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ACT

No. 15 of 2013

I assent

DR. JOYCE BANDA

PRESIDENT

19th July, 2013

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An Act to consolidate the law relating to the incorporation, administration and regulation of companies, and to provide for matters incidental thereto and connected therewith

ENACTED by the Parliament of Malawi as follows—

PART I—PRELIMINARY

Short title and
commence-
ment

1. This Act may be cited as the Companies Act, 2013, and shall come into force on such date as the Minister shall appoint by notice published in the *Gazette*.

Interpretation

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

“accounting period” means, in relation to a company or any other body corporate, the period in respect of which the financial statements of the company or any other body corporate are made up, whether that period is a year or not;

“articles” means the articles of association of a company as originally framed or as altered by special resolution, including, so far as they apply to the company, the provisions contained in regulations made by the Minister;

“beneficial interest”, when used in relation to a company’s securities, means the right or entitlement of a person, through ownership, agreement, relationship or otherwise, alone or together with another person to—

(a) receive or participate in any distribution in respect of the company’s securities;

(b) exercise or cause to be exercised, in the ordinary course, any or all of the rights attaching to the company’s securities; or

(c) dispose or direct the disposition of the company’s securities, or any part of a distribution in respect of the securities,

but does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Securities Act, 2010;

Act No. 20 of
2010

“board” in relation to a company, means—

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

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

“company” means a body corporate, including a foreign company or any other body corporate incorporated outside Malawi;

“constitution” means the memorandum and articles of association of a company;

"contributory" means a person liable to contribute to the assets of a company in the event of its being wound up, and includes the holder of fully paid shares in the company;

"convertible securities" means any securities of a company that may, by their terms, be converted into other securities of the company, including—

(a) any non-voting securities issued by a company and which will become voting securities—

(i) on the occurrence of a designated event; or

(ii) if the holder of those securities so elects at some time after acquiring them; and

(b) options to acquire securities to be issued by the company, irrespective of whether or not those securities may be voting securities or non-voting securities contemplated in paragraph (a);

"court" used in relation to a company, means the High Court;

"debenture" means a written acknowledgement of indebtedness issued by a company in respect of a loan made or to be made to it or to any other person or of money deposited or to be deposited with the company or any other person or of the existing indebtedness of the company or any other person whether constituting a charge on any of the assets of the company or not; and—

(a) includes—

(i) debenture stock;

(ii) convertible debenture;

(iii) a bond or an obligation;

(iv) loan stock;

(v) an unsecured note; or

(vi) any other instrument executed, authenticated, issued or created in consideration of such a loan or existing indebtedness; and

(b) does not include—

(i) a bill of exchange;

(ii) a promissory note;

(iii) a letter of credit;

(iv) an acknowledgement of indebtedness issued in the ordinary course of business for goods or services supplied;

(v) a policy of insurance; or

(vi) a deposit certificate, pass book or other similar document issued in connection with a deposit or current account at a banking company;

"debenture holders' representative" means a person designated as such in an agency deed;

"debenture stock"—

(a) means a debenture by which a company or a debenture holder's representative acknowledges that the holder of the stock is entitled to participate in the debt owing by the company under the agency deed; and

(b) includes loan stock;

"distribution", in relation to a distribution by a company to a shareholder, means—

(a) the direct or indirect transfer of money or property, other than the company's own shares, to or for the benefit of the shareholder; or

(b) the incurring of a debt to or for the benefit of the shareholder, in relation to shares held by that shareholder, and whether by means of a purchase of property, the redemption or other acquisition of shares, a distribution of indebtedness, or by some other means;

"dividend" has the meaning set out in section 104;

"dormant company" means that a company is "dormant" during any period in which it has no significant accounting transaction;

"employees' share scheme" means a scheme for encouraging or facilitating the holding of shares in or debentures of a company by or for the benefit of—

(a) the *bona fide* employees or former employees of—

(i) the company,

(ii) any subsidiary of the company, or

(iii) the company's holding company or any subsidiary of the company's holding company, or

(b) the spouses, civil partners, surviving spouses, surviving civil partners, or minor children or step-children of such employees or former employees;

"International Financial Reporting Standards" or "IFRS", or such subsequent standards howsoever called, means Standards

and Interpretations issued by the International Accounting Standards Board ("IASB") or its successor bodies and comprise—

- (a) International Financial Reporting Standards ("IFRS");
- (b) International Accounting Standards;
- (c) IFRIC Interpretations; and
- (d) SIC Interpretations;

"International Standards on Auditing" means the International Standards on Auditing issued by the International Auditing and Assurance Board;

"liquidator" includes the Official Receiver acting as the liquidator;

"member" means—

- (a) a shareholder within the meaning of section 71; and
- (b) in the case of a company limited by guarantee, a person whose name is entered in or who is entitled to have his name entered in the register of members;

"memorandum" means the memorandum of association of a company;

"nominee" means a person who, in exercising a right in relation to a share, debenture or other property, is entitled to exercise that right only in accordance with instructions given by some other person either directly or through the agency of one or more persons, and a person is the nominee of another person where he is entitled to exercise such a right only in accordance with instructions given by that other person;

"non-executive director" means a director who is not involved in the day to day management of the company;

"offer" includes an invitation to make an offer;

"offeree" means a holder of shares which are included in a take-over offer;

"officer", in relation to a company means a director, manager or a secretary or where the affairs of the company are managed by its members, a member;

"one person company"—

- (a) means a private company in which the only shareholder is also the sole director of the company; and
- (b) does not include a company in which the only shareholder is a company;

"ordinary resolution" means a resolution passed by a simple majority of votes cast by such shareholders of the company as are entitled to vote, voting in person or by proxy at a general meeting;

"par or nominal value" means the stated or face value;

"parent"; in relation to another company, means that the other company is its subsidiary;

"pre-emptive rights" means the rights conferred on shareholders under section 92;

"pre-incorporation contract" means—

(a) a contract purporting to be made by a company before its incorporation; or

(b) a contract made by a person on behalf of a company before and in contemplation of its incorporation;

"public notice" means, in respect of any notice that is required to be given of any matter affecting a company, that notice shall be given by publishing a notice of the matter—

(a) in the *Gazette*; and

(b) in two daily newspapers in wide circulation in Malawi;

"Registrar" means the Registrar of Companies appointed pursuant to section 3;

"share" means a share in the share capital of a company;

"special resolution" means a resolution approved by a majority of not less than seventy-five per cent or, if a higher majority is required by the company constitution, that higher majority, of the votes cast of those shareholders as are entitled to vote and voting in person or by proxy;

"stated capital"—

(a) means subject to section 100, in relation to a class or classes of shares issued by a company including such no par value or nominal shares as may have been issued by the company before the commencement of this Act, means the total of all amounts received by the company or due and payable to the company in respect of—

(i) the issue of the shares; and

(ii) calls on the shares;

(b) subject to section 100, in relation to a class or classes of shares issued by a company including such par value or nominal shares as may have been issued by the company before the commencement of this Act, means the total of all

amounts received by the company or due and payable to the company in respect of—

(i) the nominal paid-up value of the shares where applicable; and

(ii) the share premiums paid to the company in relation to those shares and required to be transferred to the share premium account under section 101;

“subsidiary” means—

(a) in relation to another company where—

(i) that other company, referred to as the parent—

(aa) controls the composition of the Board of the company;

(bb) is in a position to exercise, or control the exercise of, more than one-half of the maximum number of votes that can be exercised at a meeting of the company;

(cc) holds more than one-half of the issued shares of the company, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital; or

(dd) is entitled to receive more than one-half of every dividend paid on shares issued by the company, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital; or

(ii) the company is a subsidiary of a company that is the parent's subsidiary.

(b) in determining whether a company is a subsidiary of another company—

(i) shares held or a power exercisable by that other company only as a trustee not be treated as held or exercisable by it;

(ii) subject to paragraphs (iii) and (iv), shares held or a power exercisable—

(aa) by a person as a nominee for that other company, except where that other company is concerned only as a trustee; or

(bb) by, or by a nominee for, a subsidiary of that other company, not being a subsidiary which is concerned only as a trustee, shall be treated as held or exercisable by that other company;

(iii) shares held or a power exercisable by a person under the provisions of debentures of the company or of an agency deed for securing an issue of debentures shall be disregarded;

(iv) shares held or a power exercisable by, or by a nominee for, that other company or its subsidiary, not being held or exercisable in the manner described in paragraph (iii) shall not be treated as held or exercisable by that other company where—

(aa) the ordinary business of that other company or its subsidiary, as the case may be, includes the lending of money; and

(bb) the shares are held or the power is exercisable by way of security only for the purposes of a transaction entered into in the ordinary course of that business.

“substantial shareholder” means a person in Malawi or elsewhere, who holds by himself or his nominee, a share or an interest in a share which entitles him to exercise not less than five per cent of the aggregate voting power exercisable at the meeting of shareholders;

“unanimous resolution” means a resolution which has the assent of every shareholder entitled to vote on the matter which is the subject of the resolution, and either—

(a) given by voting at a meeting to which notice to propose the resolution has been duly given and of which the minutes of the meeting here duly recorded that the resolution was carried unanimously; or

(b) where the resolution is signed by every shareholder or his agent duly appointed in writing signed by him, one or more documents in similar form, including electronic communications, each signed by the shareholder concerned, or his agent;

“winding-up resolution” means a resolution passed for the winding up of a company;

“year” means a calendar year.

(2) For the purposes of this Act, a person controls a body corporate, or its business, if—

(a) in the case of a body corporate that is a company—

(i) that body corporate is a subsidiary of that first person, or

(ii) that first person together with any related or inter-related person, is—

(aa) directly or indirectly able to exercise or control the exercise of a majority of the voting rights associated with securities of that company, whether pursuant to a shareholder agreement or otherwise; or

(bb) has the right to appoint or elect, or control the appointment or election of, directors of that company who control a majority of the votes at a meeting of the board; or

(b) that first person has the ability to materially influence the policy of the body corporate in a manner comparable to a person who, in ordinary commercial practice, would be able to exercise control.

(3) For the purposes of this Act—

(a) an individual is related to another individual if they—

(i) are married, or live together in a relationship similar to a marriage; or

(ii) are separated by no more than two degrees of natural or adopted family relationship;

(b) an individual is related to a legal person if the individual directly or indirectly controls the legal person, as determined in accordance with subsection (2); and

(c) a body corporate is related to another body corporate if—

(i) either of them directly or indirectly controls the other, or the business of the other, as determined in accordance with subsection (2);

(ii) either is a subsidiary of the other; or

(iii) a person directly or indirectly controls each of them, or the business of each of them, as determined in accordance with subsection (2).

(4) For the purposes of this Act—

“hard copy” or “electronic form” and related expressions means—

(a) a document or information is sent or supplied in hard copy form if it is sent or supplied in a paper copy or similar form capable of being read, and, references to hard copy have a corresponding meaning;

(b) a document or information is sent or supplied in electronic form if it is sent or supplied—

(i) by electronic means (for example, by e-mail or fax); or

(ii) by any other means while in an electronic form (for example, sending a disk by post) and references to electronic copy have a corresponding meaning.

(c) a document or information is sent or supplied by electronic means if it is—

(i) sent initially and received at its destination by means of electronic equipment for the processing (which expression includes digital compression) or storage of data; and

(ii) entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means and references to electronic means have a corresponding meaning.

(d) document or information authorized or required to be sent or supplied in electronic form shall be sent or supplied in a form, and by a means, that the sender or supplier reasonably considers will enable the recipient—

(i) to read it; and

(ii) to retain a copy of it.

(e) for the purposes of this subsection, a document or information can be read only if—

(i) it can be read with the naked eye; or

(ii) to the extent that it consists of images (for example photographs, pictures, maps, plans or drawings), it can be seen with the naked eye; and

(f) this interpretation applies whether the provision of this Act uses the words “sent” or “supplied”, or uses other words such as “deliver”, “provide”, “produce” or, in the case of a notice, “give”, to refer to the sending or supplying of a document or information.

(5) For the purposes of this Act—

“solvency test” means—

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

(b) the value of the company’s assets is greater than the sum of—

(i) the value of its liabilities; and

(ii) the company’s stated capital;

(b) other than in relation to compromises, reconstructions and takeovers in determining whether the value of a company's assets is greater than the value of its liabilities, the board may take into account—

(i) in the case of a public company or a private company, the most recent financial statements of the company prepared in accordance with IFRS; and

(ii) a valuation of assets or estimates of liabilities that are reasonable in the circumstances.

(c) for the purposes of determining whether the value of the compromise, reconstruction or take-over company's assets is greater than the sum of the value of its liabilities and its stated capital, the directors of each compromise, reconstruction or take over company—

(i) shall have regard to—

(aa) financial statements that are prepared in accordance with IFRS and that are prepared as if the compromise, reconstruction or take over had become effective; and

(bb) all other circumstances that the directors know or ought to know would affect, or may affect, the value of the compromise, reconstruction or take over company's assets and the value of its liabilities;

(ii) may rely on valuations of assets or estimates of liabilities that are reasonable in the circumstances.

PART II—THE OFFICE OF THE REGISTRAR OF COMPANIES

3.—(1)—(a) There shall be a Registrar of Companies who shall have legal qualifications and be an officer in the public service.

Establishment
of the office
of the
Registrar of
Companies

(b) shall be such Deputy Registrars of Companies and Assistant Registrars of Companies who shall have legal qualifications and be officers in the public service.

(2) Anything in this Act authorized or required to be done by the Registrar or to be signed by the Registrar, may be done by or signed by the Deputy Registrar or Assistant Registrar and shall be valid and effective as if done by or signed by the Registrar.

(3) The Registrar shall be supported by adequate structures and employees with appropriate skills to enable him to perform the duties of the Registrar.

(4) The Registrar shall have a seal and such seal shall bear the words "Registrar of Companies, Malawi."

Functions of
the Registrar

4.—(1) The functions of the Registrar shall be to—

(a) administer this Act including the regulations made under it and the supervision of the incorporation and registration of companies under this Act;

(b) establish and maintain a company's registry in the Malawi Business Registration Database established under the Business Registration Act;

(c) perform such other functions as may be specified by this Act or any other written law; and

(d) undertake such other activities as may be necessary or expedient to give full effect to this Act.

Fees payable
to the
Registrar

5.—(1) The Minister, on the recommendation of the Registrar, shall have powers to require the payment of fees to the office of the Registrar in respect of the performance of any of the Registrar's functions or the provision of any services or facilities incidental to, or otherwise connected with, the performance of the Registrar's functions under this Act.

(2) The Minister may, on the recommendation of the Registrar, by order published in the *Gazette*, prescribe a schedule of penalties for non-compliance with the provisions of this Act.

Registration
of documents

6.—(1) On receipt of a document for registration under this Act, the Registrar shall—

(a) subject to subsection (2), register the document; and

(b) issue to the person, from whom the document was received, a written acknowledgement of receipt of the document.

(2) The Registrar may refuse to register a document submitted to him for registration under this Act where the document—

(a) is not in the approved form;

(b) is not in accordance with this Act or any regulations made under this Act;

(c) is not in a form that enables particulars to be entered directly by electronic or other means in the device or facility where the register is kept wholly or partly by means of a device or facility referred to in section 7;

(d) has not been properly completed;

(e) contains matter contrary to law;

(f) contains any error, alteration or erasure;

(g) contains material that is not clearly legible; or

(h) is not in accordance with any directive or notice issued by the Registrar.

(3) Where the Registrar refuses to register a document under subsection (2), the Registrar shall, within 14 days of the day on which the document was submitted for registration, in that behalf, in writing or by using such means of communication as may be determined by him, notify the person who submitted the document and may require—

(a) that the document be appropriately amended or completed and submitted for registration again; or

(b) that a fresh document be submitted in its place, on payment of the prescribed fee and within such time limit as may be determined by the Registrar.

(4) A document submitted under subsection (3) within the time limit provided there under shall, in all circumstances, be deemed to have been filed on the day the document was first submitted under subsection (1).

(5) Where a document is not collected for the purposes of subsection (3) (a), or is not resubmitted within the time limit specified in a notice under subsection (3) (b), the document shall—

(a) be deemed not to have been filed; and

(b) in the case of a document not collected for the purposes of subsection (3) (a), be disposed of by the Registrar in such manner as he may determine.

(6) The Registrar may, for the purposes of this section, issue such directions or guidelines as he considers necessary.

(7) For the purposes of this Act, a document shall be registered when—

(a) the document is filed in a register kept by the Registrar;

(b) particulars of the document are entered in any device or facility referred to in section 7 (2).

(8) The registration of a document or the refusal of registration of a document by the Registrar shall not—

(a) affect the validity of the document;

(b) create a presumption as to the correctness of the information contained therein.

(9) The Registrar may from time to time, by notice published in the *Gazette*, prescribe—

(a) the form of notices required to be given to the Registrar under this Act; or

(b) the procedure to be followed in registering documents or performing any act or thing required to be done under this Act.

Power to
require delivery
by electronic
means

7.—(1) Notwithstanding anything to the contrary, the Registrar may authorize to be made, submitted or done electronically in such manner and through such computer system as may be approved by the Registrar—

(a) the incorporation or registration of a company;

(b) the payment of any fees;

(c) the undertaking of such other activities as may be necessary or expedient to give full effect to this Act;

(d) the performance of any act or thing which is required to be done in relation to paragraphs (a) to (c).

(2) For the purposes of this section, the Minister may make regulations—

(a) providing that any document reproduced electronically or by other means by the Registrar shall for all purposes be treated as if it were the original document, notwithstanding any law to the contrary;

(b) authorizing the destruction of any documents which have been recorded or stored electronically or by other means; and

(c) giving full effect to, and ensuring the efficient operation of, any device or facility of the kind referred to in subsection (1).

PART III—REGISTERS

The Registers

8.—(1) The Registrar shall keep such registers as he considers necessary in such form and in such manner as he thinks fit.

(2) The registers referred to in subsection (1) may be kept in such manner as the Registrar thinks fit including, either wholly or partly, by means of a device or facility—

(a) that records or stores information electronically or by other means; and

(b) that permits the information so recorded or stored to be readily inspected or reproduced in usable form.

9. The Registrar shall assign unique identifiers to all registered companies.

Application
of unique
identifiers

10.—(1) The originals of documents delivered to the Registrar in hard copy shall be kept for seven years after they are received by the Registrar, after which they may be destroyed provided the information contained in them has been recorded.

Preservation
of original
documents
and
reconstitution
of lost
documents

(2) The Registrar is under no obligation to keep the originals of documents delivered in electronic form, provided the information contained in them has been recorded.

(3) Where the memorandum, articles, or any other document relating to a company required to be filed, has been lost or destroyed—

(a) the company may, with the approval of the Registrar, file a copy of the document;

(b) the Registrar may require the company to submit certified copies of the document within such time as the Registrar may decide.

(4) Where the Registrar gives his approval under subsection (3) (a), the Registrar may direct that a notice to that effect be given to such person and in such manner as the Registrar may decide.

(5) The Registrar may, on being satisfied—

(a) that the original document has been lost or destroyed,

(b) of the date of the filing of the original document; and

(c) that the copy of the document produced to him is a correct copy,

certify on that copy that the Registrar is so satisfied and direct that the copy be filed in the same manner as the original document.

(6) The copy shall, on being filed, from such date as is mentioned in the certificate as the date of the filing of the original, have the same force and effect as the original.

11.—(1) This section applies where—

(a) a company is dissolved;

(b) a foreign company ceases to have any connection with Malawi by virtue of which it is required to register under this Act.

Records
relating
to dissolved
companies

(2) The Registrar may direct that records relating to the company or institution may be removed from the register at any time after two years from the date on which it appears to the Registrar that—

(a) the company has been dissolved;

(b) the foreign company has ceased to have any connection with Malawi by virtue of which it is required to register under this Act.

(3) Records in respect of which a direction is given shall be disposed of under the enactments relating to the institution or office under which the directive is made.

Searches and
evidence of
a register

12.—(1) Subject to the other provisions of this section, a person may, on payment of the prescribed fees and during such time as the Registrar may decide, search—

(a) any document in a register kept by the Registrar;

(b) the particulars of any registered document that have been entered on any device or facility referred to in section 7 (2);

(c) any registered document the particulars of which have been entered in any such device or facility.

(2) A person may, subject to the other provisions of this section, apply to the Registrar for—

(a) a certificate of incorporation of a company;

(b) a copy of, or extract from, a document in a register kept by the Registrar;

(c) the particulars of any registered document that have been entered in any device or facility referred to in section 7 (2) of this Act; or

(d) a copy of, or extract from, a registered document the particulars of which have been entered in any such device or facility.

(3) On an application under subsection (2), the Registrar shall, on payment by the applicant of the prescribed fee, issue the document, particulars or copy or certified copy applied for.

(4) Unless otherwise ordered by the Court, the Registrar shall not be required by any process of the Court to produce—

(a) a registered document kept by the Registrar; or

(b) evidence of the entry of particulars or a registered document in any device or facility referred to in section 7 (2), and the Court shall not issue such an order where it is not satisfied that the evidence is necessary for the purposes of the proceedings.

(5) The payment of the prescribed fees under subsections (1) and (3) shall not apply to the Government.

13.—(1) The following material shall not be made available by the Registrar for public inspection—

Material not available for public search

(a) the contents of any document sent to the Registrar containing views expressed pursuant to a proposal by company to use certain words or expressions in a company name;

(b) confidential or protected information relating to particulars of directors such as residential addresses;

(c) any applications for administrative action including correction of documents, rectification of the register, to the Registrar that have not yet been determined or were not successful;

(d) any material directed to be removed from the register by Court order;

(e) any e-mail address, identification code or password deriving from a document delivered for the purpose of authorising or facilitating electronic filing procedures or providing information by telephone;

(f) any other material excluded from public inspection by or under any other law.

14. The Registrar may by order published in the *Gazette*, prescribe the format of the application for search of the register.

Form of application for search

15. A copy of, or extract from, a registered document—

Certificate of copies as accurate

(a) that constitutes part of a register kept by the Registrar; or

(b) particulars of which have been entered in any device or facility referred to in section 9 (2), certified to be a true copy or extract by the Registrar, is admissible in evidence in legal proceedings to the same extent as the original document.

16.—(1) For the purpose of ascertaining whether a company or an officer is complying with this Act or any regulations made under this Act, the Registrar may, on giving 72 hours' written notice to the company, call for the production of or inspect any book required to be kept by the company.

Registrar's powers of inspection

(2) Any person who—

(a) fails to produce any document under subsection (1); or

(b) obstructs or hinders the Registrar, or any person authorized by the Registrar, in the exercise of any powers under subsection

(1), shall be liable to a fine in accordance with the prevailing schedule of penalties.

Power to
require
compliance

17.—(1) Where a person fails to comply with any requirement of this Act, the Registrar may require the person to make good the default within 14 days of the service on the person of a notice requiring him to do so.

(2) Where, for any reason, it is not practicable for the Registrar to send individual notices under subsection (1) above, the Registrar may publish such failure to comply in relation to any persons in any newspaper of national circulation and in the *Gazette*.

(3) Any person who fails to comply with subsection (1) shall be liable to a fine in accordance with the prevailing schedule of penalties.

Power to
extend time
for doing any
required Act

18. Where a person is required by this Act to do any act within a specified time, the Registrar may, on good cause being shown, extend the time within which the act is required to be done.

Removal of
material from
the register

19.—(1) The Registrar may remove from the register—

(a) any unnecessary material; or

(b) any material derived from a document that has been replaced.

(2) Notwithstanding subsection (1), the Registrar shall not remove from the register any material whose registration has legal consequences in relation to the company as regards formation, registration, re-registration, change of name, change of status, reduction of capital, change of registered office, registration of a charge, or dissolution.

(3) On or before removing material from the Register, the registrar shall give notice of particulars of the material to be removed to—

(a) the person who filed the material; and

(b) the company to which the material relates.

Rectification
of the
register

20.—(1) The Registrar may rectify the register by removing material that is or has been declared by Court to be—

(a) invalid; or

(b) factually inaccurate, or derived from something that is factually inaccurate or forged.

(2) On or before removing material from the register, the Registrar shall give notice of particulars of the material to be removed to—

- (a) the person who filed the material; and
- (b) the company to which the material relates.

(3) Notwithstanding subsection (1), no material shall be removed from the register whose registration has legal consequences in relation to the company as regards formation, registration, re-registration, change of name, change of status, reduction of capital, change of registered office, registration of a charge, or dissolution.

21. The provisions in this Act, shall, unless the context otherwise requires, apply to foreign companies registered in Malawi.

Application
to foreign
companies

22.—(1) In carrying out his functions, the Registrar shall consult, and may enter into arrangements with other agencies of the Government.

Arrangements
with other
agencies

(2) Notwithstanding subsection (1), the Registrar may enter into arrangements with other Government agencies with respect to—

- (a) the exchange of information between the Registrar and other agencies, with due regard for the need to protect appropriately personal information about individuals;
- (b) consultation between the Registrar and the other agencies;
- (c) enforcement of this Act and assistance with enforcement of other laws; and
- (d) the conduct of investigations.

(3) The Registrar may enter into similar arrangements with agencies outside Malawi that have responsibilities under the law for the enforcement of companies legislation, or exercise similar functions to those of the Registrar.

PART IV—CORE COMPANY REQUIREMENTS

Division I—Types of Companies

23.—(1) A company shall be a private limited liability company if—

Private
limited
liability
company

- (a) its membership consists of a minimum of one person and a maximum of fifty persons;
- (b) its memorandum prohibits it from offering any of its securities to the public.

(2) Where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this section, be treated as a single member.

(3) For the purposes of this section a single member company shall be taken to be a private company.

Public
limited
liability
company

24. A company shall be a public limited liability company if—

- (a) its membership consists of a minimum of three members;
- (b) its memorandum permits offering its securities to the public; and
- (c) its memorandum permits the transferability of its securities.

Company
limited by
guarantee

25. A company shall be limited by guarantee if—

- (a) it is formed on the principle of having the liability of its members limited by its constitution to such amount as the members may respectively undertake to contribute to the assets of the company in the event of its being wound up;
- (b) it is formed for the sole purpose of operating as a charity or not for profit organization.

State owned
companies

26.—(1) A company shall be a State Owned Company if it is controlled within the meaning of this Act by the Government.

(2) The provisions in this Act pertaining to public companies shall apply to all State Owned Companies.

(3) The Minister may, where appropriate, and by notice published in the *Gazette*, exempt State Owned Companies from the provisions of this Act.

Division II—Company Formation

Forming a
company

27. A person may, subject to the provisions of this Act, apply to incorporate a company in any one of the categories provided for in sections 23 to 26 of this Act.

Requirements
for
incorporation

28.—(1) An application for incorporation of a company under this Act shall be sent or delivered to the Registrar, and shall be—

- (a) in the prescribed form;
- (b) signed by each applicant;
- (c) accompanied by—
 - (i) a document in a form approved by the Registrar, signed by every person named as a director or secretary, containing his consent to be a director or secretary;
 - (ii) a declaration that the person is not disqualified from being appointed or holding office as a director or secretary of a company;

(iii) in the case of a company having a share capital, a document in a form approved by the Registrar, signed by every person named as a shareholder, or by an agent of that person authorized in writing, containing that person's consent to being a shareholder and to taking the class and number of shares specified in the document and stating the consideration to be provided by that shareholder for the issue of those shares;

(iv) in the case of a company limited by guarantee, a document signed by each person named as a member, or by an agent of that person authorized in writing, containing the matters set out in subsection (3);

(v) where the document has been signed by an agent, the instrument authorising the agent to sign it;

(vi) a notice reserving a name for the proposed company if any; and

(vii) where the proposed company is to have a memorandum, a document certified by at least one applicant that the document is the company's memorandum.

(2) Without prejudice to subsection (1), the application shall state—

(a) the full name and address of each applicant;

(b) the present full name, any former name and the usual residential address of every director and of any secretary of the proposed company;

(c) particulars of any business occupation and directorships of any public company or subsidiary of a public company held by each director;

(d) the full name and residential address of every shareholder of the proposed company, and the number of shares to be issued to every shareholder and the amount to be paid or other consideration to be provided by that shareholder for the issue of those same shares;

(e) the type of company that is being formed;

(f) the registered office of the proposed company;

(g) such other information as may be prescribed;

(h) in the case of a one person company, the full name and residential address and occupation of the person nominated by the proposed director to be the secretary of the company pursuant to section 171 in the event of the death or incapacity of the sole shareholder and director; and

(i) a declaration made by the applicant that the information

provided in the application is true and correct.

(3) A document submitted under subsection (1) (c) (iv) shall contain the consent of the person referred to therein to be a member and shall state a specified amount up to which the member undertakes to contribute to the assets of the company, in the event of its being wound up while that person is a member, or within one year after ceasing to be a member, for payment of the debts and liabilities of the company contracted before that person ceases to be a member, and of the costs, charges and expenses of the winding up, and for the adjustments of the rights among themselves of the other members who are similarly required to contribute.

(4) Where a person is a director of one or more subsidiaries of the same parent company it shall be sufficient for the purposes of subsection (2) (c) to state that the person is the holder of one or more directorships in that group of companies and the group may be described by the name of the parent company with addition of the word "Group".

Incorporation

29. Where the Registrar is satisfied that the application for incorporation of a company complies with this Act, the Registrar shall upon payment of the prescribed fee—

- (a) enter the particulars of the company on the register;
- (b) assign a unique number to the company as its company number; and
- (c) issue a certificate of incorporation in the prescribed form.

**Statement
of capital**

30. A company's statement of capital shall consist of—

- (a) the total number of shares of the company;
- (b) the aggregate par or nominal values of those shares, issued before the commencement of this Act;
- (c) for each class of shares—
 - (i) prescribed particulars of the rights attached to the shares;
 - (ii) the total number of shares of that class;
 - (iii) the aggregate par or nominal value of those shares where applicable; and
- (d) the amount paid up and the amount, if any, unpaid on each share, whether on account of the par or nominal value of the shares, as applicable or by way of premium.

**Certificate of
incorporation**

31. A certificate of incorporation of a company issued under section 29 is conclusive evidence that—

(a) all the requirements of this Act as to incorporation have been complied with; and

(b) on and from the date of incorporation stated in the certificate, the company is incorporated under this Act.

32. A company incorporated under this Act shall be a body corporate with the name by which it is registered and continues in existence until it is removed from the register of companies.

Legal effects
of
incorporation

Division III—The Constitution Of The Company

33.—(1) The Memorandum and Articles of a company shall constitute the constitution of the Company.

A company's
constitution
and its effect

(2) The constitution of a company shall be void to the extent that it contravenes, or is inconsistent with, this Act or any other written law.

(3) Subject to this Act, the constitution of a company shall have the effect of a contract—

(a) as between the company and each member or shareholder; and

(b) as between the members or shareholders themselves.

(4) The rights, powers, duties, and obligations of the company, the Board, each director, and each shareholder of the company shall be those set out in this Act except to the extent that they are restricted, limited or modified by the constitution of the company in accordance with this Act.

(5) The shareholders of a company may enter into any agreement with one another concerning any matter relating to the company, but any such agreement must be consistent with this Act and the company's constitution, and any provision of such an agreement that is inconsistent with this Act or the company's constitution is void to the extent of the inconsistency, and the provision shall, to the extent required, be severed from the agreement and rendered ineffective.

34.—(1) A company may adopt as its constitution the model memorandum and articles of association applicable to it as prescribed in the regulations to this Act.

Power to
adopt model
constitution
and default
application
of model
constitution

(2) Where a company does not file a memorandum and articles of association it shall be deemed to have adopted the provisions of the model memorandum and articles of association.

Adoption,
alteration and
revocation of
constitution

35.—(1) Any company which was in existence as of the date of the coming into effect of this Act or a company incorporated under this Act may—

(a) by special resolution, adopt the model constitution as prescribed by the regulations to this Act;

(b) by special resolution and subject to sections 108 and 117 alter or revoke the provisions of its constitution.

(2) Within fourteen days of the adoption of a constitution by a company, or the alteration or revocation of the constitution of a company, as the case may be, the Board shall cause a notice in a form approved by the Registrar to be delivered to the Registrar for registration.

Constitutional
documents to
be provided
to members

36.—(1) A company shall, on request by a member, provide the following documents in electronic or hard form—

(a) an up-to-date copy of the company's constitution;

(b) copies of any resolutions or agreements relating to the company's constitution that are for the time being in force;

(c) copies of any Court order sanctioning a compromise agreement or facilitating a reconstruction or take over;

(d) copies of the certificate of incorporation;

(e) copies of the statement of capital;

(f) in the case of a company limited by guarantee, a copy of the guarantee statement.

(2) Where a company fails to comply with this section, the company and every officer of the company who is in default shall be liable to a fine in accordance with the prevailing schedule of penalties.

Right to
participate
in profits
otherwise than
as member
is void

37. In the case of a company limited by guarantee and not having share capital, any provision in the articles or in any resolution of the company, purporting to give a person a right to participate in the distributable profits of the company is void.

Division IV—Capacity, Powers And Validity Of Acts

A company's
capacity and
power of
directors to
bind the
company

38.—(1) Subject to this Act and to any other enactment, a company shall have, both within and outside Malawi—

(a) full capacity to carry on or undertake any business or activity, do any act, or enter into any transaction; and

(b) for the purposes of paragraph (a), full rights, powers, and privileges.

(2) The constitution of a company may contain a provision relating to the capacity, rights, powers, or privileges of the company only where such provision restricts the capacity of the company or those rights, powers, and privileges.

39. Where the constitution of a company sets out the objects of the company, there is deemed to be a restriction in the constitution on carrying on any business or activity that is not within those objects, unless the constitution expressly provides otherwise.

Validity of
company
actions

40.—(1) A company or a guarantor of an obligation of a company shall not assert against a person dealing with the company or with a person who has acquired property, rights, or interests from the company that—

Dealings
between a
company and
any other
person

(a) this Act, in so far as it provides for matters of company meetings and internal procedure, or the constitution of the company, has not been complied with;

(b) a person named as a director or secretary of the company in the most recent notice received by the Registrar—

(i) is not a director or secretary of a company;

(ii) has not been duly appointed; or

(iii) does not have authority to exercise a power which a director or secretary of a company carrying on business of the kind carried on by the company customarily has authority to exercise;

(c) a person held out by the company as a director, secretary, employee, or agent of the company—

(i) has not been duly appointed; or

(ii) does not have authority to exercise a power which a director, secretary, employee, or agent of a company carrying on business of the kind carried on by the company customarily has authority to exercise;

(d) a person held out by the company as a director, secretary, employee, or agent of the company with authority to exercise a power which a director, secretary, employee, or agent of a company carrying on business of the kind carried on by the company does not customarily have authority to exercise, does not have authority to exercise that power;

(e) a document issued on behalf of a company by a director, secretary, employee, or agent of the company with actual or usual authority to issue the document is not valid or not genuine, unless the person has, or ought to have, by virtue of his position with or

relationship to the company, knowledge of the matters referred to in paragraph (a), (b), (c), or (d), as the case may be.

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

No
constructive
notice

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

(a) the constitution or document is registered in a register kept by the Registrar; or

(b) the constitution or document is available for inspection at an office of the company.

Common seal

42.—(1) A company may have a common seal but is not obliged to have one.

(2) A company which has a common seal shall have its name engraved in legible characters on the seal.

(3) Where a company, or an officer of a company or any person acting on behalf of the company uses or authorizes the use of a seal purporting to be a seal of the company on which its name is not engraved as required by subsection (2) the company or the officer or person shall be liable to a fine in accordance with the prevailing schedule of penalties

Official seal
for share
certificates
of public
companies

43.—(1) A public company shall have an official seal for—

(a) sealing securities issued by the company; or

(b) sealing documents created or evidencing paper securities where so issued.

(2) The official seal—

(a) must have on its face the words "Common Seal"; and

(b) when duly affixed to the document has the same effect as the company's Common Seal.

Ratification of
pre-incorporation
contracts

44.—(1) Notwithstanding any enactment or rule of law, a pre-incorporation contract may be ratified within such period as may be specified in the contract, or if no period is specified, then within a

reasonable time after the incorporation of the company in the name of which, or on behalf of which, it has been made.

(2) A contract that is ratified is as valid and enforceable as if the company had been a party to the contract when it was made.

(3) A pre-incorporation contract may be ratified by a company in the same manner as a contract may be entered into on behalf of a company under this Act.

(4) For the avoidance of doubt, if a pre-incorporation contract has not been ratified by a company, or validated by the Court, the company may not enforce it or take the benefit of it.

Division V—Company Names And Registered Office

45.—(1) Notwithstanding any enactment or rule of law, a pre-incorporation contract may be ratified within such period as may be specified in the contract, or if no period is specified, then within a reasonable time after the incorporation of the company in the name of which, or on behalf of which, it has been made.

Application
for reservation
of a name

(2) The Registrar shall not reserve a name—

(a) which, or the use of which, would contravene this Act or any other law;

(b) that is identical or almost identical to a name that the Registrar has already reserved under this Act; or

(c) that, in the opinion of the Registrar, is offensive.

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

(a) whether or not the Registrar has reserved the name; and

(b) if the name has been reserved, that unless the reservation is sooner revoked by the Registrar, the name is available for incorporation of a company with that name or registration of a change of name, whichever be the case, for two months after the date stated in the notice.

(4) The reservation of a name under subsection (3) shall not by itself entitle the proposed company, the company or foreign company to be registered under that name, either originally or on a change of name.

46. The Registrar shall not register a company under a name or register a change of the name of a company, unless the name is available.

Availability
of name

Prohibited names and power of the registrar to refuse a company name

47.—(1) No company including a foreign company shall be registered under a name which is identical with that of an existing company, or any statutory body or so nearly resembles that name as to be likely to mislead, except where the existing company or statutory company is in the course of being dissolved and signifies its consent in such manner as the Registrar requires.

(2) Except with the Minister's written consent, no company including a foreign company shall be registered under a name which includes—

(a) the word "Authority", "Company", "Corporation", "Government", "Malawi", "National", "President", "Presidential", "Regional", "Republic", "State", or any other name protected under the Protected Flag, Emblems and Names Act, or any other word which in the Registrar's opinion suggests, or is likely to suggest, that it enjoys the patronage of the Government or of a statutory company, or of the Government of any other State;

(b) the word "Municipal" or "Chartered" or any other word which in the Registrar's opinion suggests, or is likely to suggest, connection with a local authority in Malawi or elsewhere;

(c) the word "cooperative";

(iii) the words "Chamber of Commerce".

(3) Except with the consent of the Registrar, no company including a foreign company shall be registered by a name which in the opinion of the Registrar is undesirable or misleading.

Public limited company's requirement to use plc

48. The name of a public limited liability company shall end with the words "public limited liability" or "plc".

Private limited company's requirement to use limited

49.—(1) Unless expressly exempted by application to the Registrar under this Act or any other law, the name of a private limited company shall end with the word "limited" or "Ltd".

(2) A private company may be granted exemption from this section if—

(a) it is a charity; or

(b) it is exempted from the requirement of subsection (1) by regulations;

(3) The Registrar may refuse to register a private limited company by a name that does not include the word "limited" unless a statement has been delivered to him that the company meets the conditions for exemption.

(4) The Registrar may accept the statement as sufficient evidence of the matters stated in it.

50.—(1) Unless expressly exempted by application to the Registrar under this Act or any other written law, the name of a company limited by guarantee shall end with the word "limited" or "ltd".

Company limited by guarantee requirement to use limited

(2) A private company limited by guarantee may be granted exemption from this section if:—

(a) it is a charity; or

(b) it is exempted from the requirement of subsection (1) by regulations;

(3) The Registrar may refuse to register a private company limited by guarantee by a name that does not include the word "limited" unless a statement has been delivered to him that the company meets the conditions for exemption.

(4) The Registrar may accept the statement as sufficient evidence of the matters stated in it.

51.—(1) If it appears to the Registrar:—

Provision of misleading information as to activities

(a) that misleading information has been given for the purpose of a company's registration by a particular name; or

(b) that an undertaking or assurance has been given for that purpose and has not been fulfilled, the Registrar may direct that the company change its name.

(2) Any such direction:—

(a) must be given within five years of the company's registration of that name; and

(b) must specify the period within which the company is to change its name.

(3) The Registrar may by further direction extend the period within which the company is to change its name.

(4) Where a company fails to comply with a direction under this section, the company and every officer of the company who is in default shall be liable to a fine in accordance with the prevailing schedule of penalties as issued by the Registrar.

52.—(1) An application to change the name of a company shall:—

Change of name

(a) be in the form duly prescribed by the Registrar;

(b) be accompanied by a notice reserving the name if any; and

(c) subject to the constitution of the company, be made by passing a special resolution to that effect and filing a copy of the resolution.

(2) Where the Registrar is satisfied that a company has complied with subsection (1), the Registrar shall—

(a) record the new name of the company;

(b) record the change of name of the company on its certificate of incorporation;

(c) require the company to cause a notice to that effect to be published in such manner as the Registrar may direct.

(3) A change of name of a company shall—

(a) take effect from the date of the certificate issued under subsection (2); and

(b) not affect the rights or obligations of the company, or legal proceedings by or against the company, and legal proceedings that might have been continued or commenced against the company under its former name may be continued or commenced against it under its new name.

Direction to
change name

53.—(1) Where the Registrar is satisfied that a company should not have been registered under a name, the Registrar may serve written notice on the company to change its name by a date specified in the notice, being a date not less than twenty-eight days after the date on which the notice is served.

(2) Where the company does not change its name within the period specified in the notice, the Registrar may register the company under a new name chosen by the Registrar, being a name under which the company may be registered under this Part.

(3) Where the Registrar registers a new name under subsection (2), he shall record the new name on the certificate of incorporation of the company and section 52 (3) shall apply in relation to the registration of the new name as if the name of the company had been changed under that section.

Requirement
to use
company name

54.—(1) A company shall ensure that its name is clearly stated—

(a) in every written communication sent by, or on behalf of, the company; and

(b) on every document issued or signed by, or on behalf of, the company and which evidences or creates a legal obligation of the company.

(2) Where the name of a company is incorrectly stated in a document which evidences or creates a legal obligation of the company and the document is issued or signed by or on behalf of the company, every person who issued or signed the document is liable to the same extent as the company unless—

(a) the person who issued or signed the document proves that the person in whose favour the obligation was incurred was aware at the time the document was issued or signed that the obligation was incurred by the company; or

(b) the Court before which the document is produced is satisfied that it would not be just and equitable for the person who issued or signed the document to be so liable.

(3) For the purposes of subsections (1) and (2) and section 51 a company may use a generally recognised abbreviation of a word or words in its name if it is not misleading to do so.

(4) Where, within the period of twelve months immediately preceding the giving by a company of any public notice, the name of the company was changed, the company shall ensure that the notice states—

(a) that the name of the company was changed in that period; and

(b) the former name or names of the company.

55.—(1) Every company registered or incorporated under this Act or any other written law prior to the enactment of this Act shall continuously maintain at least one office in Malawi.

Requirement
for company
to have a
current
registered
office in
Malawi

(2) Particulars of the registered office shall be provided in incorporation or registration documents of the company.

(3) A change in the particulars of the registered office shall be effected by filing a notice with the Registrar, together with payment of the prescribed fee.

Division VI—Alteration of Company Status by Re-registration

56.—(1) A public company may be re-registered as a private company if—

Re-registration
of public
company as
private
company

(a) a special resolution complying with subsection (2) that it should be so re-registered is passed and has not been cancelled by the Court;

(b) an application for the purpose in the prescribed form and signed by a director or the secretary of the company is delivered to the Registrar, together with a copy of the memorandum and articles of the company as altered by the resolution;

(c) the period during which an application for the cancellation of the resolution under this Act may be made has expired without any such application having been made; or

(d) where an application under this section is made and the application is withdrawn or an order is made following objection proceedings confirming the resolution and a copy of that order is delivered to the Registrar.

(2) The special resolution must alter the constitution so that it no longer states that the company is to be a public company and must make such other alterations in the company's constitution as are required in the circumstances.

(3) A company shall not under this section be re-registered otherwise than as a company limited by shares or by guarantee.

(4) The re-registration of a public company as a private company shall not affect the rights or liabilities of the company in respect of any debt or obligation incurred or any contract entered into, by, with or on behalf of the company before the re-registration.

Objection to
resolution for
a public
company
to be
re-registered
as a private
company

57. (1) Where a special resolution by a public company to be re-registered as a private company has been passed, an application may be made to the Registrar for the cancellation of that resolution.

(2) The application under subsection (1) may be made—

(a) by the holders of not less in aggregate than five per cent in nominal value of the company's stated capital or issued capital as applicable for companies formed prior to this Act or any class of shares in the company;

(b) if the company is not limited by shares, by not less than five per cent of its members; or

(c) by not less than fifty of the company's members, but not by a person who has consented to or voted in favour of the resolution.

(3) The application must be made within twenty-eight days after the passing of the resolution and may be made on behalf of the persons entitled to make the application by such one or more of their number as they may appoint in writing for the purpose.

(4) Where such an application is made, the company shall give notice in the form prescribed by the Registrar of that fact to the Registrar.

(5) In determining the application, the Registrar shall make an order cancelling or confirming the resolution and—

(a) may make that order on such terms and conditions as he thinks fit and may adjourn the proceedings in order that an arrangement may be made to the satisfaction of the Registrar for the purchase of the interests of dissenting members; and

(b) may give such directions and make such orders as he thinks expedient for facilitating or carrying into effect the arrangement.

(6) The order of the Registrar may provide for the purchase by the company of the shares of any of its members and for the reduction accordingly of the company's capital and may make such alterations in the company's constitution as may be required in consequence of that provision.

(7) Where the order of the Registrar requires the company not to make any or any specified alteration in its constitution, the company shall not without the leave of the Registrar make any such alteration.

(8) An alteration in the constitution made by virtue of an order under this section, if not made by resolution of the company, shall be of the same effect as if duly made by resolution and this Act shall apply accordingly to the constitution as so altered.

(9) A company which fails to comply with subsections (4) or (7) and any officer of the company who is in default is liable to a fine in accordance with the prevailing schedule of penalties.

(10) A person aggrieved by a decision of the Registrar made under this section may appeal to the Court.

58.—(1) If the Registrar is satisfied that a public company may be re-registered as a private company, he shall—

(a) retain the application and other documents delivered to him under that section; and

(b) issue the company with a certificate of incorporation appropriate to a private company.

(2) On the issue of the certificate—

(a) the company by virtue of the **issue** becomes a private company; and

(b) the alterations in the constitution set out in the resolution under section 56 take effect accordingly.

Certificate of
Re-registration
from a
public to a
private
company

(3) The certificate is conclusive evidence that—

(a) the requirements of section 56 in respect of re-registration and of matters precedent and incidental to it have been complied with; and

(b) the company is a private company.

Re-registration
of
private
company
as a public
company

59.—(1) Subject to this section, a private company, other than a company limited by guarantee or a State Owned Company, may be re-registered as a public company if—

(a) a special resolution that it should be so re-registered is passed; and

(b) an application for re-registration is delivered to the Registrar, together with the documents specified in subsection (4).

(2) The special resolution under subsection (1) shall—

(a) alter the company's constitution so that it states that the company is to be a public company;

(b) make such other alterations in the constitution as are necessary to bring it, in substance and in form, into conformity with the requirements of this Act with respect to the constitution of a public company.

(3) The application shall be in the form prescribed by the Registrar and be signed by a director or secretary of the company and the documents to be delivered with it shall be—

(a) a copy of the constitution as altered in accordance with the resolution;

(b) a copy of a written statement by the company's auditors that in their opinion the relevant balance sheet shows that at the balance sheet date the amount of the company's net assets was not less than the aggregate of its stated capital and undistributable reserves;

(c) a copy of the relevant balance sheet, together with a copy of an unqualified report by the company's auditors in relation to that balance sheet; and

(d) a statutory declaration in the prescribed form by a director or secretary of the company stating—

(i) that the special resolution required by this section has been passed and that the conditions specified in sections 60 and 61 so far as applicable, have been satisfied; and

(ii) that between the date of the balance sheet and that of the application for re-registration, there has been no change in the company's financial position that has resulted in the amount of its net assets becoming less than the aggregate of its stated capital and undistributable reserves.

(4) In this section "relevant balance sheet" means a balance sheet prepared as at a date not exceeding seven months before the company's application under this section.

(5) A resolution that a company be re-registered as a public company may change the company name by deleting the word "company" or the words "and company" including any abbreviations of them.

(6) A private company not being a single member company which has two or more members at the commencement of this Act, shall not become a single member company.

60.—(1) This section applies if shares have been allotted by a private company between the date as at which the relevant balance sheet was prepared and the passing of the special resolution to re-register as a public company and those shares were allotted as fully or partly paid up as to their par or nominal value if issued before the commencement of this Act or any premium on them otherwise than in cash.

Consideration
for shares
recently
allotted to
be valued

(2) Subject to this section the Registrar shall not entertain an application by a private company to re-register as a public company unless—

(a) the consideration for the allotment has been valued in accordance with the valuation procedures in Part VII; and

(b) a report with respect to the value of the consideration has been made to the company in accordance with that section during the six months immediately preceding the allotment of the shares.

(3) Where an amount standing to the credit of any of the company's reserve accounts or of its profit and loss account has been applied in paying up to any extent any of the shares allotted or any premium on those shares, the amount applied does not count as consideration for the allotment and accordingly subsection (2) does not apply to it.

(4) Subsection (2) does not apply if the allotment is in connection with an arrangement providing for it to be on terms that the whole or part of the consideration for the shares allotted is to be provided by the transfer to the company or the cancellation of all or some of

the shares or of all or some of the shares of a particular class in another company.

(5) Subsection (4) does not exclude the application of subsection (2), unless under the arrangement it is open to all the holders of the shares of the other company in question or, where the arrangement applies only to shares of a particular class, all the holders of the other company's shares of that class take part in the arrangement.

(6) In determining whether subsection (2) is excluded under subsection (5), shares held by a company or by a nominee of the company allotting shares in connection with the arrangement by a company or by a nominee of the company which is that company's parent company or subsidiary or a company which is a subsidiary of its parent company shall be disregarded.

(7) Subsection (2) does not preclude an application by a private company to be re-registered as a public company if the allotment of the company's shares is in connection with its proposed merger with another company where one of the companies concerned proposes to acquire all the assets and liabilities of the other in exchange for the issue of shares or other securities of that one to shareholders of the other, with or without any cash payment to shareholders.

Certificate of
Re-registration
from a
private to a
public
company

61.—(1) Where the Registrar is satisfied on application by a private company to re-register as a public company, that a company may be re-registered under that section as a public company, the Registrar shall—

(a) retain the application and other documents delivered to him under that section; and

(b) issue the company with a certificate of incorporation stating that the company is a public company.

(2) The Registrar may accept a statutory declaration as sufficient evidence that the special resolution required by that provision has been passed and the other conditions of re-registration have been satisfied.

(3) Upon the issue to a company of a certificate of incorporation under this section—

(a) the company by virtue of the issue of that certificate becomes a public company; and

(b) any alterations in its constitution as set out in the resolution take effect accordingly.

(4) The certificate shall be conclusive evidence—

(a) that the requirements of this Act in respect of re-registration, and of matters precedent and incidental thereto, have been complied with; and

(b) that the company is a public company.

62.—(1) A single member company may increase from a single member to two or more members if the single member has passed a resolution to that effect.

Single member company changing status

(2) Where the membership of a single member company increases from one to two or more there shall be entered in the company's register of members, the name and address of the person who was formerly the single member, a statement that the company has ceased to have only a single member and the date on which the event occurred.

(3) Where the Registrar is satisfied that a single member company has satisfied the requirements of this Act the Registrar may re-register the company as a company with more than one member and shall issue a certificate of re-registration.

Division VII—Core Requirements For Private Companies

63.—(1) A private company shall not have more than fifty shareholders.

Number of shareholders

(2) Where two or more of the shareholders in a private company hold one or more shares jointly, they shall be deemed to be one shareholder.

64. A private company shall not make any offer to the public to subscribe for its shares or debentures.

Private company not permitted to make a public offer of securities

65. A private company shall be exempt from the requirement to keep a register of shareholders under section 145.

Exemption of a private company from the requirement to keep a register of shareholders

66. A private company may dispense with the holding of shareholders' meetings provided the company's constitution permits resolutions which would otherwise require the holding of a meeting to be passed by not less than seventy-five per cent of the members.

Exemption of a private company from the requirement to hold shareholders' meetings

Exemption of
a private
company
from the
requirement
to have a
company seal

67. A private company shall not, pursuant to section 42, be required to have a company seal.

Exemption of
a private
company
from the
requirement
to have a
company
secretary

68.—(1) A private company shall not be not required to have a secretary.

(2) Anything authorized or required to be given or sent to, or served on, the company by being sent to its secretary—

(a) may be given or sent to, or served on, the company itself; and

(b) if addressed to the secretary shall be treated as addressed to the company.

(3) Anything else required or authorized to be done by or to the secretary of the company may be done by or to—

(a) a director, or

(b) a person authorized generally or specifically in that behalf by the directors.

Permitted
transactions

69. A private company may—

(a) issue shares;

(b) distribute dividends;

(c) repurchase shares;

(d) give financial assistance for the purchase of shares in the company;

(e) authorize a payment, loan or other benefit to a director, or enter into any transaction; provided—

(i) it is authorized to do so by a resolution of seventy-five per cent of the members; and

(ii) is able to satisfy the solvency test.

Directors of
private
companies to
comply with
applicable
corporate
governance
standards

70. The directors of private companies shall be required to comply with corporate governance standards in force in Malawi that apply to private companies as directed by the Registrar.

PART V—SHAREHOLDERS AND THEIR RIGHTS

71.—(1) For the purposes of this Act, "shareholder" means—

Meaning of
shareholders

(a) a person whose name is entered in the share register, where applicable, as the holder for the time being of one or more shares in the company;

(b) until the person's name is entered in the share register, a person named as a shareholder in an application for the registration of a company at the time of incorporation of the company,

(2) Until the person's name is entered in the share register (where applicable), a person who is entitled to have his name entered in the share register, under a registered amalgamation proposal, as a shareholder in an amalgamated company.

72.—(1) Subject to the constitution of a company, the liability of a shareholder to the company shall be limited to—

Liability of
shareholders

(a) any amount unpaid on a share held by the shareholder

(b) any liability to repay a distribution received by the shareholder to the extent that the distribution is recoverable under section 107;

(c) any liability expressly provided for in the constitution of the company;

(d) any liability for calls on shares.

(2) Subject to the constitution of a company, a shareholder shall not be liable for an obligation of the company by reason only of being a shareholder.

73.—(1) The Minister may, by order published in the *Gazette*, publish a code of conduct for shareholders of private companies.

Code of
conduct for
shareholders

(2) The code of conduct shall regulate all the affairs of shareholders of a private company.

(3) Where a company or an officer of the company fails to comply with the code of conduct, the Court may, in certain circumstances, direct compliance with a provision of the code conduct and the Court or the Registrar may impose a fine in accordance with the prevailing schedule of penalties.

PART III.—GENERAL DUTIES RELATING TO SHAREHOLDERS OF
PUBLIC COMPANIES

Code of
conduct for
shareholders
of public
companies

74.—(1) The Minister may by order published in the *Gazette*, published for a code of conduct for shareholders of public companies.

(2) The code of conduct shall regulate all the affairs of shareholders of a public company.

(3) Where a company or an officer of the company fails to comply with the code the Court may in certain circumstances direct compliance with a provision of the code of conduct and the Court or the Registrar may impose a fine in accordance with the prevailing schedule of penalties.

Subsidiary may
not hold shares
in holding
company

75.—(1) Subject to this section, a subsidiary shall not hold shares in its holding company.

(2) An issue of shares by a parent company to its subsidiary shall be void.

(3) A transfer of shares from a parent company to its subsidiary shall be void.

(4) Where a company that holds shares in another company becomes a subsidiary of that other company, the company may, notwithstanding subsection (1), continue to hold those shares, but the exercise of any voting rights attaching to those shares shall be of no effect.

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

Prohibition in
section 75 not
to apply where
a subsidiary is
acting as
personal
representative
or Trustee

76. Notwithstanding section 75, nothing shall prevent a subsidiary from holding shares in its parent company in its capacity as a personal representative or a trustee unless the parent company or another subsidiary has a beneficial interest under the trust other than—

(a) any interest that arises by way of security for the purposes of a transaction made in the ordinary course of the business of lending money;

(b) any residual interest under a pension scheme or employees' share scheme or employer's rights of recovery under a pension scheme or employees' share scheme;

(c) any rights that the company or subsidiary has in its capacity as trustee, including in particular—

(i) any right to recover its expenses or be remunerated out of the trust property; and

(ii) any right to be indemnified out of the trust property for any liability incurred by reason of any act or omission in the performance of its duties as trustee.

77.—(1) Where shares in a company are held on trust for the purposes of a pension scheme or employees' share scheme, there shall be disregarded for the purposes of section 75 any residual interest that has not vested in possession.

Residual interest under pension scheme or employees' share scheme to be disregarded for purposes of section 75

(2) A "residual interest" means a right of the company or subsidiary ("the residual beneficiary") to receive any of the trust property in the event of—

(a) all the liabilities arising under the scheme having been satisfied or provided for; or

(b) the residual beneficiary ceasing to participate in the scheme; or

(c) the trust property at any time exceeding what is necessary for satisfying the liabilities arising or expected to arise under the scheme.

78.—(1) Where shares in a company are held on trust for the purposes of a pension scheme or employees' share scheme, there shall be disregarded for the purposes of section 75 any charge or lien on, or set-off against, any benefit or other right or interest under the scheme for the purpose of enabling the employer or former employer of a member of the scheme to obtain the discharge of a monetary obligation due to him from the member.

Employer's rights of recovery under pension scheme or employees' share scheme to be disregarded for purposes of section 75

(2) In the case of a trust for the purposes of a pension scheme there shall also be disregarded any right to receive from the trustee of the scheme, or as trustee of the scheme to retain, an amount that can be recovered or retained, under the pension schemes law in force in Malawi.

79.—(1) The prohibition in section 75 does not apply where the shares are held by the subsidiary in the ordinary course of its business as an intermediary.

Subsidiary acting as authorized intermediary in securities

(2) For this purpose a person is an intermediary if he—

(a) carries on a bona fide business of dealing in securities;

- (b) is a member of or has access to a regulated market; and
 (c) does not carry on an excluded business..

(3) The following are excluded businesses—

(a) a business that consists wholly or mainly in the making or managing of investments;

(b) a business that consists wholly or mainly in, or is carried on wholly or mainly for the purposes of, providing services to persons who are connected with the person carrying on the business;

(c) a business that consists in insurance business;

(d) a business that consists in managing or acting as trustee in relation to a pension scheme, or that is carried on by the manager or trustee of such a scheme in connection with or for the purposes of the scheme;

(e) a business that consists in operating or acting as trustee in relation to a collective investment scheme, or that is carried on by the operator or trustee of such a scheme in connection with and for the purposes of the scheme.

Application
of provisions
to companies
limited by
guarantee

80. In relation to a company limited by guarantee, the references in this part to shares shall be read as references to the interest of its members as such, whatever the form of that interest.

Application
of this part
to nominees
acting on
behalf of a
subsidiary

81. The provisions of this part shall apply to a nominee acting on behalf of a subsidiary as to the subsidiary itself.

PART VI—THE SHARES OF A COMPANY

Division I—Legal Nature, Types Of Shares And Related Particulars

Legal nature
of shares

82. The shares or other interest of a member in a company shall be personal property.

Classification
of shares

83.—(1) Subject to any limitation in the constitution of a company with respect to the number of shares which may be issued and any pre-emptive rights, a company shall have the power at such times, and for such consideration as it shall determine, to issue shares.

(2) A company may, where so permitted by its constitution, issue classes of shares.

Preferences,
rights and
limitations in
respect of shares

84.—(1) Subject to subsection (2), a share in a company shall confer on the holder—

(a) the right to one vote on a poll at a meeting of the company on any resolution;

(b) the right to an equal share in dividends authorized by the Board;

(c) the right to an equal share in the distribution of the surplus assets of the company.

(2) Subject to section 96, the rights specified in subsection (1) may be restricted, limited, altered, or added to by the constitution of the company or in accordance with the terms on which the shares are issued.

(3) Without limiting subsection (1), shares in a company may—

(a) be redeemable in accordance with section 112;

(b) confer preferential rights to distributions of capital or income;

(c) confer special, limited, or conditional voting rights; or

(d) not confer voting rights.

85.—(1) Every company shall issue to a shareholder, on request, a statement that sets out—

Statement of
rights to be
given to
shareholders

(a) the class of shares held by the shareholder, the total number of shares of that class issued by the company, and the number of shares of that class held by the shareholder;

(b) the rights, privileges, conditions and limitations, including restrictions on transfer, attaching to the shares held by the shareholder; and

(c) the rights, privileges, conditions and limitations attaching to the classes of shares other than those held by the shareholder.

(2) The company shall not be under any obligation to provide a shareholder with a statement if—

(a) a statement has been provided within the previous six months;

(b) the shareholder has not acquired or disposed of shares since the previous statement was provided;

(c) the rights attached to shares of the company have not been altered since the previous statement was provided; and

(d) there are no special circumstances which would make it unreasonable for the company to refuse the request.

(3) The statement shall not be evidence of title to the shares or of any of the matters set out in it and the statement shall state in a prominent place that fact.

Transferability
of shares

86. The shares or any interest of a member in a company are transferable according to its constitution.

No par or
nominal
value shares

87.—(1) Any shares created or issued after the commencement of this Act shall be shares which have no par or nominal value.

(2) Subject to subsection (3), the par or nominal value shares of a company incorporated prior to the commencement of this Act shall continue to be shares having a par or nominal value with that value, denominated in Malawi currency, or with the approval of the Registrar, in a foreign currency attached to those shares being the value carried by those shares immediately before the commencement of this Act.

(3) Any company incorporated prior to the commencement of this Act, with par or nominal value shares, may at any time, convert any class of shares of the company into shares of no par or nominal value provided that—

(a) all the shares of any one class of shares of the company consist of either par or nominal value shares or no par or nominal value shares; and

(b) where all the shares of the company—

(i) are of the one class, the conversion of the shares is approved by special resolution or by consent in writing of seventy-five per cent of the shareholders; or

(ii) comprise more than one class, the conversion of the shares is approved by the holders of each class to be converted by special resolution or by consent in writing of seventy-five per cent of the holders of that class; and

(c) notice of the terms of the conversion is given to the Registrar for registration within 14 days of the approval of the conversion under paragraph (b).

(4) Notwithstanding subsection (1), a company incorporated prior to the commencement of this Act, may issue shares or a class or classes of shares having a par or nominal value.

(5) Upon registration of the notice under subsection (3) (c), the shares in question shall, subject to subsection (6), be deemed to have been converted into shares of no par or nominal value.

(6) The shares converted under subsection (3) shall not affect the rights and liabilities attached to such shares and in particular, without prejudice to the generality of this section, such conversion shall not affect—

(a) any unpaid liability on such shares; or

(b) the rights of the holders thereof in respect of dividends, voting or repayment on winding up or a reduction of capital.

(7) Where the share capital of a company is denominated in a foreign currency, it shall not, without the prior approval of the Registrar, change the denomination into another currency.

88.—(1) Each share in a company having share capital shall be distinguished by its appropriate number.

Numbering
of shares

(2) If at any time all the issued shares in a company or all the issued shares in a company of a particular class are fully paid up and rank *pari passu* for all purposes, none of the shares need thereafter have a distinguishing number so long as it remains fully paid up and ranks *pari passu* for all purposes with all shares of the same class for the time being issued and fully paid up.

89.—(1) Upon incorporation of the company, any person named in the application for incorporation as a shareholder shall be deemed to have been issued with the number of shares specified in the application.

Issue of
shares

(2) A company shall have powers to issue shares subject to section 83.

(3) Shares shall not be treated as being of the same class unless they rank equally for all purposes.

90.—(1) A company may by ordinary resolution—

Alteration in
number of
shares

(a) divide or subdivide its shares into shares of a smaller amount if the proportion between the amount paid, and the amount, if any, unpaid on each reduced share remains the same as it was in the case of the share from which the reduced share is derived,

(b) consolidate into shares of a larger amount than its existing shares.

(2) Where shares are consolidated, the amount paid and any unpaid liability thereon, any fixed sum by way of dividend or repayment to which such shares are entitled, shall also be consolidated.

(3) Where a company has altered its share capital in a manner specified in subsection (1), it shall within 14 days of the date of the alteration file a notice to that effect with the Registrar.

(4) A notice under subsection (3) shall include particulars with respect to the classes of shares affected.

Fractional
shares

91. A public company may, where its constitution so provides, issue fractions of shares which shall have corresponding fractional liabilities, limitations, preferences, privileges, qualifications, restrictions, rights and other attributes as those which relate to the whole share of the same class or series of shares.

Pre-emptive
rights to
new issues

92.—(1) Subject to its constitution, where a company issues shares which rank equally with, or in priority to existing shares as to voting or distribution rights, those shares shall be offered to the holders of existing shares in a manner which would, if the offer were accepted, maintain the relative voting and distribution rights of those shareholders.

(2) An offer under subsection (1) shall remain open for acceptance for a reasonable time, which shall not be less than fourteen days.

Consideration
for issue of
shares

93.—(1) Before it issues any shares, the Board shall determine the amount of the consideration for which the shares shall be issued and shall ensure that such consideration is fair and reasonable to the company and to all existing shareholders.

(2) The consideration for which a share is issued may take any form including payment in cash, promissory notes, contracts for future services, real or personal property, or other securities of the company.

Shares not
paid in cash

94.—(1) Shares shall be deemed not to have been paid for in cash except to the extent that the company has actually received cash in payment of the shares at the time of or subsequently to the agreement to issue the shares.

(2) Before shares that have already been issued are credited as fully or partly paid up other than for cash, the Board shall determine the reasonable present cash value of the consideration and shall ensure that the present cash value of the consideration is—

(a) fair and reasonable to the company and to all existing shareholders; and

(b) not less than the amount to be credited in respect of the shares.

(3) A certificate shall be signed by one of the directors or his agent authorized in writing describing the consideration in sufficient detail to identify it and state—

(a) the present cash value of the consideration and the basis for assessing it;

(b) that the present cash value of the consideration is fair and reasonable to the company and to all existing shareholders; and

(c) that the present cash value of the consideration is not less than the amount to be credited in respect of the shares.

(4) The Board shall deliver a copy of a certificate issued under subsection (3) to the Registrar for registration within fourteen days of its signature.

(5) Nothing in this section shall apply to the issue of shares in a company on—

(a) the conversion of any convertible securities; or

(b) the exercise of any option to acquire shares in the company.

(6) Where a shareholder of a company is dissatisfied with the value in subsection (2) he may apply to the Registrar for an assessment of the value in accordance with the provisions of Part VII.

(7) An officer who fails to comply with subsection (3) shall be liable to a fine in accordance with the prevailing schedule of penalties.

(8) Where the Board fails to comply with subsection (4), every officer of the company shall be liable to a fine in accordance with the prevailing schedule of penalties.

95. Where a call is made on a share or any other obligation attached to a share is performed by the shareholder, the company shall within 14 days give notice to the Registrar in a form approved by him of—

Calls on
shares

(a) the amount of the call or its value as determined by the Board under section 94 (2); and

(b) the amount of the stated capital of the company following the making of the call.

96. The issue by a company of a share that—

Consent to
issue shares

(a) increases a liability of a person to the company; or

(b) imposes a new liability on a person to the company, shall be void where that person, or his agent who is authorized in writing, does not consent in writing to becoming the holder of the share before it is issued.

97. A share is issued when the name of the holder is entered on the share register where a register is required to be kept.

Time of issue
of shares

Board may
authorize
distribution

98.—(1) A company shall not make any distribution to any shareholder unless that distribution—

- (a) has been authorized by the Board under subsection (2); and
- (b) subject to the constitution, has been approved by the shareholders by ordinary resolution; and
- (c) is made out of profits available for that purpose.

(2) The Board may authorize a distribution at such time and of such amount as it thinks fit, provided it is of the opinion that the company shall, upon the distribution being made, satisfy the solvency test.

(3) The directors who vote in favour of a distribution shall sign a certificate stating that, in their opinion, the company shall, upon the distribution being made, satisfy the solvency test.

(4) Where, after a distribution is authorized and before it is made, the Board ceases to be satisfied that the company shall, upon the distribution being made, satisfy the solvency test, any distribution made by the company shall be deemed not to have been authorized.

Net asset
restriction on
distribution
by public
companies

99.—(1) A public company may only make a distribution—

- (a) if the amount of its net assets is not less than the aggregate of its called up share capital and undistributable reserves, and
- (b) if, and to the extent that, the distribution does not reduce the amount of those assets to less than that aggregate.

(2) For this purpose a company's "net assets" means the aggregate of the company's assets less the aggregate of its liabilities.

(3) A company's undistributable reserves are—

- (a) its share premium account;
- (b) its capital redemption reserve;
- (c) the amount by which its accumulated, unrealized profits, so far as not previously utilized by capitalization, exceed its accumulated, unrealized losses, so far as not previously written off in a reduction or reorganization of capital duly made;
- (d) any other reserve that the company is prohibited from distributing by any enactment or by its articles.

The reference in paragraph (c) to capitalization shall not include a transfer of profits of the company to its capital redemption reserve.

(4) A public company shall not include any uncalled share capital as an asset in any accounts relevant for purposes of this section.

100.—(1) Subject to subsection (3), a company may by special resolution reduce its stated capital to such amount as it thinks fit. Reduction of stated capital

(2) Public notice of a proposed reduction of a company's stated capital shall be given not less than thirty days before the resolution to reduce its stated capital is passed.

(3) A company may agree in writing with a creditor of the company that it shall not reduce its stated capital—

(a) below a specified amount without the prior consent of the creditor; or

(b) unless specified conditions are satisfied at the time of the reduction.

(4) A resolution to reduce the stated capital passed in breach of any agreement referred to in subsection (3) shall be invalid and of no effect.

(5) A company shall not take any action—

(a) to extinguish or reduce a liability in respect of an amount unpaid on a share; or

(b) to reduce its stated capital for any purpose other than the purpose of declaring that its stated capital is reduced by an amount that is not represented by the value of its assets, unless there are reasonable grounds on which the directors may determine that, immediately after the taking of such action, the company will be able to satisfy the solvency test.

(6) Where—

(a) a share is redeemed at the option of the shareholder under section 116 or on a fixed date under section 117; or

(b) the company purchases a share under section 109, and the board is satisfied that as a consequence of the redemption or purchase, the company would, but for this subsection, fail to satisfy the solvency test—

(i) the board shall resolve that the stated capital of the company shall be reduced by the amount by which the company would so fail to satisfy the solvency test; and

(ii) the resolution of the board shall have effect notwithstanding subsections (1) to (3).

(7) A company which has reduced its stated capital shall within fourteen days of the reduction give notice of the reduction to the Registrar, specifying the amount of the reduction and the reduced amount of its stated capital.

Application
of premiums
received on
issue of
shares

101.—(1) In relation to a company incorporated before the commencement of this act, where a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount or value of the premiums on those shares shall be transferred to an account, to be called "the share premium account", and the provisions of this Act relating to the reduction of the stated capital of a company shall, except as provided in this section, apply as if the share premium account were stated capital of the company.

(2) The share premium account may, notwithstanding anything in subsection (1), be applied by the company in paying up un-issued shares of the company to be issued to members of the company as fully paid bonus shares in writing off—

(a) the preliminary expenses of the company;

(b) the expenses of, or the commission paid or discount allowed on, any issue of shares or debentures of the company; or

(c) in providing for the premium payable on redemption of any redeemable preference shares or of any debentures of the company.

(3) Where a company has before the commencement of this Act issued any shares at a premium, this section shall apply as if the share had been issued after the commencement of this Act.

Power to
issue shares
at a discount

102.—(1) Subject to this section, a company may issue at a discount shares in the company of a class already issued, except that—

(a) the issue of the shares at a discount shall be authorized by resolution passed in a general meeting of the company and must be sanctioned by the Court;

(b) the resolution shall specify the maximum rate of the discount at which the shares are to be issued;

(c) not less than one year shall have elapsed at the date of the issue since the date on which the company was entitled to commence business; and

(d) the shares to be issued at a discount must be issued within one month after the date on which the issue is sanctioned by the Court or within such extended time as the Court may allow.

(2) Where a company has passed a resolution authorising the issue of shares at a discount, it may apply to the Court for an order approving the issue and upon such application the Court, if having regard to all the circumstances of the case, thinks it proper so to

do, may make an order approving the issue on such terms and conditions as the Court thinks fit.

103.—(1) Whenever a private company limited by shares makes any allotment of its shares, the company shall, within sixty days thereafter, deliver to the Registrar for registration—

Return as to
allotment

(a) a return of the allotments, stating the number and amount of the shares comprised in the allotment, the names, addresses and descriptions of the allottees and the amount if any, paid or due and payable on each share; and

(b) in the case of shares allotted as fully or partly paid up otherwise than in cash, a contract in writing constituting the title of the allottee to the allotment together with any contract of sale or for services or other consideration in respect of which that allotment was made, such contract being duly stamped and a return stating the number and amount of shares so allotted, the extent to which they are to be treated as paid up and the consideration for which they have been allotted.

(2) Where default is made in complying with this section, every officer of the company who is in default shall be liable to a fine in accordance with the prevailing schedule of penalties.

Division II—Dividends And Distributions

104.—(1) A dividend shall be a distribution other than a distribution to which sections 109 and 124 apply.

Dividends

(2) The Board shall not authorize a dividend—

(a) in respect of some but not all the shares in a class;

(b) of a greater amount in respect of some shares in a class than other shares in that class except where—

(i) the amount of the dividend is reduced in proportion to any liability attached to the shares under the constitution;

(ii) a shareholder has agreed in writing to receive no dividend, or a lesser dividend than would otherwise be payable;

(c) unless it is paid out of profits.

(3) A public company that proposes to declare a dividend shall include declaration of dividends as an item on the agenda for the shareholders' meeting in the notice to shareholders.

Shares in lieu
of dividends

105. Subject to the constitution of the company, the Board may issue shares to any shareholders who have agreed to accept the issue of shares, wholly or partly, in lieu of a proposed dividend or proposed future dividends provided that—

(a) the right to receive shares, wholly or partly, in lieu of the proposed dividend or proposed future dividends has been offered to all shareholders of the same class on the same terms;

(b) where all shareholders elected to receive the shares in lieu of the proposed dividend, relative voting or distribution rights, or both, would be maintained;

(c) the shareholders to whom the right is offered are afforded a reasonable opportunity of accepting it;

(d) the shares issued to each shareholder are issued on the same terms and subject to the same rights as the shares issued to all shareholders in that class who agree to receive the shares; and

(e) the provisions of section 93 are complied with by the Board.

Shareholder
discounts

106.—(1) The Board may resolve that the company shall offer shareholders discounts in respect of some or all of the goods sold or services provided by the company.

(2) The Board shall not approve a discount scheme under subsection (1) unless it has previously resolved that the proposed discounts are—

(a) fair and reasonable to the company and to all shareholders; and

(b) made available to all shareholders or all shareholders of the same class on the same terms.

(3) A discount scheme shall not be approved, or where it had previously been approved shall not be continued by the Board, unless it has reasonable grounds to believe that the company satisfies the solvency test.

(4) Subject to subsection (5), a discount accepted by a shareholder under a discount scheme approved under this section shall not be a distribution for the purposes of this Act.

(5) Where—

(a) a discount is accepted by a shareholder under a scheme approved by the Board; and

(b) after the scheme is approved or the discount was offered, the Board ceases to be satisfied on reasonable grounds that the company

would satisfy the solvency test, section 107 shall apply in relation to the discount with such modifications as may be necessary as if the discount were a distribution that is deemed not to have been authorised.

107.—(1) A distribution made to a shareholder at a time when the company did not, upon distribution being made, satisfy the solvency test may be recovered by the company from the shareholder unless—

Recovery of distributions

(a) the shareholder received the distribution in good faith and without knowledge of the company's failure to satisfy the solvency test;

(b) the shareholder has altered the shareholder's position in reliance on the validity of the distribution; and

(c) it would be unfair to require repayment in full or at all.

(2) Where, in relation to a distribution made to a shareholder—

(a) the procedure set out in section 104 has not been followed; or

(b) reasonable grounds for believing that the company would satisfy the solvency test in accordance with section 109 or 124, as the case may be, did not exist at the time the certificate was signed,

a director who failed to take reasonable steps to ensure the procedure was followed or who signed the certificate, as the case may be, shall be personally liable to the company to repay to the company so much of the distribution which cannot be recovered from shareholders.

(3) Where, by virtue of section 109(4) distribution is deemed not to have been authorised, a director who—

(a) ceases after authorization but before the making of the distribution to be satisfied on reasonable grounds for believing that the company would satisfy the solvency test upon the distribution being made; and

(b) fails to take reasonable steps to prevent the distribution being made,

shall be personally liable to the company to repay to the company so much of the distribution which cannot be recovered from shareholders.

(4) Where, by virtue of section 106 (5) a distribution is deemed not to have been authorized, a director who fails to take reasonable steps to prevent the distribution being made shall be personally liable to the company to repay to the company so much of the distribution which cannot be recovered from shareholders.

(5) Where, in an action brought against a director or shareholder under this section, the Court is satisfied that the company could, by making a distribution of a lesser amount, have satisfied the solvency test, the Court may—

(a) permit the shareholder to retain; or

(b) relieve the director from liability in respect of, an amount equal to the value of any distribution that could properly have been made.

Reduction of
shareholder
liability treated
as distribution

108.—(1) Where a company—

(a) alters its constitution,

(b) acquires shares issued by it; or

(c) redeems shares under section 115,

in a manner which would cancel or reduce the liability of a shareholder to the company in relation to a share held prior to that alteration, acquisition, or redemption, the cancellation or reduction of liability shall be treated for the purposes of section 109 as if it were a distribution and for the purposes of section 104 (2) as if it were a dividend.

(2) Where a company has altered its constitution, or acquired shares, or redeemed in a manner which cancels or reduces the liability of a shareholder to the company in relation to a share held prior to that alteration, acquisition, or redemption, that cancellation or reduction of liability shall be treated for the purposes of section 100 as a distribution of the amount by which that liability was reduced.

(3) Where the liability of a shareholder of a share held prior to that alteration, acquisition, or redemption of that company is—

(a) greater than the liability of that shareholder to the company in relation to a share or shares into which that share is converted; or

(b) cancelled by the cancellation of that share in the alteration, acquisition, or redemption,

the reduction of liability affected by the alteration, acquisition, or redemption shall be treated for the purposes of section 107 (1) and (3) as a distribution by the company to that shareholder, whether or not that shareholder becomes a shareholder of the company, of the amount by which that liability was reduced.

Division III—Acquisition and Redemption of Company's Own Shares Acquisition of Shares

109.—(1) Subject to subsection (4), a company shall not purchase or otherwise acquire any of its own shares except—

Company
may acquire
its own shares

(a) as provided under sections 110 and 111 or sections 112 to 118;

(b) in the case of a private company, with the unanimous approval of all shareholders;

(c) with the approval of a unanimous resolution; or

(d) in accordance with an order made by the Court under this Act.

(2) A company may redeem a share which is a redeemable share in accordance with sections 112 to 118 but not otherwise.

(3) Where shares are acquired by a company pursuant to subsection (1), the stated capital of the class of shares so acquired, or in the case of a company having par value shares, the nominal issued share capital, so as to take into account the extent to which the amount received by the company as stated capital, is reduced by the company's acquisition of its own shares.

(4) A company shall not make any payment in whatever form to acquire any shares issued by the company where there are reasonable grounds for believing that the company is, or would after the payment, be unable to satisfy the solvency test.

(5) A company shall not acquire its own shares where, as a result of such acquisition, there would no longer be any shares on issue other than convertible shares.

(6) A company shall immediately following the acquisition of shares by the company give notice to the Registrar of the number and class of shares acquired.

(7) Where a company fails to comply with subsection (4), the company and every officer of the company who is in default shall be liable to a fine in accordance with the prevailing schedule of penalties.

Purchase of
own shares

110.—(1) A company may, subject to—

(a) the approval of the Board; and

(b) its constitution authorizing it to do so, purchase or otherwise acquire its own shares.

(2) The company shall not offer or agree to purchase or otherwise acquire its own shares unless—

(a) the Board is satisfied that—

(i) the acquisition is in the best interests of the company;

(ii) the terms of the offer or agreement and the consideration to be paid for the shares are fair and reasonable to the company;

(iii) in any case where the offer is not made to, or the agreement is not entered into with, all shareholders, the offer or the agreement, as the case may be, is fair to those shareholders to whom the offer is not made, or with whom no agreement is entered into;

(iv) shareholders to whom the offer is made have available to them any information which is material to an assessment of the value of the shares; and

(v) the company shall immediately after the acquisition satisfy the solvency test; and

(b) the Board has disclosed to shareholders or members or otherwise has made available to them all information which is material to the assessment of the value of the shares.

Act No 20 of
2010

(3) Any offer by a company to purchase or otherwise acquire its own shares on a securities exchange shall be made in accordance with the Securities Act, 2010, and in accordance with any other law regulating the securities markets in Malawi.

Disclosure
document

111.—(1) This section shall not apply to—

(a) an offer which—

(i) is made to all shareholders to acquire a proportion of their shares;

(ii) if accepted, would leave unaffected relative voting and distribution rights; and

(iii) affords a reasonable opportunity to shareholders to accept the offer;

(b) an offer to which all shareholders have consented in writing or which is the subject of unanimous approval by the shareholders;

(c) an offer made pursuant to a unanimous resolution;

(d) an offer where the purchase or acquisition is made on or any securities exchange whether within or outside Malawi is made in accordance with the Securities Act, 2010.

(2) Subject to subsection (1), before an offer is made pursuant to a resolution under section 110, the company shall send to each shareholder a disclosure document that complies with subsection (3).

(3) A disclosure document issued under this section shall set out—

(a) the nature and terms of the offer, and, if made to specified shareholders only, the names of those shareholders;

(b) the nature and extent of any relevant interest of any director of the company in any shares which are the subject of the offer; and

(c) the text of the resolution required by section 110 (2), together with such further information and explanation as may be necessary to enable a reasonable shareholder to understand the nature and implications for the company and its shareholders of the proposed acquisition.

(4) A reporting issuer may issue or transfer shares held by the reporting issuer itself subject to the provisions of the Securities Act, 2010

Act No. 20 of
2010

112. A company may issue a redeemable share where—

Meaning of
"redeemable"

(a) the constitution of the company makes provision for the company to issue redeemable shares;

(b) the shares are fully paid up at the time of redemption; and

(c) the constitution or the terms of issue of the share makes provision for the redemption of the share—

(i) at the option of the company;

(ii) at the option of the holder of the share; or

(iii) on a date specified in the constitution or in the terms of issue of the share for a consideration that is—

(aa) specified;

(bb) to be calculated by reference to a formula; or

(cc) required to be fixed by a suitably qualified person who is not associated with or interested in the company.

Application of
this Act to
redemption
of shares

113. The provisions of sections 114 and 118 shall apply to the redemption of shares.

Redemption
of redeemable
preference
shares

114.—(1) Redemption of redeemable preference shares shall be made only out of—

(a) profits of the company which would otherwise be available for dividends; or

(b) the proceeds of a fresh issue of shares made for the purposes of the redemption, before the shares are redeemed, the premium if any, payable on redemption, shall be provided for out of the profits of the company or out of the company's share premium account.

(2) Where a company has redeemed or is about to redeem any preference shares under subsection (1) (b), the company may issue shares up to the amount of the shares redeemed, or to be redeemed as if those shares had never been issued, and, accordingly, the share capital of the company shall not for the purpose of any enactments relating to stamp duty be deemed to be increased by the issue of shares under this subsection.

(3) Where new shares are issued before the redemption of the old shares, the new shares shall not, so far as relates to stamp duty, be taken to have been issued under subsection (3) unless the old shares are redeemed within one month after the issue of the new shares.

(4) Where shares are redeemed otherwise than out of the proceeds of a fresh issue, there shall, out of profits which should otherwise have been available for dividend, be transferred to a reserve fund to be called "the capital redemption reserve fund", a sum equal to the nominal amount of the shares redeemed, and the provisions of this Act relating to the reduction of the share capital of the company, shall, except as provided in this section, apply as if the capital redemption reserve fund were paid-up share capital of the company.

(5) The capital redemption reserve fund may, notwithstanding anything in this section, be applied by the company in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares.

(6) The redemption of preference shares under this section by a company shall not be taken as reducing the amount of the company's stated or authorised share capital in respect of companies formed before the commencement of this Act.

115. A redemption of a share at the option of the company shall be deemed to be—

Redemption
at option of
company

(a) an acquisition by the company of the share for the purposes of sections 110 (2) and 111; and

(b) a distribution within the meaning of this Act.

116.—(1) Where a share is redeemable at the option of the holder of the share, and the holder gives proper notice to the company requiring the company to redeem the share,

Redemption
at option of
shareholder

(a) the company shall redeem the share on the date specified in the notice, or if no date is specified, on the date of receipt of the notice;

(b) the share is deemed to be cancelled on the date of redemption; and

(c) from the date of redemption the former shareholder ranks as an unsecured creditor of the company for the sum payable on redemption.

(2) A redemption under this section—

(a) shall not be a dividend or distribution for the purposes of this Act; but

(b) shall be deemed to be a distribution for the purposes of section 107 (1) and (5).

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

Redemption
on fixed date

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

(b) the share shall be deemed to be cancelled on that date; and

(c) from that date the former shareholder shall rank as an unsecured creditor of the company for the sum payable on redemption.

(2) A redemption under this section—

(a) shall not be a dividend or distribution for the purposes of this Act; but

(b) shall be deemed to be a distribution for the purposes of sections 107 (1) and (5).

118.—(1) Subject to the provisions in this Act in relation to Treasury shares, shares that are acquired or redeemed by a company under this Act, are deemed to be cancelled immediately on acquisition.

Cancellation
of shares
repurchased

Rights of
holders of
special
classes of
shares

(2) For the purposes of subsection (1), shares are acquired on the date on which the company would, in the absence of this section, become entitled to exercise the rights attached to the shares.

119.—(1) Where the share capital of a company is divided into different classes of shares, and provision is made by the constitution for authorizing the variation of the rights attached to any class of shares in the company, subject to the consent of any specified proportion of the holders of the issued shares of that class or the approval of a resolution passed at a separate meeting of the holders of those shares and in accordance with that provision, then if the rights attached to any such class of shares are at any time varied, the holders of not less in the aggregate than 15 per cent of the issued shares of that class, being persons who did not consent to or vote in favour of the resolution for the variation, may apply to the Court to have the variation cancelled.

(2) Where an application is made under subsection (1), the variation shall not have effect unless and until it is confirmed by the Court.

(3) An application under this section shall be made by petition within 30 days after the date on which the consent was given or the resolution was passed as the case may be and may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they may appoint in writing for the purpose.

(4) On an application under this section, the Court, after hearing the applicant and any other persons who apply to the Court to be heard and appear to the Court to be interested in the application may, if it is satisfied, having regard to all the circumstances of the case, that the variation would unfairly prejudice the shareholders of the class represented by the applicant, disallow the variation and shall, if not so satisfied, confirm the variation.

(5) The company shall within 30 days after the making of an order by the Court on an application under this section, forward a certified copy of the order to the Registrar.

(6) If default is made in complying with subsection (6) the company and every officer of the company who is in default is liable to a fine in accordance with the prevailing schedule of penalties as issued by the Registrar.

(7) In this section, "variation" includes abrogation and "varied" shall be construed accordingly.

Division IV—Treasury Shares

120.—(1) The provisions in this Act on cancellation of shares repurchased shall not apply to shares acquired by a company pursuant to section 109 or 110 where—

Company
may hold its
own shares

(a) the constitution of the company expressly permits the company to hold its own shares;

(b) the Board of the company resolves that the shares concerned shall not be cancelled on acquisition; and

(c) the number of shares acquired, when aggregated with shares of the same class held by the company pursuant to this section at the time of the acquisition, does not exceed 15 per cent of the shares of that class previously issued by the company, excluding shares previously deemed to be cancelled under this Act.

(2) Any share acquired by a company pursuant to section 109 or 110 and, which is held by the company pursuant to subsection (1) shall be held by the company in itself.

(3) A share that a company holds in itself under subsection (2) may be cancelled by the Board resolving that the share is cancelled and the share shall be deemed to be cancelled on the making of such a resolution.

121.—(1) The rights and obligations attaching to a share that a company holds in itself pursuant to section 120 shall not be exercised by or against a company while it holds the share.

Rights and
obligations
of shares that
company
holds
in itself
suspended

(2) Without limiting subsection (1), while a company holds a share in itself pursuant to section 120, the company shall not—

(a) exercise any voting rights attaching to the share; or

(b) make or receive any distribution authorised or payable in respect of the share.

122.—(1) Subject to subsection (2), section 93 shall apply to the transfer of a share held by a company in itself as if the transfer were the issue of the share under section 89.

Re-issue of
shares that
company
holds in itself

(2) Subsection (1) shall not apply unless it is specifically provided in the constitution that the company may transfer the shares so held.

(3) A company shall not make an offer to sell any share it holds in itself or enter into any obligations to transfer such a share where the company has received notice in writing of a compromise, merger or take-over scheme.

Enforceability
of contract to
repurchase
shares

123.—(1) A contract with a company for the acquisition by the company of its shares shall be specifically enforceable against the company except to the extent that the company would, after performance of the contract, fail to satisfy the solvency test.

(2) The company bears the burden of proving that performance of the contract would result in the company being unable to satisfy the solvency test.

(3) Subject to subsection (1), where the company has entered into a contract for the acquisition by the company of its shares, the other party to the contract shall, on the conclusion of the contract, become a creditor and shall—

(a) be entitled to be paid as soon as the company is lawfully able to do so; or

(b) prior to the removal of the company from the register of companies, be ranked subordinate to the rights of creditors but in priority to the other shareholder.

Division V—Financial Assistance in Connection with Purchase of Shares

Restrictions on
giving financial
assistance

124.—(1) A company shall not give financial assistance directly or indirectly for the purpose of or in connection with the acquisition of its own shares, other than in accordance with this section.

(2) A company may give financial assistance for the purpose of or in connection with the acquisition of its own shares if the Board has previously resolved that—

(a) giving the assistance is in the interests of the company;

(b) the terms and conditions on which the assistance is given are fair and reasonable to the company and to any shareholders not receiving that assistance; and

(c) immediately after giving the assistance, the company shall satisfy the solvency test.

(3) Where the amount of any financial assistance approved under subsection (2) together with the amount of any other financial assistance which is still outstanding exceeds 10 per cent of the company's stated capital, the company shall not give the assistance unless it first obtains from its auditor or, if it does not have an auditor, from a person qualified to act as its auditor, a certificate that—

(a) the person has inquired into the state of affairs of the company; and

(b) there is nothing to indicate that the opinion of the Board the company shall, immediately after giving the assistance, satisfy the solvency test, is unreasonable in all the circumstances.

(4) The amount of any financial assistance under this section shall not be a distribution for the purposes of sections 98 and 104.

(5) For the purposes of this section, the term "financial assistance" includes giving a loan or guarantee, or the provision of security.

125. Section 124 shall not apply to—

Transactions
not prohibited
by section
124

(a) a distribution to a shareholder approved under section 98;

(b) the issue of shares by the company;

(c) a repurchase or redemption of shares by the company;

(d) anything done under a compromise under this Act or a compromise or arrangement approved under this Act; or

(e) where the ordinary business of a company includes the lending of money by the company in the ordinary course of business.

Division VI—Debentures

126.—(1) Where a company issues or agrees to issue debentures of the same class in accordance with Part XI, the company shall before issuing any of the debentures issue a trust deed for securing the issue of the debentures or a contract with the holders of debentures secured by a trust deed.

Issue of
debentures

(2) For the purposes of this section, debentures shall not be deemed to be of the same class where—

(a) they do not rank equally for repayment when any security created by the debenture is enforced or the company is wound up; or

(b) different rights attach to them in respect of—

(i) the rate of, or dates for, payment of interest;

(ii) the dates when, or the instalments by which, the principal of the debentures shall be repaid, unless the difference is solely that the class of debentures shall be repaid during a stated period of time and particular debentures shall be selected by the company for repayment at different dates during that period by drawings, ballot or otherwise;

(iii) any right to subscribe for or convert the debentures into shares or other debentures of the company or any other company or company; or

(iv) the powers of the debenture holders to realise any security.

(3) For the purposes of this section—

(a) the trust deed shall not cover more than one class of debentures;

(b) any provision contained in the trust deed or any contract secured by the trust deed is void insofar as it would have the effect of exempting a trustee of the deed from, or indemnifying him against, liability for breach of trust; save where a release is given to a trustee having been agreed upon by more than seventy-five per cent of debenture holders at a meeting summoned for that purpose.

Act No. 2013 of 2013
Specific performance
Perpetual debentures
Register of debenture holders

(4) For the avoidance of doubt, secured debentures shall also be subject to the Personal Property Security Act, 2013.

127. A contract with a company to take up and pay for debentures may be enforced by an order of the High Court for specific performance.

128. Notwithstanding any other enactment, a condition contained in a debenture or in an agency deed for securing a debenture, whether the debenture or agency deed is issued or made before or after the commencement of this Act, shall not be invalid by reason that the debentures are thereby made irredeemable only on the happening of a contingency, however remote, or on the expiration of a period however long.

129.—(1) Every company which issues debentures shall at its registered office keep a register of debenture holders which shall contain—

(a) the names and addresses of the debenture holders;

(b) the amount of debentures held by them.

(2) The register shall, except when duly closed pursuant to subsection (3), be open to the inspection of a debenture holder or a member.

(3) For the purposes of this section, a register shall be deemed to be duly closed if closed in accordance with a provision contained in the constitution, the debenture, the debenture stock certificate, the trust deed or any other document relating to or securing the debenture, during such period, not exceeding 30 days in any year, as is specified in the document.

(4) Every company shall, at the request of a debenture holder or a member, provide a copy of the register of debenture holders and the copy need not include any particulars as to a debenture holder other than his name and address and the debenture held by him.

130.—(1) Where a company has, whether before or after the commencement of this Act, redeemed a debenture, it shall be subject to subsection (2)—

Re-issue of
redeemed
debentures

(a) unless any provision to the contrary, whether express or implied, is contained in the constitution or in any contract entered into by the company; or

(b) unless the company has, by passing a resolution to that effect or by some other act, manifested its intention that the debentures shall be cancelled, have and be deemed always to have had the power to reissue the debentures by reissuing the same debentures or by issuing other debentures in their place.

(2) The reissue of a debenture or the issue of one debenture in place of another under subsection (1) shall not be regarded as the issue of a new debenture for the purpose of any provision in the constitution or in any contract entered into by the company limiting the amount or number of debentures that may be issued by the company.

(3) After the reissue the person entitled to the debentures shall have and shall be deemed always to have had the same priorities as if the debentures had never been redeemed.

(4) Where, whether before or after the commencement of this Act, a company has given a debenture to secure advances on current account or otherwise, the debenture shall not be deemed to have been redeemed by reason that the account of the company with the debenture holder has ceased to be in debit while the debenture remains unsatisfied.

PART VII—REGISTERED VALUERS

131. Where under any provision of this Act, valuation is required to be made in respect of any property, stocks, shares, debentures, securities or goodwill or net worth of a company or its assets, it shall be valued by a person registered as a valuer under this Part and appointed by the board.

Valuation by
registered
valuers

132.—(1) The Minister may by regulation require the Registrar to maintain a register to be called "The Register of Valuers" in which shall be entered the names and addresses of persons registered under subsection (2) as valuers.

Register of
valuers

(2) Any person with such professional qualifications as may be prescribed may apply to the Registrar in the prescribed form to be registered as a valuer under this section, provided that no company or body corporate shall be eligible to so apply.

(3) Every application under subsection (2) shall be accompanied by such fee as may be prescribed by the Registrar, and shall contain a declaration to the effect that the applicant shall—

(a) make an impartial and true valuation of any assets which may be required to be valued;

(b) make the valuation in accordance with such rules as may be prescribed, and

(c) shall not undertake valuation of any assets in which he has a direct or indirect interest or becomes so interested at any time during the valuation of the assets.

Practice as a
registered
valuer

133.—(1) No person, either alone or in partnership with any other person, shall practise, describe or project himself as a registered valuer for the purposes of this Act or permit himself to be so described or projected unless he is registered as a valuer, or, as the case may be, he and all his partners are so registered under this Part.

(2) The report of valuation of any assets by a registered valuer shall be submitted in such form as may be prescribed.

(3) A registered valuer shall be bound by the prevailing rates of fees as may be prescribed.

Removal and
restoration of
names of
valuers from
the register

134.—(1) The Registrar may remove the name of any person from the register of valuers where he is satisfied, after giving that person a reasonable opportunity of being heard and after such further inquiry, if any, as he thinks fit—

(a) that his name has been entered in the register by error or on account of misrepresentation or suppression of a material fact; or

(b) that he has been convicted of any offence and a term of imprisonment or has been guilty of misconduct in his professional capacity which, in the opinion of the Registrar, renders his name unfit to be kept in the register.

(2) The Registrar may on application and on sufficient cause being shown, restore in the register the name of any person removed therefrom.

PART VIII—SHARE CERTIFICATION AND TRANSFER

Division I—Securities By Written Instrument

135. A certificate under the common seal of the company registered in Malawi specifying any shares held by any member shall be prima facie evidence of title of the member to the shares.

Share
certificate as
evidence
of title

136.—(1) Notwithstanding any other law, a company shall, where the constitution so provides, be entitled to a lien, independently of and without the necessity for inscription, in priority to any other claim, over every issued share, not being a fully paid share, and over any dividend payable on the share, for all money due by the holder of that share to the company whether by way of money called or payable at a fixed time in respect of that share.

Rights to a
lien on shares

(2) In the case of a company, other than a public company, the constitution may provide for a lien of the same kind as referred to in subsection (1) over fully paid shares and dividends on those shares for all money owing by the shareholders to the company.

(3) Subject to subsection (4), a company may, in such manner as the directors think fit, sell any share on which the company has a lien.

(4) No sale shall be made unless—

(a) a sum in respect of which the lien exists is presently payable; and

(b) until the expiry of 14 days after a written notice, demanding payment of such part of the amount in respect of which the lien exists as is presently payable, has been given to the registered holder for the time being of the share, or the person entitled to the share by reason of the death or bankruptcy of the registered holder.

(5) The directors may, to give effect to any sale under subsection (3), authorise some person to transfer the shares sold to the purchaser of the shares.

(6) The purchaser referred to in subsection (5) shall be registered as the holder of the share comprised in any such transfer, and shall not be bound to see to the application of the purchase money, nor shall the title of the purchaser to the share be affected by any irregularity or invalidity in the proceedings relating to the sale.

(7) The proceeds of the sale shall be received by the company and applied for the payment of such part of the amount in respect of which the lien exists as is presently payable, and any residue shall,

subject to a like lien for sums not presently payable as existed upon the share before the sale, be paid to the person entitled to the share at the date of the sale.

(8) The directors may, where the constitution so provides, decline to register the transfer of a share on which the company has a lien.

Requirement
for instrument
of transfer

137.—(1) Notwithstanding anything in the constitution of a company, the company may not register a transfer of shares in a company unless a proper instrument of transfer has been delivered to the company.

(2) Nothing in this section shall prejudice any power of the company to register as a shareholder any person to whom the right to any shares in or debentures of the company has been transmitted by operation of the law.

Procedure on
lodging of
transfer

138. When a transfer of shares in a company has been lodged with a company, the company must—

(a) either register the transfer;

(b) or give the transferee notice of refusal to register the transfer, together with reasons for the refusal.

Request of
transfer or
for entry in
the register

139.—(1) On the written request of the transferor of any share, debenture or other interest in a company, the company shall enter in the appropriate register the name of the transferee in the same manner and subject to the same conditions as if the application for the entry were made by the transferee.

(2) On the written request of the transferor of a share or debenture or other interest in a company, the company shall by written notice require the person having the possession, custody or control of the debenture or share certificate if a certificate has been issued and the instrument of transfer thereof or either of them, to deliver it or them to its registered office, within such period as may be specified in the notice, being not less than seven nor more than twenty-eight days after the date of the notice, to have the share certificate or debenture cancelled or rectified and the transfer entered in the appropriate register or otherwise dealt with.

(3) Where a person refuses or neglects to comply with a notice under subsection (2) the transferor may apply to the Registrar to show cause why the document mentioned in the notice should not be delivered or produced.

(4) The Registrar may require a person under subsection (3) to deliver a document referred to in subsection (2) to the company on such terms or conditions as the Registrar may direct.

(5) A list of all share certificates or debentures called for under this section and not delivered shall be exhibited at the registered office of the company and shall be advertised in such newspapers and at such times as the company thinks fit.

140. A transfer of the share or other interest of a deceased member of a company made by his personal representative shall, although the personal representative is not himself or herself a member of the company, be as valid as if he had been a member at the time of the execution of the instrument of transfer.

Transfer by
personal
representatives
or on the
grant of
probate

141.—(1) The certification by a company of any instrument of transfer of shares in or debentures of the company shall be taken as a representation by the company to any person acting on the faith of the certification that there have been produced to the company, such documents as on the face of them show a prima facie title to the shares or debentures to the transferor named in the instrument of transfer but not as a representation that the transferor has any title to the shares or debentures.

Certification
of transfers

(2) Where a person acts on the faith of a false certification by a company made negligently, the company shall be under the same liability to him as if the certification had been made fraudulently.

(3) For the purposes of this section—

(a) an instrument of transfer shall be taken to be certified if it bears the words "certificate lodged" or words to the like effect;

(b) the certification of an instrument of transfer shall be taken to be made by a company if—

(i) the person issuing the instrument is a person authorised to issue certificated instruments of transfer on the company's behalf; and

(ii) the certification is signed by a person authorised to certificate transfers on the company's behalf or by any officer or servant either of the company or of a body corporate so authorised;

(c) a certification shall be taken to be signed by a person if—

(i) it purports to be authenticated by his or her signature or initials whether handwritten or not; and

(ii) it is not shown that the signature or initials was or were placed there by himself or herself or by any person authorised to use the signature or initials for the purpose of certifying transfers on the company's behalf.

Duties of
company with
respect to
certificates

142.—(1) A company shall, within 60 days after the allotment of any of its shares, debentures or debenture stock and within two months after the date on which a transfer of the shares, debentures or debenture stock is lodged with the company, complete and have ready for delivery the certificates of all shares, the debentures and the certificates of all debenture stock allotted or transferred, unless the conditions of issue of the shares, debentures or debenture stock otherwise provide.

(2) For the purposes of subsection (1), "transfer" means a transfer duly stamped and otherwise valid and does not include a transfer which the company is for any reason entitled to refuse to register and does not register.

(3) If a company on which a notice has been served requiring the company to make good any default in complying with subsection (1), fails to make good the default within ten days after the service of the notice, the Registrar may, on the application of the person entitled to have the certificates or the debentures delivered to him, make an order directing the company and any officer of the company to make good the default within the time specified in the order.

(4) The order may provide that all costs of and incidental to the application shall be borne by the company or by any officer of the company responsible for the default.

Transfer of
shares in
a single
member
company

143.—(1) A single member company may transfer or allot shares on the death of the single member, or by operation of law, or by a single member company changing status by transferring or allotting shares to more members.

(2) In the case of a transfer of shares or further allotment of shares the company shall—

(a) pass a special resolution for change of status from a single member company to a private company and alter its articles accordingly within 30 days of the transfer of shares or further allotment of shares; and

(b) appoint and elect one or more additional directors within fifteen days of the date of passing of the special resolution and notify the appointment to the Registrar.

(3) In the case of the death of a single member, the company may either be wound up or change its status from a single member company by transferring or allotting shares for which—

(a) the nominee director shall transfer the shares in the name of the legal heirs of the single member within 30 days;

(b) the company shall pass a special resolution for change of status from a single member company and alter its articles accordingly within 30 days of the transfer of shares; and

(c) the members shall appoint or elect one or more additional directors in accordance with this Act and within 14 days of the date of passing of the special resolution notify the appointment to the Registrar.

(4) In the case of operation of the law the company shall—

(a) transfer the shares, within seven days, in the name of relevant persons to give effect to the order of the Court or any other authority;

(b) pass a special resolution for change of status from a single member and alter its articles accordingly within 30 days of the transfer of shares; and

(c) appoint an additional director or directors in accordance with this Act within fourteen days of the date of passing of the special resolution and notify the appointment within fourteen days of the date after the appointment.

(5) The persons becoming members due to the transfer or further allotment of shares, as the case may be, shall pass a special resolution to make the alterations in the constitution and appoint one or more additional directors.

(6) Where a single member company changes its status pursuant to subsection (1), it shall file a notice in writing with the Registrar within 60 days from the date of passing of the special resolution.

144. Notwithstanding anything provided in this Division as to the requirement to keep a share register a private company shall not be under any obligation to maintain a share register but shall be under an obligation to keep and maintain proper records of shares and debentures it has issued and transferred.

Private
companies

145.—(1) A company shall maintain an electronic or hard copy share register which shall record the shares issued by the company and which shall state—

Company to
maintain
share register

(a) whether, under the constitution of the company or the terms of issue of the shares, there are any restrictions or limitations on their transfer; and

(b) the place where any document that contains the restrictions or limitations may be inspected.

(2) A public company or subsidiary or parent company of a public company shall maintain a register of substantial shareholders in which it shall enter the particulars specified in subsection (3) in respect of every share held by a substantial shareholder or in which directly or indirectly he has an interest. Such register may be in electronic form.

(3) The share register under subsection (1) shall state, with respect to each class of shares—

(a) the names, in alphabetical order, and the last known address of each person who is, or has within the last seven years been, a shareholder;

(b) the number of shares of that class held by each shareholder within the last seven years; and

(c) the date of any—

(i) issue of shares to;

(ii) repurchase or redemption of shares from; or

(iii) transfer of shares by or to, each shareholder within the last seven years, and in relation to the transfer, the name of the person to or from whom the shares were transferred.

(4) An agent may maintain the share register of the company provided that the agent is qualified to be the secretary of a public company in accordance with this Act.

(5) Every company having more than 50 shareholders shall—

(a) unless the share register is in such a form as to constitute in itself an index, keep an index of the names of the shareholders of the company; and

(b) within fourteen days from the day on which any alteration is made in the share register, make any necessary alteration in the index.

(6) Notwithstanding subsection (5), where a company has more than 50 shareholders, the Registrar may require the company to keep the share register in such form as the Registrar deems fit.

(7) The index shall contain sufficient indication to enable the particulars of each shareholder to be readily found in the register.

Treasury
shares to be
entered on
the register
of shares

146.—(1) Where a company purchases its own shares in circumstances where section 145 applies, the requirements in section 145 need not be complied with if the company cancels all of the shares.

(2) Where a company holds shares as treasury shares, the company must be entered on the register as the member holding those shares.

(3) The treasury share register may be in electronic or hard copy form.

147.—(1) A company's share register must be capable of search either by electronic means or by physical inspection.

Share register to be kept available for search

(2) A company must give notice to the Registrar of the place where its share register is kept available for physical inspection and of any change in that place.

(3) No such notice is required if the register has, at all times since it came into being, been kept available for physical inspection at the company's registered office.

(4) If a company fails to comply with subsection (2) within fourteen days then the company and every officer of the company is liable to a fine in accordance with the prevailing schedule of penalties.

148.—(1) Where kept in hard copy form the principal share register shall be kept in Malawi.

Place where register kept

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

(a) the company shall, within 14 days of the date on which the share register is divided, by notice in writing inform the Registrar of the places where the registers are kept;

(b) where the place where a register is kept is altered, the company shall, within fourteen days of the alteration, by notice in writing inform the Registrar of the alteration;

(c) a copy of every branch register shall be kept at the same place as the principal register; and

(d) if an entry is made in a branch register, a corresponding entry shall be made within fourteen days in the copy of that register kept with the principal register.

(3) In this section—

"principal register", in relation to a company, means—

(a) in case the share register is not divided, the share register;

(b) in case the share register is divided into two or more registers, the register described as the principal register in the last notice sent to the Registrar.

“branch register” means a register other than the principal register.

Right to search
and require
copies

149.—(1) The share register and index must be open to search by—

(a) any member of the company without charge; and

(b) any other person on payment of such fee as may be prescribed.

(2) Any person may require a copy of a company's register of members, or of any part of it, on payment of such fee as may be prescribed.

(3) A person seeking to exercise either of the rights conferred by this section must make a request to the company to that effect.

(4) The request must contain the following information—

(a) in the case of an individual, his name and address;

(b) in the case of an organisation, the name and address of an individual responsible for making the request on behalf of the organisation;

(c) the purpose for which the information is to be used; and

(d) whether the information will be disclosed to any other person, and if so—

(i) where that person is an individual, his name and address,

(ii) where that person is an organization, the name and address of an individual responsible for receiving the information on its behalf, and

(iii) the purpose for which the information is to be used by that person.

Public
company's
secretary's
duty to keep,
maintain and
supervise
share register

150.—(1) The secretary shall take reasonable steps to ensure that the share register is properly kept and that share transfers are promptly entered on it in accordance with section 139.

(2) A secretary who fails to comply with subsection (1) is liable to a fine in accordance with the prevailing schedule of penalties.

Power of
registrar to
rectify share
register

151.—(1) Where the name of a person is wrongly entered in, or omitted from, the share register of a company, the person aggrieved, or a shareholder, may apply to the Registrar for rectification of the share register;

(2) On an application under this section the Registrar may order the rectification of the register;

(3) On an application under this section, the Registrar may decide —

(a) any question relating to the entitlement of a person who is a party to the application to have his name entered in, or omitted from, the register; and

(b) any question necessary or expedient to be decided for rectification of the register.

(4) Where a person is aggrieved by any act or decision of the Registrar under this section, he may appeal to the Court.

152. No notice of any expressed, implied or constructive trust shall be entered in the share register or be receivable by the Registrar.

Trusts not to
be entered
on register

153.—(1) Subject to subsection (2), a public company shall, within twenty-eight days after the issue, or registration of a transfer, of shares in the company, as the case may be, send a share certificate to every holder of those shares stating—

Share
certificates

(a) the name of the company;

(b) the class of shares held by that person; and

(c) the number of shares held by that person.

(2) Subsection (1) shall not apply in relation to a company the shares of which have been deposited under a system where title to securities may be evidenced and transferred without a written instrument.

(3) A shareholder in a company, not being a company to which subsection (1) or (2) applies, may apply to the company for a certificate relating to some or all of the shareholder's shares in the company.

(4) On receipt of an application for a share certificate under subsection (3), the company shall, within 28 days after receiving the application—

(a) if the application relates to some but not all of the shares, separate the shares shown in the register as owned by the applicant into separate parcels, one parcel being the shares to which the share certificate relates, and the other parcel being any remaining shares; and

(b) send to the shareholder a certificate stating —

(i) the name of the company;

(ii) the class of shares held by the shareholder; and

(iii) the number of shares held by the shareholder to which the certificate relates.

(5) Notwithstanding section 137, where a share certificate has been issued, a transfer of the shares to which it relates shall not be registered by the company unless the instrument of transfer required by that section is accompanied—

- (a) by the share certificate relating to the share; or
- (b) by evidence as to its loss or destruction and, if required, an indemnity in a form required by the Board.

(6) Subject to subsection (1), where shares to which a share certificate relates are to be transferred, and the share certificate is sent to the company for registration of the transfer, the share certificate shall be cancelled and no further share certificate shall be issued except at the request of the transferee.

(7) This section shall not apply to an investment company either on issue of a share certificate or on registration of a transfer of shares.

Replacement
of lost or
destroyed
certificates

154.—(1) Subject to subsections (2) where a certificate or other document of title to a share or a debenture is lost or destroyed, the company shall on application being made by the owner and on payment of the prescribed fee issue a duplicate certificate or document to the owner.

(2) The application shall be accompanied by a written undertaking that where the certificate or document is found, or received by the owner, it shall be returned to the company and the directors may also require the applicant to furnish such indemnity as the directors consider to be adequate against any loss following the production of the original certificate or document.

Share register
as evidence
of legal title

155.—(1) Subject to section 151, the entry of the name of a person in the share register as holder of a share shall be prima facie evidence that legal title to the share is vested in that person.

(2) A company may treat a shareholder as the only person entitled to—

- (a) exercise the right to vote attaching to the share;
- (b) receive notices;
- (c) receive a distribution in respect of the share; and
- (d) exercise the other rights and powers attaching to the share.

Division II—Securities Without Written Instrument

Meaning of
securities
Act No. 20 of
2010

156.—(1) In this part securities shall have the same meaning as in the Securities Act, 2010 and or any amendments thereto.

(2) References to—

(a) title to securities include any legal or equitable interest in securities;

(b) a transfer of title include a transfer by way of security; and

(c) transfer without a written instrument include, in relation to bearer securities, transfer without delivery.

157. The Registrar of Financial Institutions may issue directives providing for—

Power to
issue
directives

(a) the title to securities to be evidenced and transferred without written instrument;

(b) procedures for recording and transferring title to securities; and

(c) the regulation of those procedures and the persons responsible for their operation.

PART IX—THE OFFICERS OF A COMPANY

Division I—Directors And The Board Of Directors

158.—(1) For the purposes of this Act, “director”—

Meaning of
“director”

(a) includes a person occupying the position of director of the company by whatever name called; and

(b) includes an alternate director; but

(c) does not include a receiver.

(2) For the purposes of sections 159 to 222, “directors” includes—

(a) a person in accordance with whose directions or instructions a person referred to in subsection (1) may be required or is accustomed to act;

(b) a person in accordance with whose directions or instructions the Board of the company may be required or is accustomed to act;

(c) a person who exercises or who is entitled to exercise or who controls or who is entitled to control the exercise of powers which, apart from the constitution of the company, would fall to be exercised by the Board; and

(d) a person to whom a power or duty of the Board has been directly delegated by the Board with that person's consent or acquiescence, or who exercises the power or duty with the consent or acquiescence of the Board.

(3) For the purposes of sections 159 to 222 a director includes a person in accordance with whose directions or instructions a person referred to in subsections (1) and (2) may be required or is accustomed to act in respect of his duties and powers as a director.

(4) Where the constitution of a company confers a power on shareholders which is exercisable by the Board, any shareholder who exercises that power or who takes part in deciding whether to exercise that power shall be deemed, in relation to the exercise of the power or any consideration concerning its exercise, to be a director for the purposes of sections 176 to 182, 220 and 222.

(5) Where the constitution of a company requires a director or the Board to exercise or refrain from exercising a power in accordance with a decision or direction of shareholders, any shareholder who takes part in—

(a) the making of any decision that the power should or should not be exercised; or

(b) the making of any decision whether to give a direction, as the case may be, shall be deemed, in relation to the making of any such decision, to be a director for the purposes of sections 159 to 222.

(6) Subsection (2) shall not include a person to the extent that the person acts only in a professional capacity.

Powers of
directors
as to the
management
of the
company

159.—(1) The business and affairs of a company shall be managed by, or under the direction or supervision of, the Board.

(2) The Board shall have all the powers necessary for managing, and for directing and supervising the management of, the business and affairs of the company.

(3) Subsections (1) and (2) shall be subject to any modifications, adaptations, exceptions, or limitations contained in this Act or in the company's constitution.

Substantial
transactions

160.—(1) A company shall not enter into a substantial transaction unless the transaction is—

(a) approved by special resolution; or

(b) contingent on approval by special resolution.

(2) In this section—

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

"substantial transaction", in relation to a company, means—

(a) the acquisition of, or an agreement to acquire, whether contingent or not, assets the value of which is more than seventy-five per cent of the value of the company's assets before the acquisition;

Delegation
of powers

(b) the disposition of, or an agreement to dispose of, whether contingent or not, assets of the company the value of which is more than 75 per cent of the value of the company's assets before the disposition; or

(c) a transaction that has or is likely to have the effect of the company acquiring rights or interests or incurring obligations or liabilities the value of which is more than seventy-five per cent of the value of the company's assets before the transaction.

(3) A company shall not enter into a transaction of the kind referred to in subsection (1) which involves the acquisition or disposition or the acquiring of rights, interests or incurring obligations of, in any case, more than half the value of the company's assets unless the transaction is—

(a) approved by ordinary resolution; or

(b) contingent on approval by ordinary resolution, and the description of a substantial transaction in subsection (2) (a) (b) and (c) shall, in all respects, apply when determining the nature of such transaction except that "half of the value" shall be applied instead of "seventy-five per cent of the value".

(4) The provisions of subsection (5) shall apply to a transaction under subsection (3) in the same manner as they apply to a substantial transaction except that "seventy-five per cent of the value" shall be applied instead of "half of the value".

(5) Nothing in paragraph (c) of the definition of "substantial transaction" in subsection (2) shall apply by reason only of the company giving, or entering into an agreement to give, a charge secured over assets of the company, the value of which is more than seventy-five per cent of the value of the company's assets for the purpose of securing the repayment of money or the performance of an obligation.

(6) This section shall not apply to a substantial transaction or a transaction under subsection (3) entered into by a receiver appointed pursuant to an instrument creating a charge over all or substantially all of the property of a company.

(7) No lender or other person dealing with a company shall be concerned to see or inquire whether the conditions of this section have been fulfilled and no debt incurred or contract entered into with the company by a person dealing with it shall be invalid or ineffectual, except in the case of actual notice to that person, at the time when the debt was incurred or the contract was entered into, that the company was acting in breach of this section.

(8) This section shall not apply to a collective investment company licensed by the Registrar of Financial Institutions.

Delegation
of powers

161.—(1) The Board of a company may delegate to a committee of directors, a director or employee of the company, or any other person, any one or more of the powers conferred on them by the constitution of the company on such terms and conditions as they see fit.

(2) A Board that delegates a power under subsection (1) shall be responsible for the exercise of the power by the delegate as if the power had been exercised by the Board, unless the Board—

(a) believed on reasonable grounds at all times before the exercise of the power that the delegate would exercise the power in conformity with the duties imposed on directors of the company by this Act and the company's constitution; and

(b) has monitored, by means of reasonable methods properly used, the exercise of the power by the delegate.

Division 2—Appointment And Removal Of Directors

Number of
directors

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

(2) A public company shall have at least three directors.

(3) A company shall have at least one director who shall be ordinarily resident in Malawi.

Direction for
a company
to make an
appointment

163.—(1) If it appears to the Registrar that a company is in breach of section 162, the Registrar shall direct the company to comply with the provisions of this Act on appointment of directors within a specified period but not later than three months.

(2) A company shall comply with the direction of the Registrar by—

(a) making the necessary appointment or appointments, and

(b) giving notice of them in accordance with section 172 before the end of the period specified in the direction.

(3) A company and every officer of the company who fails to comply with a direction under this section is liable to a fine in accordance with the prevailing schedule of penalties.

164.—(1) A company shall appoint a natural person as director.

Qualification
and minimum
age for
appointment
as director

(2) No person shall be appointed, or hold office, as a director of a company if he is a person who—

- (a) is under 18 years of age;
- (b) subject to section 169 (4) to (7), is, in the case of a public company, over 70 years of age;
- (c) is an undischarged bankrupt;
- (e) is prohibited from being a director or promoter of or being concerned or taking part in the management of a company;
- (d) is not a natural person save in the case of State Owned Companies;
- (e) has been adjudged to be of unsound mind;
- (f) by virtue of the constitution of a company, does not comply with any qualifications for directors.

(3) A person who is disqualified from being a director but who acts as a director shall be deemed to be a director for the purposes of a provision of this Act that imposes a duty or an obligation on a director of a company.

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

Director's
consent
required

166.—(1) A person named as a director in an application for registration or in an amalgamation proposal shall hold office as a director from the date of registration or the date the amalgamation proposal is effective, as the case may be, until that person ceases to hold office as a director in accordance with this Act.

Appointment
of first and
subsequent
directors

(2) All subsequent directors of a company shall, unless the constitution of the company otherwise provides, be appointed by ordinary resolution.

167.—(1) Where—

Court may
appoint
directors

(a) there are no directors of a company, or the number of directors is less than the quorum required for a meeting of the Board; and

(b) it is not possible or practicable to appoint directors in accordance with the company's constitution or under section 171(3), a shareholder or creditor of the company may apply to the Court to appoint one or more persons as directors of the company, and the Court may make an appointment if it considers that it is in the interests of the company to do so.

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

Appointment
of directors
of public
company to
be voted on
individually

168.—(1) Subject to the constitution of the company, the shareholders of a public company shall not vote on a resolution to appoint a director of the company unless—

(a) the resolution is in respect of the appointment of one director; or

(b) where the resolution is a single resolution for the appointment of two or more persons as directors of the company, a separate resolution that it be so voted on has first been passed without a vote being cast against it.

(2) A resolution in contravention of subsection (1) shall be void even though no objection was taken at the time it was passed.

(3) Subsection (2) shall not limit the operation of section 173.

(4) No provision for the automatic reappointment of retiring directors in default of another appointment shall apply on the passing of a resolution in contravention of subsection (1).

(5) Nothing in this section shall prevent the election of two or more directors by ballot or poll.

Removal of
directors

169.—(1) Notwithstanding anything in its constitution or in any agreement between it and a director, a director of a public company may be removed from office by an ordinary resolution passed at a meeting called for that purpose.

(2) Subject to the constitution of a company, a director of a private company may be removed from office by special resolution passed at a meeting called for the purpose that includes the removal of the director.

(3) The notice of meeting shall state that the purpose of the meeting is the removal of the director.

(4) The office of director of a public company or of a subsidiary of a public company shall become vacant at the conclusion of the annual meeting commencing next after the director attains the age of seventy years.

(5) Where the office of director has become vacant under subsection (4), no provision for the automatic reappointment of retiring directors in default of another appointment shall apply to that director.

(6) Notwithstanding anything in this section, a person of or over the age of seventy years may—

(a) by an ordinary resolution of which no shorter notice is given than that required to be given for the holding of a meeting of shareholders, be appointed or re-appointed as a director of that company to hold office until the next annual meeting of the company or be authorised to continue to hold office as a director until the next annual meeting of the company; or

(b) in the case of an application for incorporation of a public company, be appointed with the consent in writing of the proposed shareholders.

(7) Nothing in this section shall limit or affect the operation of any provision in the constitution of a company preventing any person from being appointed a director or requiring any director to vacate his office at any age below seventy years.

(8) The provisions of the constitution of a company relating to the rotation and retirement of directors shall not apply to a director who is appointed or re-appointed pursuant to subsections (5) to (7) but such provisions of the constitution shall continue to apply to all other directors of the company.

170.—(1) The office of director of a company shall be vacated if the person holding that office—

Director
ceasing to
hold office

- (a) resigns in accordance with subsection (2);
- (b) is removed from office in accordance with this Act or the constitution of the company;
- (c) becomes disqualified from being a director pursuant to section 164;
- (d) becomes disqualified from being a director pursuant to subsection (4);
- (e) dies; or
- (f) otherwise vacates office in accordance with the constitution of the company.

(2) A director of a company may resign office by signing a written notice of resignation and delivering it to the address for service of the company.

(3) A notice under subsection (2) shall be effective when it is received at that address or at a later time specified in the notice.

(4) Notwithstanding the vacation of office, a person who held office as a director shall remain liable under the provisions of this Act that impose liabilities on directors in relation to acts and omissions and decisions made while that person was a director.

Resignation
or death of
last remaining
Director

171.—(1) Where a company has only one director, that director shall not resign office until that director has called a meeting of shareholders to receive notice of the resignation, and to appoint one or more new directors.

(2) A notice of resignation given by the sole director of a company shall not take effect, notwithstanding its terms, until the date of the meeting of shareholders called in accordance with subsection (1).

(3) Every company which for a continuous period of six months has been a one person company shall, if it has not already made the nomination at the time of incorporation, file with the Registrar a notice nominating a person to be the secretary of the company in the event of the death of the sole shareholder and director.

(4) A notice under subsection (3) shall state the full name, residential address and occupation of the person nominated and shall be accompanied by the consent to act in writing signed by that person.

(5) The person nominated by a one person company pursuant to subsection (3) shall assume office as secretary of the company upon the death of the sole shareholder and director with the responsibility of calling as soon as practicable a meeting of persons who appear to be beneficiaries of the deceased's estate or other personal representative of the deceased for the purpose of appointing a new director or directors.

(6) The secretary shall resign from office at the meeting referred to in subsection (5) and during the interim period until the meeting is called shall attend to the filing of any returns that may be required from the company.

(7) The secretary shall be entitled to be indemnified by the company in relation to any reasonable costs and expenses of acting together with the payment of such fee as shall be agreed in writing with the company at the time of appointment or at any subsequent time.

(8) Where a person who is the only director and shareholder of a private company dies, persons who appear to be beneficiaries of the deceased's estate, or where he leaves no person who appears to be a beneficiary of the deceased's estate, the Registrar may appoint a director.

(9) Where the persons who appear to be beneficiaries of the deceased's estate fail to appoint a director within three months of the death of the last director, the Registrar may appoint a fit and proper person to act as director, until the appointment of a director by the persons who appear to be beneficiaries of the deceased's estate.

(10) Where a person who is the only director and shareholder of a private company is unable to manage the affairs of the company by reason of his mental incapacity, the appointed guardian may act as director or appoint a person as director.

172.—(1) The Board shall deliver or cause to be delivered to the Registrar for registration notice in an approved form of—

Notice of
change of
Directors and
Secretaries

(a) any change in the directors or the secretary of a company or person nominated pursuant to section 171 (3); or

(b) any change in the name or the residential address or other particulars of a director or secretary of a company or person nominated pursuant to section 171 (3).

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

(a) specify the date of the change;

(b) include the full name and residential address of every person who is a director or secretary of the company or person nominated under section 171 (3) from the date of the notice;

(c) in the case of the appointment of a new director or secretary, or person nominated under section 171 (3), be accompanied by the form of consent and certificate required pursuant to section 165; and

(d) be delivered to the Registrar within 28 days of—

(i) in the case of an appointment or resignation of a director or secretary, the date on which the change occurs;

(ii) in the case of the death of a director or secretary or a change in the name or residential address of a director or secretary, of the date on which the company becomes aware of the change.

(3) Where the company fails to comply with this section every officer of the company who is in default is liable to a fine in accordance with the prevailing schedule of penalties.

Validity of acts
of Directors

173. The acts of a director shall be valid even though—

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

Register of
Directors

174.—(1) Every company must keep a register of its directors.

(2) The register must contain particulars of each person who is a director of the company including but not limited to—

- (a) names;
- (b) address;
- (c) nationality;
- (d) country of residence;
- (e) occupation or profession;
- (f) date of birth;

(3) The register must be kept available for search—

- (a) at the company's registered office; or
- (b) other designated place.

(4) The company must give notice to the Registrar—

- (a) of the place at which the register is kept available for search; and
- (b) of any change in that place;

(5) The register must be open to the search—

- (a) of any member of the company without charge; and
- (b) of any other person on payment of such fee as may be prescribed.

(6) A company or every officer of the company who defaults in complying with subsection (1), (2) or (3) or defaults for fourteen days in complying with subsection (4), or refuses a search required under subsection (5) is liable to a fine in accordance with the prevailing schedule of penalties.

(7) In the case of a refusal of a search of the register, the Registrar may by order compel an immediate search of it.

Division III—Core Duties Of Directors

175.—(1) The general duties specified in sections 176 to 182 are owed by a director of a company to the company.

Scope and
nature of
general duties

(2) A person who ceases to be a director continues to be subject—

(a) to the duty in section 180 as regards the exploitation of any property, information or opportunity of which he became aware at a time when he was a director; and

(b) to the duty in section 181 as regards things done or omitted by him before he ceased to be a director.

(3) Subsection (2) applies to a former director as to a director, subject to any necessary adaptations.

(4) The general duties are based on certain common law rules and equitable principles as they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to a company by a director.

(5) The general duties shall be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties.

(6) The general duties apply to shadow directors where, and to the extent that, the corresponding common law rules or equitable principles so apply.

176. A director of a company shall—

Duty to act
within powers

(a) act in accordance with the company's constitution; and

(b) only exercise powers for the purposes for which they are conferred.

177.—(1) A director of a company shall act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in so doing have regard to factors including—

Duty to
promote the
success of
the company

(a) the likely consequences of any decision in the long term;

(b) the interests of the company's employees;

(c) the need to foster the company's business relationships with suppliers, customers and others;

(d) the impact of the company's operations on the community and the environment;

(e) the desirability of the company maintaining a reputation for high standards of business conduct; and

(f) the need to act fairly as between members of the company.

(2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.

(3) The duty imposed by this section has effect subject to any written law or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.

Duty to
exercise
independent
judgment

178.—(1) A director of a company must exercise independent judgment.

(2) This duty shall not be infringed by the director acting—

(a) in accordance with an agreement duly entered into by the company that restricts the future exercise of discretion by its directors; or

(b) in a way authorized by the company's constitution.

Duty to
exercise
reasonable
care, skill
and diligence

179.—(1) A director of a company shall exercise reasonable care, skill and diligence.

(2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with—

(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company; and

(b) the general knowledge, skill and experience that the director has.

Duty to avoid
conflict of
interest

180.—(1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.

(2) This applies in particular to the exploitation of any property, information or opportunity and it is immaterial whether the company could take advantage of the property, information or opportunity.

(3) This duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company.

(4) This duty is not infringed—

(a) if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or

(b) if the matter has been authorized by the directors.

(5) Authorization may be given by the directors—

(a) where the company is a private company and nothing in the company's constitution invalidates such authorization, by the matter being proposed to and authorized by the directors; or

(b) where the company is a public company and its constitution includes provision enabling the directors to authorise the matter, by the matter being proposed to and authorised by them in accordance with the constitution.

(6) The authorization shall be effective only if—

(a) any requirement as to the quorum at the meeting at which the matter is considered is met without counting the director in question or any other interested director; and

(b) the matter was agreed to without their voting or would have been agreed to if their votes had not been counted.

(7) Any reference in this section to a conflict of interest includes a conflict of interest and duty and a conflict of duties.

181.—(1) A director of a company must not accept a benefit from a third party conferred by reason of—

(a) his being a director; or

(b) his doing, or failure to do, anything as director.

Duty not to
accept
benefits
from third
parties

(2) A "third party" means a person other than the company, an associated body corporate or a person acting on behalf of the company or an associated body corporate.

(3) Benefits received by a director from a person by whom his services as a director or otherwise are provided to the company are not regarded as conferred by a third party.

(4) This duty is not infringed if the acceptance of the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest.

(5) Any reference in this section to a conflict of interest includes a conflict of interest and duty and a conflict of duties.

182.—(1) If a director is in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company, he shall declare the nature and extent of that interest to the other directors.

Duty to
declare
interest in
proposed
transaction or
arrangement

(2) The declaration may be made—

(a) at a meeting of the directors; or

(b) by notice in writing to the directors.

(3) If a declaration of interest under this section proves to be, or becomes, inaccurate or incomplete, a further declaration shall be made.

(4) Any declaration required by this section shall be made before the company enters into the transaction or arrangement.

(5) This section does not require a declaration of an interest of which the director is not aware or where the director is not aware of the transaction or arrangement in question and for this purpose a director is treated as being aware of matters of which he ought reasonably to be aware.

(6) A director need not declare an interest—

(a) if it cannot reasonably be regarded as likely to give rise to a conflict of interest;

(b) if, or to the extent that, the other directors are already aware of it (and for this purpose the other directors are treated as aware of anything of which they ought reasonably to be aware); or

(c) if, or to the extent that, it concerns terms of his service contract that have been or are to be considered—

(i) by a meeting of the directors; or

(ii) by a committee of the directors appointed for the purpose under the company's constitution.

Consent,
approval or
authorization
by members

183.—(1) In a case where—

(a) section 180 is complied with by authorization by the directors; or

(b) section 182 is complied with, the transaction or arrangement is not liable to be set aside by virtue of any common law rule or equitable principle requiring the consent or approval of the members of the company. This is without prejudice to any enactment, or provision of the company's constitution, requiring such consent or approval.

(2) The application of the general duties is not affected by the fact that the case also falls within Part IX except that where that Part applies and—

(a) approval is given under that Part; or

(b) the matter is one as to which it is provided that approval is not needed, it is not necessary also to comply with section 180 or section 181.

(3) Compliance with the general duties does not remove the need for approval under any applicable provision of Part IX.

(4) The general duties—

(a) have effect subject to any rule of law enabling the company to give authority, specifically or generally, for anything to be done or not to be done by the directors, or any of them, that would otherwise be a breach of duty; and

(b) where the company's articles contain provisions for dealing with conflicts of interest, are not infringed by anything done or omitted to be done by the directors, or any of them, in accordance with those provisions.

(5) The general duties shall have effect except as otherwise provided or the context otherwise requires, notwithstanding any enactment or rule of law.

184.—(1) Directors shall comply with any code for corporate governance as may be prescribed.

Duty to comply with the prescribed code of corporate governance in Malawi

(2) Where a specific sector code of corporate governance exists, directors shall also comply with the provisions of the sector code.

(3) Any code of corporate governance prescribed under this section shall be directory in nature but the Court, the Registrar or any authority shall be entitled to have regard to such code in interpreting and applying any of the provisions of this Act.

185.—(1) The consequences of breach of sections 176 to 182 shall be the same as would apply if the corresponding common law rule or equitable principle applied.

Civil consequences for breach of general duties

(2) The duties in those sections, with the exception of section 179 shall, accordingly, be enforceable in the same way as any other fiduciary duty owed to a company by its directors.

Division IV—Core Disclosure Obligations In Transactions Involving Self Interest

186.—(1) Subject to subsection (2), a director of a company shall be interested in a transaction or arrangement to which the company is a party where the director—

Meaning of "interested"

(a) is a party to, or shall or may derive a material financial benefit from, the transaction or arrangement;

(b) has a material financial interest in or with another party to the transaction or arrangement;

(c) is a director, officer, or trustee of another party to, or person who shall or may derive a material financial benefit from, the transaction, not being a party or person that is—

(i) the company's parent company being a parent company of which the company is a wholly-owned subsidiary;

(ii) a wholly-owned subsidiary of the company; or

(iii) a wholly-owned subsidiary of a parent company of which the company is also a wholly-owned subsidiary;

(d) is the parent, child or spouse of another party to, or person who shall or may derive a material financial benefit from the transaction; or

(e) is otherwise directly or indirectly materially interested in the transaction or arrangement.

(2) A director of a company shall not be deemed to be interested in a transaction or arrangement to which the company is a party if the transaction or arrangement comprises only the giving by the company of security to a third party and at the request of that third party which has no connection with the director and in respect of a debt or obligation of the company for which the director or another person has personally assumed responsibility in whole or in part under a guarantee, indemnity, or by the deposit of a security.

Declaration
of interest

187.—(1) A director of a company shall, forthwith after becoming aware of the fact that he is interested in a transaction or arrangement or proposed transaction or proposed arrangement with the company, cause to be entered in the register of interests where it has one, and, where the company has more than one director, disclose to the Board of the company—

(a) where the monetary value of the director's interest is able to be quantified, the nature and monetary value of that interest; or

(b) where the monetary value of the director's interest cannot be quantified, the nature and extent of that interest.

(2) A director of a company shall not be required to comply with subsection (1) where—

(a) the transaction or arrangement or proposed transaction or proposed arrangement is between the director and the company; and

(b) the transaction or arrangement or proposed transaction or proposed arrangement is or is to be entered into in the ordinary course of the company's business and on usual terms and conditions.

(3) For the purposes of subsection (1), a general notice entered in the interests register or disclosed to the Board to the effect that a director is a shareholder, director, officer or trustee of another named company or other person and is to be regarded as interested in any transaction which may, after the date of the entry or disclosure, be entered into with that company or person, is a sufficient disclosure of interest in relation to that transaction.

(4) A failure by a director to comply with subsection (1) shall not affect the validity of a transaction or arrangement entered into by the company or the director.

188.—(1) A transaction or arrangement entered into by the company in which a director of the company is interested may be voided by the company at any time before the expiration of six months after the transaction or arrangement is disclosed to all the shareholders, whether by means of the company's annual report or otherwise.

Voidability of transactions where no declaration has been made

(2) A transaction or arrangement shall not be voided where the company receives fair value under it.

(3) For the purposes of subsection (2), the question as to whether a company receives a fair value under a transaction or arrangement shall be determined on the basis of the information known to the company and to the interested director at the time the transaction or arrangement is entered into.

(4) Where a transaction is entered into by the company in the ordinary course of its business and on usual terms and conditions, the company shall be presumed to have received a fair value under the transaction.

(5) For the purposes of this section—

(a) a person seeking to uphold a transaction or arrangement and who knew or ought to have known of the director's interest at the time the transaction was entered into shall have the onus of establishing a fair value; and

(b) in any other case, the company shall have the onus of establishing that it did not receive a fair value.

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

189. The voidability of a transaction or arrangement under section 188 shall not affect the title or interest of a person in or to

Effect on third parties

property which that person has acquired where the property was acquired—

(a) from a person other than the company;

(b) for valuable consideration; and

(c) without knowledge of the circumstances of the transaction or arrangement under which the person referred to in paragraph (a) acquired the property from the company.

Application of
section 188
and 189 in
certain cases

190. Sections 188 and 189 shall not apply in relation to—

(a) remuneration or any other benefit given to a director; or

(b) an indemnity given or insurance provided in accordance with section 221.

Interested
Director may
vote

191. Subject to subsection (2) and to the constitution of the company, a director of a company who is interested in a transaction or arrangement entered into, or to be entered into, by the company, may—

(a) in the case of a public company, not vote on any matter relating to the transaction or arrangement, and if he does vote, his vote shall not be counted;

(b) in the case of a private company, vote on any matter relating to the transaction or arrangement provided he discloses his interest under section 187;

(c) attend a meeting of directors at which a matter relating to the transaction or arrangement arises and be included among the directors present at the meeting for the purpose of a quorum;

(d) sign a document relating to the transaction or arrangement on behalf of the company; and

(e) do any other thing in his capacity as a director in relation to the transaction or arrangement, as if the director were not interested in the transaction or arrangement.

Relevant
interests to be
disregarded in
certain cases

192.—(1) For the purposes of section 193, no account shall be taken of a relevant interest of a person in a share if—

(a) the ordinary business of the person who has the relevant interest consists of, or includes, the lending of money or the provision of financial services, or both, and that person has the relevant interest only as security given for the purposes of a transaction or arrangement entered into in the ordinary course of the business of that person;

(b) that person has the relevant interest by reason only of acting for another person to acquire or dispose of that share on behalf of the other person in the ordinary course of business of licensed investment dealer;

(c) that person has the relevant interest solely by reason of being appointed as a proxy to vote at a particular meeting of members, or of a class of members, of the company and the instrument of that person's appointment is produced before the start of the meeting or by a time specified in the company's constitution, as the case may be;

(d) that person—

(i) is a trustee or a nominee company; and

(ii) has the relevant interest by reason only of acting for another person in the ordinary course of business of that trustee or nominee company; or

(e) the person has the relevant interest by reason only that the person is a bare trustee of a trust to which the share is subject.

(2) For the purposes of subsection (1) (d), a trustee company is a collective investment scheme licensed under the Financial Services Act, 2010.

Act No. 26 of
2010

(3) For the purposes of subsection (1) (e), a trustee may be a bare trustee notwithstanding that he is entitled as a trustee to be remunerated out of the income or property of the trust.

193.—(1) A person who—

Disclosure of
share dealing
by directors

(a) on the coming into operation of this section, is a director of a public company; or

(b) becomes a director of a public company; and who has a relevant interest in any shares issued by the company shall forthwith—

(i) disclose to the board the number and class of shares in which the relevant interest is held and the nature of the relevant interest; and

(ii) ensure that the particulars disclosed to the board under paragraph (2) (a) are entered in the register of interests.

(2) A director of a public company who acquires or disposes of a relevant interest in shares issued by the company shall forthwith, after the acquisition or disposition—

(a) disclose to the board—

(i) the number and class of shares in which the relevant interest has been acquired or the number and class of shares in which the relevant interest was disposed of, as the case may be;

(iii) the nature of the relevant interest;

(iv) the consideration paid or received; and

(iv) the date of the acquisition or disposition; and

(b) ensure that the particulars disclosed to the board under paragraph (a) are entered in the interests register.

Restriction on
share dealing
by directors

194.—(1) Where a director of a company in his capacity as a director, or an employee of the company or a related company, has information which is material to an assessment of the value of shares or other securities issued by the company or a related company, being information that would not otherwise be available to him, the director may acquire or dispose of those shares or securities only where—

(a) in the case of an acquisition, the consideration given for the acquisition is not less than the fair value of the shares or securities; or

(b) in the case of a disposition, the consideration received for the disposition is not more than the fair value of the shares or securities.

(2) For the purposes of subsection (1), the fair value of shares or securities is to be determined on the basis of all information known to the director or publicly available at the time.

(3) Subsection (1) shall not apply in relation to a share or security that is acquired or disposed of by a director only as a nominee for the company or a related company.

(4) Where a director acquires shares or securities in contravention of subsection (1) (a), the director shall be liable to the person from whom the shares or securities were acquired for the amount by which the fair value of the shares or securities exceeds the amount paid by the director.

(5) Where a director disposes of shares or securities in contravention of subsection (1) (b), the director shall be liable to the person to whom the shares or securities were disposed of for the amount by which the consideration received by the director exceeds the fair value of the shares or securities.

Act No. 20 of
2010

(6) This section shall not apply in relation to a company listed on a stock exchange licensed under the Securities Act, 2010.

Division V—Transactions Involving Self-Interest which Require the Disclosure and Approval of Shareholders

195.—(1) This section applies to provision under which the guaranteed term of a director's employment—

Directors' long-term service contracts

(a) with the public company of which he is a director; or

(b) where he is the director of a holding company, within the group consisting of that company and its subsidiaries is, or may be, longer than two years.

(2) A public company may not agree to such provision unless it has been approved—

(a) by resolution of the shareholders of the company; and

(b) in the case of a director of a holding company, by resolution of the shareholders of that company.

(3) The guaranteed term of a director's employment is—

(a) the period, if any, during which the director's employment—

(i) is to continue, or may be continued otherwise than at the instance of the company (whether under the original agreement or under a new agreement entered into in pursuance of it); and

(ii) cannot be terminated by the company by notice, or can be so terminated only in specified circumstances; or

(b) in the case of employment terminable by the company by notice, the period of notice required to be given, or, in the case of employment having a period within paragraph (a) and a period within paragraph (b), the aggregate of those periods.

(4) If more than six months before the end of the guaranteed term of a director's employment the company enters into a further service contract (otherwise than in pursuance of a right conferred, by or under the original contract, on the other party to it), this section applies as if there were added to the guaranteed term of the new contract the unexpired period of the guaranteed term of the original contract.

(5) A resolution approving provision to which this section applies must not be passed unless a memorandum setting out the proposed contract incorporating the provision is made available to members—

(a) in the case of a written resolution, by being sent or submitted to every eligible member at or before the time at which the proposed resolution is sent or submitted to him;

(b) in the case of a resolution at a meeting, by being made available for inspection by members of the company both—

(i) at the company's registered office for not less than fifteen days ending with the date of the meeting; and

(ii) at the meeting itself.

(6) No approval is required under this section on the part of the shareholders of a body corporate that—

(a) is not a company registered in Malawi; or

(b) is a wholly-owned subsidiary of another body corporate.

(7) In this section "employment" means any employment under a director's service contract.

(8) If a company agrees to provision in contravention of this section—

(a) the provision is void, to the extent of the contravention; and

(b) the contract is deemed to contain a term entitling the company to terminate it at any time by the giving of reasonable notice.

Substantial
property
transactions

196.—(1) A public company may not enter into an arrangement under which—

(a) a director of the company or of its holding company, or a person connected with such a director, acquires or is to acquire from the company, directly or indirectly, a substantial non-cash asset; or

(b) the company acquires or is to acquire a substantial non-cash asset, directly or indirectly, from such a director or a person so connected, unless the arrangement has been approved by a resolution of the members of the company or is conditional on such approval being obtained.

(2) If the director or connected person is a director of the company's parent company or a person connected with such a director, the arrangement must also have been approved by a resolution of the members of the parent company or be conditional on such approval being obtained.

(3) A company shall not be subject to any liability by reason of a failure to obtain approval required by this section.

(4) No approval is required under this section on the part of the members of a body corporate that—

(a) is not a public company registered in Malawi; or

(b) is a wholly-owned subsidiary of another body corporate.

(5) For the purposes of this section—

(a) an arrangement involving more than one non-cash asset; or

(b) an arrangement that is one of a series involving non-cash assets,

shall be treated as if they involved a non-cash asset of a value equal to the aggregate value of all the non-cash assets involved in the arrangement or, as the case may be, the series.

(6) This section shall not apply to a transaction so far as it relates—

(a) to anything to which a director of a company is entitled under his service contract; or

(b) to payment for loss of office.

197.—(1) An asset is a substantial asset in relation to a company if its value exceeds ten per cent of the value of the company's net assets determined by reference to its most recent audited accounts.

Meaning of
"substantial"

(2) Whether an asset is a substantial asset may be determined as at the time the arrangement is entered into.

198. Approval shall not be required for substantial property transactions—

Exception for
transaction
with
shareholders
or other
group
companies

(a) between a public company and a person in his capacity as a shareholder of that company; or

(b) for a transaction between—

(i) a parent company and its wholly-owned subsidiary; or

(ii) two wholly-owned subsidiaries of the same holding company.

199.—(1) This section shall apply to a public company—

Exception in
case of
company in
winding-up or
administration

(a) that is being wound-up (unless the winding-up is a members' voluntary winding-up); or

(b) that is in insolvency proceedings within the meaning of the Insolvency Act.

(2) Approval shall not be required for substantial property transactions—

(a) on the part of the members of a company to which this section applies; or

(b) for an arrangement entered into by a company to which this section applies.

Exception for
transaction on
a licensed
stock
exchange

200.—(1) Approval shall not be required for substantial property transactions in respect of transactions on a licensed stock exchange effected by a director, or a person connected with him, through the agency of a person who in relation to the transaction acts as an independent broker.

(2) For this purpose—

(a) “independent broker” means a person who, independently of the director or any person connected with him, selects the person with whom the transaction is to be effected; and

(b) “licensed stock exchange” has the same meaning as in the Securities Act 2010.

Loans and
quasi-loans
to directors or
connected
persons

201.—(1) A public company may not—

(a) make a loan or quasi-loan to a director or a person connected with a director of the company or of its holding company; or

(b) give a guarantee or provide security in connection with a loan or quasi-loan made by any person to such a director or a person connected with a director, unless the transaction has been approved by a resolution of the shareholders of the company.

(2) If the director is a director of the company’s holding company, the transaction must also have been approved by a resolution of the shareholders of the holding company.

(3) A resolution approving a transaction to which this section applies shall not be passed unless a memorandum setting out the matters mentioned in subsection (4) is made available to members—

(a) in the case of a written resolution, by being sent or submitted to every eligible member at or before the time at which the proposed resolution is sent or submitted to him;

(b) in the case of a resolution at a meeting, by being made available for inspection by members of the company both—

(i) at the company’s registered office for not less than fifteen days ending with the date of the meeting, and

(ii) at the meeting itself.

(4) The matters to be disclosed shall be—

(a) the nature of the transaction;

(b) the amount of the loan and the purpose for which it is required; and

(c) the extent of the company's liability under any transaction connected with the loan.

(5) No approval shall be required under this section on the part of the shareholders of a body corporate that—

(a) is not a company registered in Malawi; or

(b) is a wholly-owned subsidiary of another body corporate.

202.—(1) A "quasi-loan" is a transaction under which one party ("the creditor") agrees to pay, or pays otherwise than in pursuance of an agreement, a sum for another party ("the borrower"), or agrees to reimburse, or reimburses, otherwise than in pursuance of an agreement, expenditure incurred by the borrower—

Meaning of
"quasi-loan"
and related
expressions

(a) on terms that the borrower or a person on behalf of the borrower will reimburse the creditor; or

(b) in circumstances giving rise to a liability on the borrower to reimburse the creditor.

(2) Any reference to the person to whom a quasi-loan is made is a reference to the borrower.

(3) The liabilities of the borrower under a quasi-loan include the liabilities of any person who has agreed to reimburse the creditor on behalf of the borrower.

203.—(1) A public company to which this section applies may not—

Credit
transactions

(a) enter into a credit transaction as creditor for the benefit of a director of the company or of its holding company, or a person connected with such a director; or

(b) give a guarantee or provide security in connection with a credit transaction entered into by any person for the benefit of such a director, or a person connected with such a director, unless the credit transaction, the giving of the guarantee or the provision of security, as the case may be has been approved by a resolution of the members of the company.

(2) If the director or connected person is a director of its parent company or a person connected with such a director, the transaction must also have been approved by a resolution of the members of the holding company.

(3) A resolution approving a transaction to which this section applies must not be passed unless a memorandum setting out the matters mentioned in subsection (5) is made available to members—

(a) in the case of a written resolution, by being sent or submitted to every eligible member at or before the time at which the proposed resolution is sent or submitted to him;

(b) in the case of a resolution at a meeting, by being made available for inspection by members of the company both—

(i) at the company's registered office for not less than fifteen days ending with the date of the meeting; and

(ii) at the meeting itself.

(4) The matters to be disclosed are—

(a) the nature of the transaction;

(b) the value of the credit transaction and the purpose for which the land, goods or services sold or otherwise disposed of, leased, hired or supplied under the credit transaction are required; and

(c) the extent of the company's liability under any transaction connected with the credit transaction.

(5) No approval shall be required under this section on the part of the members of a body corporate that—

(a) is not a public company registered in Malawi; or

(b) is a wholly-owned subsidiary of another body corporate.

Meaning of
"credit
transactions"

204.—(1) A "credit transaction" is a transaction under which one party ("the creditor")—

(a) supplies any goods or sells any land under a hire-purchase agreement or a conditional sale agreement;

(b) leases or hires any land or goods in return for periodical payments; or

(c) otherwise disposes of land or supplies goods or services on the understanding that payment, whether in a lump sum or instalments or by way of periodical payments or otherwise, is to be deferred.

(2) Any reference to the person for whose benefit a credit transaction is entered into shall be reference to the person to whom goods, land or services are supplied, sold, leased, hired or otherwise disposed of under the transaction.

Exceptions
for expenditure
on company
business, etc.

205.—(1) Approval shall not required under section 201 and 203 for anything done by a public company—

(a) to provide a director of the company or of its holding company, or a person connected with any such director, with funds to meet expenditure incurred or to be incurred by him—

(i) for the purposes of the company; or

(ii) for the purpose of enabling him properly to perform his duties as an officer of the company, provided the value of the transaction in question, and the value of any other relevant transactions or arrangements, do not exceed the prevailing limit as established by regulations issued by the Registrar.

(b) to provide a director of the company or of its parent company with funds to meet expenditure incurred or to be incurred by him in defending any criminal or civil proceedings in connection with any alleged negligence, default, breach of duty or breach of trust by him in relation to the company or an associated company;

(c) to provide a director of the company or of its parent company with funds to meet expenditure incurred, or to be incurred, by him in defending himself—

(i) in an investigation by a regulatory authority; or

(ii) against action proposed to be taken by a regulatory authority, in connection with any alleged negligence, default, breach of duty or breach of trust by him in relation to the company or an associated company;

(d) for a company to make a loan or quasi-loan, enter into a credit transaction, or to give a guarantee or provide security in connection with a loan or quasi-loan, if the aggregate of—

(i) the value of the transaction; and

(ii) the value of any other relevant transactions or arrangements, does not exceed the prevailing limit as issued by the Registrar by way of Order;

(e) for the making of a loan or quasi-loan to an associated body corporate, or the giving of a guarantee or provision of security in connection with a loan or quasi-loan made to an associated body corporate;

(f) to enter into a credit transaction as creditor for the benefit of an associated body corporate, or to give a guarantee or provide security in connection with a credit transaction entered into by any person for the benefit of an associated body corporate;

(g) for a money lending company if the transaction or arrangement is entered into by the company in the ordinary course of the company's business, and the value of the transaction is not greater, and its terms are not more favourable, than it is reasonable to expect the company would have offered to a person of the same financial standing but unconnected with the company.

Other relevant
transactions or
arrangements

206.—(1) This section has effect for determining what are “other relevant transactions or arrangements” for the purposes of any exception to section 201 and 203 and in the following provisions “the relevant exception” means the exception for the purposes of which that falls to be determined.

(2) Other relevant transactions or arrangements are those previously entered into, or entered into at the same time as the transaction or arrangement in question in relation to which the following conditions are met.

(3) Where the transaction or arrangement in question is entered into—

(a) for a director of the company entering into it; or

(b) for a person connected with such a director,

the conditions are that the transaction or arrangement was entered into for that director, or a person connected with him, by virtue of the relevant exception by that company or by any of its subsidiaries.

(4) Where the transaction or arrangement in question is entered into—

(a) for a director of the parent company of the company entering into it; or

(b) for a person connected with such a director,

the conditions are that the transaction or arrangement was entered into for that director, or a person connected with him, by virtue of the relevant exception by the parent company or by any of its subsidiaries.

(5) A transaction or arrangement entered into by a company that at the time it was entered into—

(a) was a subsidiary of the company entering into the transaction or arrangement in question; or

(b) was a subsidiary of that company’s holding company,

shall not be a relevant transaction or arrangement if, at the time the question arises whether the transaction or arrangement in question falls within a relevant exception, it is no longer such a subsidiary.

The value of
transactions
and
arrangements

207.—(1) For the purposes of the provision in this Division on loans, quasi-loans and credit transactions, the value of a transaction or arrangement shall be determined as follows—

(a) the value of any other relevant transaction or arrangement shall be taken to be the value so determined reduced by any amount by which the liabilities of the person for whom the transaction or arrangement was made have been reduced;

(b) the value of a loan shall be the amount of its principal;

(c) the value of a quasi-loan is the amount, or maximum amount, that the person to whom the quasi-loan is made shall be liable to reimburse the creditor;

(d) the value of a credit transaction shall be the price that it is reasonable to expect could be obtained for the goods, services or land to which the transaction relates if they had been supplied at the time the transaction is entered into, in the ordinary course of business and on the same terms apart from price as they have been supplied, or are to be supplied, under the transaction in question;

(e) the value of a guarantee or security shall be the amount guaranteed or secured;

(f) if the value of a transaction or arrangement shall not be capable of being expressed as a specific sum of money—

(i) whether because the amount of any liability arising under the transaction or arrangement is unascertainable, or for any other reason; and

(ii) whether or not any liability under the transaction or arrangement has been reduced, its value is deemed to exceed the prevailing limit as issued by the Registrar by way of Order.

208.—(1) For purposes of this section, a "payment for loss of office" means a payment made to a director or past director of a company—

Payments for
loss of office

(a) by way of compensation for loss of office as director of the company;

(b) by way of compensation for loss, while director of the company or in connection with his ceasing to be a director of it, of—

(i) any other office or employment in connection with the management of the affairs of the company; or

(ii) any office, whether as director or otherwise, or employment in connection with the management of the affairs of any subsidiary or undertaking of the company;

(2) The references to compensation and consideration include benefits otherwise than in cash and references in this part to payment have a corresponding meaning.

(3) For the purposes of sections 210 to 214—

(a) payment to a person connected with a director; or

(b) payment to any person at the direction of, or for the benefit of, a director or a person connected with him is treated as payment to the director.

(4) References in sections 210 to 214 to payment by a person include payment by another person at the direction of, or on behalf of, the person referred to.

Amounts
taken to be
payments for
loss of office

209.—(1) This section shall apply where, in connection with any such transfer as is mentioned in section 211 or 212, a director of the company—

(a) is to cease to hold office; or

(b) is to cease to be the holder of—

(i) any other office or employment in connection with the management of the affairs of the company; or

(ii) any office, as director or otherwise, or employment in connection with the management of the affairs of any subsidiary or undertaking of the company.

(2) If in connection with any such transfer—

(a) the price to be paid to the director for any shares in the company held by him is in excess of the price which could at the time have been obtained by other holders of like shares; or

(b) any valuable consideration is given to the director by a person other than the company,

the excess or, as the case may be, the money value of the consideration shall be taken, for the purposes of those sections, to have been a payment for loss of office.

Payments by
company

210.—(1) A public company shall not make a payment for loss of office to a director of the company unless the payment has been approved by a resolution of the shareholders of the company.

(2) A public company shall not make a payment for loss of office to a director of its parent company unless the payment has been approved by a resolution of the shareholders of each of those companies.

(3) A resolution approving a payment to which this section applies must not be passed unless a memorandum setting out particulars of the proposed payment including the amount is made

available to the shareholders of the company whose approval is sought—

(a) in the case of a written resolution, by being sent or submitted to every eligible shareholder at or before the time at which the proposed resolution is sent or submitted to him;

(b) in the case of a resolution at a meeting, by being made available for inspection by the shareholders both—

(i) at the company's registered office for not less than fifteen days ending with the date of the meeting; and

(ii) at the meeting itself.

(4) No approval shall be required under this section on the part of the members of a body corporate that—

(a) is not a public company registered in Malawi; or

(b) is a wholly-owned subsidiary of another body corporate.

211.—(1) No payment for loss of office may be made by any person to a director of a public company in connection with the transfer of the whole or any part of the undertaking or property of the company unless the payment has been approved by a resolution of the shareholder of the company.

Payment in connection with transfer of undertaking, etc.

(2) No payment for loss of office may be made by any person to a director of a public company in connection with the transfer of the whole or any part of the undertaking or property of a subsidiary of the company unless the payment has been approved by a resolution of the members of each of the companies.

(3) A resolution approving a payment to which this section applies must not be passed unless a memorandum setting out particulars of the proposed payment including the amount, is made available to the shareholders of the company whose approval is sought—

(a) in the case of a written resolution, by being sent or submitted to every eligible member at or before the time at which the proposed resolution is sent or submitted to him;

(b) in the case of a resolution at a meeting, by being made available for inspection by the members both—

(i) at the company's registered office for not less than fifteen days ending with the date of the meeting; and

(ii) at the meeting itself.

(4) No approval shall be required under this section on the part of the members of a body corporate that—

- (a) is not a public company registered in Malawi; or
- (b) is a wholly-owned subsidiary of another body corporate.

(5) A payment made in pursuance of an arrangement—

(a) entered into as part of the agreement for the transfer in question, or within one year before or two years after that agreement; and

(b) to which the company whose undertaking or property is transferred, or any person to whom the transfer is made,

shall be privy, is presumed, except in so far as the contrary is shown, to be a payment to which this section applies.

Payment in
connection
with share
transfer

212.—(1) No payment for loss of office may be made by any person to a director of a public company in connection with a transfer of shares in the company, or in a subsidiary of the company, resulting from a takeover bid unless the payment has been approved by a resolution of the relevant shareholders.

(2) The relevant shareholders are the holders of the shares to which the bid relates and any holders of shares of the same class as any of those shares.

(3) A resolution approving a payment to which this section applies must not be passed unless a memorandum setting out particulars of the proposed payment including the amount, is made available to the shareholders of the company whose approval is sought—

(a) in the case of a written resolution, by being sent or submitted to every eligible member at or before the time at which the proposed resolution is sent or submitted to him;

(b) in the case of a resolution at a meeting, by being made available for inspection by the members both—

(i) at the company's registered office for not less than fifteen days ending with the date of the meeting; and

(ii) at the meeting itself.

(4) Neither the person making the offer, nor an associate of that person, shall be entitled to vote on the resolution, but—

(a) where the resolution is proposed as a written resolution, they are entitled if they would otherwise be so entitled to be sent a copy of it; and

(b) at any meeting to consider the resolution they are entitled if they would otherwise be so entitled to be given notice of the meeting, to attend and speak and if present in person or by proxy to count towards the quorum.

(5) If at a meeting to consider the resolution a quorum is not present, and after the meeting has been adjourned to a later date, a quorum is again not present, the payment shall for the purposes of this section, be deemed to have been approved.

(6) No approval shall be required under this section on the part of shareholders in a body corporate that—

(a) is not a public company registered in Malawi; or

(b) is a wholly-owned subsidiary of another body corporate.

(7) A payment made in pursuance of an arrangement—

(a) entered into as part of the agreement for the transfer in question, or within one year before or two years after that agreement; and

(b) to which the company whose shares are the subject of the bid, or any person to whom the transfer is made, is privy,

shall be presumed, except in so far as the contrary is shown, to be a payment to which this section applies.

213.—(1) Approval shall not be required under section 210, 211 or 212 for a payment made in good faith—

(a) in discharge of an existing legal obligation (as defined below);

(b) by way of damages for breach of such an obligation;

(c) by way of settlement or compromise of any claim arising in connection with the termination of a person's office or employment; or

(d) by way of pension in respect of past services.

(2) In relation to a payment within section 210 an existing legal obligation means an obligation of the company, or anybody corporate associated with it, that was not entered into in connection with, or in consequence of, the event giving rise to the payment for loss of office.

(3) In relation to a payment within section 211 or 212 an existing legal obligation means an obligation of the person making the payment that was not entered into for the purposes of, in connection with or in consequence of, the transfer in question.

Exception for
payments in
discharge
of legal
obligations

(4) In the case of a payment within both section 210 and section 211, or within both section 210 and 212, subsection (2) above applies and not subsection (3).

(5) A payment part of which falls within subsection (1) above and part of which does not is treated as if the parts were separate payments.

Exception
for small
payments

214.—(1) Approval shall not be required under section 210, 211 or 212 if—

(a) the payment in question is made by the company or any of its subsidiaries; and

(b) the amount or value of the payment, together with the amount or value of any other relevant payments, does not exceed the prevailing small payments limit as issued by the Registrar by way of Order.

(2) For the purposes of this section, “other relevant payments” shall be payments for loss of office in relation to which the following conditions are met.

(3) Where the payment in question is one to which section 210 applies, the conditions are that the other payment was or is paid—

(a) by the company making the payment in question or any of its subsidiaries;

(b) to the director to whom that payment is made; and

(c) in connection with the same event.

(4) Where the payment in question is one to which section 210 or 212, applies the conditions shall be that the other payment was paid in connection with the same transfer—

(a) to the director to whom the payment in question was made; and

(b) by the company making the payment or any of its subsidiaries.

Payments
made without
approval

215.—(1) If a payment is made in contravention of section 210—

(a) it shall be held by the recipient on trust for the company making the payment; and

(b) any director who authorized the payment shall be jointly and severally liable to indemnify the company that made the payment for any loss resulting from it.

(2) If a payment is made in contravention of section 211, it shall be held by the recipient on trust for the company whose undertaking or property is or is proposed to be transferred.

(3) If a payment is made in contravention of section 212—

(a) it is held by the recipient on trust for persons who have sold their shares as a result of the offer made; and

(b) the expenses incurred by the recipient in distributing that sum amongst those persons shall be borne by him and not retained out of that sum.

(4) If a payment is in contravention of section 210 and section 211, subsection (2) of this section shall apply rather than subsection (1).

(5) If a payment is in contravention of section 210 and section 212, subsection (3) of this section shall apply rather than subsection (1), unless the Court directs otherwise.

Division VI—Directors' Service Contracts for Public Companies

216.—(1) For the purposes of this Division, a director's "service contract", in relation to a public company, means a contract under which —

Directors'
service
contracts

(a) a director of the company undertakes personally to perform services (as director or otherwise) for the company, or for a subsidiary of the company; or

(b) services that a director of the company undertakes personally to perform are made available by a third party to the company, or to a subsidiary of the company.

(2) The provisions of this Part relating to directors' service contracts apply to the terms of a person's appointment as a director of a company and are not restricted to contracts for the performance of services outside the scope of the ordinary duties of a director.

217.—(1) A public company shall keep available for inspection —

Copy of
contract or
memorandum
of terms to be
available for
inspection

(a) a copy of every director's service contract with the company or with a subsidiary of the company; or

(b) if the contract is not in writing, a written memorandum setting out the terms of the contract.

(2) All the copies and memoranda shall be kept available for inspection at the company's registered office.

(3) The copies and memoranda shall be retained by the company for at least one year from the date of termination or expiry of the contract and must be kept available for inspection during that time.

(4) If default is made in complying with subsection (1), (2) or (3), or default is made for 14 days in complying with subsection (4), an offence is committed by every officer of the company who is in default.

(5) Every officer of the company who defaults in complying with subsection (1), (2) or (3), is liable to a fine in accordance with the prevailing schedule of penalties.

(6) The provisions of this section apply to a variation of a director's service contract as they apply to the original contract.

Right of
shareholder to
inspect and
request copy

218.—(1) Every copy or memorandum required to be kept under section 217 shall be open to inspection by any member of the company without charge.

(2) Any member of the company shall be entitled, on request and on payment of such fee as may be prescribed, to be provided with a copy of any such copy or memorandum, and a copy shall be provided within seven days after the request is received by the company.

(3) A person who contravenes this section shall be liable to a fine in accordance with the prevailing schedule of penalties.

(4) In the case of any such refusal or default the Registrar may order an immediate inspection or, as the case may be, direct that the copy required be sent to the person requiring it.

Application
to shadow
directors

219. A shadow director shall be treated as a director for the purposes of the provisions in this Part.

Division VII—Directors' Liabilities

Standard of
care and civil
liability of
directors and
officers

220.—(1) Every director and officer of a company shall exercise—

(a) the powers and discharge the duties of his office honestly, in good faith and in the best interests of the company; and

(b) the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

(2) Where a director or officer of a public company also holds office as an executive, the director shall exercise that degree of care,

diligence and skill which a reasonably prudent and competent executive in that position would exercise.

(3) Where a director or officer commits a breach of any duty under this Division—

(a) the director or officer and every person who knowingly participated in the breach shall be liable to compensate the company for any loss it suffers as a result of the breach;

(b) the director or officer shall be liable to account to the company for any profit made by the officer as a result of such breach; and

(c) any contract or other transaction entered into between the director or officer and the company in breach of those duties may be rescinded by the company.

(4) A director or officer of a company who makes a business judgment shall be taken to meet the requirements of subsections (1) and (2) in respect of the judgment where the director or officer—

(a) makes the judgment in good faith for a proper purpose;

(b) does not have a material personal interest in the subject matter of the judgment;

(c) informs the company of the subject matter of the judgment to the extent he reasonably believes to be appropriate; and

(d) reasonably believes that the judgment is in the best interests of the company.

(5) The director's or officer's belief that the judgment is in the best interests of the company shall be taken to be a reasonable one unless the belief is one that no reasonable person in his position would hold.

(6) In this section "business judgment" means any decision to take or not take action in respect of a matter relevant to the business operations of the company.

221.—(1) Except as provided in this section, a company shall not indemnify or directly or indirectly effect insurance for, a director, officer or employee of the company or a related company in respect of—

Indemnity
and
insurance

(a) liability for any act or omission in his capacity as a director, officer or employee; or

(b) costs incurred by that director, officer or employee in defending or settling any claim or proceedings relating to any such liability.

(2) An indemnity given in breach of this section shall be void.

(3) Subject to its constitution, a company may indemnify a director, officer or employee of the company or a related company for any costs incurred by him or the company in respect of any proceedings—

(a) that relate to liability for any act or omission in his capacity as a director, officer or employee; and

(b) in which judgment is given in his favour, or in which he is acquitted, or which is discontinued or in which he is granted relief or where proceedings are threatened and such threatened action is abandoned or not pursued.

(4) Subject to its constitution, a company may indemnify a director, officer or employee of the company or a related company in respect of—

(a) liability to any person, other than the company or a related company, for any act or omission in his capacity as a director, officer or employee; or

(b) costs incurred by that director, officer or employee in defending or settling any claim or proceedings relating to any such liability.

(5) Subsection (4) shall not apply to a director, officer or employee who exercises his powers honestly and in good faith, in the best interests of the company and for the respective purposes for which such powers are explicitly or implicitly conferred.

(6) Subject to its constitution, a company may with the prior approval of the Board, effect insurance for a director, officer or employee of the company or a related company in respect of—

(a) liability, not being criminal liability, for any act or omission in his capacity as a director or employee;

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

(c) costs incurred by that director or employee in defending any criminal proceedings -

(i) that have been brought against the director or employee in relation to any act or omission in that person's capacity as a director or employee;

(ii) in which that person is acquitted; or

(iii) in relation to which a *nolle prosequi* is entered.

(7) The Board shall—

(a) enter or cause to be entered in the register of interests where the company has one;

(b) record or cause to be recorded in the minutes of directors;

(c) disclose or cause to be disclosed in the annual report, the particulars of any indemnity given to, or insurance effected for, any director or employee of the company or a related company.

(8) Where an insurance is effected for a director or employee of a company or a related company and the provisions of subsection (6) or (7) have not been complied with, the director or employee shall be personally liable to the company for the cost of effecting the insurance unless the director or employee proves that it was fair to the company at the time the insurance was effected.

(9) In this section—

“director” —

(a) includes an officer of a company, a management company or registered agent; and

(b) includes a person formerly holding anyone of these offices.

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

“employee” includes a former employee;

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

222.—(1) A director of a company who believes that the company is unable to pay its debts as they fall due shall forthwith call a meeting of the Board to consider whether the Board should appoint a liquidator or an administrator.

Duty of directors as to the company's solvency

(2) Where a meeting is called under this section, the Board shall consider whether to appoint a liquidator or an administrator, or to carry on the business of the company.

(3) Where—

(a) a director fails to comply with subsection (1);

(b) at the time of that failure the company was unable to pay its debts as they fell due; and

(c) the company is subsequently placed in liquidation,

the Court may, on the application of the liquidator or of a creditor of the company, make an order that the director shall be liable for the whole or any part of any loss suffered by creditors of the company as a result of the company continuing to trade.

(4) Where—

(a) at a meeting called under this section the Board does not resolve to appoint a liquidator or an administrator;

(b) at the time of the meeting there were no reasonable grounds for believing that the company was able to pay its debts as they fell due; and

(c) the company is subsequently placed in liquidation,

the Court may, on the application of the liquidator or of a creditor of the company, make an order that the directors, other than those directors who attended the meeting and voted in favour of appointing a liquidator or an administrator, shall be liable for the whole or any part of any loss suffered by creditors of the company as a result of the company continuing to trade.

Division VIII—Company Secretaries

Public
company
required to
have secretary

223. A public company shall have a secretary.

Direction
requiring
public
company to
appoint
secretary

224.—(1) If it appears to the Registrar that a public company is in breach of section 223, the Registrar shall inform the company that it is in breach of the said provision and require the company to comply within a specified period of time.

(2) Where the company is in breach of section 223, the company shall comply with the direction of the Registrar by making the necessary appointment, and giving the Registrar notice of it before the end of the period specified in the direction.

(3) A company or every officer of the company who contravenes this section commits an offence and is liable to a fine in accordance with the prevailing schedule of penalties.

Qualifications
of secretaries
of public
companies

225.—(1) It shall be the duty of the directors of a public company to take all reasonable steps to ensure that the secretary or each joint secretary of the company—

(a) is a person who appears to them to have the requisite knowledge and experience to discharge the functions of secretary of the company;

(b) is a person who, by virtue of his holding or having held any other position or his being a member of any other body, appears to the directors to be capable of discharging the functions of secretary of the company; or

(c) has the qualifications specified in subsection (2).

(2) The qualifications of the secretary include—

(a) that he has held the office of secretary of a public company for at least three of the five years immediately preceding his appointment as secretary; or

(b) that he is a member of any professional body of company secretaries in Malawi.

226. Where in the case of any public company the office of secretary is vacant, or there is for any other reason no secretary capable of acting, anything required or authorised to be done by or to the secretary may be done—

Discharge of
functions
where office
vacant or
secretary
unable to act

(a) by or to an assistant or deputy secretary if any; or

(b) if there is no assistant or deputy secretary or none capable of acting, by or to any person authorised generally or specifically in that behalf by the directors.

227.—(1) A public company shall keep a register of its secretaries.

Duty to keep
register of
secretaries

(2) The register shall contain the particulars of the person who is, or persons who are, the secretary or joint secretaries of the company including but not limited to—

(a) name;

(b) address;

(c) any other relevant information.

(3) The register shall be kept available for inspection at the company's registered office.

(4) The register shall be open to the inspection—

(a) of any member of the company without charge; and

(b) of any other person on payment of such fee as may be prescribed.

(5) A company or every officer of the company who defaults in complying with subsection (1), (2) or (3), or defaults for fourteen days in complying with subsection (4), or refuses an inspection required under subsection (4) is liable to a fine in accordance with the prevailing schedule of penalties.

(6) In the case of a refusal of inspection of the register, the Court may by order compel an immediate inspection of it.

Duty to notify
Registrar of
changes

228.—(1) A public company shall, within the period of 14 days from—

(a) a person becoming or ceasing to be its secretary or one of its joint secretaries; or

(b) the occurrence of any change in the particulars contained in its register of secretaries,

give notice to the Registrar of the change and of the date on which it occurred.

(2) Notice of a person having become secretary, or one of joint secretaries, of the public company shall be accompanied by the consent by that person to act in the relevant capacity.

(3) Where the company fails to comply with this section, every officer of the company who is in default shall be liable to a fine in accordance with the prevailing schedule of penalties.

PART X—ACCOUNTING REQUIREMENTS

Division I—General Obligations for all Companies Except Private Companies

Requirement to
keep accurate
and complete
accounting
records

229.—(1) Subject to the other provisions of this section, the board of a company shall cause accounting records to be kept that—

(a) correctly record and explain the transactions of the company;

(b) shall at any time enable the financial position of the company to be determined with reasonable accuracy;

(c) shall enable the directors to prepare financial statements that comply with this Act, and

(d) shall enable the financial statements of the company to be readily and properly audited.

Place where
accounting
records shall
be kept

230.—(1) A company shall keep its accounting records in Malawi.

(2) A company shall keep its accounting records outside Malawi, only in accordance with regulations made under this Act.

Appointment
of auditor

231.—(1) A company shall at each annual meeting, appoint an auditor to—

(a) hold office from the conclusion of the meeting until the conclusion of the next annual meeting; and

(b) audit the financial statements of the company and, if the company is required to complete group financial statements, those group financial statements, for the accounting period next after the meeting.

(2) The Board of a company may fill any casual vacancy in the office of auditor, but while the vacancy remains, the surviving or continuing auditor, if any, may continue to act as auditor.

(3) Where—

(a) at an annual meeting of a company, no auditor is appointed or reappointed and no notice has been given; or

(b) a casual vacancy in the office of auditor is not filled within one month of the vacancy occurring, the Registrar may appoint an auditor.

(4) A company shall, within seven days of the power becoming exercisable, give written notice to the Registrar of the fact that the Registrar is entitled to appoint an auditor under subsection (3).

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

Auditor's
fees and
expenses

(a) where the auditor is appointed at a meeting of the company, by the company at the meeting or in such manner as the company may determine at the meeting;

(b) where the auditor is appointed by the directors, by the directors; or

(c) where the auditor is appointed by the Registrar, by the Registrar.

233.—(1) A partnership may be appointed by the firm name to be the auditor of a company where—

Appointment
of a
partnership
as auditor

(a) at least one member of the firm is ordinarily resident in Malawi;

(b) all or some of the partners including the partner who is ordinarily resident in terms of paragraph (a) are qualified for appointment under section 234;

(c) no member of the firm is indebted to the company or a related company unless the debt is in the ordinary course of business;

(d) no member of the firm is—

(i) an officer or employee of the company; or

(ii) a partner, or in the employment, of a director or employee of the company or a related company;

(e) no officer of the company receives any remuneration from the firm or acts as a consultant to it on accounting or auditing matters.

(2) The appointment of a partnership by the firm named to be the auditor of a company shall, notwithstanding section 234, be deemed to be the appointment of all the persons who are partners in the firm from time to time whether ordinarily resident or not in Malawi at the date of the appointment.

(3) Where a partnership that includes persons who are not qualified to be appointed as auditors of a company is appointed as auditor of a company, the persons who are not qualified to be appointed as auditors shall not act as auditors of the company.

(4) Where a firm has been appointed as auditor of a company and the members constituting the firm change by reason of the death, retirement, or withdrawal of a member or by reason of the admission of a new member, the firm as newly constituted shall, if it is not disqualified from acting as auditor of the company by virtue of subsection (1), be deemed to be appointed under this section as auditor of the company and that appointment shall be taken to be an appointment of all persons who are members of the firm as newly constituted.

(5) A report required to be signed on behalf of a firm appointed as auditor of a company shall be signed in the firm's name and in his own name by a member of the firm who is a qualified auditor.

Qualifications
of auditor

Act No. ... of
2013

234.—(1) A person shall not be appointed or act as auditor of a company unless the person is qualified as an auditor under the Public Accountants and Auditors Act, 2013.

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

(a) a director or employee of the company;

(b) a person who is a partner, or in the employment, of a director or employee of the company;

(c) a liquidator or a person who is a receiver in respect of the property of the company;

(d) a body corporate;

(e) a person who is not ordinarily resident in Malawi;

(f) a person who is indebted to the company, or to a related company unless the debt is in the ordinary course of business; or

(g) a person who, by virtue of paragraph (a) or (b), may not be

appointed or act as auditor of a related company.

(3) No person shall—

(a) where he has been appointed auditor of a company, wilfully disqualify himself, while the appointment continues, from acting as auditor of the company; or

(b) where he is a member of a firm that has been appointed auditor of a company, wilfully disqualify the firm while the appointment continues, from acting as auditor of the company.

Approval
of auditor

235.—(1) Every application by a person to be an auditor for the purposes of section 234 shall be made in the prescribed form.

Act No.
of 2013

(2) The authority prescribed by the Public Accountants and Auditors Act, 2013 may, where it appears to it from an investigation under this Act that a qualified auditor is not a fit and proper person to continue to act as a qualified auditor, inquire into the conduct of an auditor and the authority may, where it is satisfied that the conduct of the auditor is such as to render him unfit to continue to discharge the function of a qualified auditor, declare by notice published in the Gazette that such person is no longer a qualified auditor and on publication of the notice he shall cease to be a qualified auditor under this Act.

Automatic
reappointment
of auditor

236.—(1) An auditor of a company, other than an auditor appointed under section 237, shall be automatically reappointed at an annual meeting of the company unless—

(a) the auditor is not qualified for appointment; or

(b) the company passes a resolution at the meeting appointing another person to replace him as auditor; or

(c) the auditor has given notice to the company that he does not wish to be reappointed.

(2) An auditor shall not be automatically reappointed where the person to be reappointed becomes incapable of, or disqualified from, appointment.

Appointment
of first
auditor

237.—(1) The first auditor of a company may be appointed by the directors of the company before the first annual meeting, and, if so appointed, holds office until the conclusion of that meeting.

(2) Where the directors do not appoint an auditor under subsection (1), the company shall appoint the first auditor at a meeting of the company.

Replacement
of auditor

238.—(1) A company shall not remove or appoint a new auditor in the place of an auditor who is qualified for reappointment, unless—

(a) at least twenty-eight days' written notice of a proposal to do so has been given to the auditor; and

(b) the auditor has been given a reasonable opportunity to make representations to the shareholders on the appointment of another person either, at the option of the auditor, in writing or by the auditor or his representative speaking at the annual meeting of shareholders at which it is proposed not to reappoint the auditor or at a special meeting of shareholders called for the purpose of removing and replacing the auditor.

(2) An auditor shall be entitled to be paid by the company reasonable fees and expenses for making the representations to the shareholders.

(3) Where, on the application of the company or any other person who claims to be aggrieved by the auditor's representations being sent out or being read out at the meeting of shareholders, the Registrar is satisfied that the rights conferred by subsection (1) are being abused to secure needless publicity of defamatory matter, the Registrar may—

(a) order that the auditor's representations shall not be sent out or shall not be read at the meeting of shareholders; and

(b) order the costs of the application to the Registrar to be paid in whole or in part by the auditor.

Auditor not
seeking
reappointment
or giving notice
of resignation

239.—(1) Where an auditor gives the Board of a company written notice that he does not wish to be reappointed, the Board shall, if requested to do so by that auditor—

(a) distribute to all shareholders and to the Registrar, at the expense of the company, a written statement of the auditor's reasons for his wish not to be reappointed; or

(b) permit the auditor or his representative to explain at a shareholders' meeting the reasons for his wish not to be reappointed.

(2) An auditor may resign prior to the annual meeting by giving notice to the company calling on the board to call a special meeting of the company to receive the auditor's notice of resignation.

(3) Where a notice is given by an auditor under subsection (2), the auditor may, at the time of giving his notice to the board, request the board to distribute a written statement providing him or his

representative with the opportunity to give an explanation on the same terms as are set out in subsection (1).

(4) Where a written statement is provided for by an auditor under subsection (3), the provisions of section 239 (3) shall apply to that statement and explanation.

(5) Where a notice of resignation is given by an auditor under this section, the appointment of the auditor shall terminate at that meeting and the business of the meeting shall include the appointment of a new auditor to the company.

(6) An auditor shall be entitled to be paid by the company reasonable fees and expenses for making the representations to shareholders.

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

Auditor to
avoid conflict
of interest

241.—(1) The auditor of a company shall make a report to the shareholders on the financial statements which have been audited.

Auditor's
report

(2) The auditor's report shall state—

(a) the scope and limitations of the audit;

(b) whether the auditor has obtained all information and explanations that the auditor has required;

(c) whether, in the auditor's opinion, the financial statements and any group financial statements give a true and fair view of the matters to which they relate, and where they do not, the respects in which they fail to do so and whether the financial statements have been prepared in accordance with IFRS and this Act.

(3) The audit of the financial statements shall be carried out in accordance with International Standards on Auditing.

242.—(1) The board of a company shall ensure that an auditor of the company has access at all times to the accounting records and other documents of the company.

Access to
information

(2) An auditor of a company is entitled to receive from a director or employee of the company such information and explanations as he thinks necessary for the performance of his duties as auditor.

(3) Where the board of a company fails to comply with subsection (1), every director shall be liable to a fine in accordance with the prevailing schedule of penalties.

Auditor's
attendance at
shareholders'
meetings

243. The board of a company shall ensure that an auditor of the company—

(a) is permitted to attend a meeting of shareholders of the company;

(b) receives the notices and communications that a shareholder is entitled to receive relating to a meeting of the shareholders; and

(c) may be heard at a meeting of the shareholders which he attends on any part of the business of the meeting which concerns him as auditor.

Division 2—General Obligations for Private Companies

General
obligations
for private
companies

244.—(1) A private company need not appoint an auditor, unless exempted by regulations made under this Act.

(2) Where the shareholders of a private company resolve to appoint an auditor, the appointment and removal of the auditor of a private company shall, subject to this section be made in accordance with sections 235 to 239 and the auditor shall carry out the auditor's duties in accordance with section 240.

(3) An auditor of a private company may resign by written notice to the directors.

(4) Where the auditor gives written notice to resign under subsection (3), the directors shall call a meeting of shareholders or circulate a resolution to the shareholders as soon as practicable for the purpose of appointing an auditor in the place of the auditor who desires to resign and on the appointment of another auditor, the resignation shall take effect.

(5) Where at, or before, the time for the holding of the annual meeting of a private company, notice is given to the board of the company, signed by a shareholder who holds at least five per cent of the shares of the company, the company shall appoint an auditor and such resolution shall cease to have effect at the next annual meeting and the auditor shall thereupon be reappointed unless the shareholders by unanimous resolution agree not to appoint the auditor.

Division III—Financial Statements

245.—(1) The board of every company shall ensure that, within 6 months after the balance sheet date of the company, financial statements that comply with section 246 are—

Obligation
to prepare
financial
statements

(a) completed in relation to the company at its balance sheet date; and

(b) dated and signed on behalf of the board by two directors of the company, or, where the company has only one director, by that director.

(2) The Registrar may, where he considers it appropriate to do so, extend the period of six months specified in subsection (1).

246.—(1) Subject to the other provisions of this section, the financial statements of a company shall present a true and fair view of the state of affairs of the company at the balance sheet date and of its profit or loss and cash flows for the accounting period.

Content and
form of
financial
statements

(2) The financial statements shall—

(a) be prepared in accordance with IFRS; and

(b) comply with any requirement which applies to the company's financial statements under any other enactment.

(3) The financial statements of a private company shall comply with any Orders made under this Act or any accounting standards issued by a prescribed body or authority, or with IFRS or the IFRS for SME's.

247.—(1) Subject to the other provisions of this section, a company shall present its financial statements in the Malawi currency.

Financial
statements
to be
presented
in Malawi
currency

(2) The Registrar may approve the presentation by a company of its financial statements in a foreign currency where the Registrar is satisfied—

(a) that the company's principal operational activity during the accounting year in question has been undertaken in that foreign currency; and

(b) that the presentation of the financial statements in that foreign currency provides a true and fair view of the company's affairs.

Presentation
of group
financial
statements

248. The board of a company that has, on the balance sheet date of the company, one or more subsidiaries, shall, in addition to complying with section 246, ensure that within six months after the balance sheet date, it prepares group financial statements.

Content and
form of group
financial
statements

249.—(1) Subject to the other provisions of this section, the group financial statements shall present a true and fair view of the state of affairs of the group at the balance sheet date and of its profit or loss and cash flows for the accounting period.

(2) Except in the case of private companies the group financial statements shall—

(a) be prepared in accordance with IFRS; and

(b) comply with any requirement which applies to the group's financial statements under any other enactment.

(3) The group financial statements of a private company shall comply with any Orders made under this Act or any accounting standards issued by the prescribed body or authority, or with IFRS or the IFRS for SME's.

(4) Where a subsidiary becomes a subsidiary of a company during the accounting period to which the group financial statements relate, the consolidated profit and loss statement shall relate to the profit or loss of the subsidiary for each part of that accounting period during which it was a subsidiary, and not to any other part of that accounting period.

Right of
member or
debenture
holder of a
public
company to
copies of
financial
statements
and reports

250. A member of, or holder of debentures of, a public company is entitled to be provided, on demand and without charge, with a copy of the company's last financial statements together with any directors' report and auditor's report on those financial statements.

*Division IV—Filing of Annual Report and Accounts for
Companies than Private Companies*

Obligation to
prepare an
annual report
and accounts

251.—(1) For the purposes of this Division, the annual report and accounts shall comprise a directors' report, the financial statements and the auditor's report.

(2) Subject to subsections (3) and (4), the Board of every company shall, within six months after the balance sheet date of the company, prepare an annual report and accounts.

(3) The shareholders of a private company may resolve by unanimous resolution that this section shall not apply to the company.

(4) This section does not apply to a one person company.

252.—(1) A directors' report is required for all public companies. It shall be in writing and be dated and, subject to subsection (3) shall set out—

Contents of
directors'
report

(a) so far as the board reasonably believes is material for the shareholders to have an appreciation of the state of the company's affairs and is not harmful to the business of the company or of any of its subsidiaries, any change during the accounting period in—

(i) the nature of the business of the company or any of its subsidiaries; or

(ii) the classes of business in which the company has an interest, whether as a shareholder of another company or otherwise; and

(b)—(i) the names of the persons who, at any time during the financial year, were directors of the company;

(ii) particulars of entries in the register of interests made during the accounting period;

(iii) with respect to the accounting period, the amount which represents the total of the remuneration and benefits received, or due and receivable, from the company by—

(aa) executive directors of the company engaged in the full-time or part-time employment of the company, including all bonuses and commissions receivable by them as employees; and

(bb) in a separate statement, non-executive directors of the company;

(iv) in the case of a holding company, with respect to the accounting period, the amount which represents the total of the remuneration and benefits received, or due and receivable, from the parent company and from its subsidiaries by—

(aa) executive directors of the parent company engaged in the full-time or part-time employment of the holding company, including all bonuses and commission receivable by them as employees; and

(bb) in a separate statement, non-executive directors of the holding company;

(c) state the total amount of donations made by the company and any subsidiary during the accounting period;

(d) state the amounts payable by the company to the person or firm holding office as auditor of the company as audit fees and,

as a separate item, fees payable by the company for other services provided by that person or firm; and

(e) be signed on behalf of the board by two directors of the company or, where the company has only one director, by that director.

(2) The information to be disclosed under subsection (1) (b) shall be—

(a) the term of the director's service contract with its date of expiry;

(b) any notice period for termination of the contract;

(c) particulars of any provisions for predetermined compensation on termination exceeding one year's salary and of any benefits including benefits in kind.

(3) A company that is required to include group financial statements in its annual report shall include, in relation to each of its subsidiaries, the information specified in paragraphs (b) to (e) of subsection (1).

Sending
annual report
and accounts
to
shareholders

253.—(1) Subject to subsection (2), the Board of a company shall cause a copy of the annual report and accounts to be sent to every shareholder of the company not less than 14 days before the date fixed for holding the annual meeting of the shareholders and such delivery may be made by electronic means.

(2) The board of a company shall not be required to send an annual report and accounts to a shareholder where—

(a) the shareholder has given notice in writing to the company waiving the right to be sent a copy of the annual report and accounts or copies of annual reports and accounts of the company generally; and

(b) the shareholder has not revoked that notice.

Failure to
send an
annual report
and accounts

254. Subject to the constitution of a company, the failure to send an annual report and accounts, notice, or other documents to a shareholder in accordance with this Act shall not affect the validity of proceedings at a meeting of the shareholders of the company where the failure to do so was accidental.

Filing of
annual report
and accounts

255. Every company, other than a private company, shall ensure that, within 28 days after the annual report and accounts of the company and of the group are required to be signed, the annual report and accounts are filed with the Registrar.

Division V—Annual Return

256.—(1) Subject to subsection (3), every company shall, once in every year, file with the Registrar for registration an annual return which may be in electronic form. Annual return

(2) Subject to subsection (3), the annual return shall be completed and filed with the Registrar within 28 days of the date of the annual meeting of the company.

(3) A company which keeps a branch register outside Malawi shall comply with the requirements of subsection (2) within eight weeks after the dates referred to in subsection (2).

(4) The annual return shall be signed by a director or secretary.

(5) The annual return shall contain the information set out in the regulations save that where the matters required to be stated are in each case unchanged from the last preceding annual return, the company may present a "No change return" in which it is certified by a director or secretary of the company that there is no change with respect to any of the matters stated from the last preceding annual return.

(6) A company may not make an annual return in the calendar year of its incorporation.

(7) A public company which—

(a) has more than five hundred members; and

(b) provides reasonable accommodation and facilities at a place approved by the Registrar for persons to inspect and take a list of its members and particulars of shares transferred,

shall not, unless the Registrar otherwise directs, be required to include a list of members with the annual return where a certificate by the secretary is included that the company is of a kind to which this subsection applies.

PART XI—PUBLIC OFFERINGS OF SECURITIES

257. All public offers of securities shall be made in accordance with the Securities Act, 2010.

Public offers
of securities
in Malawi
Act No. 20 of
2010

258. An offer or invitation to make an offer of securities to the public shall be construed as including—

Meaning of
"public offer"

(a) offering securities to a section of the public, however selected, whether selected as clients, employees, or a purchaser of

goods from the offeror or a promoter of the securities, or being the holder of securities previously issued by the issuer or promoter of the securities;

(b) offering the securities to individual members of the public selected at random; or

(c) offering the securities to a person if the person became known to the offeror as a result of an advertisement made by or on behalf of the offeror or that was intended or likely to result in the public seeking further information or advice about an investment opportunity or services.

General duty
of disclosure
in a prospectus

259. An offer or invitation to make an offer of securities or debentures shall be construed as a private offer if—

(a) an offer of securities where the amount subscribed for the securities by each person to whom the securities are offered is not more than the prevailing limit as established by the Registrar of Financial Institutions,

(b) an offer of securities which is restricted to persons who are directors or executive officers of the company making the offer or are close relatives or business partners or close business associates of such director or executive officer;

(c) an offer of securities which is restricted to persons referred to in paragraph (a) and to a body corporate in which an executive officer or a close relative or business partner or associate of the kind referred to in paragraph (b) have a controlling interest;

(d) an offer of securities where no consideration is paid or provided in respect of the issue or allotment of the securities;

(e) an offer to enter into an underwriting agreement;

(f) an issue or allotment of securities to not more than one hundred persons who are professional investors or experienced investors as may be defined by the Registrar of Financial Institutions where the securities are allotted as a result of an invitation or offer made personally to that person or those persons; or

(g) an offer made to acquire all of the shares in a company which provides ownership of the whole of the assets and undertaking of a business enterprise or to acquire the whole of the undertaking and assets of a partnership or trust and which offer is capable of acceptance by and restricted to not more than ten persons and each person has reasonably available to him or her the financial and other information needed by that person to make a reasonably informed investment decision.

260.—(1) A prospectus shall contain all such necessary information as investors and their professional advisers would reasonably require, and reasonably expect to find there, for the purpose of making an informed assessment of—

General duty
of disclosure
in a
prospectus

(a) the assets and liabilities, financial position, profits and losses, and prospects of the issuer of the securities; and

(b) the rights attaching to the securities, and "necessary information" means information which a person considering acquiring the securities of the kind in question would be likely to need in order not to be misled about any material facts which it is essential for him to know to make an informed assessment.

(2) The prospectus shall contain information or documents as may be necessary in respect of—

(a) the terms of the offer including, the identity of any underwriter and the method of the offer;

(b) information about the business and operations of the issuer;

(c) the identity of directors, senior management, promoters and auditors;

(d) capitalisation and indebtedness of the issuer;

(e) risk factors;

(f) securities market data regarding any trading history of the issuer's shares;

(g) use of the proceeds of the offer;

(h) details of pending litigation;

(i) management discussion and analysis of the financial condition and results of the company's business operations;

(j) a forecast of estimated profit or loss for the year ending immediately before the date of the prospectus and the year ending immediately after the date of the prospectus;

(k) a certificate from the issuer's auditor stating any changes in directors and auditors during the last three years, indicating the reasons for any changes; and

(l) audited financial statements for the years and periods as required by the Registrar of Financial Institutions.

(3) The prospectus shall be signed by the company's senior management or persons performing similar functions accompanied by a duly verified resolution of the board of directors. Any written consent of an expert named as having certified any part of the prospectus or any document used in that connection must also be delivered to the Registrar of Financial Institutions.

PART XII—ARRANGEMENT, COMPROMISES AND RECONSTRUCTIONS;
MERGERS AND DIVISIONS AND TAKE-OVERS

Division I—Arrangements, Compromises And Reconstructions

Interpretation
in this Division

261.—In this Division, unless the context otherwise requires—

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

“company” includes a foreign company registered under Part XV;

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

(a) cancelling all or part of a debt of the company; or

(b) varying the rights of its creditors or the terms of a debt;

or

(c) relating to an alteration of a company’s constitution that affects the likelihood of the company being able to pay a debt;

“creditor” includes—

(a) a person who, in a liquidation, would be entitled to claim that a debt is owing to that person by the company; and

(b) a secured creditor;

“merger” means where two or more companies amalgamate and continue as one company, which may be one of the amalgamating companies, or may be a new company.

Power to
refer any
compromise
to the court
Act No. ... of
2013

262.—(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them, the proposed compromise shall be subject to the Insolvency Act, 2013 and the Court may, on the application of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, in accordance with that Act.

(2) Where a compromise or arrangement proposed under subsection (1) relates to a public company, that proposed compromise or arrangement is subject to the requirements of a stock exchange licensed under the Securities Act, 2010.

Act No. 20 of
2010

(3) If a majority in number representing 75 per cent in value of the creditors or class of creditors, present and voting either in person or by proxy at that meeting, agree to any compromise or arrangement, the compromise or arrangement shall be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company.

(4) Any order made under subsection (3) shall have no effect until a copy of the order has been delivered to the Registrar for registration, and a copy of every such order shall be annexed to every copy of the constitution of the company issued after the order has been made.

(5) Upon the hearing by the Court of the application to sanction the compromise or arrangement any member or creditor of the company claiming to be affected thereby shall be entitled to be represented and to object.

(6) The Court may prescribe such terms as it thinks fit as a condition of its sanction including a condition that any members shall be given rights to require the company to purchase their shares at a price fixed by a registered valuer under Part VII.

(7) If a company defaults in complying with subsection (4), the company and every officer of the company who is in default shall be liable to a fine in accordance with the prevailing schedule of penalties.

263.—(1) Where a meeting of creditors or any class of creditors or of members or any class of members is summoned under section 262 there shall—

Information
as to
compromises
with creditors
and members

(a) with every notice summoning the meeting which is sent to a creditor or member, be sent also a statement explaining the effect of the compromise or arrangement and in particular stating any material interests of the directors of the company, whether as directors or as members or as creditors of the company or otherwise, and the effect thereon of the compromise or arrangement, insofar as it is different from the effect on the like interests of other persons; and

(b) in every notice summoning the meeting which is given by advertisement, be included either such a statement as aforesaid or a notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of such a statement.

(2) Where the compromise or arrangement affects the rights of debenture holders of the company, the statement shall give the like

explanation as respects the debenture holders of the company or any trustees of any instrument for securing the issue of the debentures as it is required to give as respects the company's directors.

(3) Where a notice given by advertisement includes a notification that copies of a statement explaining the effect of the compromise or arrangement proposed can be obtained by creditors or members entitled to attend the meeting, every such creditor or member shall, on making application in the manner indicated by the notice be furnished by the company free of charge with a copy of the statement.

(4) Where a company makes default in complying with any requirement of this section, the company and every officer of the company who is in default shall be liable to a fine in accordance with the prevailing schedule of penalties; and for the purpose of this subsection any liquidator of the company and any trustee of an instrument for securing the issue of debentures of the company shall be deemed to be an officer of the company.

(5) A person shall not be liable under subsection (4) if that person shows that the default was due to the refusal of any other person to supply the necessary particulars as to his interests.

(6) It shall be the duty of any director of the company and of any trustee for debenture holders of the company to give notice to the company of such matters relating to himself as may be necessary for the purposes of this section, and any person who makes default in complying with this subsection shall be liable to a fine in accordance with the prevailing schedule of penalties.

Provisions for
reconstructions

264.—(1) Where an application is made to the Court under section 262 for the sanctioning of a compromise or arrangement proposed and it is shown to the Court that the compromise or arrangement has been proposed for the purposes of or in connexion with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies, and that under the scheme the whole or any part of the undertaking or the property of any company concerned in the scheme (in this section referred to as "a transferor company") is to be transferred to another company (in this section referred to as "the transferee company"), the Court may, either by the order sanctioning the compromise or arrangement or by any subsequent order, make provision for all or any of the following matters—

(a) the transfer to the transferee company of the whole or any part of the undertaking and of the property or liability of any transferor company;

(b) the allotting or appropriation by the transferee company of any shares, debentures, policies or other like interest in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person;

(c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;

(d) the dissolution, without winding-up, of any transferor company;

(e) the provision to be made for any persons who, within such time and in such manner as the Court directs, dissent from the compromise or arrangement; and

(f) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out.

(2) Where an order under this section provides for the transfer of property or liabilities, that property shall, by virtue of the order, be transferred to and vest in, and those liabilities shall, by virtue of the order, be transferred to and become the liabilities of, the transferee company, and in the case of any property, if the order so directs, be freed from any charge which is by virtue of the compromise or arrangement to cease to have effect.

(3) Where an order is made under this section, every company in relation to which the order is made shall cause a copy thereof to be delivered to the Registrar for registration within 21 days after the making of the order, and if default is made in complying with this subsection, the company and every officer of the company who is in default shall be liable to a fine in accordance with the prevailing schedule of penalties.

(4) In this section the expression "property" includes property rights and powers of every description and the expression "liabilities" includes duties of every description.

Division II—Mergers And Divisions

265.—(1) This Division shall apply where—

Application
of this
Division

(a) a compromise or arrangement is proposed between a public company and—

(i) its creditors or any class of them, or

(ii) its members or any class of them, for the purposes of, or

in connection with, a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies,

(b) the scheme involves—

- (i) a merger, or
- (ii) a division, and

(c) the consideration for the transfer (or each of the transfers) envisaged is to be shares in the transferee company (or one or more of the transferee companies) receivable by members of the transferor company (or transferor companies), with or without any cash payment to members.

(2) In this Division—

(a) a “new company” means a company formed for the purposes of, or in connection with, the scheme; and

(b) an “existing company” means a company other than one formed for the purposes of, or in connection with, the scheme.

(3) This Division shall not apply where the company in respect of which the compromise or arrangement is proposed is being wound up;

(4) The Court shall not sanction any compromise or arrangement under Division I of this Part unless the requirements of this Division have been complied with.

Mergers and
merging
companies

266.—(1) The scheme involves a merger where under the scheme—

(a) the undertaking, property and liabilities of one or more public companies, including the company in respect of which the compromise or arrangement is proposed, are to be transferred to another existing public company (a “merger by absorption”); or

(b) the undertaking, property and liabilities of two or more public companies, including the company in respect of which the compromise or arrangement is proposed, are to be transferred to a new company, whether or not a public company, (a “merger by formation of a new company”).

(2) References in this Division to “the merging companies” are—

(a) in relation to a merger by absorption, to the transferor and transferee companies;

(b) in relation to a merger by formation of a new company, to the transferor companies.

267.—(1) A draft of the proposed terms of the scheme shall be drawn up and adopted by the directors of the merging companies. Draft terms of a merger

(2) The draft terms shall give particulars of at least the following matters—

(a) in respect of each transferor company and the transferee company—

- (i) its name,
- (ii) the address of its registered office, and
- (iii) whether it is a company limited by shares or a company limited by guarantee;

(b) the number of shares in the transferee company to be allotted to members of a transferor company for a given number of their shares (the "share exchange ratio") and the amount of any cash payment;

(c) the terms relating to the allotment of shares in the transferee company;

(d) the date from which the holding of shares in the transferee company will entitle the holders to participate in profits, and any special conditions affecting that entitlement;

(e) the date from which the transactions of a transferor company are to be treated for accounting purposes as being those of the transferee company;

(f) any rights or restrictions attaching to shares or other securities in the transferee company to be allotted under the scheme to the holders of shares or other securities in a transferor company to which any special rights or restrictions attach, or the measures proposed concerning them;

(g) any amount of benefit paid or given or intended to be paid or given—

- (i) to any of the experts referred to in section 271 the expert's report, or
- (ii) to any director of a merging company, and the consideration for the payment of benefit.

(3) The requirements in subsection (2) (b), (c) and (d) shall be subject to section 277 circumstances in which certain particulars are not required.

268.—(1) The directors of each of the merging companies shall deliver a copy of the draft terms to the Registrar. Publication of draft terms of a merger

(2) The Registrar shall publish in the *Gazette* notice of receipt by him from that company of a copy of the draft terms.

(3) The notice shall be published at least 1 month before the date of any meeting of that company summoned for the purpose of approving the scheme.

Approval of
members of
a merging
company

269.—(1) The scheme shall be approved by a majority in number, representing 75 per cent in value, of each class of members of each of the merging companies, present and voting either in person or by proxy at a meeting.

(2) This requirement shall be subject to section 279 with respect to circumstances in which meetings of members are not required.

Directors'
report of a
merging
company

270.—(1) The directors of each of the merging companies shall draw-up and adopt a report.

(2) The report shall consist of—

(a) the statement required by section 267; and

(b) insofar as that statement does not deal with the following matters, a further statement—

(i) setting out the legal and economic grounds for the draft terms, and in particular for the share exchange ratio, and

(ii) specifying any special valuation difficulties.

(3) The requirement in this section is subject to section 277 with respect to circumstances in which reports are not required.

Expert's
report on
a merger

271.—(1) An expert's report shall be drawn up on behalf of each of the merging companies.

(2) The report required shall be a written report on the draft terms to the members of the company.

(3) The Court may, on the joint application of all the merging companies, approve the appointment of a joint expert to draw-up a single report on behalf of all those companies, provided that where no such appointment is made, there shall be a separate expert's report to the members of each merging company drawn up by a separate expert appointed on behalf of that company.

(4) The expert shall be a person who is eligible for appointment as a statutory auditor.

(5) The expert's report shall—

(a) indicate the method or methods used to arrive at the share exchange ratio;

(b) give an opinion as to whether the method or methods used are reasonable in all the circumstances of the case, indicate the values arrived at using each such method and (if there is more than one method) give an opinion on the relative importance attributed to such methods in arriving at the value decided on;

(c) describe any special valuation difficulties that have arisen;

(d) state whether in the expert's opinion the share exchange ratio is reasonable; and

(6) The expert (or each of them) shall have—

(a) the right of access to all such documents of all the merging companies; and

(b) the right to require from the companies' officers all such information, as he thinks necessary for the purposes of making his report.

(7) The requirement in this section shall be subject to section 277 with respect to circumstances in which reports are not required.

272.—(1) If the last annual accounts of any of the merging companies relate to a financial year ending more than 7 months before the first meeting of the company summoned for the purposes of approving the scheme, the directors of that company shall prepare a supplementary accounting statement.

Supplementary
accounting
statement
for a merger

(2) The statement shall consist of—

(a) a balance sheet dealing with the state of affairs of the company as at a date not more than three months before the draft terms were adopted by the directors; and

(b) where the company would be required to prepare group accounts if that date were the last day of a financial year, a consolidated balance sheet dealing with the state of affairs of the company and the undertakings that would be included in such a consolidation.

(3) The requirements of this Act as to the balance sheet forming part of a company's annual accounts, and the matters to be included in notes to it, apply to the balance sheet required for an accounting statement under this section, with such modifications as are necessary by reason of its being prepared otherwise than as at the last day of a financial year.

273.—(1) The members of each of the merging companies shall, during the period specified below, be able—

Inspection of
documents
on a merger

(a) to inspect at the registered office of that company copies of

the documents listed below relating to that company and every other merging company; and

(b) to obtain copies of those documents or any part of them on request free of charge.

(2) The period referred to above is the period—

(a) beginning one month before; and

(b) ending on the date of, the first meeting of the members, or any class of members, of the company for the purposes of approving the scheme.

(3) The documents referred to above shall be—

(a) the draft terms;

(b) the directors' explanatory report;

(c) the expert's report;

(d) the company's annual accounts and reports for the last three financial years ending on or before the first meeting of the members, or any class of members, of the company summoned for the purposes of approving the scheme; and

(e) any supplementary accounting statement required by section 272.

(4) The requirements of subsection (3) (b) and (c) shall be subject to section 277 with respect to circumstances in which reports are not required.

Approval of
constitution
of a new
transferee
company
on a merger

274. In the case of a merger by formation of a new company, the constitution of the transferee company, or a draft of them, must be approved by ordinary resolution of the transferor company or, as the case may be, each of the transferor companies.

Protection of
holders of
securities to
which special
rights are
attached in
a merger

275.—(1) The scheme shall provide that where any securities of a transferor company other than shares, to which special rights are attached are held by a person otherwise than as a member or creditor of the company, that person is to receive rights in the transferee company of equivalent value.

(2) Subsection (1) shall not apply if—

(a) the holder has agreed otherwise; or

(b) the holder is, or under the scheme is to be, entitled to have the securities purchased by the transferee company on terms that the Court considers reasonable.

276. The scheme shall not provide for shares in the transferee company to be allotted to a transferor company or its nominee in respect of shares in the transferor company held by it, or its nominee.

No allotment of shares to transferor company or its nominee in a merger

277.—(1) This section shall apply in the case of a merger by absorption where all of the relevant securities of the transferor company or, if there is more than one transferor company, of each of them are held by or on behalf of the transferee company.

Circumstances in which certain particulars and reports are not required in a merger

(2) The draft terms of the scheme need not give the particulars mentioned in section 267 (2) (b), (c) or (d).

(3) The provisions of section 263 with respect to the explanatory statement to be circulated or made available shall not apply.

(4) The requirements of section 270 with respect to the directors' explanatory report, and section 271 with respect to the expert's report, shall not apply.

(5) The requirements of section 273 as to inspection of documents so far as relating to any document required to be drawn up under the provisions mentioned in subsection (3) shall not apply.

(6) In this section, "relevant securities", in relation to a company, means shares or other securities carrying the right to vote at general meetings of the company.

278.—(1) This section shall apply in the case of a merger by absorption where 90 per cent or more of the relevant securities of the transferor company, or, if there is more than one transferor company, of each of them, are held by or on behalf of the transferee company.

Circumstances in which meeting of members of transferee company is not required in a merger

(2) It shall not be necessary for the scheme to be approved at a meeting of the members, or any class of members, of the transferee company if the Court is satisfied that the following conditions have been complied with—

(a) *Condition One:* The publication of notice of receipt of the draft terms by the Registrar took place in respect of the transferee company at least one month before the date of the first meeting of members, or any class of members, of the transferor company summoned for the purpose of agreeing to the scheme.

(b) *Condition Two:* The members of the transferee company were able during the period beginning one month before, and ending on, that date—

(i) to inspect at the registered office of the transferee company copies of the documents listed in section 273 (3) (a), (d) and (e) relating to that company and the transferor company (or, if there is more than one transferor company, each of them); and

(ii) to obtain copies of those documents or any part of them on request free of charge.

(c) Condition Three—

(i) one or more members of the transferee company, who together held not less than five per cent of the paid-up capital of the company which carried the right to vote at general meetings of the company (excluding any shares in the company held as treasury shares) would have been able, during that period, to require a meeting of each class of members to be called for the purpose of deciding whether or not to agree to the scheme; and

(ii) no such requirement was made.

(3) In this section, "relevant securities", in relation to a company, means shares or other securities carrying the right to vote at general meetings of the company.

Circumstances
in which no
members
meetings are
required
in a merger

279.—(1) This section applies in the case of a merger by absorption where all of the relevant securities of the transferor company (or, if there is more than one transferor company, of each of them) are held by or on behalf of the transferee company.

(2) It shall not be necessary for the scheme to be approved at a meeting of the members, or any class of members, of any of the merging companies if the Court is satisfied that the following conditions have been complied with—

(a) Condition One: Publication of notice of receipt of the draft terms by the Registrar of the company took place in respect of all the merging companies at least one month before the date of the Court's order.

(b) Condition Two: Members of the transferee company were able during the period beginning one month before, and ending on, that date—

(i) to inspect at the registered office of that company copies of the documents listed in section 273 relating to that company and the transferor company (or, if there is more than one transferor company, each of them); and

(ii) to obtain copies of those documents or any part of them on request free of charge.

(c) *Condition Three*—

(i) that one or more members of the transferee company, who together held not less than five per cent of the paid-up capital of the company which carried the right to vote at general meetings of the company (excluding any shares in the company held as treasury shares) would have been able, during that period, to require a meeting of each class of members to be called for the purpose of deciding whether or not to agree to the scheme; and

(ii) no such requirement was made.

(3) In this section, “relevant securities”, in relation to a company, means shares or other securities carrying the right to vote at general meetings of the company.

280. In the case of any merger by absorption, it is not necessary for the scheme to be approved by the members of the transferee company if the Court is satisfied that the following conditions have been complied with—

Other circumstances in which meetings of members of transferee company are not required in a merger

(a) *Condition One*: Publication of notice of receipt of the draft terms by the Registrar took place in respect of that company at least one month before the date of the first meeting of members, or any class of members, of the transferor company or, if there is more than one transferor company, any of them, summoned for the purposes of agreeing to the scheme.

(b) *Condition Two*: Members of that company were able during the period beginning one month before, and ending on, the date of any such meeting—

(i) to inspect at the registered office of that company copies of the documents specified in section 273 (3) relating to that company and the transferor company, or, if there is more than one transferor company, each of them, and

(ii) to obtain copies of those documents or any part of them on request free of charge.

(c) *Condition Three*: that—

(i) one or more members of that company, who together held not less than five per cent of the paid-up capital of the company which carried the right to vote at general meetings of the company (excluding any shares in the company held as treasury shares) would have been able, during that period, to require a meeting of each class of members to be called for the purpose of deciding whether or not to agree to the scheme; and

(ii) no such requirement was made.

Division III—Mergers and Divisions for Public and Private Companies

Divisions and companies involved in a division

281.—(1) The scheme shall involve a division where under the scheme the undertaking, property and liabilities of the company in respect of which the compromise or arrangement is proposed are to be divided among and transferred to two or more companies each of which is either—

- (a) an existing public company; or
- (b) a new company, whether or not a public company.

(2) References in this Division to the companies involved in the division are to the transferor company and any existing transferee companies.

Draft terms of a division

282.—(1) A draft of the proposed terms of the scheme shall be drawn up and adopted by the directors of each of the companies involved in the division.

(2) The draft terms shall give particulars of at least the following matters—

(a) in respect of the transferor company and each transferee company—

- (i) its name;
- (ii) the address of its registered office; and
- (iii) whether it is a company limited by shares or a company limited by guarantee;

(b) the number of shares in a transferee company to be allotted to members of the transferor company for a given number of their shares (the "share exchange ratio") and the amount of any cash payment;

(c) the terms relating to the allotment of shares in a transferee company;

(d) the date from which the holding of shares in a transferee company will entitle the holders to participate in profits, and any special conditions affecting that entitlement;

(e) the date from which the transactions of the transferor company are to be treated for accounting purposes as being those of a transferee company;

(f) any rights or restrictions attaching to shares or other securities in a transferee company to be allotted under the scheme to the holders of shares or other securities in the transferor company to which any special rights or restrictions attach, or the measures proposed concerning them;

(g) any amount of benefit paid or given or intended to be paid or given—

(i) to any of the experts referred to in section 286 the expert's report, or

(ii) to any director of a company involved in the division, and the consideration for the payment of benefit.

(3) The draft terms shall further—

(a) give particulars of the property and liabilities to be transferred, to the extent that these are known to the transferor company, and their allocation among the transferee companies;

(b) make provision for the allocation among and transfer to the transferee companies of any other property and liabilities that the transferor company has acquired or may subsequently acquire; and

(c) specify the allocation to members of the transferor company of shares in the transferee companies and the criteria upon which that allocation is based.

283.—(1) The directors of each company involved in the division shall deliver a copy of the draft terms to the Registrar.

Publication of
draft terms
of a division

(2) The Registrar shall publish in the *Gazette* notice of receipt by him from that company of a copy of the draft terms.

(3) That notice shall be published at least 1 month before the date of any meeting of that company summoned for the purposes of approving the scheme.

(4) The requirements in this section shall subject to section 296.

284.—(1) The compromise or arrangement shall be approved by a majority in number, representing 75 per cent in value, of each class of members of each of the companies involved in the division, present and voting either in person or by proxy at a meeting.

Approval of
members of
companies
involved in
the division

(2) requirement in subsection (1) shall be subject to sections 293 and 294 as to the circumstances in which a meeting of members is not required.

285.—(1) The directors of the transferor and each existing transferee company shall draw up and adopt a report.

Directors'
explanatory
report for
a division

(2) The report shall consist of—

(a) the statement required by section 263 as to the explaining the effect of the compromise or arrangement; and

(b) insofar as the statement does not deal with the following matters, a further statement—

(i) setting out the legal and economic grounds for the draft terms, and in particular for the share exchange ratio and for the criteria on which the allocation to the members of the transferor company of shares in the transferee companies was based; and

(ii) specifying any special valuation difficulties.

(3) The report shall further state—

(a) whether a report has been made to any transferee company in relation to any valuation of non-cash consideration for shares; and

(b) if so, whether that report has been delivered to the Registrar of companies.

(4) The requirement in this section shall be subject to section 295 as to an agreement to dispense with reports.

Expert's report
in a division

286.—(1) An expert's report shall be drawn up on behalf of each company involved in a division.

(2) The report required under subsection (1) shall be a written report on the draft terms to the members of the company.

(3) The Court may, on the joint application of the companies involved in the division, approve the appointment of a joint expert to draw up a single report on behalf of all those companies. If no such appointment is made, there shall be a separate expert's report to the members of each company involved in the division drawn up by a separate expert appointed on behalf of that company.

(4) The expert shall be a person who is eligible for appointment as a statutory auditor.

(5) The expert's report shall—

(a) indicate the method or methods used to arrive at the share exchange ratio;

(b) give an opinion as to whether the method or methods used are reasonable in all the circumstances of the case, indicate the values arrived at using each such method and, if there is more than one method, give an opinion on the relative importance attributed to such methods in arriving at the value decided on;

(c) describe any special valuation difficulties that have arisen;

(d) state whether in the expert's opinion the share exchange ratio is reasonable; and

(6) The expert or each of them has—

(a) the right of access to all such documents of the companies involved in the division; and

(b) the right to require from the companies' officers all such information, as he thinks necessary for the purposes of making his report.

(7) The requirement in this section shall be subject to section 295 an agreement to dispense with reports.

287.—(1) If the last annual accounts of a company involved in the division relate to a financial year ending more than 7 months before the first meeting of the company summoned for the purposes of approving the scheme, the directors of that company must prepare a supplementary accounting statement.

Supplementary
accounting
statement
in a division

(2) That statement shall consist of—

(a) a balance sheet dealing with the state of affairs of the company as at a date not more than three months before the draft terms were adopted by the directors; and

(b) where the company would be required to prepare group accounts if that date were the last day of a financial year, a consolidated balance sheet dealing with the state of affairs of the company and the undertakings that would be included in such a consolidation.

(3) The requirements of this Act as to the balance sheet forming part of a company's annual accounts, and the matters to be included in notes to it, apply to the balance sheet required for an accounting statement under this section, with such modifications as are necessary by reason of its being prepared otherwise than as at the last day of a financial year.

(4) The requirement in this section shall be subject to section 296 as to an agreement to dispense with reports.

288.—(1) The members of each company involved in the division shall be entitled be able, during the period specified below—

Inspection of
documents in
a division

(a) to inspect at the registered office of that company copies of the documents listed below relating to that company and every other company involved in the division; and

(b) to obtain copies of those documents or any part of them on request free of charge.

(2) The period referred to above is the period—

(a) beginning 1 month before, and

(b) ending on the date of, the first meeting of the members, or any class of members, of the company for the purposes of approving the scheme.

(3) The documents referred to above are—

(a) the draft terms;

(b) the directors' explanatory report;

(c) the expert's report;

(d) the company's annual accounts and reports for the last three financial years ending on or before the first meeting of the members, or any class of members, of the company summoned for the purposes of approving the scheme; and

(e) any supplementary accounting statement required by section 287.

(4) The requirements in subsection (3) (b), (c) and (e) are subject to section 295 and agreement to dispense with reports and section 296 the power of the Court to exclude certain requirements.

Report on
material
changes of
assets of
transferor
company
in a division

289.—(1) The directors of the transferor company shall report—

(a) to every meeting of the members, or any class of members, of that company summoned for the purpose of agreeing to the scheme; and

(b) to the directors of each existing transferee company, any material changes in the property and liabilities of the transferor company between the date when the draft terms were adopted and the date of the meeting in question.

(2) The directors of each existing transferee company shall, in turn—

(a) report those matters to every meeting of the members, or any class of members, of that company summoned for the purpose of agreeing to the scheme; or

(b) send a report of those matters to every member entitled to receive notice of such a meeting.

(3) The requirement in this section shall be subject to section 295 as to an agreement to dispense with reports.

Approval of
constitution
of new
transferee
company in
a division

290. The constitution of every new transferee company, or a draft of them, shall be approved by ordinary resolution of the transferor company.

291.—(1) The scheme shall provide that where any securities of the transferor company other than shares to which special rights are attached are held by a person otherwise than as a member or creditor of the company, that person shall to receive rights in a transferee company of equivalent value.

Protection of holders of securities to which special rights attach in a division

(2) Subsection (1) shall not apply if—

(a) the holder has agreed otherwise; or

(b) the holder is, or under the scheme is to be, entitled to have the securities purchased by a transferee company on terms that the Court considers reasonable.

292. The scheme shall not provide for shares in a transferee company to be allotted to the transferor company or its nominee in respect of shares in the transferor company held by it or its nominee.

No allotment of shares to transferor company or its nominee in a division

293.—(1) This section shall apply in the case of a division where all of the shares or other securities of the transferor company carrying the right to vote at general meetings of the company are held by or on behalf of one or more existing transferee companies.

Circumstances in which a meeting of members of transferor company is not required in a division

(2) It shall not be necessary for the scheme to be approved by a meeting of the members, or any class of members, of the transferor company if the Court is satisfied that the following conditions have been complied with.

(3) Condition One: Publication of notice of receipt of the draft terms by the Registrar took place in respect of all the companies involved in the division at least one month before the date of the Court's order.

(4) Condition Two: Members of every company involved in the division were able during the period beginning one month before, and ending on, that date—

(a) to inspect at the registered office of their company copies of the documents listed in section 288 (3) relating to every company involved in the division; and

(b) to obtain copies of those documents or any part of them on request free of charge.

(5) Condition Three: is that—

(a) one or more members of the transferor company, who together held not less than five per cent of the stated capital of the company (excluding any shares in the company held as treasury

shares) would have been able, during that period, to require a meeting of each class of members to be called for the purpose of deciding whether or not to agree to the scheme; and

(b) no such requirement was made.

(6) Condition Four: The directors of the transferor company have sent—

(a) to every member who would have been entitled to receive notice of a meeting to agree to the scheme (had any such meeting been called); and

(b) to the directors of every existing transferee company, a report of any material change in the property and liabilities of the transferor company between the date when the terms were adopted by the directors and the date one month before the date of the Court's order.

Circumstances in which a meeting of members of transferee company are not required in a division

294.—(1) In the case of a division, it is not necessary for the scheme to be approved by the members of a transferee company if the Court is satisfied that the following conditions have been complied with in relation to that company.

(2) *Condition One:* Publication of notice of receipt of the draft terms by the registrar took place in respect of that company at least one month before the date of the first meeting of members of the transferor company summoned for the purposes of agreeing to the scheme.

(3) *Condition Two:* Members of that company were able during the period beginning one month before, and ending on, that date—

(a) to inspect at the registered office of that company copies of the documents specified in section 288 (3) relating to that company and every other company involved in the division; and

(b) to obtain copies of those documents or any part of them on request free of charge.

(4) *Condition Three:* that—

(a) one or more members of that company, who together held not less than five per cent of the stated capital of the company which carried the right to vote at general meetings of the company, excluding any shares in the company held as treasury shares, would have been able, during that period, to require a meeting of each class of members to be called for the purpose of deciding whether or not to agree to the scheme; and

(b) no such requirement was made.

(5) Conditions One and Two shall be subject to section 296 as to the power of the Court to exclude certain requirements.

295.—(1) If all members holding shares in and all persons holding other securities of, the companies involved in the division, being shares or securities that carry a right to vote in general meetings of the company in question, so agree, the following requirements set out in subsection (2) shall not apply.

Agreement to dispense with reports in a division

(2) The requirements that may be dispensed with under this section are the requirements of 285, 286, 287, 289 and 288 so far as relating to any document required to be drawn up under sections 285, 286 and 287, and section 289.

(3) For the purposes of this section—

(a) the members, or holders of other securities, of a company; and

(b) whether shares or other securities carry a right to vote in general meetings of the company,

shall be determined as at the date of the application to the Court under section 296.

296.—(1) In the case of a division, the Court may by order, direct that—

(a) in relation to any company involved in the division, the requirements of section 283 and section 288; and

(b) in relation to an existing transferee company, section 294 relating to circumstances in which meeting of members of transferee company are not required, shall have effect with the omission of conditions one and two specified in that section, if the Court is satisfied that the following conditions will be fulfilled in relation to that company—

Power of Court to exclude certain requirements in a division

(A) *Condition One:* Members of that company will have received, or will have been able to obtain free of charge, copies of the documents listed in section 288—

(i) in time to examine them before the date of the first meeting of the members, or any class of members, of that company summoned for the purposes of agreeing to the scheme; or

(ii) in the case of an existing transferee company where in the circumstances described in section 294 no meeting is held, in time to require a meeting as mentioned in subsection (4) of that section.

(B) *Condition Two:* Creditors of that company will have received or will have been able to obtain free of charge copies of the draft terms in time to examine them—

(i) before the date of the first meeting of the members, or any class of members, of the company summoned for the purposes of agreeing to the scheme; or

(ii) in the circumstances mentioned in subsection (2) (b), at the same time as the members of the company.

(C) *Condition Three:* No prejudice would be caused to the members or creditors of the transferor company or any transferee company by making the order in question.

Part IV—The Take-Over Panel

The take-over
Panel

297.—(1) The Minister may, by regulation, establish a body known as the Panel on Takeovers and Mergers ("the Panel") which is to have the functions conferred on it by or under this Part.

(2) The Panel may do anything that it considers necessary or expedient for the purposes of, or in connection with, its functions.

(3) The Panel may make arrangements for any of its functions to be discharged by—

(a) a committee or subcommittee of the Panel; or

(b) an officer or member of staff of the Panel, or a person acting as such.

Panel rules

298.—(1) The Minister may make rules for the Panel—

(a) for or in connection with the regulation of—

(i) takeover bids;

(ii) merger transactions; and

(iii) transactions not falling within subparagraph (i) or (ii) that have or may have, directly or indirectly, an effect on the ownership or control of companies;

(b) for or in connection with the regulation of things done in consequence of, or otherwise in relation to, any such bid or transaction;

(c) about cases where—

(i) any such bid or transaction is, or has been, contemplated or apprehended; or

(ii) an announcement is made denying that any such bid or transaction is intended.

(2) The rules may—

- (a) make different provision for different purposes;
- (b) make provision subject to exceptions or exemptions;
- (c) contain incidental, supplemental, consequential or transitional provision;
- (d) authorize the Panel to dispense with or modify the application of rules in particular cases and by reference to any circumstances.

(3) The rules made by virtue of paragraph (d) shall require the Panel to give reasons for acting as mentioned in that paragraph.

(4) The rules may contain provision conferring power on the Panel to impose sanctions on a person who—

- (a) acts in breach of rules; or
- (b) fails to comply with a direction given by virtue of section 300.

(5) The rules may provide for fees or charges to be payable to the Panel for the purpose of meeting any part of its expenses.

(6) The rules shall be made available to the public, with or without payment, in whatever way the Panel thinks appropriate.

(7) A person shall not to be taken to have contravened a rule if he shows that at the time of the alleged contravention, the text of the rule had not been made available as required by subsection (6).

(8) The Panel may promulgate or adopt a code of practice on the conduct of take overs and mergers.

299.—(1) The Panel may give rulings on the interpretation, Panel rulings
application or effect of the rules.

(2) To the extent and in the circumstances specified in the rules, and subject to any review or appeal, a ruling shall have binding effect.

300. Rules may contain provision conferring power on the Directions
Panel to give any direction that appears to the Panel to be necessary in order—

- (a) to restrain a person from acting or continuing to act in breach of rules;
- (b) to restrain a person from doing or continuing to do a particular thing, pending determination of whether that or any other conduct of his is or would be a breach of rules;
- (c) otherwise to secure compliance with rules.

Power to
require
documents
and
information

301.—(1) The Panel may by notice in writing require a person—

(a) to produce any documents that are specified or described in the notice;

(b) to provide, in the form and manner specified in the notice, such information as may be specified or described in the notice.

(2) A requirement under subsection (1) shall be complied with—

(a) at a place specified in the notice; and

(b) before the end of such reasonable period as may be so specified.

(3) This section shall apply only to documents and information reasonably required in connection with the exercise by the Panel of its functions.

(4) The Panel may require—

(a) any document produced to be authenticated; or

(b) any information provided whether in a document or otherwise to be verified, in such manner as it may reasonably require.

(5) The Panel may authorize a person to exercise any of its powers under this section.

(6) A person exercising a power by virtue of subsection (5) shall, if required to do so, produce evidence of his authority to exercise the power.

(7) The production of a document in pursuance of this section shall not affect any lien that a person has on the document.

(8) The Panel may take copies of or extracts from a document produced in pursuance of this section.

(9) A reference in this section to the production of a document includes a reference to the production of—

(a) a hard copy of information recorded otherwise than in hard copy form; or

(b) information in a form from which a hard copy can be readily obtained.

(10) A person is not required by this section to disclose documents or information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.

302.—(1) This section shall apply to information—

(a) relating to the private affairs of an individual; or

(b) relating to any particular business, that is provided to the Panel in connection with the exercise of its functions.

Restrictions
on disclosure
of
information

(2) No such information may, during the lifetime of the individual or so long as the business continues to be carried on, be disclosed without the consent of that individual or (as the case may be) the person for the time being carrying on that business.

(3) Subsection (2) shall not apply to any disclosure of information that—

(a) is made for the purpose of facilitating the carrying out by the Panel of any of its functions; or

(b) such information as the Minister may by regulation permit as likely to facilitate the exercise of a function of a public nature; or have the effect of permitting disclosures to be made to a body other than one that exercises functions of a public nature in a country outside Malawi;

(4) Subsection (2) shall not apply to—

(a) the disclosure by the Registrar under this Act, Registrar of Financial Institutions, or a licensed stock exchange, of information disclosed to it by the Panel in reliance of subsection (3);

(b) the disclosure of such information by anyone who has obtained it directly or indirectly from an authority within subsection (4) (a); or

(c) any other person or body that exercises functions of a public nature, under legislation in a country other than Malawi that are similar to the Panel's functions or those of the Registrar and of the Registrar of Financial Institutions.

(5) This section shall not prohibit the disclosure of information if the information is or has been available to the public from any other source.

303.—(1) Any person who discloses information in contravention of section 302 commits an offence, unless—

(a) he did not know, and had no reason to suspect, that the information had been provided as mentioned in section 302; or

(b) he took all reasonable steps and exercised all due diligence to avoid the commission of the offence.

Contravention
of the
restrictions on
disclosure of
information

(2) A person convicted of an offence under this section shall be liable to imprisonment for 2 years and a fine as shall be determined by the Court taking into account the gravity of the offence.

Panel's duty of cooperation

304.—(1) The Panel shall take such steps as it considers appropriate to co-operate with—

(a) the Registrar, the Registrar of Financial Institutions, and a licensed stock exchange;

(b) any other person or body that exercises functions of a public nature, under legislation in any country outside Malawi that appear to the Panel to be similar to its own functions or those under paragraph (a).

(2) Cooperation may include the sharing of information that the Panel is not prevented from disclosing.

Appeals

305. An appeal against the decision of the Panel shall lie to the Court.

Failure to comply with rules about bid documentation

306.—(1) This section shall apply where a takeover bid is made for a company that is publicly traded on a licensed exchange in Malawi.

(2) Where an offer document published in respect of the bid does not comply with offer document rules, an offence is committed by—

(a) the person making the bid; and

(b) where the person making the bid is a body of persons, any director, officer or member of that body who caused the document to be published

(3) A person shall be in contravention of subsection (2) only if—

(a) he knew that the offer document did not comply, or was reckless as to whether it complied; and

(b) he failed to take all reasonable steps to secure that it did comply.

(4) Where a response document published in respect of the bid does not comply with response document rules, by any director or other officer of the company referred to in subsection (1) who—

(a) knew that the response document did not comply, or was reckless as to whether it complied; and

(b) failed to take all reasonable steps to secure that it did comply shall have contravened subsection (2).

(5) Where there is a contravention of subsection (2) (b) or (4) by a company or other body corporate ("the relevant body")—

(a) subsection (2) (b) has effect as if the reference to a director, officer or member of the person making the bid included a reference to a director, officer or member of the relevant body;

(b) subsection (4) has effect as if the reference to a director or other officer of the company referred to in subsection (1) included a reference to a director, officer or member of the relevant body.

(6) A person who contravenes the requirements of this section shall be liable to a fine in accordance with the prevailing schedule of penalties.

307. The Panel shall be capable of—

Panel as
party to
proceedings

(a) bringing proceedings under this Division in its own name;

(b) bringing or defending any other proceedings in its own name.

308. If, on the application of the Panel, the Court is satisfied—

Enforcement
by the Court

(a) that there is a reasonable likelihood that a person will contravene a rule-based requirement; or

(b) that a person has contravened a rule-based requirement or a disclosure requirement,

the Court may make any order it thinks fit to secure compliance with the requirement.

309.—(1) Neither the Panel, nor any person within subsection (2), is to be liable in damages for anything done or omitted to be done in, or in connection with, the discharge or purported discharge of the Panel's functions.

Exemption
from liability
in damages

(2) A person is within this subsection if—

(a) he is or is acting as, a member, officer or member of staff of the Panel; or

(b) he is a person authorized under section 298.

(3) Subsection (1) does not apply if the act or omission is shown to have been in bad faith.

310. A statement made by a person in response to—

Privilege
against self-
incrimination

(a) a requirement under section 301 (1); or

(b) an order made by the Court under section 308 to secure compliance with such a requirement may not be used against him in criminal proceedings in which he is charged with an offence to which this subsection applies.

Division V—Take Over Offers

Meaning of
"take-over
offer"

311.—(1) For the purposes of this Part, an offer to acquire shares in a company is a "takeover offer" if the conditions set out in subsections (2) and (3) are satisfied in relation to the offer.

(2) The first condition is that it is an offer to acquire—

(a) all the shares in a company; or

(b) where there is more than one class of shares in a company, all the shares of one or more classes, other than shares that at the date of the offer are already held by the offeror.

(3) The second condition is that the terms of the offer are the same—

(a) in relation to all the shares to which the offer relates; or

(b) where the shares to which the offer relates include shares of different classes, in relation to all the shares of each class.

(4) In subsections (1) to (3), "shares" means shares, other than relevant treasury shares, that have been allotted on the date of the offer.

(5) A takeover offer may include among the shares to which it relates—

(a) all or any shares that are allotted after the date of the offer but before a specified date;

(b) all or any relevant treasury shares that cease to be held as treasury shares before a specified date;

(c) all or any other relevant treasury shares.

(6) In this section—

"relevant treasury shares" means shares that—

(a) are held by the company as treasury shares on the date of the offer; or

(b) become shares held by the company as treasury shares after that date but before a specified date;

"specified date" means a date specified in or determined in accordance with the terms of the offer.

(7) Where the terms of an offer make provision for their revision and for acceptances on the previous terms to be treated as acceptances on the revised terms, then, if the terms of the offer are revised in accordance with that provision—

(a) the revision is not to be regarded for the purposes of this Part as the making of a fresh offer; and

(b) references in this Division to the date of the offer are accordingly to be read as references to the date of the original offer.

312.—(1) The reference in section 311 (2) to shares already held by the offeror includes a reference to shares that he has contracted to acquire, whether unconditionally or subject to conditions being met. This is subject to subsection (2).

Shares
already held
by the offeror

(2) The reference in section 311 (2) to shares already held by the offeror shall not include a reference to shares that are the subject of a contract—

(a) intended to secure that the holder of the shares will accept the offer when it is made; and

(b) entered into—

(i) by deed and for no consideration;

(ii) for consideration of negligible value; or

(iii) for consideration consisting of a promise by the offeror to make the offer.

(4) The condition in section 311 (2) shall be treated as satisfied where—

(a) the offer does not extend to shares that associates of the offeror hold or have contracted to acquire whether unconditionally or subject to conditions being met; and

(b) the condition would be satisfied if the offer did extend to those shares.

313.—(1) The condition in section 311 (3) on terms of offer to be the same for all shares or all shares of particular classes, is treated as satisfied where subsection (2) or (3) below applies.

Cases where
offer treated
as being in
the
same terms

(2) This subsection shall apply where—

(a) shares carry an entitlement to a particular dividend which other shares of the same class, by reason of being allotted later, do not carry;

(b) there is a difference in the value of consideration offered for the shares allotted earlier as against that offered for those allotted later;

(c) that difference merely reflects the difference in entitlement to the dividend; and

(d) the condition in section 311 (3) would be satisfied but for that difference.

(3) This subsection shall apply where—

(a) the law of a country outside Malawi—

(i) precludes an offer of consideration in the form, or any of the forms, specified in the terms of the offer ("the specified form"); or

(ii) precludes it except after compliance by the offeror with conditions with which he is unable to comply or which he regards as unduly onerous;

(b) the persons to whom an offer of consideration in the specified form is precluded are able to receive consideration in another form that is of substantially equivalent value; and

(c) the condition in section 311 (3) would be satisfied but for the fact that an offer of consideration in the specified form to those persons is precluded.

Shares to which an offer relates

314.—(1) Where a takeover offer is made and, during the period beginning with the date of the offer and ending when the offer can no longer be accepted, the offeror acquires or unconditionally contracts to acquire any of the shares to which the offer relates but does not do so by virtue of acceptances of the offer, those shares shall be treated, for the purposes of this Division, as excluded from those to which the offer relates.

(2) For the purposes of this Division, shares that an associate of the offeror holds or has contracted to acquire, whether at the date of the offer or subsequently, shall not be treated as shares to which the offer relates, even if the offer extends to such shares.

In this subsection "contracted" means contracted unconditionally or subject to conditions being met.

(3) This section is subject to section 316 (8) and (9).

Effect of impossibility of communicating or accepting offer

315.—(1) Where there are holders of shares in a company to whom an offer to acquire shares in the company is not communicated, that does not prevent the offer from being a takeover offer for the purposes of this Division if—

(a) those shareholders have no registered address in Malawi;

(b) the offer was not communicated to those shareholders in order not to contravene the law of a country outside Malawi; and

(c) the offer is published in the *Gazette*, or a notice is published in the *Gazette*, specifying the address a website containing the offer.

(2) Where an offer is made to acquire shares in a company and there are persons for whom, by reason of the law of a country outside Malawi, it is impossible to accept the offer, or more difficult to do so, that does not prevent the offer from being a takeover offer for the purposes of this Division.

(3) It is not to be inferred—

(a) that an offer which is not communicated to every holder of shares in the company cannot be a takeover offer for the purposes of this Part unless the requirements of paragraphs (a) to (c) of subsection (1) are met; or

(b) that an offer which is impossible, or more difficult, for certain persons to accept cannot be a takeover offer for those purposes unless the reason for the impossibility or difficulty is the one mentioned in subsection (2).

“SQUEEZE-OUT”

316.—(1) Subsection (2) shall apply in a case where a takeover offer does not relate to shares of different classes.

Right of
offer or to
buy out
minority
shareholder

(2) If the offeror has, by virtue of acceptances of the offer, acquired or unconditionally contracted to acquire—

(a) not less than 90 per cent in value of the shares to which the offer relates; and

(b) in a case where the shares to which the offer relates are voting shares, not less than ninety per cent of the voting rights carried by those shares, he may give notice to the holder of any shares to which the offer relates which the offeror has not acquired or unconditionally contracted to acquire that he desires to acquire those shares.

(3) Subsection (4) applies in a case where a takeover offer relates to shares of different classes.

(4) If the offeror has, by virtue of acceptances of the offer, acquired or unconditionally contracted to acquire—

(a) not less than ninety per cent in value of the shares of any class to which the offer relates; and

(b) in a case where the shares of that class are voting shares, not less than ninety per cent of the voting rights carried by those shares, he may give notice to the holder of any shares of that class to which the offer relates which the offeror has not acquired or unconditionally contracted to acquire that he desires to acquire those shares.

(5) In the case of a takeover offer which includes among the shares to which it relates—

(a) shares that are allotted after the date of the offer; or

(b) relevant treasury shares within the meaning of section 320 that cease to be held as treasury shares after the date of the offer, the offeror's entitlement to give a notice under subsection (2) or (4) on any particular date shall be determined as if the shares to which the offer relates did not include any allotted, or ceasing to be held as treasury shares, on or after that date.

(6) Subsection (7) applies where—

(a) the requirements for the giving of a notice under subsection (2) or (4) are satisfied; and

(b) there are shares in the company which the offeror, or an associate of his, has contracted to acquire subject to conditions being met, and in relation to which the contract has not become unconditional.

(7) The offeror's entitlement to give a notice under subsection (2) or (4) shall be determined as if—

(a) the shares to which the offer relates included shares falling within subsection (6) (b); and

(b) in relation to shares falling within that paragraph, the words "by virtue of acceptances of the offer" in subsection (2) or (4) were omitted.

(8) Where—

(a) a takeover offer is made;

(b) during the period beginning with the date of the offer and ending when the offer can no longer be accepted, the offeror acquires or unconditionally contracts to acquire any of the shares to which the offer relates, but does not do so by virtue of acceptances of the offer; and

(c) subsection (10) shall apply,

then for the purposes of this section those shares are not excluded by section 314 (1) from those to which the offer relates, and the offeror is treated as having acquired or contracted to acquire them by virtue of acceptances of the offer.

(9) Where—

(a) a takeover offer is made;

(b) during the period beginning with the date of the offer and ending when the offer can no longer be accepted, an associate of the offeror acquires or unconditionally contracts to acquire any of the shares to which the offer relates; and

(c) subsection (10) shall apply.

then for the purposes of this section those shares are not excluded by section 314 (2) from those to which the offer relates.

(10) This subsection shall apply if—

(a) at the time the shares are acquired or contracted to be acquired as mentioned in subsection (8) or (9) as the case may be, the value of the consideration for which they are acquired or contracted to be acquired ("the acquisition consideration") does not exceed the value of the consideration specified in the terms of the offer, or

(b) those terms are subsequently revised so that when the revision is announced the value of the acquisition consideration, at the time mentioned in paragraph (a), no longer exceeds the value of the consideration specified in those terms.

317.—(1) A notice under section 316 must be given in the prescribed manner.

Further provision about notices given under section 316

(2) No notice may be given under section 316 (2) or (4) after the end of—

(a) the period of 3 months beginning with the day after the last day on which the offer can be accepted; or

(b) the period of 6 months beginning with the date of the offer, where that period ends earlier and the offer is one to which subsection (3) below applies.

(3) At the time when the offeror first gives a notice under section 316 in relation to an offer, he must send to the company—

(a) a copy of the notice; and

(b) a statutory declaration by him in the prescribed form, stating that the conditions for the giving of the notice are satisfied.

(4) Where the offeror is a company whether or not a company within the meaning of this Act the statutory declaration must be signed by a director.

(5) Where a person fails to send a copy of a notice or a statutory declaration as required by subsection (3), or makes such a

declaration for the purposes of that subsection knowing it to be false or without having reasonable grounds for believing it to be true he shall be liable to a fine in accordance with the prevailing schedule of penalties.

(6) It is a defence for failing to send a copy of a notice as required by subsection (3) for a person to prove that he took reasonable steps for securing compliance with that subsection.

Effect of
notice under
section 316

318.—(1) Subject to section 323 this section applies where the offeror gives a shareholder a notice under section 316.

(2) The offeror is entitled and bound to acquire the shares to which the notice relates on the terms of the offer.

(3) Where the terms of an offer are such as to give the shareholder a choice of consideration, the notice must give particulars of the choice and state—

(a) that the shareholder may, within six weeks from the date of the notice, indicate his choice by a written communication sent to the offeror at an address specified in the notice; and

(b) which consideration specified in the offer will apply if he does not indicate a choice.

(4) Subsection (3) applies whether or not any time-limit or other conditions applicable to the choice under the terms of the offer can still be complied with.

(5) If the consideration offered to or as the case may be chosen by the shareholder—

(a) is not cash and the offeror is no longer able to provide it; or

(b) was to have been provided by a third party who is no longer bound or able to provide it, the consideration is to be taken to consist of an amount of cash, payable by the offeror, which at the date of the notice is equivalent to the consideration offered or as the case may be chosen.

(6) At the end of 6 weeks from the date of the notice the offeror shall immediately—

(a) send a copy of the notice to the company; and

(b) pay or transfer to the company the consideration for the shares to which the notice relates.

Where the consideration consists of shares or securities to be allotted by the offeror, the reference in paragraph (b) to the transfer of the consideration shall be read as a reference to the allotment of the shares or securities to the company.

(7) If the shares to which the notice relates are registered, the copy of the notice sent to the company under subsection (6) (a) must be accompanied by an instrument of transfer executed on behalf of the holder of the shares by a person appointed by the offeror. On receipt of that instrument the company must register the offeror as the holder of those shares.

(8) If the shares to which the notice relates are transferable by the delivery of warrants or other instruments, the copy of the notice sent to the company under subsection (6) (a) must be accompanied by a statement to that effect. On receipt of that statement the company must issue the offeror with warrants or other instruments in respect of the shares, and those already in issue in respect of the shares become void.

(9) The company shall hold any money or other consideration received by it under subsection (6) (b) on trust for the person who, before the offeror acquired them, was entitled to the shares in respect of which the money or other consideration was received.

319.—(1) This section shall apply where an offeror pays or transfers consideration to the company under section 318 (6).

Further
provision
about
consideration
held on trust

(2) The company shall pay into a separate bank account that complies with subsection (3)—

(a) any money it receives under paragraph (b) of section 318 (6); and

(b) any dividend or other sum accruing from any other consideration it receives under that paragraph.

(3) A bank account complies with this subsection if the balance on the account—

(a) bears interest at an appropriate rate; and

(b) can be withdrawn by such notice (if any) as is appropriate.

(4) If—

(a) the person entitled to the consideration held on trust by virtue of section 318 (9) cannot be found; and

(b) subsection (5) applies, the consideration, together with any interest, dividend or other benefit that has accrued from it, shall be paid into Court.

(5) This subsection shall apply where—

(a) reasonable enquiries have been made at reasonable intervals to find the person; and

(b) 12 years have elapsed since the consideration was received, or the company is wound-up.

(6) If the person entitled to the consideration held on trust by virtue of section 318 (9) cannot be found and subsection (5) applies—

(a) the trust terminates;

(b) the company or, if the company is wound-up, the liquidator must sell any consideration other than cash and any benefit other than cash that has accrued from the consideration; and

(c) a sum representing—

(i) the consideration so far as it is cash;

(ii) the proceeds of any sale under paragraph (b); and

(iii) any interest, dividend or other benefit that has accrued from the consideration, must be deposited in the name of the Registrar of the Court in a separate bank account complying with subsection (3) and the receipt for the deposit must be transmitted to the Registrar of the Court.

“SELL-OUT”

Right of
minority
shareholder
to be bought
out by offeror

320.—(1) Subsections (2) and (3) shall apply in a case where a takeover offer relates to all the shares in a company.

(2) For this purpose a takeover offer relates to all the shares in a company if it is an offer to acquire all the shares in the company within the meaning of section 311.

(3) The holder of any voting shares to which the offer relates who has not accepted the offer may require the offeror to acquire those shares if, at any time before the end of the period within which the offer can be accepted—

(a) the offeror has by virtue of acceptances of the offer acquired or unconditionally contracted to acquire some but not all of the shares to which the offer relates; and

(b) those shares, with or without any other shares in the company which he has acquired or contracted to acquire whether unconditionally or subject to conditions being met.—

(i) amount to not less than 90 per cent in value of all the voting shares in the company, or would do so but for section 327 (1); and

(ii) carry not less than 90 per cent of the voting rights in the company (or would do so but for section 327 (1)).

(4) The holder of any non-voting shares to which the offer relates who has not accepted the offer may require the offeror to acquire those shares if, at any time before the end of the period within which the offer can be accepted—

(a) the offeror has by virtue of acceptances of the offer acquired or unconditionally contracted to acquire some but not all of the shares to which the offer relates; and

(b) those shares, with or without any other shares in the company which he has acquired or contracted to acquire whether unconditionally or subject to conditions being met, amount to not less than ninety per cent in value of all the shares in the company or would do so but for section 327 (1).

(5) If a takeover offer relates to shares of one or more classes and at any time before the end of the period within which the offer can be accepted—

(a) the offeror has by virtue of acceptances of the offer acquired or unconditionally contracted to acquire some but not all of the shares of any class to which the offer relates; and

(b) those shares, with or without any other shares of that class which he has acquired or contracted to acquire whether unconditionally or subject to conditions being met—

(i) amount to not less than ninety per cent in value of all the shares of that class; and

(ii) in a case where the shares of that class are voting shares, carry not less than ninety per cent of the voting rights carried by the shares of that class, the holder of any shares of that class to which the offer relates who has not accepted the offer may require the offeror to acquire those shares.

(6) For the purposes of subsections (3) to (5), in calculating ninety per cent of the value of any shares, shares held by the company as treasury shares are to be treated as having been acquired by the offeror.

(7) Subsection (8) applies where—

(a) a shareholder exercises rights conferred on him by subsection (3), (4) or (5);

(b) at the time when he does so, there are shares in the company which the offeror has contracted to acquire subject to conditions being met, and in relation to which the contract has not become unconditional; and

(c) the requirement imposed by subsection (3) (b), (4) (b) or (5) (b) (as the case may be) would not be satisfied if those shares were not taken into account.

(8) The shareholder is treated for the purposes of section 322 as not having exercised his rights under this section unless the requirement imposed by paragraph (b) of subsection (3), (4) or (5) as the case may be would be satisfied if—

(a) the reference in that paragraph to other shares in the company which the offeror has contracted to acquire unconditionally or subject to conditions being met were a reference to such shares which he has unconditionally contracted to acquire; and

(b) the reference in that subsection to the period within which the offer can be accepted were a reference to the period referred to in section 321 (2).

(9) A reference in section 320 (3) (b), (4) (b), (5) (b), (7) or (8) to shares which the offeror has acquired or contracted to acquire includes a reference to shares which an associate of his has acquired or contracted to acquire.

Further
provision
about rights
to be
bought out

321.—(1) Rights conferred on a shareholder by subsection (3), (4) or (5) of section 320 are exercisable by a written communication addressed to the offeror.

(2) Rights conferred on a shareholder by section 320 (3), (4) or (5) shall not be exercisable after the end of the period of three months from—

(a) the end of the period within which the offer can be accepted; or

(b) if later, the date of the notice that must be given under subsection (3) below.

(3) Within 1 month of the time specified in subsection (2), (3) or (4) (as the case may be) of that section, the offeror must give any shareholder who has not accepted the offer notice in the prescribed manner of—

(a) the rights that are exercisable by the shareholder under that subsection; and

(b) the period within which the rights are exercisable.

If the notice is given before the end of the period within which the offer can be accepted, it shall state that the offer is still open for acceptance.

(4) Subsection (3) shall not apply if the offeror has given the shareholder a notice in respect of the shares in question under section 316.

(5) Where a person fails to comply with subsection (3), he shall be liable to a fine in accordance with the prevailing schedule of penalties.

(6) It shall be a defence to failure to comply with subsection (3) for a person to prove that he took reasonable steps for securing compliance with that subsection.

322.—(1) Subject to section 323, this section applies where a shareholder exercises his rights under section 320 in respect of any shares held by him. Effect of right to be bought out

(2) The offeror shall be entitled and bound to acquire those shares on the terms of the offer or on such other terms as may be agreed.

(3) Where the terms of an offer are such as to give the shareholder a choice of consideration—

(a) the shareholder may indicate his choice when requiring the offeror to acquire the shares; and

(b) the notice given to the shareholder under section 321 (3)—

(i) must give particulars of the choice and of the rights conferred by this subsection; and

(ii) may state which consideration specified in the offer will apply if he does not indicate a choice.

The reference in subsection (2) to the terms of the offer is to be read accordingly.

(4) Subsection (3) shall apply whether or not any time-limit or other conditions applicable to the choice under the terms of the offer can still be complied with.

(5) If the consideration offered to, or as the case may be, chosen by, the shareholder—

(a) is not cash and the offeror is no longer able to provide it; or

(b) was to have been provided by a third party who is no longer bound or able to provide it,

the consideration is to be taken to consist of an amount of cash, payable by the offeror, which at the date when the shareholder requires the offeror to acquire the shares is equivalent to the consideration offered or as the case may be chosen.

Applications
to the court

323.—(1) Where a notice is given under section 316 to a shareholder the Court may, on an application made by him, order—

(a) that the offeror is not entitled and bound to acquire the shares to which the notice relates; or

(b) that the terms on which the offeror is entitled and bound to acquire the shares shall be such as the Court thinks fit.

(2) An application under subsection (1) must be made within 6 weeks from the date on which the notice referred to in that subsection was given.

If an application to the Court under subsection (1) is pending at the end of that period, section 318 (6) shall not have effect until the application has been disposed of.

(3) Where a shareholder exercises his rights under section 320 in respect of any shares held by him, the Court may, on an application made by him or the offeror, order that the terms on which the offeror is entitled and bound to acquire the shares shall be such as the Court thinks fit.

(4) On an application under subsection (1) or (3)—

(a) the Court may not require consideration of a higher value than that specified in the terms of the offer ("the offer value") to be given for the shares to which the application relates unless the holder of the shares shows that the offer value would be unfair;

(b) the Court may not require consideration of a lower value than the offer value to be given for the shares.

(5) No order for costs or expenses may be made against a shareholder making an application under subsection (1) or (3) unless the Court considers that—

(a) the application was unnecessary, improper or vexatious;

(b) there has been unreasonable delay in making the application; or

(c) there has been unreasonable conduct on the shareholder's part in conducting the proceedings on the application.

(6) A shareholder who has made an application under subsection (1) or (3) shall give notice of the application to the offeror.

(7) An offeror who is given notice of an application under subsection (1) or (3) shall give a copy of the notice to—

(a) any person, other than the applicant, to whom a notice has been given under section 316; and

(b) any person who has exercised his rights under section 320.

(8) An offeror who makes an application under subsection (3) shall give notice of the application to—

(a) any person to whom a notice has been given under section 315;

(b) any person who has exercised his rights under section 320;

(9) Where a takeover offer has not been accepted to the extent necessary for entitling the offeror to give notices under subsection (2) or (4) of section 316 the Court may, on an application made by him, make an order authorizing him to give notices under that subsection if it is satisfied that—

(a) the offeror has after reasonable enquiry been unable to trace one or more of the persons holding shares to which the offer relates;

(b) the requirements of that subsection would have been met if the person, or all the persons, mentioned in paragraph (a) above had accepted the offer; and

(c) the consideration offered is fair and reasonable.

(10) The Court may not make an order under subsection (9) unless it considers that it is just and equitable to do so having regard, in particular, to the number of shareholders who have been traced but who have not accepted the offer.

324.—(1) In the case of a takeover offer made by two or more persons jointly, this Division has effect in accordance with this section. Joint offers

(2) The conditions for the exercise of the rights conferred by section 316 shall be satisfied—

(a) in the case of acquisitions by virtue of acceptances of the offer, by the joint offerors acquiring or unconditionally contracting to acquire the necessary shares jointly;

(b) in other cases, by the joint offerors acquiring or unconditionally contracting to acquire the necessary shares either jointly or separately.

(3) The conditions for the exercise of the rights conferred by section 320 shall be satisfied—

(a) in the case of acquisitions by virtue of acceptances of the offer, by the joint offerors acquiring or unconditionally contracting to acquire the necessary shares jointly;

(b) in other cases, by the joint offerors acquiring or contracting, whether unconditionally or subject to conditions being met, to acquire the necessary shares either jointly or separately.

(4) Subject to the following provisions, the rights and obligations of the offeror under sections 316 to 322 are respectively joint rights and joint and several obligations of the joint offerors.

(5) A provision of sections 316 to 323 that requires or authorizes a notice or other document to be given or sent by or to the joint offerors is complied with if the notice or document is given or sent by or to any of them.

(6) The statutory declaration required by section 317 (4) shall be made by all of the joint offerors and, where one or more of them is a company, signed by a director of that company.

(7) In sections 311 to 314, 316 (9), 318 (6), 320(8) and 325 references to the offeror are to be read as references to the joint offerors or any of them.

(8) In section 318(7) and (8) references to the offeror shall be read as references to the joint offerors or such of them as they may determine.

(9) In sections 318 (5) (a) and 322 (5) (a) references to the offeror being no longer able to provide the relevant consideration are to be read as references to none of the joint offerors being able to do so.

(10) In section 323 references to the offeror shall be read as references to the joint offerors, except that—

(a) an application under subsection (3) or (9) may be made by any of them; and

(b) the reference in subsection (9) (a) to the offeror having been unable to trace one or more of the persons holding shares shall be read as a reference to none of the offerors having been able to do so.

Associates

325.—(1) In this Division, “associate”, in relation to an offeror, means—

(a) a nominee of the offeror;

(b) a holding company, subsidiary or fellow subsidiary of the offeror or a nominee of such a holding company, subsidiary or fellow subsidiary;

(c) a body corporate in which the offeror is substantially interested;

(d) a person who is, or is a nominee of, a party to a share acquisition agreement with the offeror; or

(e) where the offeror is an individual, his spouse or civil partner and any minor child or step-child of his.

(2) For the purposes of subsection (1) (b), a company shall be a fellow subsidiary of another body corporate if both are subsidiaries of the same body corporate but neither is a subsidiary of the other.

(3) For the purposes of subsection (1) (c) an offeror shall have a substantial interest in a body corporate if—

(a) the body or its directors are accustomed to act in accordance with his directions or instruction; or

(b) he is entitled to exercise or control the exercise of one-third or more of the voting power at general meetings of the body.

(4) For the purposes of subsection (1) (d) an agreement shall be a share acquisition agreement if—

(a) it is an agreement for the acquisition of, or of an interest in, shares to which the offer relates;

(b) it includes provisions imposing obligations or restrictions on any one or more of the parties to it with respect to their use, retention or disposal of such shares, or their interests in such shares, acquired in pursuance of the agreement, whether or not together with any other shares to which the offer relates or any other interests of theirs in such shares; and

(c) it is not an excluded agreement under subsection (5).

(5) An agreement shall be an "excluded agreement"—

(a) if it is not legally binding, unless it involves mutuality in the undertakings, expectations or understandings of the parties to it; or

(b) if it is an agreement to underwrite or sub-underwrite an offer of shares in a company, provided the agreement is confined to that purpose and any matters incidental to it.

(6) The reference in subsection (4) (b) to the use of interests in shares is to the exercise of any rights or of any control or influence arising from those interests including the right to enter into an

agreement for the exercise, or for control of the exercise, of any of those rights by another person.

(7) In this section—

(a) "agreement" includes any agreement or arrangement;

(b) references to provisions of an agreement include—

(i) undertakings, expectations or understandings operative under an arrangement; and

(ii) any provision whether express or implied and whether absolute or not.

Convertible
securities

326.—(1) For the purposes of this Division, securities of a company are treated as shares in the company if they are convertible into or entitle the holder to subscribe for such shares. References to the holder of shares or a shareholder are to be read accordingly.

(2) Subsection (1) shall not to be read as requiring any securities to be treated—

(a) as shares of the same class as those into which they are convertible or for which the holder is entitled to subscribe; or

(b) as shares of the same class as other securities by reason only that the shares into which they are convertible or for which the holder is entitled to subscribe are of the same class.

Debentures
carrying
voting rights

327.—(1) For the purposes of this Division, debentures issued by a company to which subsection (2) applies are treated as shares in the company if they carry voting rights.

(2) This subsection applies to a company that has voting shares, or debentures carrying voting rights, which are admitted to trading on a regulated market.

(3) In this Part, in relation to debentures treated as shares by virtue of subsection (1)—

(a) references to the holder of shares or a shareholder are to be read accordingly;

(b) references to shares being allotted are to be read as references to debentures being issued.

Interpretation
in this Part

328.—(1) In this Part—

"the company" means the company whose shares are the subject of a takeover offer;

"date of the offer" means—

(a) where the offer is published, the date of publication;

(b) where the offer is not published, or where any notices of the offer are given before the date of publication, the date when notices of the offer (or the first such notices) are given; and references to the date of the offer are to be read in accordance with section 311 (7) (revision of offer terms) where that applies;

"non-voting shares" means shares that are not voting shares;

"offeror" means, subject to section 324, the person making a takeover offer;

"voting rights" means rights to vote at general meetings of the company, including rights that arise only in certain circumstances;

"voting shares" means shares carrying voting rights.

(2) For the purposes of this Part, a person contracts unconditionally to acquire shares if his entitlement under the contract to acquire them is not, or is no longer, subject to conditions, or if all conditions to which it was subject have been met, a reference to a contract becoming unconditional shall be read accordingly.

PART XIII—WINDING-UP AND LIQUIDATION

329. The provisions of the Insolvency Act, 2013, apply to all companies incorporated or registered under this Act.

Application
of the
insolvency
Act
Act No. 24 of
2013

330. A company may be wound-up in accordance with the provisions of the Insolvency Act, 2013 where the company meets the requirements of that Act.

Winding-up
Act No. 24 of
2013

PART XIV—REMEDIES AND ENFORCEMENT

Division I—Company Investigations

331.—(1) The Minister, The Registrar or the Registrar of Financial Institutions where the company's securities are publicly traded within the meaning of the Securities Act, 2010, may appoint one or more competent inspectors to investigate the affairs of a company and to report on them in such manner as he may direct.

Power to
appoint
inspectors
Act No. 20 of
2010

(2) The appointment may be made if it appears that there are circumstances suggesting—

(a) that the company's affairs have been or are being conducted with intent to defraud its creditors or the creditors of

any other person, or otherwise for a fraudulent or unlawful purpose, or in a manner which is unfairly prejudicial to some part of its members; or

(b) that any actual or proposed act or omission of the company including an act or omission on its behalf is, or would be prejudicial, or that the company was formed for any fraudulent or unlawful purpose; or

(c) that persons concerned with the company's formation or the management of its affairs have in connection therewith been guilty of, misfeasance or other deceitful misconduct towards it or towards its members; or

(d) that the company's members have not been given all the information with respect to its affairs which they might reasonably expect;

(e) any other circumstances that warrant an investigation of the company's affairs.

Power to make
regulations
for the
investigation
of companies
Act No. of
2010

332. The Minister or the Registrar of Financial Institutions where the company's securities are publicly traded within the meaning of the Securities Act, 2010, shall make regulations providing for the investigation of companies.

Cost of
investigations

333.—(1) The expenses of an investigation shall be defrayed in the first instance by the company and subsequently be recovered from persons found liable as a result of the investigation.

(2) A person convicted on a prosecution instituted as a result of the investigation, shall be ordered to pay, in whole or in part, the costs of the investigation.

(3) No prosecution for an offence under this section shall be instituted except by, or with the written consent of, the Director of Public Prosecutions.

(4) Where under subsection (3) the Director of Public Prosecutions withholds consent to any prosecution under this Act, he shall—

(a) provide to the Minister, or the Registrar of Financial Institutions reasons in writing, devoid of any consideration other than those of fact and the law, for the withholding of that consent; and

(b) inform the Legal Affairs Committee of Parliament of his decision within 30 days of the decision.

334.—(1) An inspector who makes an investigation under section 331, may, and if so directed by the Minister, the Registrar or the Registrar of Financial Institutions, make interim reports. Report of
inspector

(2) A copy of the inspector's final report shall be forwarded to the Registrar and to the registered office of the company.

(3) The Minister, the Registrar or the Registrar of Financial Institutions may, where he is of the opinion that it is necessary in the public interest to do so, cause the report to be published provided that where the report is not so published reason therefor shall be given in writing to the Legal Affairs Committee of Parliament within 30 days of the decision.

(4) Where, from a report of an inspector, it appears to the Minister, the Registrar or the Registrar of Financial Institutions that proceedings ought in the public interest to be brought by a company dealt with by the report—

(a) for the recovery of damages in respect of any fraud, misfeasance or other misconduct in connection with—

- (i) the promotion or formation of that company; or
- (ii) the management of its affairs; or

(b) for the recovery of any property of the company which has been misapplied or wrongly retained, the Minister or Registrar of Financial Institutions may direct the Registrar to bring proceedings for that purpose in the name of the company.

(5) Where proceedings are brought in the public interest under subsection (4) the Registrar may, if he is not the party commencing the proceedings, if he so wishes, intervene as an interested party in any such proceedings.

(6) Where from a report of an inspector it appears that any qualified auditor—

(a) has been guilty of misconduct; or

(b) has conducted an audit in a manner which renders him in the opinion of the inspector unfit to be a qualified auditor, the Minister shall refer the matter to the Institute prescribed by the Public Accountants and Auditors Act, 2013 for action.

Act No. 2013 of

(7) Where from a report of an inspector it appears to the Registrar that in the case of any public company or private company—

(a) the use of—

- (i) a parent company or any subsidiary company;
- (ii) shares with restricted voting rights or special rights; or

(iii) any voting trust or arrangement, by any member has been made in order to confer or maintain control in that company; and

(b) such control unfairly discriminates against or is unfairly prejudicial to other members of the company, the Registrar may apply to the Court under section 343 for an order under that section.

(8) A report of inspectors appointed under section 331 shall, if certified by the Registrar as a true copy, be admissible in any legal proceedings as evidence of the opinion of inspectors in relation to any matter contained in the report.

Duty to
cooperate with
inspectors

335. If in the course of an investigation, it appears to the inspectors that they may need information from a person, body corporate, association, statutory or enforcement body, it shall be under duty to co-operate with the inspectors.

Power to
terminate or
suspend any
investigation
in relation
to a company

336. The Minister shall have powers to suspend or terminate an investigation if it appears that the matters in respect of which an investigation was commenced are the subject of criminal or civil proceedings.

Division II—Proceedings By Shareholders And Directors

Derivative
actions

337.—(1) Subject to subsection (3), the Court may, on the application of a shareholder or director of a company, grant leave to that shareholder or director to—

(a) bring proceedings in the name and on behalf of the company or its subsidiary; or

(b) intervene in proceedings to which the company or any related company is a party for the purpose of continuing, defending, or discontinuing the proceedings on behalf of the company or its subsidiary, as the case may be.

(2) Without prejudice to subsection (1), in determining whether to grant leave under that subsection, the Court shall have regard to—

(a) the likelihood of the proceedings that may follow;

(b) the costs of the proceedings in relation to the relief likely to be obtained;

(c) any action already taken by the company or its subsidiary to obtain relief;

(d) the interests of the company or its subsidiary in the proceedings being commenced, continued, defended, or discontinued, as the case may be.

(3) Leave to bring proceedings or intervene in proceedings may be granted under subsection (1), only where the Court is satisfied that either—

(a) the company or related company does not intend to bring, continue or defend, or discontinue, the proceedings, as the case may be; or

(b) it is in the interests of the company or its subsidiary that the conduct of the proceedings should not be left to the directors or to the determination of the shareholders as a whole.

(4) Notice of the application shall be served on the company or its subsidiary.

(5) The company or related company—

(a) may appear and be heard; and

(b) shall inform the Court, whether or not it intends to bring, continue, defend, or discontinue the proceedings, as the case may be.

(6) Except as provided for in this section, a shareholder or director of a company is not entitled to bring or intervene in any proceedings in the name of, or on behalf of, a company or its subsidiary.

338. The Court shall, on the application of the shareholder or director to whom leave was granted under section 337 to bring or intervene in the proceedings, order that the whole or part of the reasonable costs of bringing or intervening in the proceedings, including any costs relating to any settlement, compromise, or discontinuance approved under section 337, shall be met by the company unless the Court considers that it would be unjust or inequitable for the company to bear those costs.

Cost of
derivative
action to be
met by
company

339. The Court may, at any time, make any order it thinks fit in relation to proceedings brought by a shareholder or a director or in which a shareholder or director intervenes, as the case may be, with leave of the Court under section 337, and without prejudice to the generality of this section may—

Powers of
Court where
leave granted

(a) make an order authorizing the shareholder or any other person to control the conduct of the proceedings;

(b) give directions for the conduct of the proceedings;

(c) make an order requiring the company or the directors to provide information or assistance in relation to the proceedings;

(d) make an order directing that any amount ordered to be paid by a defendant in the proceedings shall be paid, in whole or part, to former and present shareholders of the company or its subsidiary instead of to the company or the related company.

Compromise,
settlement or
withdrawal of
derivative
action

340. No proceedings brought by a shareholder or a director or in which a shareholder or a director intervenes, as the case may be, with leave of the Court under section 337, may be settled or compromised or discontinued without the approval of the Court.

Personal
actions by
shareholders
against
directors

341.—(1) A shareholder or former shareholder may bring an action against a director and in the case of section 145, a secretary, for breach of a duty owed to him as a shareholder.

(2) An action may not be brought under subsection (1) to recover any loss in the form of a reduction in the value of shares in the company or a failure of the shares to increase in value by reason only of a loss suffered, or a gain forgone, by the company.

(3) For the purposes of subsection (1), the duties set out in sections 150, 187 and 342 are duties owed to shareholders while the duties of directors set out in sections 176 to 180 are duties owed to the company and not to shareholders.

Personal
actions by
shareholders
against
company

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

Unfairly
prejudicial
conduct

343.—(1) Any shareholder or former shareholder of a company, or any other entitled person, who considers that the affairs of a company have been, or are being, or are likely to be, conducted in a manner that is, or any act or acts of the company have been, or are, or are likely to be, oppressive, unfairly discriminatory, or unfairly prejudicial to that person in that capacity or in any other capacity, may apply to the Court for an order under this section.

(2) The provisions of this Division shall apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law as they apply to a member of a company.

(3) Where, on an application under this section, the Court considers that it is just and equitable to do so, it may make such order as it thinks fit including, without prejudice to the generality of this subsection, an order—

(a) requiring the company or any other person to acquire the shareholder's shares; or

(b) requiring the company or any other person to pay compensation to a person; or

(c) regulating the future conduct of the company's affairs; or

(d) altering or adding to the company's constitution; or

(e) appointing a receiver of the company; or

(f) directing the rectification of the records of the company; or

(g) putting the company into liquidation; or

(h) setting aside action taken by the company or the Board in breach of this Act or the constitution of the company.

(4) No order may be made against the company or any other person under subsection (2) unless the company or that person is a party to the proceedings in which the application is made.

(5) Where an order is made under this section the Court shall record on the order the date and time at which the order is made.

344.—(1) If the Court is satisfied that a petition under sections 341 to 343 is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of. Remedies

(2) Without prejudice to the generality of subsection (1), the Court's order may—

(a) regulate the conduct of the company's affairs in the future;

(b) require the company—

(i) to refrain from doing or continuing an act complained of; or

(ii) to do an act that the petitioner has complained it has omitted to do;

(c) authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the Court may direct;

(d) require the company not to make any, or any specified, alterations in its articles without the leave of the Court;

(e) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly.

Division III—Penalties

False or
misleading
statements
provided
under this Act

345.—(1) Any person who, with respect to a document required by or for the purposes of this Act—

(a) makes, or authorizes the making of, a statement that is false or misleading in a material particular knowing it to be false or misleading; or

(b) omits, or authorizes the omission of, any matter knowing that the omission makes the document false or misleading in a material particular, commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years and a fine as shall be determined by the Court taking into account the gravity of the offence.

(2) Any director or employee of a company who knowingly makes or furnishes, or authorizes or permits the making or furnishing of, a statement or report that relates to the affairs of the company, that is false or misleading in a material particular, to—

(a) a director, employee, auditor, shareholder, debenture holder, or trustee for debenture holders of the company;

(b) a liquidator, liquidation committee, or receiver or manager of property of the company; or

(c) where the company is a subsidiary, a director, employee, or auditor of its holding company, commits an offence and shall, on conviction, be liable to imprisonment for 5 years and a fine as shall be determined by the Court taking into account the gravity of the offence.

Fraudulent
trading

346.—(1) If any business of a company is carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, every person who is knowingly a party to the carrying on of the business in that manner commits an offence.

(2) Subsection (1) shall apply whether or not the company has been, or is, in the course of being, wound-up.

(3) A person guilty of an offence under this section shall be liable, on conviction, to imprisonment for ten years and a fine as shall be determined by the Court taking into account the gravity of the offence.

Director's
disqualification

347.—(1) A person shall be disqualified from acting as a director of a company if—

(a) a Court order is issued against that person by reason of mental incapacity ; or

(b) subject to subsections (2), the person—

- (i) has been declared bankrupt or insolvent by the Court;
- (ii) is prohibited by any other law from serving as a director of a company;
- (iii) has been removed from an office of trust, on the grounds of misconduct involving dishonesty; or
- (iv) has been convicted and imprisoned or fined for theft, fraud, forgery, perjury or an offence—
 - (aa) involving fraud, misrepresentation or dishonesty;
 - (bb) in connection with the promotion, formation or management of a company.

(2) A disqualification in terms of subsection (2) (b) (iii) or (iv) shall expire at the later of—

- (a) 5 years after the date of removal from office; or
- (b) the completion of the sentence imposed for the relevant offence, as the case may be.

(3) Notwithstanding subsection (1), a person may act as a director of a private company if all of the shares of that company are held by that disqualified person alone, or by—

- (a) that disqualified person; and
- (b) persons related to that disqualified person, and each such person has consented in writing to that person being a director of the company.

(4) A notice of the disqualification shall be published in newspapers of general circulation and in the *Gazette* and the Registrar may make the notice available in electronic form.

Division 4—Removal from the register of companies

348.—(1) Subject to the other provisions of this section, the Registrar shall remove a company from the register of companies where—

Grounds for
removal from
the register
of companies

(a) the company is an amalgamating company, other than an amalgamated company, on the day on which the Registrar issues a certificate of amalgamation under this Act; or

(b) the Registrar is satisfied that—

- (i) the company has ceased to carry on business; and
- (ii) there is no other reason for the company to continue in existence; or

(c) the company has been put into liquidation, and—

(i) no liquidator is acting; or

(ii) the Registrar has not been furnished with information within six months from the date on which the liquidation of the company is completed; or

(d) the Registrar receives a request, in a form approved by him, from—

(i) a shareholder authorised to make the request by a special resolution of shareholders entitled to vote and voting on the question; or

(ii) the Board or any other person, where the constitution of the company so requires or permits, that the company be removed from the register on any grounds specified in subsection (2); or

(e) a liquidator sends or delivers to the Registrar information indicating completion of the liquidation process.

(2) A request that a company be removed from the register under subsection (1) (d) may be made on the grounds—

(a) that the company has ceased to carry on business, has discharged in full its liabilities to all its known creditors, and has distributed its surplus assets in accordance with its constitution and this Act; or

(b) that the company has no surplus assets after paying its debts in full or in part, and no creditor has applied to the Court for an order putting the company into liquidation.

(3) A request that a company be removed from the register under subsection (1) (d) shall be accompanied by a written notice from the Malawi Revenue Authority stating that there is no objection to the company being removed from the register.

(4) The Registrar shall not remove a company from the register under subsection (1) (b) unless—

(a) the Registrar has issued a notice; and

(b) the company has satisfied the Registrar that it is carrying on business or that reasons exist for the company to continue in existence.

(5) The Registrar shall not remove a company from the register under subsection (1) (c) or (e) unless—

(a) the Registrar is satisfied that notice of intention to remove the company from the register has been given under section 349; and

(b) the Registrar—

(i) is satisfied that no person has objected to the removal under section 350; or

(ii) where an objection to the removal has been received, has complied with section 351.

349.—(1) Before removing a company from the register under section 348 (1) (b), the Registrar shall—

Requirement for the Registrar to give the company notice of intention

(a) give notice to the company in accordance with subsection (2):

(b) give notice of the matters set out in subsection (3) to any person who is entitled to register a charge; and

(c) give notice in the *Gazette* of the matters set out in subsection (3).

(2) The notice to be given under subsection (1) (a) shall—

(a) state the section under, and the grounds on, which it is intended to remove the company from the register; and

(b) state that, unless—

(i) by the date specified in the notice, which shall not be less than 28 days after the date of the notice, the company satisfies the Registrar by notice in writing that it is still carrying on business or there is other reason for it to continue in existence; or

(ii) the Registrar shall not proceed to remove the company from the register under section 351, the company shall be removed from the register.

(3) The notice to be given under subsection (1) (b) and (c) shall specify—

(a) the name of the company and its registered office;

(b) the section under, and the grounds on, which it is intended to remove the company from the register; and

(c) the date by which an objection to the removal under section 348 shall be delivered to the Registrar, which shall not be less than 28 days after the date of the notice.

350.—(1) Where a notice is given of an intention to remove a company from the register, any person may deliver to the Registrar, not later than the date specified in the notice, an objection to the removal on grounds that—

Objection to removal from the register

(a) the company is still carrying on business or there is other reason for it to continue in existence;

(b) the company is a party to legal proceedings;

(c) the company is in receivership, or liquidation, or both;

(d) the person is a creditor, or a shareholder, or a person who has an undischarged claim against the company;

(e) the person believes that there exists, and intends to pursue, a right of action on behalf of the company under this Act ; or

(f) for any other reason, it would not be just and equitable to remove the company from the register.

(2) Where a person delivers an objection under subsection (1)—

(a) the person shall at the same time, serve a copy of same on the company;

(b) file proof of the ground of objection with the Registrar within six weeks of the date of the objection and shall, at the same time, serve a copy thereof on the company.

(3) Where a person fails to comply with subsection (2), the objection delivered under subsection (1) shall be deemed to have lapsed.

(4) For the purposes of subsection (1) (d)—

(a) a claim by a creditor against a company is not an undischarged claim where—

(i) the claim has been paid in full;

(ii) the claim has been paid in part under a compromise entered into under this Act or by being otherwise compounded to the reasonable satisfaction of the creditor;

(iii) the claim has been paid in full or in part by a receiver or a liquidator in the course of a completed receivership or liquidation; or

(iv) a receiver or a liquidator has notified the creditor that the assets of the company are not sufficient to enable any payment to be made to the creditor; and

(b) a claim by a shareholder or any other person against a company is not an undischarged claim unless—

(i) payment has been made to the shareholder or that person in accordance with a right under the company's constitution or this Act to receive or share in the company's surplus assets; or

(ii) a receiver or liquidator has notified the shareholder or that person that the company has no surplus assets.

351.—(1) Where an objection to the removal of a company from the register is made on a ground specified in section 350 (1) (a), (b), or (c), the Registrar shall not proceed with the removal unless the Registrar is satisfied that—

Duties of
Registrar
where
objection
received

- (a) the objection has been withdrawn;
- (b) any facts on which the objection is based are not, or are no longer, correct; or
- (c) the objection is frivolous or vexatious.

(2) Where an objection to the removal of a company from the register is made on a ground specified in section 350 (1) (d), (e), or (f), the Registrar shall give notice to the person objecting that, unless notice of an application to the Court by that person for an order—

- (a) that the company be put into liquidation; or
- (b) that, on any ground specified in section 350, the company shall not be removed from the register, is served on the Registrar not later than 28 days after the date of the notice, the Registrar intends to proceed with the removal.

(3) Where—

- (a) notice of an application to the Court under subsection (2) is not served on the Registrar;
- (b) the application is withdrawn; or
- (c) on the hearing of such an application, the Court refuses to grant either an order putting the company into liquidation or an order that the company not be removed from the register, the Registrar shall proceed with the removal.

(4) Every person who makes an application to the Court under subsection (2) shall give the Registrar notice in writing of the decision of the Court within seven days of the decision.

(5) The Registrar shall send—

- (a) a copy of an objection under section 350;
- (b) a copy of a notice given by or served on the Registrar under this section; and
- (c) where the company is removed from the register, notice of the removal, to a person who sent or delivered to the Registrar a request that the company be removed from the register under section 348 (1) (d) or, while acting as liquidator, sent or delivered to the Registrar the documents referred to in section 348 (1) (e).

Circumstances where property of the company removed from the register vests in the state

352.—(1) Any property which, immediately before the removal of a company from the register of companies, had not been distributed or disclaimed, shall vest in a Consolidated Fund established by the Registrar with effect from the removal of the company from the register.

(2) The Registrar shall, forthwith on becoming aware of the vesting of the property—

(a) inform the Registrar of the High Court; and

(b) give public notice in daily newspapers in wide circulation in Malawi, of the vesting, setting out the name of the former company and particulars of the property.

(3) Where any property is vested in the Consolidated Fund under this section, a person who would have been entitled to receive all or part of the property, or payment from the proceeds of its realisation, if it had been in the hands of the company immediately before the removal of the company from the register of companies, or any other person claiming on behalf of that person, may apply to the Court for an order—

(a) vesting all or part of the property in that person; or

(b) for payment to that person of compensation of an amount not greater than the value of the property.

(4) On an application made under subsection (3), the Court may—

(a) decide any question concerning the value of the property, the entitlement of any applicant to the property or to compensation, and the apportionment of the property or compensation among two or more applicants;

(b) order that the hearing of two or more applications be consolidated;

(c) order that an application be treated as an application on behalf of all persons, or all members of a class of persons, with an interest in the property; or

(d) make an ancillary order.

(5) Any compensation ordered to be paid under subsection (3) shall be paid out of the Consolidated Fund without further appropriation.

(6) For purposes of this section, "property" includes leasehold rights and all other rights vested in or held on behalf of or on trust for the company prior to its removal (referred to as "former company") but does not include property held by the former company on trust for any other person.

353.—(1) A company shall be restored to the register of companies when a notice signed by the Registrar stating that the company is restored to the register is registered under this Act.

General power to restore to the register

(2) A company that is restored to the register shall be deemed to have continued in existence as if it had not been removed from the register.

Division V.—Dormant Companies

354.—(1) For the purposes of this Part, a company—

Meaning of dormant company

(a) shall be a dormant company for any period during which no significant accounting transaction occurs in relation to the company; and

(b) shall cease to be a dormant company when any significant accounting transaction occurs in relation to the company.

(2) In this Part—

(a) no significant accounting transaction shall be deemed to have occurred unless it is a transaction which is required to be entered in the accounting records of the company;

(b) a significant accounting transaction shall not include—

(i) any transaction which arises from the issue to a subscriber, of shares in the company in respect of the application for incorporation;

(ii) the payment of bank charges, licence fees or any other compliance costs.

355.—(1) Where a company has—

Company may be recorded in register as dormant company

(a) been dormant from the time of its formation, or

(b) has been dormant since the end of its previous accounting period, and is not required to prepare group accounts for that period, the company may, by a special resolution passed at a meeting of shareholders of the company at any time after copies of the annual accounts and reports for that year have been duly sent to shareholders, declare itself to be a dormant company.

(2) A company shall not declare itself to be a dormant company where it is a company formed for the business of banking or insurance.

(3) The company shall, within 14 days of the passing of the special resolution referred to in subsection (1), give notice to the Registrar of the passing of that resolution and the Registrar shall, on receipt of that resolution for registration, record the company in the register as being a dormant company.

(4) Where a company which has declared itself to be a dormant company under subsection (1) ceases to be dormant, the company shall, within fourteen days of any significant accounting transaction taking place which has resulted in the company ceasing to be dormant, give notice to the Registrar that the company has ceased to be dormant.

(5) Where the Registrar receives a notice under subsection (4), he shall enter in the register of companies the fact that the company has ceased to be dormant.

Exemption
available
to dormant
companies

356. Any company, which is recorded by the Registrar as being a dormant company, shall, for so long as it continues to be a dormant company—

(a) be exempted from the requirement of having its accounts audited; and

(b) be exempted from the payment of specified fees.

PART XV—FOREIGN COMPANIES

Application
of this part

357. Notwithstanding the generality of section 358, this Part shall apply to a foreign company only if it has a place of business or is carrying on business in Malawi.

Meaning of
carrying on
business

358. For the purposes of this Part—

(a) a reference to a foreign company carrying on business in Malawi includes a reference to the foreign company—

(i) establishing or using a share transfer office or a share registration office in Malawi; or

(ii) administering, managing, or dealing with property in Malawi as an agent, or personal representative, or trustee, and whether through its employees or an agent or in any other manner;

(b) a foreign company shall not be held to carry on business in Malawi merely because in Malawi it—

(i) is or becomes a party to a legal proceeding or settles a legal proceeding or a claim or dispute;

(ii) holds meetings of its directors or shareholders or carries on other activities concerning its internal affairs;

(iii) maintains a bank account;

(iv) effects a sale of property through an independent contractor;

(v) solicits or procures an order that becomes a binding contract only if the order is accepted outside Malawi;

(vi) creates evidence of a debt or creates a charge on property;

(vii) secures or collects any of its debts or enforces its rights in relation to securities relating to those debts;

(viii) conducts an isolated transaction that is completed within a period of 31 days, not being one of a number of similar transactions repeated from time to time; or

(ix) invests its funds or holds property.

359.—(1) A foreign company shall not carry on business in Malawi on or after the commencement of this Act unless the name of the foreign company is available.

Availability
of name
before
carrying on
business

(2) A foreign company registered under this Part that carries on business in Malawi shall not change its name unless the name is available.

(3) Sections 16 to 20 shall apply, subject to any necessary modifications to the reservation of the name, if any, of a foreign company, in the same way as they apply to the registration of companies under this Act and to the change of names of companies registered under this Act.

(4) Where a foreign company contravenes this section, the company and every director of the company commits an offence and is liable to a fine as provided in the prevailing schedule of penalties.

360.—(1) Every foreign company shall, within thirty days after it establishes a place of business or commences to carry on business in Malawi, file with the Registrar—

Registration
of foreign
companies

(a) a duly authenticated copy of the certificate of its incorporation or registration in its place of incorporation or origin or a document of similar effect;

(b) a duly authenticated copy of its constitution, charter, statute or memorandum and articles or other instrument constituting or defining its constitution;

(c) a list of its directors containing similar particulars with respect to directors as are, by this Act, required to be contained in the register of the directors and secretaries of a company;

(d) where the list includes directors resident in Malawi who are members of the local Board of directors of the company, a memorandum duly executed by or on behalf of the foreign company stating the powers of the local directors;

(e) a memorandum of appointment or power of attorney under the seal of the foreign company or executed on its behalf in such manner as to be binding on the company, stating the names and addresses of two or more persons resident in Malawi, not including a foreign company, authorised to accept on its behalf service of process and any notices required to be served on the company;

(f) notice of the situation of its registered office in Malawi and, unless the office is open and accessible to the public during ordinary business hours on each day, other than Saturdays and public holidays, the days and hours during which it is open and accessible to the public; and

(g) a declaration made by the authorized agents of the company.

(2) Where a memorandum of appointment or power of attorney filed under subsection (1) (e) is executed by a person on behalf of the company, a duly authenticated copy of the deed or document by which that person is authorized to execute the memorandum of appointment or power of attorney shall be filed.

(3) Where a foreign company has complied with subsection (1), the Registrar shall, subject to section 363 register the company under this Part and shall issue a certificate in the prescribed form.

(4) Where any document required to be submitted is not in the English language, the Registrar may require a copy of the document translated into English language and duly authenticated in accordance with the Authentication of Documents Act.

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Registered
office and
authorized
agents

361.—(1) A foreign company shall have a registered office in Malawi to which all communications and notices may be addressed and which shall be open and accessible to the public for not less than four hours on every day other than a Saturday, Sunday or a public holiday.

(2) An authorized agent shall, until he ceases to be such in accordance with subsection (4)—

(a) continue to be the authorized agent of the company;

(b) be answerable for the doing of all such acts, matters and things as are required to be done by the company by or under this Act.

(3) A foreign company or its authorized agent may file with the Registrar a written notice stating that the authorised agent has ceased to be the authorized agent or shall cease to be the authorized agent on a date specified in the notice.

(4) The authorised agent in respect of whom the notice has been filed shall cease to be an authorized agent—

(a) on the expiry of a period of 21 days after the date of filing of the notice or on the date of the appointment of another authorized agent, the memorandum of whose appointment has been filed in accordance with subsection (5), whichever is earlier; or

(b) where the notice states a date on which he or she is to so cease and the date is later than the expiry of that period, on that date.

(5) Where an authorized agent ceases to be the authorized agent and the company is then without an authorized agent in Malawi, the company shall, where it continues to carry on business or has a place of business in Malawi, within 21 days after the authorized agent ceased to be one, appoint an authorized agent.

(6) On the appointment of a new authorised agent the company shall file with the Registrar a memorandum of the appointment.

362.—(1) Where any change or alteration is made in—

Return of
alterations

(a) the constitution, charter, statutes, memorandum or articles or other instrument filed;

(b) the directors;

(c) the authorised agents or the address of an authorized agent;

(d) the situation of the registered office in Malawi or of the days or hours during which it is open and accessible to the public;

(e) the address of the registered office in its place of incorporation or origin;

(f) the name of the company; or

(g) the powers of any directors resident in Malawi who are members of the local Board of directors, the foreign company shall, within thirty days file with the Registrar particulars of the change or alteration.

(2) Where a foreign company increases its stated share capital or authorized share capital as applicable, it shall, within 30 days file with the Registrar a notice of the amount from which and of the amount to which it has been so increased.

(3) Where a foreign company not having a stated share capital increases the number of its members beyond the registered number it shall, within thirty days file with the Registrar a notice of the increase.

(4) Where an order is made by a Court under any law, in force in the country in which a foreign company is incorporated which corresponds to orders made under Part XII, the company shall, within 30 days, file with the Registrar a copy of the order.

Registrar's
certificate

363. On the registration of a foreign company under this Part or the filing with the Registrar of particulars of a change or alteration in a matter referred to in section 362 the Registrar shall issue a certificate to that effect.

Validity of
transactions
not affected

364. A failure by a foreign company to comply with section 164 and section 347 shall not affect the validity or enforceability of any transaction entered into by the foreign company.

Financial
statements

365.—(1) Every foreign company shall, in every calendar year—

(a) make out a balance sheet and profit and loss account in such form, containing such particulars including documents relating to every subsidiary company of the foreign company, as under the provisions of this Act it would, if it had been a company within the meaning of this Act, have been required to make; and

(b) deliver a copy of those documents to the Registrar.

(2) The Minister may, by order, direct that, in the case of any foreign company or class of foreign companies, the requirements of subsection (a) shall not apply, or shall apply subject to such exceptions and modifications as may be specified.

Notice by
foreign
company of
particulars of
its business
in Malawi

366. A foreign company shall file with the Registrar in each year at the time its financial statements are filed, a notice containing particulars with respect to the business being carried out by the company in Malawi.

Name and
country of
incorporation

367.—(1) Except with the written consent of the Minister, a foreign company shall not be registered by a name or an altered name that, in the opinion of the Registrar, is undesirable or is a name, or a name of a kind, that he has directed the Registrar not to accept for registration.

(2) No foreign company shall use in Malawi any name other than that under which it is registered.

(3) Every foreign company shall—

(a) conspicuously exhibit on the outside of every office or place where it carries on business in Malawi the name of the company and the country in which it is incorporated, in letters easily legible in English characters, and also in the characters of the language or one of the languages in general use in the locality in which the office or place is situate;

(b) cause the name of the company and of the country in which the company is incorporated, to be stated in legible English characters in all business and other official publications of the company; and

(c) if the liability of the members of the company is limited, cause notice of that fact—

(i) to be stated in every such prospectus in all business and other official publications of the company, in legible English characters; and

(ii) to be conspicuously exhibited on the outside of every office or place where it carries on business in Malawi, in legible English characters and also in legible characters of the language or one of the languages in general use in the locality in which the office or place is situate.

368.—(1) Subject to the other provisions of this section, a foreign company which has a share capital and has a shareholder resident in Malawi shall keep at its registered office in Malawi or at some other place in Malawi a branch register for the purpose of registering shares of shareholders resident in Malawi who apply to have the shares registered therein.

Branch
registers

(2) The company shall not be obliged to keep a branch register until after the expiry of two months from the receipt by it of a written application by a shareholder resident in Malawi for registration of his shares.

(3) This section shall not apply to a foreign company which by its constitution prohibits an invitation to the public to subscribe for shares in the company.

(4)—(a) Every branch register shall be kept in the manner provided by section 145 and any transfer shall be effected in the same manner.

(b) Every transfer registered at its registered office in Malawi shall be binding on the company and the Court shall have the same powers in relation to rectification of the register as it has under section 151.

(5) Where a foreign company opens a branch register, it shall, within fourteen days of the date the branch register is opened, file with the Registrar a notice to that effect specifying the address where the register is kept.

(6) Where any change is made in the place where the register is kept or where the register is discontinued, the company shall, within fourteen days of the date of the change, file with the Registrar a notice to that effect.

(7) Where a company or corporation is entitled under a law of the place of incorporation of a foreign company to give notice to a dissenting shareholder in that foreign company that it desires to acquire any of his shares registered on a branch register kept in Malawi, this section shall cease to apply to that foreign company until—

(a) the shares have been acquired; or

(b) the company or corporation has ceased to be entitled to acquire the shares.

(8) On application made in that behalf by a member resident in Malawi, the foreign company shall register in its branch register the shares held by a member which are registered in any other register kept by the company.

(9) On application made in that behalf by a member holding shares registered in a branch register, the foreign company shall remove the shares from the branch register and register them in such other register within Malawi as is specified in the application.

(10) Part III of this Act shall apply with such adaptations and modifications as may be necessary to the register and branch register of a foreign company.

(12) A branch register shall be prima facie evidence of any matters under this Part directed or authorised to be inserted therein.

(13) A certificate under the seal of a foreign company or signed by a director of the company specifying any shares held by any shareholder of that company and registered in the branch register shall be prima facie evidence of the title of the shareholder to the shares and the registration of the shares in the branch register.

Cessation
of business
in Malawi

369.—(1) Where a foreign company ceases to have a place of business or to carry on business in Malawi, it shall, within seven days of the date of the cessation, file with the Registrar a notice to that effect, and as from the day on which the notice is filed, its obligation to file any document other than a document that ought to have been filed shall cease, and the Registrar shall on the expiry of three months after the filing of the notice remove the name of the company from his or her register.

(2) Where a foreign company goes into liquidation or is dissolved in its place of incorporation or origin—

(a) every person who immediately before the commencement of the liquidation proceedings was an authorised agent shall, within one month after the commencement of the liquidation or the dissolution, file or cause to be filed with the Registrar a notice to that effect and, where a liquidator is appointed, notice of the appointment; and

(b) the liquidator shall, until a liquidator for Malawi is appointed by the Court, under the Insolvency Act, 2013, have the powers and functions of a liquidator for Malawi.

Act No. ... of
2013

(3) A liquidator of a foreign company appointed under the provisions of the Insolvency Act 2013, shall—

Act No. ... of
2013

(a) before any distribution of the foreign company's assets is made, by advertisement in a newspaper circulating generally in each country where the foreign company had been carrying on business before the liquidation and where no liquidator has been appointed for that place, invite all creditors to make their claims against the foreign company within a reasonable time before the distribution;

(b) not, subject to subsection (7), without leave of the Court, pay out any creditor to the exclusion of any other creditor;

(c) unless the Court otherwise directs, only recover and realise the assets of the foreign company in Malawi and shall, subject to paragraph (b) and to subsection (7), pay the net amount so recovered and realised to the liquidator of that foreign company in the place where it was formed or incorporated after paying any debts and satisfying any liabilities incurred in Malawi by the foreign company.

(4) Where a foreign company has been wound up so far as its assets in Malawi are concerned and there is no liquidator for the place of its incorporation or origin, the liquidator may apply to the Court for directions as to the disposal of the net amount recovered under subsection (3).

(5) On receipt of a notice from an authorized agent that the company has been dissolved, the Registrar shall remove the name of the company from his register.

(6) Where the Registrar has reasonable cause to believe that a foreign company has ceased to carry on business or to have a place of business in Malawi, Division IV of Part XIII shall, with such adaptations and modifications as may be necessary, apply to a foreign company as they apply to a company.

370. For the purposes of this Part—

Interpretation
in this Part

(a) the expression "certified" means certified in the prescribed manner to be a true copy or a correct translation;

(b) the expression "director", in relation to a foreign company, has the same meaning as in section 158 of this Act; and

(c) the expression "place of business" includes a share transfer or share registration office.

Prospectus **371.—**(1) No person shall issue, circulate or distribute in Malawi any prospectus offering to subscribe for securities of a company incorporated or to be incorporated outside Malawi, whether the company has or has not established, or when formed will or will not establish, a place of business in Malawi save than in accordance with Part XI of this Act.

PART XVI—SERVICE OF DOCUMENTS

Service of documents on company in legal proceedings **372.—**(1) A document in any legal proceedings may be served on a company—

(a) by delivery to a person named as a director of the company on the register of companies;

(b) by delivery to an employee of the company at the company's head office or principal place of business;

(c) by leaving it at the company's registered office or address for service;

(d) by serving it in accordance with any directions as to service given by the Court having jurisdiction in the proceedings; or

(e) in accordance with an agreement made with the company.

(2) The methods of service specified in subsection (1) are, notwithstanding any other enactment, the only methods by which a document in legal proceedings may be served on a company in Malawi.

Service of other documents on company **373.** A document, other than a document in any legal proceedings, may be served on a company—

(a) by any of the methods set out in section 372 (1) (a), (b), (c) or (e);

(b) by posting it to the company's registered office or address for service or delivering it to a post office box which the company is using at the time;

(c) by sending it by facsimile machine to a telephone number used for the transmission of documents by facsimile at the company's registered office or address for service or its head office or principal place of business.

Service of documents on foreign company in legal proceedings **374.—**(1) A document in any legal proceedings may be served on a foreign company in Malawi as follows—

(a) by delivery to a person named in the register as a director of the foreign company and who is resident in Malawi;

(b) by delivery to a person named in the register as being authorised to accept service in Malawi of documents on behalf of the foreign company;

(c) by delivery to an employee of the foreign company at the foreign company's place of business in Malawi or, if the foreign company has more than one place of business in Malawi, at the foreign company's principal place of business in Malawi;

(d) by serving it in accordance with any directions as to service given by the Court having jurisdiction in the proceedings; or

(e) in accordance with an agreement made with the foreign company.

(2) The methods of service specified in subsection (1) are notwithstanding any other enactment, the only methods by which a document in legal proceedings may be served on a foreign company in Malawi.

375. A document other than a document in any legal proceedings, may be served on a foreign company—

Service of
other
documents
on foreign
company

(a) by any of the methods set out in section 372 (1) (a), (b), (c) or (e);

(b) by posting it to the address of the foreign company's principal place of business in Malawi or delivering it to a post office box which the foreign company is then using at the time; or

(c) by sending it by facsimile machine to a telephone number used for the transmission of documents by facsimile at the principal place of business in Malawi of the foreign company.

376.—(1) A notice, statement, report, accounts, or other document to be sent to a shareholder or creditor who is a natural person may—

Service of
documents on
shareholders
and creditors

(a) be delivered to that person;

(b) be posted to that person's address or delivered to a post office box which that person is using at the time;

(c) be sent by facsimile machine to a telephone number used by that person for the transmission of documents by facsimile; or

(d) subject to subsection (5), be sent by email or other electronic form of communication to the address provided by that person for the transmission of documents by electronic means.

(2) A notice, statement, report, accounts, or other document to be sent to a shareholder or creditor that is a company or a foreign company may be sent by any of the methods of serving documents referred to in section 374 or 376 as the case may be.

(3) A notice, statement, report, accounts, or other document to be sent to a creditor that is a body corporate, not being a company or a foreign company, may—

(a) be delivered to a person who is a principal officer of the body corporate;

(b) be delivered to an employee of the body corporate at the principal office of principal place of business of the body corporate;

(c) be delivered in such manner as the Court directs;

(d) be delivered in accordance with an agreement made with the body corporate;

(e) be posted to the address of the principal office of the body corporate or delivered to a box at a document exchange which the body corporate is using at the time;

(f) be sent by facsimile machine to a telephone number used for the transmission of documents by facsimile at the principal office or principal place of business of the body corporate; or

(g) subject to subsection (5), be sent by email or other electronic form of communication to the address provided by that person for the transmission of documents by electronic means.

(4) Where a liquidator sends documents—

(a) to the last known address of a shareholder or creditor who is a natural person; or

(b) to the address for service of a shareholder or creditor that is a company and the documents are returned unclaimed three consecutive times, the liquidator need not send further documents to the shareholder or creditor until the shareholder or creditor gives notice to the company of his new address.

(5) A document may be sent under subsection (1) (d) or (3) (g) by electronic means of communication provided that—

(a) the shareholder has consented in writing to that form of communication being used by the company or other person providing the communication; and

(b) the shareholder or creditor has provided an electronic address to which such communication may be sent.

(6) Any consent under subsection (5) may be revoked at any time on the provision of five days' notice in writing to the person sending the document.

377.—(1) Subject to subsection (2), for the purposes of sections 372 to 376—

Additional provisions relating to service

(a) where a document is to be served by delivery to a natural person, service shall be made—

(i) by handing the document to the person; or

(ii) where the person refuses to accept the document, by bringing it to the attention of, and leaving it in a place accessible to, the person;

(b) a document posted or delivered to a post office box is deemed to be received within seven days, or any shorter period as the Court may determine in a particular case, after it is posted or delivered;

(c) a document sent by facsimile machine is deemed to have been received on the working day following the day on which it was sent;

(d) in proving service of a document by post or by delivery to a post office box it shall be sufficient to prove that—

(i) the document was properly addressed;

(ii) all postal or delivery charges were paid; and

(iii) the document was posted or was delivered to any document exchange facility;

(e) in proving service of a document by facsimile machine, it is sufficient to prove that the document was properly transmitted by facsimile to the person concerned.

(2) A document shall not be deemed to have been served or sent or delivered to a person where the person proves that, through no fault on the person's part, the document was not received within the time specified.

PART XVII—MISCELLANEOUS

378. —(1) No company, association or partnership consisting of more than 20 persons shall be formed for the purpose of carrying on any business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of any other enactment.

Prohibition of large partnerships

(2) Subsection (1) shall not apply to the formation of any association, or partnership for carrying on any regulated professions.

Jurisdiction

379. The High Court of Malawi shall have jurisdiction to try an offence under this Act and any subsidiary enactment made under this Act.

**Periodic
information
to Minister
of Lands
on status of
shareholding
of companies
in Malawi**

380.—(1) The Registrar shall, at the beginning of each calendar year, furnish the Minister of Lands with information regarding the status of shareholding of companies in Malawi.

(2) The information under subsection (1) shall include—

- (a) membership of the company;
- (b) nationality of the members of the company; and
- (c) whether the company is Malawian or foreign owned.

General penalty

381. A person who is convicted of an offence under this Act for which no specific penalty is provided shall be liable to a fine of five million Kwacha (K5,000,000), or to an amount equivalent to the financial gain generated by the offence or the loss suffered due to the offence as the case may be, whichever is greater.

**Regulations,
Rules, etc**

382.—(1) The Minister may make regulations for carrying out or giving effect to the provisions of this Act.

(2) Without prejudice to the generality of subsection (1), the regulations may prescribe—

- (a) forms;
- (b) time periods
- (c) information required
- (d) fees;
- (e) access to confidential information;
- (f) model memorandum articles of association for companies;
- (g) the keeping of accounting records outside Malawi by companies;
- (h) procedures relating to the exercise by the Registrar of any powers conferred on him;
- (i) electronic registration of companies and filing of documents; and
- (j) such other matters as are necessary or conducive for the better carrying out of the provisions of this Act.

(3) The Chief Justice may make rules with respect to proceedings, and the practice and procedures of the Court under this Act.

(4) Notwithstanding section 21 (e) of the general Interpretation Act, the regulations or rules made under this section may create offences in respect of any contraventions of the regulations or rules and may, for any such offences, impose a fine of up to five million kwacha (K5,000,000), and to imprisonment for twelve (12) months.

(5) The Registrar of Financial Institutions may issue directives for any matter required to be prescribed by him under this Act.

383.—(1) The Companies Act is hereby repealed.

Repeal and
savings

(2) Any subsidiary legislation made under the Act repealed by subsection (1) in force immediately before the commencement of this Act—

(a) shall remain in force, unless in conflict with this Act, and shall be deemed to be subsidiary legislation made under this Act; and

(b) may be replaced, revoked, or amended by subsidiary legislation made under this Act.

(3) Any approval given, or authorization granted, and in force or any act or thing done under the Act repealed by subsection (1), shall be deemed to have been given, granted or done under the relevant provisions of this Act, and any such approval or authorization shall remain valid for the period specified therein.

(4) any fee, charge or any sum paid or unpaid under the Companies Act repealed by subsection (1) shall, in respect of the corresponding period, be deemed to have been paid or unpaid under the provisions of this Act.

Passed in Parliament this twenty fifth day of June, two thousand and thirteen.

H. H. NJOLOMOLE
for: Clerk of Parliament

