self-dealing

Section 90 sets out a prohibition against a director taking actions where they have a conflict of interest. Subsection 90(a) states: "A director must not exercise any power as a director if he or she is materially interested, whether directly or indirectly, in the exercise of the power." In other words, directors can't vote on proposed deals in which they have a self-interest. However, a director may overcome the prohibition by fully disclosing their interest to other directors (or to the shareholders in the event a shareholder vote on the proposed action is required).

Section 134 explains what happens if a company unknowingly enters into a transaction where a director has a material interest, i.e., where a director fails to disclose their self-interest. It provides that the company may cancel the transaction within 3 months of learning of the director's interest. However, the company may not cancel the transaction if the company receives "fair value" under the transaction. A company is presumed to receive "fair value" if the company in good faith enters into the transaction in the ordinary course of the company's business and "on usual terms and conditions." This last phrase is key. For example, if a director owned a construction supply store and the company purchased building materials from that store, there would be no right to cancel the transaction if the supplies were sold at the regular retail price. Similar rules apply if a director breaches the duty of good faith in entering a contract with a third party. Section 135.

3.1.6 Company information to be kept as confidential

Section 91 states that a director must not disclose, or use for their own benefit, "company information" except in the interests of the company or as otherwise required by law. The term "company information" is defined as information that the director has in his or her capacity as director or employee of the company" and that "would not otherwise be available to him or her."

3.1.7 Must exercise care and diligence

Section 92 concludes this part of the new Companies Act by setting out the general duty to act in a diligent and reasonable manner as a director. This Section reads:

> "A director of a company, when exercising powers or performing duties as a director, must 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 responsibilities undertaken by him or her."

3.2 Shadow directors and "control persons"

Regulation of shadow directors is new to the Cook Islands. A "shadow director" is a person who is not formally listed as a director on the company register and does not openly participate in making decisions, but whose instructions or directions are routinely followed by the formally identified directors. Under the new Company Act such a person will be deemed a de facto "shadow director" and subjected to the same duties as are imposed upon the actual named directors. See Sections 96-97.

Similarly, any 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" can be deemed a director for purposes of assessing director liability. Section 98.

These provisions are consistent with international good governance and anti-money laundering mandates which recognize that sometimes a front-person is named as a director in official filings even though someone else is actually in charge of the company.

3.3 Banning Directors

Section 106 allows a court to disqualify a director from acting in that capacity for up to 5 years if that director is found to have engaged in certain prohibited activities, such as being convicted of a crime. Two specific prohibited activities relate to the management of the company for which the person serves as a director. If a director is convicted of fraud committed in relation to the company, or is "found liable for a breach of duty to a company" then they can be banned. One practical effect of this is to allow a shareholder or another director to bring an action against the rogue director to seek their removal from office. Creditors and liquidators are also empowered to bring an action under this provision seeking removal.

4.0 Enforcement

Sections 109-127 of the Act provide for various mechanisms for remedying, preventing, or investigating wrongdoing in relation to a company. These sections provide interested persons with the power to protect

their interests in a company that may have engaged in improper activities. The most important of these sections are noted below.

4.1 Injunctive relief for director actions

Section 109 allows a shareholder, another director *or the Registrar* to seek an injunction to stop a director of a company from conduct that would contravene this Act or the constitution of the company. The Court may make any order it deems appropriate in the action. Similarly, Section 119 gives a shareholder the right to seek a court order compelling a director to take an action that is required by the company's constitution.

4.2 Shareholder proceeding against director, company for breach of duty

A shareholder or former shareholder may sue a director or former director for breach of a director duty owed to the shareholder in that capacity. Section 118. The same sort of action can be brought against the company itself. Section 120.

4.3 Prejudiced shareholders

Section 123 allows a shareholder (or former shareholder) to apply for relief where the "affairs of the company have been, or are being, or are likely to be, conducted in a manner that is…or are likely to be, oppressive, unfairly discriminatory, or unfairly prejudicial" to the shareholder. This is not an open-ended invitation to sue, however, as Section 124 lists the specific actions that can give rise to a claim under Section 123. These are all corporate-type actions, such as problems related to the issuance of new shares, or the failure to declare and pay dividends The Court may then make any order it deems just, including an order "requiring the company or any other person to pay compensation to a person." Note how this is phrased: technically this could allow the Court to order the complaining shareholder to pay compensation to the company if the original claim was frivolous.

4.4 Investigations

Section 126 balances needs of certain parties to inspect company records with the rights of a company to keep its affairs confidential. This section allows a shareholder, creditor or other "entitled person" (someone with contractual rights over the company) to seek a court order to allow the inspection and copying of company records, and to obtain an independent audit of the company books. However, the Court must not make such an order unless it is satisfied that the applicant is acting in good faith and that the inspection is for a proper purpose. If an order of inspection is issued, the person appointed by the Court to conduct the investigation must submit their findings back to the Court. Section 127.

4.5 Director liabilities: offences

In prior amendments to the old Companies Act the Cook Islands began to criminalize some behaviour by officers of companies, so this concept is not new. See Sections 461A-461D, 1995 and 1999 Amendments to the old Cook Islands Companies Act. In 2014 New Zealand made an amendment to its Companies Act to take a far more aggressive stance towards directors' duties by criminalizing certain behaviours. Against this background, Section 94 of the new Companies Act 2017 provides:

> (1) A director of a company commits an offence if he or she exercises powers or performs duties as a director of the company—
>
> (a) in bad faith towards the company and believing that the conduct is not in the best interests of the company; and
>
> (b) knowing that the conduct will cause serious loss to the company.

A person who commits an offence under this section is liable on conviction to a fine not exceeding $100,000 or to imprisonment for a term not exceeding 7 years, or both. Along these lines Section 101 states that a company may not indemnify a director for criminal acts.

There are other actions (or inactions) that can give rise to criminal liability, including:

- Making false statements in documents required by the Act or in reports relating to the affairs of the company. Section 391.
- Where any director, shareholder or employee fraudulently takes property of the company for their own use, or conceals or destroys it. Section 392.
- Falsification or destruction of company records. Section 393.
- Carrying on business fraudulently with the intent to deceive creditors of for some other fraudulent purpose. Section 394.
- A director may have criminal liability where they fraudulently do any thing that causes a material loss to creditors. Section 395.
- Dishonestly incurring a debt, which would occur if a company takes on debt that causes the company to fail the solvency test. Section 396.

4.6 Director liabilities: defences to liability

Section 103 provides directors with defences to criminal liability. Generally, if a director can show that they took "all reasonable and proper steps" to ensure compliance with the Companies Act, or could not have reasonably complied with the Act, then there will be no criminal liability.

Section 93(1) boosts this defence by stating that a director may rely on information supplied by a professional (like an attorney or accountant) or other expert if the director—

(a) acts in good faith; and

(b) believes on reasonable grounds that the information or advice is within the competence of the third party to prepare, supply, or give; and

(c) makes proper inquiry where the need for inquiry is indicated by the circumstances.

5.0 Shares

5.1 General

Sections 18-55 of the Companies Act set out the rules and procedures for the issuance, maintenance, transfer and buy-back of shares in a company, starting with the obvious rule that a company must have at least one issued share to at least one shareholder (Section 20). Shares are defined as "personal property" (Section 18) which has implications under the new PPSA, in essence meaning that shares can be pledged as collateral for a loan. Most of these sections will be familiar as there are few departures from the existing law. A few of the highlights from these sections are set out below.

5.2 No nominal or par value

In a departure from the position under the old Cook Islands company law, Section 19(1) provides that a share must not have a nominal or par value. Thus, the concept of nominal capital is redundant under the Bill.

5.3 Rights attached to shares

Section 21(1) sets out the core rights that attach to a share, which include the right to vote at company meetings during which: i) directors may be appointed or removed; ii) a constitution may be adopted or amended; iii) "major transactions" may be approved or rejected; and iv) a liquidator may be appointed. The holder of a share also has the right to an equal share in dividends and distribution of assets upon liquidation. *Importantly*, these rights may be varied or excluded by the constitution or the terms of issue of shares (Section 21(2)). This gives each company the flexibility to customize its internal operations and distribution of profits and/or assets as it sees fit.

5.3.1 Distributions and dividends

A distribution is a payment to a shareholder in any form, including not only a cash transfer but also such things as a purchase of a shareholder's shares or incurring a debt on the shareholder's behalf. A dividend is a direct cash payment to a shareholder. So, a dividend is a kind of a distribution.

The Act provides that distributions and dividends may only be paid if, after the payment, the company would pass the solvency test. Sections 29 and 32. Unless the constitution provides otherwise, or if there are multiple classes of shares with different rights, all shareholders participate equally in any dividends paid out by the company.

5.4 Issuance of shares

A company must, immediately after its incorporation, issue to any person named in the application for incorporation as a shareholder the number of shares specified in the application tied to that person. Section 23.

A company may issue additional shares over its life so long as the issuance is either in compliance with the constitution or is approved by all existing shareholders. If new shares are issued, the company must update the online company registry within 10 working days with the new shareholder information. Section 24.

The directors determine how much to charge for the issuance of a new share(s) and what form the payment should take, which can include such things as cash, promissory notes, contracts for future services, real or personal property, or other financial products of the company (for example, a debt security). Section 27.

5.4.1 Raising capital

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 Section 360. 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.

Recent trends in international capital markets have recognized that non-traditional mechanisms for raising capital may be appropriate for companies that are privately held. Crowd-funding and other internet-based platforms have opended up new avenues for start-up and smaller companies seeking investement funds. For this reason, many jurisdictions no longer contain rigid obstacles on raising funds from the public. Instead, the modern approach imposes a duty on the company and its promotors to refrain from making false claims or otherwise engage in deceptive advertising, and then criminalizes that fraudulent behaviour. This approach strikes a balance between allowing companies to tap new financial markets but still protect investors.

The new Companies Act follows this modern trend, 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. Section 397 provides:

397. Misleading or deceptive conduct in relation to offer of securities to public

(1) A person must not engage in conduct that is—

(a) reckless conduct in relation to—

(i) any advertisement; or

(ii) the offer of debt or equity securities generally; or

(iii) any dealing (including trading) in debt or equity securities; and

(b) misleading or deceptive or likely to mislead or deceive.

(2) A person who contravenes this section commits an offence and is liable on conviction to a fine not exceeding $50,000 or to imprisonment for a term not exceeding 5 years, or both.

Section 398 then defines the term "advertisement" as follows:

398. Definitions for purposes of section 397

For the purposes of section 397,—

advertisement means a form of communication—

(a) that—

(i) contains or refers to an offer of debt or equity securities to the public; or

(ii) is reasonably likely to induce persons to subscribe for the debt or equity securities of an issuer, being securities to which the communication relates and that have been, or are to be, offered to the public; and

(b) that is authorised or instigated by or on behalf of the issuer of the debt or equity securities or prepared with the co-operation of, or by arrangement with, the issuer of the securities; and

(c) that has been, or is to be, distributed to a person

See also Section 393, which makes it a crime to falsify corporate records with the intent to deceive any person. Thus, a buyer of shares who inspects the books of the company can feel more confident in their accuracy.

5.5 Treasury shares

Treasury shares are formerly outstanding shares that have been repurchased and are being held by the issuing company. Under Section 35(1), the general rule is that when a company acquires its own shares then those shares must be treated as immediately cancelled. However, Section 37 allows treasury stock to be held if it is expressly permitted by the constitution and the directors resolve that the shares should not be cancelled. The rights and obligations attaching to these shares are suspended for so long as they are held as treasury stock (clause 38), meaning that they cannot be voted or receive dividends. These shares may later be transferred (clause 39) whereupon rights and obligations revive. This allows a company to resell shares without having to go through the more complicated issuance-of-new-shares process.

5.6 Share register: "beneficial owners"

A company must keep a share register that contains biographical information about each shareholder and the information that relates to the transfers of shares. The entry of the name of a person in the share register as holder of a share is evidence that legal title to the share vests in that person. Sections 49-50.

A new innovation to the Cook Islands is the requirement that a company's share registry hold 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. Section 52. 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.

6.0 Shareholders and their rights

6.1 General

Part 6 contains important innovations strengthening the position of shareholders of a company and otherwise allowing for expedited decision-making by shareholders. The following are highlights of the new Act.

6.2 Shareholder powers

Under Section 58, certain powers are reserved exclusively to the shareholders. These are the power to vary the constitution, to approve a major transaction (under Section 61), 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.

6.2.1 "Major transaction" and shareholder approval

Section 61 prohibits a company from entering into a major transaction without first obtaining shareholder approval (under Section 62). **Major transaction** is defined in Section 62(3). Broadly, it means a transaction whose 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.

6.3 No arbitrary alteration of rights

Section 63 prevents alterations to core shareholder rights without prior shareholder approval of the alteration. Core rights include the right to vote and to receive dividends. This prevents the directors from making such changes without shareholder approval. In some cases this also gives

dissenting shareholders the opportunity to opt out and force a sale of their shares back to the company. See the next section on Dissenting right immediately below.

6.4 Dissenting rights

Section 65 gives a shareholder who dissents on certain fundamental decisions the right to require the company to purchase the dissenting shareholder's shares. The procedure to be followed is set out in Schedule 5 "Procedure for minority buy-out." This helps protect minority shareholders from oppressive acts by the majority.

6.5 Right to information

Companies must make periodic disclosures to their shareholders in three different ways. First, certain companies must send an annual report to its shareholders. Section 174. However, only those companies that have 10 or more shareholders and have not opted out from this annual report preparation must complete an annual report, so in practice there will be few companies that are covered by this requirement. See Sections 160 and 163.

The second disclosure requirement for shareholders is that there are miscellaneous documents that must periodically be sent to shareholders, either because the constitution requires it or because specific provisions of the Act do so. Section 176 lists these documents:

(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)).

Third, Sections 177-181 provide that a shareholder may request information held by the company and provides a process by which the request can be addressed. 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 (Section 178). Grounds for refusing disclosure include commercial prejudice to the company or another person (Section 179). In the last resort, a shareholder may seek a Court order for disclosure if the Court considers that there is no reason to withhold the information requested, or that the company is dragging its feet in providing it, or that the company is demanding an excessive fee to provide it (Section 181).

7.0 Closing a business

There are various parts in the Act that relate to closing a business. The last step in closing a business is its removal from the register as an active company.

7.1 Compromises with creditors

Sections 188-199 provide a formal mechanism for a company to reach some arrangement with its creditors. These compromises usually are for less than the total amount owed, but may allow the company to escape a full-blown liquidation proceeding. This usually has some value for a creditor in that they can get paid quicker than in liquidation. The compromise is often proposed by the directors, but can also be proposed by a creditor. If approved by the creditors, it 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 (Section 194). Most of the sections in this part of the Act address technical procedural matters to make sure that all parties are protected.

7.2 Receivership

Sections 296-336 govern receiverships of companies. The receiver is empowered to manage the property subject to the charge, which could involve the routine carrying on of regular business, closure of the company's doors, or anything in between. The receiver's primary charge is to maximize the value of the secured assets held by the company for the benefit of the appointing secured creditor(s). However, 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.

Once the property has been dealt with, the secured creditor(s) is paid and any surplus is retained by the company. The receivership then ends and the company may either continue its business, close its doors or enter formal liquidation proceedings if other assets remain to be distributed. Under this system secured creditors feel more confident providing credit when they know that they have a good chance of recovering value on assets charged, which leads to increased lending on a macro-economic basis.

To start a receivership a secured creditor appoints a receiver to take control of the property of the company that is subject to the creditor's security interest. A receiver must, within 5 working days after appointment, notify the appointment to the company, give public notice of their appointment, and then forward a copy of the public notice to the Registrar. (Section 301).

Subject to the terms of their appointment, a receiver has the following powers under Section 316:

(a) demand and recover income of the property in receivership:
(b) issue receipts for income recovered:
(c) manage the property in receivership:
(d) insure the property in receivership:
(e) repair and maintain the property in receivership:
(f) inspect at any reasonable time documents that relate to the property in receivership and are in the possession or under the control of the company:

(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:

(h) buy and sell the property in receivership in the ordinary course of business.

Further, a receiver may execute documents on behalf of the company that relate to the property under receivership (Section 317) and may also under certain circumstances sell real property (land) that is subject to the receivership (Section 318).

The receiver must prepare reports of their activities and provide them to the secured creditor, the company, the Registrar (using the prescribed form) and the Court, if appointed via a court order (Sections 313 and 314) until the matter is closed or a liquidation is commenced.

7.3 Liquidation

Liquidation begins with the appointment of the liquidator (Section 202). The liquidator must be a named person and must consent to the appointment. The liquidator may be appointed by the directors, the shareholders, or the Court, though 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(1)(c)). Most commonly, the application is made by a creditor seeking the liquidation of an insolvent company.

There are numerous provisions in the Act that detail how liquidation is to proceed and the periodic filings that a liquidator must make with the Court, and reference should be made to those provisions. See Sections 200-295. In general, once appointed a liquidator must soon afterwards prepare a report that includes:

- A statement of company's affairs
- Proposals for conducting the liquidation
- Estimated completion date
- Alert investors to their statutory right to call a meeting of creditors or shareholders, and
- A list of every known creditor of the company with each creditor's address (if known).

The liquidator must subsequently prepare 6-month reports advising interested parties of the progress of the liquidation and file these with the Registrar. This brings transparency to the entire process for all creditors and the Registrar to see.

Liquidators are also empowered to call creditors' meeting if these would be beneficial. Creditors' meetings can be a useful tool to more fully investigate a company's affairs including the causes of insolvency. The meetings may also lead to the identification of previously undiscovered assets. They can also be a forum for raising and discussing matters relevant to the administration of the liquidation, giving creditors a voice in the process.

7.4 Removal from the register

Removal from the Cook Islands register is the final step in the life of a company. Once removed, it ceases to exist and any 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. Objections can be made by filing an application to the Court for an order that the company not be removed from the register.

7.4.1 Automatic removal: annual return compliance

As discussed earlier in this Summary, a company will automatically be removed from the register for the failure to file an annual return. No one may object to this removal. However, it is easy to restore a company removed for failing to file an AR by simply filing back due ARs and paying the applicable fees and penalties. Shareholders, directors, creditors, persons with undischarged claims and liquidators may all apply for restoration. In the case of a creditor of undischarged claimant, the Registrar may waive the requirement for all outstanding annual returns, or accept 1 or more partially completed annual returns, if the Registrar is satisfied that it is not practical for the applicant to fulfil the requirement. Section 350.

Automatically removal for failure to file an AR keeps the registry up to date. Any third party seeking to know the status of a company can easily see if it is active and in good standing or if it is delinquent in its responsibilities under the Act. No third party should enter new contracts with a company that has been removed, so there is a self-enforcing mechanism behind this removal: companies have incentive to stay compliant and, if they slip, they will soon find that commercial pressures force them to seek restoration.

7.4.2 Voluntary removal

A company may request to be removed from the register when it is finished doing business. The request may be made by a shareholder, a person authorised to make the request under a special resolution, or by a director if the constitution allows this. The request can be made on the grounds that the company has: i) ceased doing business, discharged in full its liabilities, and distributed its assets; or ii) no surplus assets after paying its debts in full or in part, and no creditor has sought to put the company into liquidation. The request for removal is filed with the register. Section 339. Public notice of the pending removal must be given, allowing the public (usually a creditor) to file an objection. Section 340. Sections 341-343 detail the procedure around handling objections.

7.4.3 Court ordered restoration

A person that has been harmed by the removal of a company may apply to the court for an order to restore the company to the register. The Registrar may also apply. The court may make whatever order it deems just in evaluating the proper steps to take. Section 351. Upon restoration all rights in company property returns to the company. Section 353.

8.0 Overseas companies

Just as with existing law, an overseas must register as an overseas company within 20 days of commencing business in the Cook Islands (Section 358). The new Companies Act 2017 specifies that applicants must supply evidence of the company's compliance with Part V of the Development Investment Act 1995-96. This is commonly called the "BTIB Certificate" indicating that the overseas company had registered with the Business Trade and Investment Board. Registration with the BTIB has long been the law in the Cook Islands, but the lack of an electronic registry made enforcement challenging.

Some other key requirements under the new Act are as follows. They must: i) make an annual return or risk being de-registered (Section 362); file a notice of changes in directors (Section 364); and give public notice of their intention to cease carrying on business in the Cook Islands and then file a notice of their intent with the Registrar (Section 365).

9.0 Administering the new Act

A central feature of the reform is the implementation of a new electronic, fully online registry system. This online system will create significant efficiencies for both business owners and Government by: i) making it easier for business to incorporate and then maintain their company records; ii) providing information about companies to the public via on online website; iii) enforcing compliance with the Act by running automated checks to make sure filings are current; and iv) providing Government with statistics related to business activity within the country.

9.1 Online registry

The electronic, online system will provide all business functions for the Cook Islands registry beginning with initial incorporation, updating and maintaining information about the registered entity throughout its life, enforcing compliance with filing deadlines including the annual return requirement, publishing entity information to the web for online searchers, and allowing businesses to properly close down.

MOJ has determined that all filings will be submitted online. This means that no longer will any business be required to front up at the Ministry of Justice to complete their work with the registry. To submit filings online, a person must first establish a client account with the registry. This is easy to do and is free. Please see the link on the MOJ company registry website titled "Client Accounts" for instructions on how to apply.

To encourage companies to keep their registry records up to date, many routine filings (like changes of address or names) are free. For filings that do have a fee, clients must prefund their account. This can be done one of two ways: either with a credit card at the time the online filing is to be submitted or via a cash payment to MOJ. Frequent users may find it easier to prefund their account with a larger amount so that funds are available whenever they wish to submit a filing. The system will then debit their account for the filing fee, and a statement will be maintained in the registry showing all of a client's fee-based transactions.

9.2 Registrar's powers

With the advent of an electronic registry comes new opportunities for the Registrar to administer the law more efficiently. These include wide-ranging functions such as the ability to more closely monitor compliance with filing deadlines (including annual return filings), the authority to rectify the register in the event of minor errors (typos), and the recognition of the validity of email notices sent from the Registrar. The new Act also grants the Registrar expansive powers to inspect company records and to require submission of director consents or beneficial ownership information in the event of some controversy or investigation.

9.3 Company charges: enactment of the Personal Property Securities Act

There will no longer be any company charges filed in the company registry. Instead, the Cook Islands has enacted its own version of the Personal Property Securities Act (PPSA), which became effective on the same day that the new Company Act became effective. All of the existing charges in the company registry must be re-registered into the new online PPSA registry and work commenced with the major lenders prior to the effective date of the PPSA to make this happen. Any other persons (like trade creditors) that have existing company charges must re-register those charges into the PPSA within 180 days from the commencement of that law. Please see the section of the MOJ registry dedicated to the PPSA for more details.

10.0 Transition from current to new requirements: re-registration

The information currently maintained by the MOJ for each company will be out of sync with the new Companies Act requirements. Additionally, there is no electronic database within MOJ that can serve as a comprehensive source from which to migrate information into the new electronic registry. New Zealand faced the same question when it passed its 1993 Act: how to transition from the old paper-based system to a new electronic registry. To address this situation New Zealand determined to require all companies to re-register as a company under the new Act.[2] Similarly, many of the other Pacific island jurisdictions that have implemented a new online registry reform have required a re-registration.[3]

Following these examples, all previously registered Cook Islands Companies and Overseas Companies must be re-registered within one year after the Companies Act 2017 commences, or by 9-Dec-2020. In order to re-register, a person responsible for the company must first: i) register as a client of the registry, then ii) obtain authority over the company that they wish to re-register. To obtain authority over the company, once you have a client account, please search by the registration number of the company you wish to re-register. You will then have the option to request company authority if you don't already have authority, or initiate the re-registration if you already have authority.

[2] New Zealand passed a separate Companies Reregistration Act 1993 to address various issues presented by this approach. This legislation served as the model for the transition provisions within the new Companies Act 2017.

[3] Tonga, Samoa, and Solomon Islands all instituted a re-registration.

The re-registration process will require submission of the same data elements as would be required for a new company formed under the new law. In this way, all existing companies will provide information into the registry that is up-to-date and in compliance with the new law. This process also has the positive effect of aging-off the companies that are no longer active as failure to re-register will result in a company being struck off the registry. The obligation to re-register also applies to overseas companies.

Re-registration is free, and there will be no annual return required during the year in which the re-registration occurs. Once a company is re-registered, all of its future annual returns will be due in the calendar month in which it re-registered. However, if this month is inconvenient then the company may request a different month be assigned to it.

Re-registration does not create a new legal entity and leaves the property, rights, and obligations of the company unaffected. From a practical perspective all re-registration does is update the information in the new online registry and tells the Registrar that the company is still active. The following provisions discuss some of the details to keep in mind when completing the re-registration.

First, with regard to the new requirement that a company must have a constitution, during the re-registration process a company may choose to adopt one of the standard constitutions set out in the Act by simply ticking a box on the Application to Re-register online form. On the other hand, if a company already has a document(s) in place that amounts to a constitution that it wishes to continue to operate under, the company will need to scan and then upload that document(s) during the re-registration process.

Second, earlier in this Summary Memo it was noted that that shares under the new Act must not have a par value. Therefore, for re-registration purposes, there will of necessity be an adjustment of share capital.

Third, note also that in order to re-register any local company with more than one-third foreign shareholdings must present the BTIB certificate as part of their Application to Incorporate. This is consistent with how new incorporations will be handled.