**DRAFT 3: FOR COMMENTS BY STAKEHOLDERS AND THE GENERAL PUBLIC**

**CORPORATE LAWS BILL OF 2025**

**To reform company law and restate the greater part of the enactments relating to companies; to make other provision relating to companies and other forms of business organisation; to make provision about directors’ standards of conduct and liability, business names, auditors and audit committees; to modernize and re-enact the Close Corporations Act, 1988 (Act 28 of 1988) as a Schedule to this Act; and for connected purposes. –**

(*Introduced by the Minister of Industrialisation and Trade*)

ARRANGEMENT OF ACT

PREAMBLE

CHAPTER 1:

INTERPRETATION, APPLICATION AND REGULATORY FRAMEWORK OF ACT.

PART 1: GENERAL PROVISIONS

1. Definitions
2. General application of Act
3. Restricted Application of Act
4. Related and inter-related persons, and control
5. Purpose of Act
6. General interpretation of Act
7. Registration Office and Register
8. Registrar and delegation of power
9. Manner of payment of fees
10. Annual report by Registrar
11. Directions to comply with international obligations

PART 2: BUSINESS AND INTELLECTUAL PROPERTY AUTHORITY (BIPA)

1. Objectives of the Business and Intellectual Property Authority under this Act
2. Functions of Business and Intellectual Property Authority
3. Reporting, research, public information and relations with other regulators
4. Minister may direct policy and require investigation
5. Establishment of specialist committees
6. Constitution of the specialist committee

PART 3: REGULATIONS AND NOTICES

1. Regulations
2. Prohibition of disclosure of, and exemption from obligation to disclose, certain information
3. Notices amending or adding to Schedules

PART 4: REGULATORY FRAMEWORK OF THE ACT

1. Enforcement Powers of the Business and Intellectual Property Authority
2. Appeal and/or Review of the decisions of Business and Intellectual Property Authority
3. Ad hoc Panel of Experts for Takeovers
4. Composition of the ad hoc Panel of Experts for Takeovers

PART 5: COMPANIES TRIBUNAL AND PROCEDURES APPLICABLE TO TRIBUNAL

1. Establishment of Companies Tribunal
2. Appointment of members of Companies Tribunal
3. Functions of Companies Tribunal
4. Qualifications for membership of Companies Tribunal
5. Conflicting interests of members of Companies Tribunal
6. Resignation and removal from office and vacancies
7. Reviews and reports to Minister
8. Confidential information
9. Employees of Companies Tribunal and conflict of interests
10. Finances of Companies Tribunal

CHAPTER 2:

TYPES AND FORMS OF COMPANIES, PRESERVATION AND CONVERSIONS

PART 1: CATEGORIES OF COMPANIES AND MODIFIED APPLICATIONS

1. Categories of companies
2. Modified application for state-owned companies
3. Modified application for non-profit companies
4. Modified application for personal liability companies
5. Duality of corporate purpose of a state-owned company
6. Incorporation of certain branches of foreign companies and non-profit associations

PART 2: CONVERSION OF COMPANIES

1. Conversion of public company into private company, and vice versa
2. Conversion of company into a non-profit company
3. Conversion of company limited by guarantee or non-profit companies into limited liability company (i.e. private or public companies)
4. Conversion of unlimited company

45. Notice of intended conversion of company

46. Contents and form of articles on conversion

47. Registration of conversion

48. Effect of conversion and alteration of other registers

PART 3: CONVERSION OF COMPANIES AND CLOSELY HELD COMPANIES

49. Conversion of company into closely held company

50. Conversion of closely held company into company

51. Effect of conversion of closely held company into company

PART 4: LIFTING OF LIMITATIONS ON PARTNERSHIPS AND ASSOCIATIONS FOR GAIN

52. No prohibition of associations or partnerships exceeding 20 members

53. Status of unregistered associations carrying on business for gain

54. Business Names

CHAPTER 3: FORMATION, CAPACITY, POWERS, NAMES, REGISTRATION AND INCORPORATION OF COMPANIES, INCIDENTAL MATTERS AND DEREGISTRATION

PART 1: FORMATION, CAPACITY, LIMITATION OF CAPACITY AND RING-FENCED COMPANIES

55. Mode of forming company

56. Capacity, Purposes and powers of companies

57. Dealings between company and other persons

58. Internal consequences of an ultra vires act

59. No constructive knowledge

60. Pre-incorporation contracts

61. Company not to be member of its holding company

62. Limitation of Company Powers and Objectives

PART 2: NAME REGISTRATION

63 Names of companies not to be undesirable

64. Reservation of name

65. Registration of shortened form of name or business name

66. Change of name and effect

67. Order to change name

68 Provisions as to order to change name

69. Registrar may call for affidavits and must give reasons for decisions as to names

70. Recourse to Companies Tribunal in matters as to names

71. Formal requirements as to names of companies

72. Use and publication of name by company

73. Improper use of word “Limited,” “Incorporated” or “Closely Held” and its consequences

74. Savings regarding certain existing name registrations

PART 3: MEMORANDUM OF ASSOCIATION

75. Requirements for the memorandum of association

76. Memorandum may contain special conditions and provide for unlimited liability of directors

PART 4: ALTERATION OF MEMORANDUM

77. Alteration of memorandum as to special conditions and other provisions

78. Lodgment of altered memorandum

PART 5: ARTICLES OF ASSOCIATION

79. Companies to have articles

80. Form and signing of articles

81. Consolidation of articles

82. Alteration of articles

PART 6: REGISTRATION, INCORPORATION AND CANCELLATION OF REGISTRATION OF MEMORANDUM AND ARTICLES

83. Registration of memorandum and articles

84. Memorandum and articles to be in official language

85. Certificate of incorporation and its effect

86. Effect of incorporation on company and members

87. Liability for unconscionable abuse of separate legal personality

88. Rights of members to copies of memorandum and articles

89. Cancellation of registration of memorandum and articles

PART 7: INCIDENTAL MATTERS

90. Issued copies of memorandum or articles to embody alterations

91. Contracts by companies

92. Service of documents on companies

93. Arbitration between companies and others

CHAPTER 4: REGULATION OF CORPORATE FINANCE AND SECURITIES

PART 1: CAPITALISATION OF PROFIT COMPANIES

94. Legal nature of company shares and requirement to have shareholders

95. Authorisation for shares

96. Preferences, rights, limitations and other share terms

97. Issuing of shares

98. Subscription of shares

99. Consideration for shares

100. Shareholder approval for issuing shares in certain cases

101. Options for subscription of securities

102. Financial assistance for subscription of securities

103. Loans and other financial assistance to directors `

104. Distributions to be authorised by boards

105. Capitalisation shares

106. Companies and subsidiaries acquiring shares of companies

107. Securities to be evidenced by certificates or uncertificated

PART 2: SECURITIES REGISTRATIONS AND TRANSFERS

108. Registers of issued securities

109. Registration and transfer of certificated securities

110. Registration of uncertificated securities

111. Transfer of uncertificated securities

112. Substitution of certificated and uncertificated securities

113. Liability relating to uncertificated securities

114. Register of beneficial owners

PART 3: DISTRIBUTIONS BY COMPANIES

115. Requirements for distributions

116. Company to comply with equity solvency test

117. Redemption of redeemable shares

118. Consequences of acquisition with regard to shares

119. Liability of shareholders and others under certain circumstances

120. Procedure of acquisition of certain shares by company

121. Enforceability of contracts for acquisition by company of certain shares

PART 4: MEMBERS AND REGISTER OF MEMBERS

122. Members of company

123. Trusts in respect of shares

124. Register of members

125. Index to register of members

126. Branch registers in foreign countries

127. Provisions as to branch register

128. Register of members to be evidence

129. Where the register of members to be kept

130. Disposal of closed accounts in register

131. Penalties in respect of register of members

132. Inspection of register of members

133. Power to close register of members

134. Rectification of register of members

PART 5: SECURITIES OTHER THAN SHARES

135. Creation and issue of debt securities

136. Registration of bonds and annexure to bonds and deeds of pledge

137. Debt securities may be registered

138. Issue of debt securities at different dates and ranking of preference

139. Rights of debt securities’ holders

140. Director or officer not to be trustee for debt securities’ holders

141. Liability of trustee for debt securities’ holders

142. Power to re-issue convertible debt securities in certain cases

143. Debt securities to be described as secured or unsecured

144. Form of debt securities or certificates

145. Register of pledges and bonds

146. Register of debt securities’ holders

147. Registers may be kept where made up

148. Inspection of registers and copies and extracts

149. Failure to keep registers

PART 6 WINDING-UP OF SOLVENT COMPANIES AND DEREGISTERING COMPANIES

150. Winding-up of solvent companies

151. Voluntary winding-up of solvent companies

152. Winding-up of solvent companies by court order

153. Dissolution of companies and removal from register

154. Effect of removal of company from register

CHAPTER 5: PUBLIC OFFERING OF SECURITIES

155. Application and interpretation of Chapter

156. Offers that are not offers to public

157. Standards for qualifying employee share schemes

158. Advertisements relating to offers

159. General restrictions on offers to public

160. Requirements concerning prospectus

161. Secondary offers to public

162. Consent to use of name in prospectus

163. Variation of agreement mentioned in prospectus

164. Liability and limitation thereof for untrue statements in prospectus

165. Liability of experts and others

166. Responsibility for untrue statements in prospectus

167. Time limit for allotments and acceptances

168. Restrictions on allotments

169. Voidable allotments

170. Minimum intervals before allotments and acceptances

171. Conditional allotments if prospectus states securities to be listed

CHAPTER 6: CORPORATE GOVERNANCE AND CORPORATE LAW ENFORCEMENT

PART 1: SHAREHOLDER AND BOARD GOVERNANCE WITHIN COMPANIES

172. Interpretation and application of this Part

173. Right of shareholders to be represented by proxies

174. Record date for determining rights of shareholders

175. Shareholders acting other than at meetings

176. Shareholders meetings

177. Notice of meetings

178. Conduct of meetings

179. Quorum and adjournment of meetings

180. Resolutions of shareholders

181. Board, directors and prescribed officers

182. First director and directors

183. Election of directors of profit companies

184. Ineligibility and disqualification of persons to be directors and prescribed officers

185. Vacancies on board

186. Removal of directors

187. Committees of Boards

188. Meetings of boards

189. Directors acting other than at meetings

190. Personal financial interests of directors

191. Standards of conduct for directors

192. Liability of directors and prescribed officers

193. Indemnification and insurance of directors

PART 2: INTERESTS OF AND DEALINGS BY DIRECTORS AND OTHERS IN SHARES OF COMPANY

194. Definitions for purposes of this Part

195. Register of interests of directors and others in shares and debt securities of company

196. Directors to determine officers for purpose of the register

197. Duty of directors and others as to register of interests

CHAPTER 7: REMEDIES AND INVESTIGATIONS

-PART 1 RELIEF FROM OPPRESSION

198. Relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of company

PART 2: INQUIRY INTO MEMBERSHIP AND OWNERSHIP OF SHARES AND CONTROL OF COMPANY

199. Power of Registrar to request information concerning shares and members

200. Appointment and powers of inspectors to investigate financial interest in and control of company

201. Power to require information as to interest in shares or debt securities

202. Power to impose restrictions on shares or debt securities

PART 3: INVESTIGATION INTO AFFAIRS OF COMPANY

203. Inspection of affairs of company on application of members

204. Investigation of affairs of the company in other cases

205. Power of inspector to conduct investigation into affairs of related companies

206. Production of documents and evidence on investigation

207. Report of inspector

208. Proceedings on report of inspector

PART 4: MATTERS INCIDENTAL TO INVESTIGATIONS

209. Expenses of and incidental to investigation of affairs of company

210. Saving in respect of legal practitioners and bankers

211. Report of inspectors to be evidence

PART 5: PROCEEDINGS ON BEHALF OF COMPANIES

212. Initiation of proceedings on behalf of company by member (derivative action proceedings)

213. Powers of independent investigator

214. Security for costs by applicant for appointment of an independent investigator

PART 6: DISSENTING SHAREHOLDERS’ APPRAISAL RIGHTS

215. Exemptions

216. Trigger events

217. Notice by dissenting shareholder

218. Company Notice

219. A shareholder’s demand

220. Limitations to Shareholder’s demand

221. Process for making the shareholder’s demand

222. Delivery of the Shareholder’s demand to BIPA

223. Waiver of any further rights in respect of shares

224. Re-institution of Shareholder’s rights

225. Company’s offer to pay fair value of the relevant shares

226. Terms and lapsing of the company’s offer

227. Acceptance of offer by shareholder

228. Application to Companies Tribunal to determine a fair value in respect of shares

229. Application procedure to the Companies Tribunal

230. Shareholder’s acceptance of the offer before an order by the Companies Tribunal

231. The date for the determination of the fair value in respect of shares

232. Failure to satisfy the equity solvency test as a result of the order of the Companies Tribunal

233. The effect of amalgamation or merger on the shareholder’s appraisal rights

234. Payment by Company in terms of this Part not a distribution

235. No obligation to make a comparable offer

PART 7: VOLUNTARY RESOLUTION OF DISPUTES

236. Alternative dispute resolution

237. Dispute resolution may result in a consent order

CHAPTER 8: ACCOUNTABILITY AND TRANSPARENCY

PART 1: COMPANY RECORDS

238. Form and standards for records of companies

239. Location of records of companies

240. Access to records of companies

241. Financial year of companies

242. Accounting records

243. Financial statements

244. Annual financial statements of companies

245. Access to financial statements and related information

246. Use of names and registration numbers of companies

247. Annual return

248. Additional accountability requirements for certain companies

PART 2: ACCOUNTING RECORDS

249. Determination of financial year of company

250. Issue of incomplete financial statements and circulars

PART 2: ACCOUNTING BY HOLDING COMPANIES

251. Obligation to present group statements before annual general meeting

252. Group annual financial statements

253. Where annual financial statements are to be consolidated

254. Where group annual financial statements need not deal with subsidiary

255. Accounting periods of the company and subsidiary to be the same

256. Duty of the auditor to report on decisions of directors on group annual financial statements

PART 4: DISCLOSURE OF CERTAIN MATTERS IN FINANCIAL STATEMENTS AND FURTHER REQUIREMENTS

257. Disclosure of loans to and security for benefit of directors and managers

258. Disclosure of loans made to and security provided for benefit of directors or managers before their appointment

259. Approval and signing of financial statements

260. Duty of company to send annual financial statements to members and Registrar

261. Report of directors

PART 5: DUTIES OF AUDITOR AS TO ANNUAL FINANCIAL STATEMENTS

262. Duties of auditor as to annual financial statements and other matters

263. Report of auditor

PART 6: INTERIM ACCOUNTING

264. Half-yearly interim reports

265. Provisional annual financial statements

266. Form and contents of interim report and provisional annual financial statements

267. Copies of interim report and provisional annual financial statements to be lodged with Registrar

268. Registrar may grant exemptions and extensions of time

PART 7: RIGHT OF MEMBERS AND OTHERS TO COPIES OF ANNUAL FINANCIAL STATEMENTS AND INTERIM REPORTS

269. Right of members and others to copies of annual financial statements and interim reports

PART 8: ENHANCED ACCOUNTABILITY AND TRANSPARENCY

270. Application and general requirements of Part

271. Registration of company secretaries and auditors

272. Appointment of company secretary

273. Appointment of juristic persons and partnerships as company secretaries

274. Duties of company secretaries

275. Resignation and removal of company secretaries

276. Appointment of auditors

277. Resignation of auditors and vacancies

278. Rotation of auditors

279. Audit committees

280. Duties of audit committees

CHAPTER 9: FUNDAMENTAL TRANSACTIONS, TAKEOVERS AND OFFERS

PART 1: FUNDAMENTAL TRANSACTIONS

281. Proposals to dispose of all and greater part of assets and undertaking

282. Proposals for amalgamation and merger

283. Proposals for scheme of arrangement

284. Required approval for transactions

285. Implementation of amalgamation and merger

PART 2: TAKEOVER REGULATIONS, AFFECTED TRANSACTIONS AND OFFERS

286. Definitions for this Part

287. Application of this Part

288. Takeover regulations

289. Regulating of affected transactions by the ad-hoc Panel

290. General requirement concerning transactions and offers

291. Required disclosure concerning certain share transactions

292. Mandatory offers

293. Compulsory acquisitions and squeeze out

294. Comparable and partial offers

295. Restrictions on frustrating actions

296. Prohibited dealings before and during offers

CHAPTER 10: EXTERNAL COMPANIES

PART 1: REGISTRATION

297. Registration of memorandum of external company

298. Effect of registration of memorandum of external company

299. Power of external company to own immovable property in Namibia

PART 2: ADMINISTRATIVE AND OTHER DUTIES OF EXTERNAL COMPANIES

300. External company to have auditor

301. External company to have person authorised to accept service

302. Register of directors and managers and secretaries and power of Registrar to request particulars

303. Changes in the memorandum of external company

304. External company to keep accounting records and lodge annual financial statements and interim report

305. External companies to lodge annual return

306. Further administrative duties of external company

307. Deregistration of external company

308. Statutory transgressions in respect of external companies

309. Transfer of undertaking of external company and exemption from transfer duty under scheme

310. Registration of external companies as companies in Namibia

311. Effect of registration of memorandum of external company

CHAPTER 11: BUSINESS RESCUE

PART 1: BUSINESS RESCUE PROCEEDINGS

312. Application and Definitions applicable only to this Chapter

313. Company resolution to begin business rescue

314. Objections to company resolution

315. BIPA directives to begin business rescue proceedings

316. Review of BIPA’s directives

317. Duration of business rescue proceedings

318. General moratorium on legal proceedings against the company

319. Protection of property interests

320. Post commencement finance- the Business Rescue Fund

321. Effect of business rescue on employees and contracts

322. Effect on shareholders and directors

PART 2: PRACTITIONER’S FUNCTIONS AND TERMS OF APPOINTMENT AND THE CONTINUED ROLE OF BOARD AND MANAGEMENT OF COMPANY DURING BUSINESS RESCUE

323. Qualifications of practitioners

324. Removal and replacement of practitioner

325. General powers and duties of practitioners

326. Role of board and management during business rescue

327. Terms and conditions for the continued role of board and management during business rescue

328. General powers and duties of company’s board during business rescue

329. Investigation of the affairs of the company

330. Directors of company to co-operate with the Court and Practitioner during business rescue

331. Remuneration of directors and practitioners during business rescue

PART 3: RIGHTS OF AFFECTED PERSONS DURING BUSINESS RESCUE

332. Rights of employees

333. Participation by creditors through committee of creditors

334. Participation by holders of company’s securities

335. First meeting of creditors

336. First meeting of employees’ representatives

337. Functions, duties and membership of committees of affected persons

PAR4T 4: DEVELOPMENT AND APPROVAL OF BUSINESS RESCUE PLAN

338. Proposal of a business rescue plan

339. Meeting to determine future of company

340. Consideration of the business rescue plan

341. Failure to adopt business rescue plan

342. Discharge of debts and claims

PART 5: COMPROMISE WITH CREDITORS

343 Compromise between company and creditors

CHAPTER 12: MARKET ABUSE

PART 1: INTERPRETATION

344. Definitions

PART 2: INSIDER TRADING

345. Insider Trading

PART 3: PUBLICATION

346. Publication

PART 4: PROHIBITED TRADING PRACTICES

347. Prohibited Trading Practices

PART 5: FALSE, MISLEADING OR DECEPTIVE STATEMENTS, PROMISES AND FORECASTS

348. False, misleading or deceptive statements, promises and forecasts

PART 6: INSIDER TRADING SANCTION: LIABILITY RESULTING FROM INSIDER TRADING

349. Insider trading sanction: liability resulting from insider trading

PART 7: PROCEDURAL MATTERS

350. Attachments and interdicts

351. Powers and duties of Financial Intelligence Centre

352. Composition and functions of the Enforcement Committee

PART 8: GENERAL PROVISIONS

353. Financing of the Enforcement Committee

354. Protection of existing rights

355. Confidentiality and sharing of information

CHAPTER 13:

CONTROL OF POLITICAL DONATIONS AND EXPENDITURE BY COMPANIES

PART 1: INTERPRETATION

356 Introductory

PART 2: DONATIONS AND EXPENDITURE TO WHICH THIS PART APPLIES

357 Political parties, organisations etc. to which this Chapter applies

358 Meaning of “political donation”

359 Meaning of “political expenditure”

PART 3: AUTHORISATION REQUIRED FOR DONATIONS OR EXPENDITURE

360 Authorisation required for donations or expenditure

361 Form of authorising resolution

362 Period for which resolution has effect

PART 4: REMEDIES IN CASE OF UNAUTHORISED DONATIONS OR EXPENDITURE

363 Liability of directors in case of unauthorised donation or expenditure

364 Enforcement of directors’ liabilities by shareholder action

365 Enforcement of directors’ liabilities by shareholder action: supplementary

366 Costs of shareholder action

367 Information for purposes of shareholder action

PART 5: EXEMPTIONS

368 Trade unions

369 Subscription for membership of trade association

370 All-party parliamentary groups

371 Political expenditure exempted by order

372 Donations not amounting to more than NAD$115,000 in any twelve month period

CHAPTER 14: TRANSITIONAL AND MISCELLANEOUS PROVISIONS

373. Conversion of closely held companies into companies

374. Preservation of rights

375. Transitional provisions as to unlimited companies, companies limited by guarantee, close corporations and par value shares

376. Regulations under repealed Act relating to winding up and judicial management

CHAPTER 15: REPEAL OF LAWS AND COMMENCEMENT OF ACT

377. Repeal of laws

378. Short title and commencement

SCHEDULES

SCHEDULE 1: Forms of Articles of Association

TABLE A – ARTICLES OF ASSOCIATION FOR A PUBLIC COMPANY

TABLE B – ARTICLES OF ASSOCIATION FOR A PRIVATE COMPANY

TABLE C – ARTICLES FOR A NOT FOR PROFIT COMPANY

SCHEDULE 2: Provisions Concerning Closely Held Companies

1. Definitions

PART I: FORMATION AND JURISTIC PERSONALITY OF CLOSELY HELD COMPANIES

2. Formation and juristic personality of closely held companies

PART II: ADMINISTRATION OF THE SCHEDULE

3. Registration Office and register

4. Registrar

5. Inspection and copies of documents in Registration Office

6. Payment of fees

7. Tribunal and Courts having jurisdiction in respect of closely held companies

8. Security for costs in legal proceedings by closely held companies

9. Transmission of copies of Court orders to Registrar and Master

10. Regulations

PART III: REGISTRATION, DEREGISTRATION AND CONVERSION

11. Memorandum of Incorporation

12. Registration of Memorandum of Incorporation

13. Certificate of incorporation

14. Registration of amended Memorandum of Incorporation

15. Keeping of copies of Memoranda of Incorporation by closely held companies

16. No constructive notice of particulars in Memorandum of Incorporation and other documents

17. Meaning of “name” in items 19, 20 and 21

18. Undesirable names

19. Order to change name

20. Effect of change of name

21. Formal requirements as to names and registration numbers

22. 22A. Improper references to incorporation in terms of Schedule

23. Use and publication of names

24. Contributions by shareholders

25. Postal address and registered office

26. Deregistration

27. Conversion of companies and close corporations into closely held companies

PART IV: MEMBERSHIP

28. Number of shareholders

29. Requirements for shareholding

30. Nature of shares

31. Certificate of shares

32. Representation of shareholders

33. Acquisition of shares by new shareholder

34. Disposal of interest of insolvent shareholder

35. Disposal or interest of deceased shareholder

36. Cessation of shareholding by order of Court

37. Other dispositions of shareholders’ shares

38. Maintenance of aggregate shareholding in the company

39. Payment by closely held company for shareholders’ shares acquired

40. Financial assistance by closely held companies in respect of acquisition of shares

41. Publication of names of shareholders

PART V: INTERNAL RELATIONS

42. Fiduciary position of shareholders as a governing body

43. Liability of shareholders for negligence when acting as a governing body

44. Association agreements

45. No access to or constructive notice of association agreement

46. Variable rules regarding internal relations

47. Disqualified shareholders regarding management of business of closely held company

48. Meetings of shareholders

49. Unfairly prejudicial conduct

50. Proceedings against fellow-shareholders on behalf of closely held company (derivative litigation proceedings)

51. Payments by closely held company to shareholders

52. Prohibition of loans and furnishing of security to shareholders and others by closely held company

PART VI EXTERNAL RELATIONS

53. Pre-incorporation contracts

54. Power of shareholders to bind closely held company

55. Application of sections 43 and 253 of Corporate Laws Act, 2023

PART VII: ACCOUNTING AND DISCLOSURE

56. Accounting records

57. Financial year of closely held company

58. Annual financial statements

59. Appointment of accountants

60. Qualifications of accountants

61. Right of access and remuneration of accountants

62. Duties of accountants

PART VIII: LIABILITY OF MEMBERS AND OTHERS FOR DEBTS OF CLOSELY HELD COMPANY

63. Limited liability for debts of closely held company

64. Liability for reckless or fraudulent carrying on of business of closely held company

65. Powers of Court in case of abuse of separate juristic personality of closely held company

PART IX: WINDING-UP

66. Application of Corporate Laws Act, 2023

67. Voluntary winding-up

68. Liquidation by Court

69. Circumstances under which closely held company deemed unable to pay debts

70. Repayments by shareholders

71. Repayment of salary or remuneration by shareholders

72. Composition

73. Repayments, payments of damages and restoration of property by shareholders and others

74. Appointment of liquidator

75. Vacancies in office of liquidators

76. Refusal by Master to appoint nominated person as liquidator

77. Resignation and absence of liquidator

78. First meeting of creditors and members

79. Report to creditors and members

80. Repayments by shareholders or former shareholders

81. Duties of liquidator regarding liability of shareholders to creditors or closely held company

PART X: PENALTIES AND GENERAL

82. Penalties

83. Commencement of Schedule

SCHEDULE 3: Requirements Concerning Offering of Securities

1. Interpretation

2. Application of Schedule

3. Rights offers

4. General requirements for a prospectus

5. Signing, date and date of issue, of prospectus

PART B – ITEMS REQUIRED TO BE INCLUDED IN A PROSPECTUS

PART C – ITEMS REQUIRED TO BE INCLUDED IN A PROSPECTUS

SCHEDULE 4: Conversion of Close Corporations to Closely Held Companies

1. Notice of conversion of close corporation

2. Effect of conversion on legal status

3. Automatic conversion of close corporations

SCHEDULE 5: Consequential Amendments

1. Interpretation

2. Repeal of the Close Corporations Act, 1988

3. Proscription of incorporation of close corporations

4. Legal status of close corporations

5. Rescue of financially distressed close corporations and closely held companies

6. Administration and enforcement of Schedule 2 concerning Closely Held Companies

SCHEDULE 6: Legislation to be Enforced by Business and Intellectual Property Authority

Legislation to be Enforced by BIPA

BIPA is responsible for the administration and enforcement of the following Acts:

Close Corporations Act, 1988 (Act No. 26 of 1988)

Corporate Laws Act, 2024 (Act No\_\_\_of 2024)

Copyright and Neighbouring Rights Protection Act, 1994 (Act No. 6 of 1994)

Industrial Property Act, 2012 (Act No. 1 of 2012)

SCHEDULE 7: Transitional Arrangements

1. Interpretation

2. Continuation of pre-existing companies and introduction of closely held companies

3. Pending filings

4. Memorandum of Incorporation for closely held companies

5. Pre-incorporation contracts

6. Par value of shares, share premiums, treasury shares, capital accounts and share certificates

7. Company finance and governance

8. Company names and name reservations

9. Adaptation of Insolvency Bill 2019 to Companies

10. Preservation and continuation of court proceedings and orders

11. General preservation of regulations, rights, duties, notices and other instruments

12. Transition of regulatory agencies

13. Continued investigation and enforcement of previous Act

14. Regulations

**BE IT ENACTED** as passed by the Parliament, and assented to by the President, of the Republic of Namibia as follows:

CHAPTER 1

INTRODUCTORY PROVISIONS

PART 1

INTERPRETATION

**Definitions**

(1) In this Act -

“accounting records”, means information in any decipherable form concerning the financial affairs of a company, howsoever stored.

“acquiring party”, when used in respect of a transaction or proposed transaction, means a person or persons acting in concert who, as a result of the transaction, would directly or indirectly acquire or establish direct or indirect control or increased control over all or the greater part of a company, or all or the greater part of the assets or undertaking of a company;

“Administration of Estates Act” means the Administration of Estates Act, 1965 (Act No. 66 of 1965);

“address” in relation to a company includes -

(a) Electronic mail or any other electronic address used for the purposes of sending or receiving documents or information by electronic means, excluding WhatsApp or other impermanent records; and

(b) a postal and physical address;

“advertisement” means any direct or indirect communication transmitted by any medium, or any representation or reference written, inscribed, recorded, encoded upon or embedded within any medium, by means of which a person seeks to bring any information to the attention of all or part of the public;

“agreement” includes a contract, an arrangement or understanding between or among two or more parties that purports to create legally enforceable rights and obligations.

“all or the greater part of the assets or undertaking”, when used in respect of a company, means either-

(a) in the case of the company’s assets, more than 50% of its gross assets fairly valued, irrespective of its liabilities; or

(b) in the case of the company’s undertaking, more than 50% of the value of its entire undertaking, fairly valued;

“alterable provision” means a provision of this Act in which it is expressly contemplated that its effect on a particular company may be negated, restricted, limited, qualified, extended or otherwise altered in substance or effect by memorandum or articles of association of that company;

“alternate director” means a person elected or appointed to serve, as the occasion requires, as a member of the board of a company in substitution for a particular elected or appointed director of that company;

“amalgamation or merger” means a transaction, or series of transactions, pursuant to an agreement between two or more companies, resulting in -

(a) the formation of one or more new companies, which together hold all of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement, and the dissolution of each of the amalgamating or merging companies; or

(b) the survival of at least one of the amalgamating or merging companies, with or without the formation of one or more new companies, and the vesting in the surviving company or companies, together with any such new company or companies, of all of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement;

“amalgamated or merged company” means a company that either -

(a) was incorporated pursuant to an amalgamation or merger agreement; or

(b) was an amalgamating or merging company and continued in existence after the implementation of the amalgamation or merger agreement,

and holds any part of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement;

“amalgamating or merging company” means a company that is a party to an amalgamation or merger agreement;

“annual duty” means the annual duty referred to in section 10;

“annual general meeting” means the meeting of a public company required by section 179(7);

“annual return” means the annual return referred to in section 250;

“applicable legislation” means applicable legislation listed in Schedule 6 to this Act;

“articles”, or “articles of association”, means the document, as amended from time to time, that sets out rights, duties and responsibilities of shareholders, directors and others within and in relation to a company, and other matters as contemplated in section 80 and by which -

(a) the company was incorporated under this Act as contemplated in section 56;

(b) a pre-existing company was structured and governed before the later of the -

1. commencement date; or
2. date it was converted to a company in terms of Part 2 of Chapter 2; or

(c) a domesticated company is structured and governed;

“audit” means audit as contemplated in the Accountants’ and Auditors’ Act, 2022 but does not include an “independent review”of annual financial statements, as contemplated in this Act;

“auditor” means a person appointed as an auditor under section 279;

“banking institution” means a banking istitution registered under the Banking Institutions Act;

“Banking Institutions Act”, means the Banking Institutions Act, 1998 (Act No. 2 of 1998);

“beneficial owner” means a natural person or persons who ultimately owns or controls an interest in a company by means of any arrangement or undertaking that gives such a person total or substantive control;

“BIPA” means the Business and Intellectual Property Authority established by section 3 of BIPA Act;

“BIPA Act” means the Business and Intellectual Property Authority Act, 2016 (Act No. 8 of 2016);

“board” means the board of directors of a company;

“Board” means the Board of BIPA constituted under section 8 of BIPA Act;

“building society” means a building society registered under the Building Societies Act, 1986 (Act No. 2 of 1986);

“certified” means certified in the manner prescribed by the Board to be a true copy or a correct translation;

“central securities depository” means a public company incorporated in terms of this Act and registered as central securities depository in terms of any law relating to the custody and administration of securities;

“closely held company” means a closely held company registered and incorporated in terms Schedule 2 of this Act;

“Companies Act, 1926” means the Companies Act, 1926 (Act No. 46 of 1926), repealed by the Companies Act, 1973 and referred to in section 449 of the repealed Act;

“Companies Act, 1973” means the Companies Act, 1973 (Act No. 61 of 1973), referred to in the repealed Act and repealed by that Act;

“company” means a company incorporated under section 56 and includes a body corporate which, immediately before the commencement of this Act, was a company in terms of the repealed Act;

“Companies Tribunal” means the Tribunal established in terms of section 25;

“competent authority” means a competent authority as defined in section 1 of the Financial Intelligence Act, 2012 (Act No. 13 of 2012);

“consideration” means anything of value given and accepted for any property, service, act, omission or forbearance or any other thing of value, including -

(a) any money, property, negotiable instrument, securities, investment credit facility, token or ticket;

(b) any labour, barter or similar exchange of one thing for another; or

(c) any other thing, undertaking, promise, agreement or assurance, irrespective of its apparent or intrinsic value, or whether it is transferred directly or indirectly;

“convertible”, when used in relation to any securities of a company means securities that may, by their terms, be converted into other securities of the company, including -

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

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

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

“co-operative” means a juristic person as defined in the Co-operatives Act, 1996 (Act No.23 of 1996);

“Court”, in relation to any -

1. company, closely company or other body corporate, means the High Court and includes the Companies Tribunal as comtemplated in section 25 of the Act; and
2. offence under this Act, includes a magistrate’s court having jurisdiction in respect of that offence;

“debenture” includes debenture bonds, whether constituting a charge on the assets of the company or not;

“director” means a member of the board of a company, as contemplated in section 184, or an alternate director of a company and includes a shadow director and any person occupying the position of a director, such as a de facto director, by whatever name designated;

“distribution” means a direct or indirect -

(a) transfer by a company of money or other property of the company, except at full value and other than its own shares, to or for the benefit of one or more holders of any of the shares, or to the holder of a beneficial interest in any such shares, of that company or of another company within the same group of companies, whether -

(i) in the form of a dividend, or acquisition of shares, whether by redemption or other acquisition;

(ii) as a payment *in lieu* of a capitalisation share, as contemplated in section 107;

(iii) as consideration for the acquisition -

(aa) by the company of any of its shares as contemplated in section 108; or

(bb) by any company within the same group of companies of any shares of a company within that group of companies; or

(iv) otherwise in respect of any of the shares of that company or of another company within the same group of companies subject to Part 6 of Chapter 7 of the Act;

(b) incurrence of a debt or other obligation by a company for the benefit of one or more holders of any of the shares of that company or of another company within the same group of companies; or

(c) forgiveness or waiver by a company of a debt or other obligation owed to the company by one or more holders of any of the shares of that company or of another company within the same group of companies,

but does not include the transfer of money or property by a company to a subsidiary, as consideration for the purchase of shares in that subsidiary.

“electronic communication” has the meaning set out in section 1 of the Electronic Transactions Act;

“Electronic mail” means an electronic transmission directed to a unique electronic mail address.

“Electronic Transactions Act”means the Electronic Transactions Act, 2019 (Act No. 4 of 2019);

“equity solvency test” means the liquidity test companies must comply with in order to effect a lawful distribution pursuant to section 117;

“exchange” when used as a noun, has the meaning set out in section 1 of the Financial Institutions and Markets Act;

“exercise”, when used in relation to voting rights, includes voting by proxy, nominee, trustee or other person in a similar capacity;

“*ex officio* director” means a person who holds office as a director of a particular company solely as a consequence of that person holding some other office, title, designation or similar status specified in the memorandum or articles of association of a company;

“equity share capital” and “equity shares”, in relation to a company, means its issued share capital and shares, excluding any part which, neither with regard to dividends nor with regard to capital, carries any right to participate beyond a specified amount in a distribution;

“existing company” means any body which, before the commencement of this Act, was a company in terms of the repealed Act;

“external company” means a foreign company or other association of persons, incorporated outside Namibia, that has a place of business or a place where it carries on its nonprofit activities in Namibia , or which was an external company in terms of the repealed Act;

“FIC” or “Centre” means the Financial Intelligence Centre as defined in section 1 of the Financial Intelligence Act, 2012 (Act No. 13 of 2012);

“file”, when used as a verb, means to deliver a document to BIPA in the manner and form, if any, prescribed for that document;

“Financial Institutions and Markets Act” means the Financial Institutions and Markets Act, 2021 (Act No. 2 of 2021);

“financial reporting standards”, with respect to any particular company’s financial statements, means the standards applicable to that company as prescribed in terms of the Accountants’ and Auditors’ Act, 2022;

“financial statement” includes -

(a) annual financial statements and provisional annual financial statements;

(b) interim or preliminary reports;

(c) group and consolidated financial statements in the case of a group of companies; and

(d) financial information in a circular, prospectus or provisional announcement of results, that an actual or prospective creditor or holder of the company’s securities, or its employees, or BIPA or other regulatory authority, may reasonably be expected to rely on;

“foreign company” means an entity incorporated outside Namibia, irrespective of whether it is -

(a) a profit, or non-profit, entity; or

(b) carrying on business or non-profit activities, within Namibia;

“foreign country” means any state, country or territory other than Namibia;

“general voting rights” means voting rights that can be exercised generally at a general meeting of a company;

“group of companies” means a holding company and all of its subsidiaries;

“holding company”, in relation to a subsidiary, means a juristic person that controls that subsidiary as a result of any circumstances contemplated in section 4(2)(a);

“incorporator”, when used -

(a) with respect to a company incorporated in terms of this Act, means a person who incorporated that company as contemplated in section 56; or

(b) with respect to a pre-existing company, means a person who took the relevant actions comparable to those contemplated in section 56 to bring about the incorporation of that company;

“individual” means a natural person;

“inspector” means a person appointed as inspector under section 203;

“Insolvency Act” means the Insolvency Act, 1936 (Act No. 24 of 1936);

“inter-related”, when used in respect of three or more persons, means persons who are related to one another in a linked series of relationships, such that two of the persons are related in a manner contemplated in section 4(1), and one of them is related to the third in any such manner, and so forth in an unbroken series;

“investigator” means an independent investigator appointed under section 216;

“juristic person” includes -

(a) a foreign company; and

(b) any other body corporate, by whatever name designated, constituted in accordance with any public regulation or legislation, whether or not it was established within or outside the Republic;

“knowing”, “knowingly” or “knows”, when used with respect to a person, and in relation to a particular matter, means that the person either -

(a) had actual knowledge of the matter;

(b) was in a position in which the person reasonably ought to have -

(i) had actual knowledge;

(ii) investigated the matter to an extent that would have provided the person with actual knowledge; or

(iii) taken other measures which, if taken, would reasonably be expected to have provided the person with actual knowledge of the matter;

“liquidator”, in relation to a -

1. closely held company; or
2. company,

means the person appointed under this Act as liquidator of the closely held company or the company, and includes any co-liquidator and any provisional liquidator so appointed;

“liability” means the obligation to pay a judgment, settlement, penalty, fine (including an excise tax assessed with respect to an employee benefit plan), or expenses incurred with respect to a proceeding, and it includes interest on any such judgement, settlement, penalty or fine;

“listed securities” has the meaning set out in section 1 of the Financial Institutions and Markets Act;

“manager”, in relation to a company, means any person who is a principal executive officer of the company for the time being, by whatever name designated and whether or not that person is a director;

“Master” means the Master of the High Court;

“material”, when used as an adjective, means significant in the circumstances or in aggregation of relevant events, in respect of a particular matter, to a degree that is -

(a) of consequence in determining the matter; or

(b) might reasonably affect a person’s judgement or decision-making in the matter;

“member”, when used in reference to -

(a) a closely held company, has the meaning set out in item 1 of Schedule 2; or

(b) a non-profit company, means a person who holds membership in, and specified rights in respect of, that non-profit company as contemplated in section 37; or

(c) any other entity, means a person who is a constituent part of that entity;

“memorandum”, or “memorandum of association”, means the document, as amended from time to time, that sets out registration particulars in relation to a company, and other matters as contemplated in section 76 and by which -

(a) the company was incorporated under this Act as contemplated in section 56;

(b) a pre-existing company was structured before the later of the -

(i) commencement date; or

(ii) date it was converted to a company in terms of Part 2 of Chapter 2; or

(c) a domesticated company is structured;

“Minister” -

1. means the Minister responsible for industrialisation and trade; and
2. in relation to any matter to be dealt with in the office of the Master in connection with the winding-up or business rescue of companies, means the Minister responsible for justice;

“nominee” means a person that acts as the registered holder of securities or an interest in securities on behalf of other persons;

“non-profit company” means a company -

(a) incorporated for a public benefit or other object as required by section 37; and

(b) the income and property of which are not distributable to its incorporators, members, directors, officers or persons related to any of them except to the extent permitted by Table C of Schedule 1 to the Act;

“Notice of Incorporation” means the notice to be filed in terms of section 56 by which the incorporators of a company inform BIPA of the incorporation of that company for the purpose of having it registered;

“objectively ascertainable” whenever a provision of this Act permits any of the terms of a plan or a filed document to be dependent on facts objectively ascertainable outside the plan or filed document, the following provisions apply:

(1) The manner in which the facts will operate upon the terms of the plan or filed document must be set forth in the plan or filed document.

(2) The facts may include:

(a) any of the following that is available in a nationally recognized news or information medium either in print or electronically: statistical or market indices, market prices of any security or group of securities, interest rates, currency exchange rates, or similar economic or financial data;

(b) a determination or action by any person or body, including the company or any other party to a plan or filed document; or

(c) the terms of, or actions taken under, an agreement to which the corporation is a party, or any other agreement or document.

(3) As used in this subsection:

(a) “filed document’’ means a document filed by the registrar under any provision of this Act; and

(b) “plan’’ means an agreement of merger or amalgamation, or scheme of arrangement or share exchange.

(4) The following provisions of a plan or filed document may not be made dependent on facts outside the plan or filed document:

(a) the name and address of any person required in a filed document;

(b) the registered office of any entity required in a filed document;

(c) the registered agent of any entity required in a filed document;

(d) the number of authorized shares and designation of each class or series of shares;

(e) the effective date of a filed document; and

(f) any required statement in a filed document of the date on which the underlying transaction was approved or the manner in which that approval was given.

(5) If a provision of a filed document is made dependent on a fact ascertainable outside of the filed document, and that fact is not ascertainable by reference to a source described in subsection (2)(a) or a document that is a matter of public record, and the affected shareholders have not received notice of the fact from the company, then the company shall file with the Registrar notice of amendment to the filed document setting forth the fact promptly after the time when the fact referred to is first ascertainable or thereafter changes. Notice of amendment under this subsection (5) are deemed to be authorized by the authorization of the original filed document to which they relate and may be filed by the company without further action by the board of directors or the shareholders.

“officer”, in relation to -

1. a closely held company, means any manager or secretary thereof, whether or not such manager or secretary is also a shareholder of the closely held company;

(b) a company, it is any person acting as manager or secretary, whether formally appointed or not;

“official language” means the official language of Namibia referred to in Article 3 of the Namibian Constitution;

“ordinary resolution” means a resolution adopted with the support of more than 50% of the voting rights exercised on the resolution -

(a) at a shareholders meeting; or

(b) by holders of securities of the company acting, other than at a meeting, as contemplated in section 178;

except that it does not apply to a meeting of debenture holders, even if they possess voting rights as contemplated in this sub-section.

“participant” has the meaning set out in section 1 of the Financial Institutions and Markets Act;

“person” includes a juristic person;

“personal financial interest”, when used with respect to any person -

(a) means a direct or indirect material interest of that person, of a financial, monetary or economic nature, or to which a monetary value may be attributed; but

(b) does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Financial Institutions and Markets Act unless that person has direct control over the investment decisions of that fund or investment;

“personal liability company” means a profit company that satisfies the criteria set out in section 38;

“place of business” means any place where the company transacts or holds itself out as transacting business and includes a share transfer or share registration office;

“pre-incorporation contract” means a written agreement entered into before the incorporation of a company by a person who purports to act in the name of, or on behalf of, the proposed company, with the intention or understanding that the proposed company will be incorporated, and will thereafter be bound by the agreement;

“premises” includes land, or any building, structure, vehicle, ship, boat, vessel, aircraft or container;

“prescribed” means prescribed by regulations;

“prescribed officer” means a person who, within a company, performs any function that has been designated in terms of section 184;

“present at a meeting” means -

1. to be present at the meeting in person;
2. to be able to participate in the meeting by electronic communication; or
3. to be represented by a proxy who is present in person or able to participate in the meeting by electronic communication;

“private company” means a profit company that is not a public, personal liability or state-owned company and satisifies the criteria set out in section 35;

“profit company” means a company incorporated for the purpose of financial gain for its shareholders;

“prospectus” means any prospectus, notice, circular, advertisement or other invitation offering any securities of a company to the public;

“Public Accountants’ and Auditors’ Act”, means the Public Accountants’ and Auditors’ Act, 1951 (Act No. 51 of 1951);

“public company” means a profit company that is neither a State-owned company, a private company nor a personal liability company;

“public regulation” means any legislation or subordinate legislation, or any licence, tariff, directive or similar authorisation issued by a regulatory authority or pursuant to any statutory authority;

“records”, when used with respect to any information pertaining to a company, means any information contemplated in section 241;

“record date” means the date established under section 177 on which a company determines the identity of its shareholders and their shareholdings for the purposes of this Act;

“registered external company” means an external company that has registered its office as required by section 194, and has been assigned a registration number in terms of that section;

“registered office” means the office of a company, or of an external company, that is registered as required by section 56;

“registered trade union” means a trade union registered in terms of section 57 of the Labour Act, 2007 (Act No. 11 of 2007);

“Registrar” means the Registrar of business and industrial property as defined in section 1 of BIPA Act;

“registration certificate”, when used with respect to -

(a) a company incorporated on or after the commencement date, means the certificate, or amended certificate, issued by BIPA as evidence of the incorporation and registration of that company;

(b) a pre-existing company registered in terms of -

(i) the repealed Act, means the certificate of incorporation or registration issued to it in terms of that Act;

(ii) the repealed Close Corporations Act, and converted in terms of Schedule 2 to this Act, means the certificate of incorporation issued to the company in terms of that Schedule, read with section 35;

(iii) any other law, means any document issued to the company in terms of that law as evidence of the incorporation of the company; or

(c) registered external company;

means the certificate of registration issued to it in terms of this Act or the repealed Act;

“Registration Office” means the Registration Office as defined in section 1 of BIPA Act;

“registry” means a depository of documents, including in an electronic format, kept by BIPA in terms of BIPA Act,;

“regulated person or entity” means a person that has been granted authority to conduct business by a regulatory authority;

“regulation” means a regulation made under section 18, read with item 14 of Schedule 7 to this Act;

“regulated company” means a company to which Chapter 6 and the Takeover Regulations apply;

“regulatory authority” means an entity established in terms of legislation and which is responsible for regulating an industry or sector of an industry;

“related”, when used in respect of two persons, means persons who are connected to one another in any manner contemplated in section 4;

“relationship” includes the connection subsisting between any two or more persons who are related or inter-related as determined in accordance with section 4;

“repealed Close Corporations Act means the Close Corporations Act, 1988 (Act No. 26 of 1988) repealed by section 382;

“secretary” includes any official of a company by whatever name designated, including a body corporate, performing the duties normally performed by a secretary of a company;

“securities” means any shares, debentures or other instruments, irrespective of their form or title, issued or authorised to be issued by a profit company;

“securities register” means the register required to be established by a profit company in terms of section 110;

“share” means one of the units into which the proprietary interest in a profit company is divided;

“shareholder”, subject to section 175(1), means the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register and includes,where expressly provided for, persons with a beneficial interest in the shares;

“shareholders meeting”, with respect to any particular matter concerning a company, means a meeting of those holders of that company’s issued shares who are entitled to exercise voting rights in relation to that matter;

the solvency and liquidity test requires that a company, at any time when the test is required to be met, has to satisfy the following conditions: –

(a) the assets of the company , as fairly valued, equal or exceed the liabilities of the company as fairly valued; and

(b) it reasonably appears that the company will be able to pay its debts as they become due in the ordinary course of business for a foreseeable future

“special resolution” means -

(a) in the case of a company, a resolution adopted with the support of at least 75% of the voting rights exercised on the resolution -

(i) at a shareholders meeting; or

(ii) by holders of the company’s securities acting other than at a meeting as contemplated in section 186; or

(b) in the case of any other juristic person, a decision by the owner or owners of that person, or by another authorised person, that requires the highest level of support in order to be adopted, in terms of the relevant law under which that juristic person was incorporated;

“state-owned company” means an enterprise that is registered in terms of this Act as a company, and either -

(a) is listed as a public entity in section 2 of the Public Enterprises Governance Act, 2019, (Act No.1 of 2019); or

(b) is owned by a municipality, as contemplated in the and is otherwise similar to an enterprise referred to in paragraph (a);

“State Finance Act” means the State Finance Act, 1991 (Act No. 31 of 1991);

“subsidiary company” or “subsidiary” means a subsidiary company as determined in section 3;

“Takeover Regulations” means the regulations made under section 293;

“the repealed Act” means the Companies Act, 2004 (Act No. 28 of 2004) repealed by section 382;

“this Act” includes the regulations;

“Companies Tribunal” means the Tribunal established in terms of section 25;

“unalterable provision” means a provision of this Act that does not expressly contemplate that its effect on any particular company may be negated, restricted, limited, qualified, extended or otherwise altered in substance or effect by a company’s memorandum or articles of association;

“uncertificated securities” means any securities defined as such in section 1 of the Financial Institutions and Markets Act, 2021;

“uncertificated securities register” means the record of uncertificated securities administered and maintained by a participant or central securities depository as determined in accordance with the rules of a central securities depository, and which forms part of the relevant company’s securities register established and maintained in terms 110;

“voting power”, with respect to any matter to be decided by a company, means the voting rights that may be exercised in connection with that matter by a particular person, as a percentage of all such voting rights;

“voting rights”, with respect to any matter to be decided by a company, means -

(a) the rights of any holder of the company’s securities to vote in connection with that matter, in the case of a profit company; or

(b) the rights of a member to vote in connection with the matter, in the case of a non-profit company;

“voting securities” with respect to any particular matter, means securities that-

(a) carry voting rights with respect to that matter; or

(b) have been converted into securities that carry voting rights with respect to that matter;

“wholly owned subsidiary” means a wholly owned subsidiary as defined in section 4(5); and

“winding-up order” means any order of court whereby a company is wound up and includes any order of court whereby a company is placed under provisional winding-up for so long as that order is in force.

“Writing” or “written” means any information in the form of a document, including in electronic form.

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(2) A person is not deemed to be, within the meaning of this Act, a person in accordance with whose directions or instructions the directors of a company are accustomed to act by reason only that the directors of the company act on advice given by him or her in a professional capacity.

**General application of Act**

(1) This Act applies to every company incorporated under this Act, every external company and, save as is otherwise provided in this Act, to every existing company.

**Restricted Application of Act**

(1) This Act does not apply to -

1. any company the formation, registration and management of which is governed by any law relating to building societies, friendly societies, including pension funds, within the meaning of the Pension Funds Act, 1956 (Act No. 24 of 1956), trade unions and employers’ organisations, or co-operative societies or companies, save in so far as may be otherwise provided in that law;

(b) any company or external company or society which is subject to any law relating to banks or insurance companies or societies in so far as that law is inconsistent with this Act.

**Related and inter-related persons, and control**

(1) For all 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, civil union and/or long-term same sex relationship; or

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

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

(c) a juristic person is related to another juristic person 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).

(2) For the purpose of subsection (1), a person controls a juristic person, or its business, if -

(a) in the case of a juristic person that is a company -

(i) that juristic person 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;

(b) in the case of a juristic person that is a closely held company, that first person owns the majority of the company’s shares, or controls directly, or has the right to control, the majority of shareholders’ votes in the closely held company;

(c) in the case of a juristic person that is a trust, that first person has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees, or to appoint or change the majority of the beneficiaries of the trust; or

(d) that first person has the ability to materially influence the policy of the juristic person in a manner comparable to a person who, in ordinary commercial practice, would be able to exercise an element of control referred to in paragraph (a), (b) or (c).

(3) With respect to any particular matter arising in terms of this Act, a court, the Tribunal or BIPA may exempt any person from the application of a provision of this Act that would apply to that person because of a relationship contemplated in subsection (1) if the person can show that, in respect of that particular matter, there is sufficient evidence to conclude that the person acts independently of any related or inter-related person.

**Purpose of Act**

1. **5.**

The purpose of this Act is to promote the realisation of the fundamental freedom to practise any profession, or carry on any occupation, trade or business pursuant to art. 21(1)(j) of the Namibian Constitution, 1990 (as amended).

**General interpretation of Act**

1. **6.**

(1) This Act must be interpreted and applied in a manner that gives effect to the purposes set out in section 5.

(2) To the extent appropriate, a court interpreting or applying this Act may consider the law of a foreign jurisdiction.

(3) When, in this Act, a particular number of ‘business days’ is provided for between the happening of one event and another, the number of days must be calculated by -

(a) excluding the day on which the first such event occurs;

(b) including the day on or by which the second event is to occur; and

(c) excluding any public holiday, Saturday or Sunday that falls on or between the days contemplated in paragraphs (a) and (b), respectively.

(4) If there is an inconsistency between any provision of this Act and a provision of any other Act -

(a) the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second; and

(b) to the extent that it is impossible to apply or comply with one of the inconsistent provisions without contravening the second -

(i) any applicable provisions of the -

(aa) Public Accountants’ and Auditors’ Act;

(bb) Labour Act, 2007 (Act No. 11 of 2007);

(cc) Access to Information legislation;

(dd) State Finance Act;

(ee) Financial Institutions and Markets Act;

(ff) Banking Institutions Act;

(gg) Section 8 of the Payment System Management Act, 2003 (Act No. 18 of 2003;

(hh) Financial Intelligence Act;

(ii) BIPA Act,

prevail in the case of an inconsistency involving any of them, except to the extent that the fundamental freedom encapsulated in the purpose clause under section 5 of the Act is promoted; or

(ii) the provisions of this Act prevail in any other case, except to the extent provided otherwise in the Namibian Constitution, 1990 (as amended).

(5) If there is a conflict between any provision of this Act and a provision of the listing requirements of an exchange of the Namibia Stock exchange Act -

(a) the provisions of both this Act and the listing requirements apply concurrently to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second; and

(b) to the extent that it is impossible to apply and comply with one of the inconsistent provisions without contravening the second, the provisions of this Act prevail, except to the extent that this Act expressly provides otherwise.

**Registration Office and Register**



(1) For the purposes of this Act, the companies are registered at theRegistration Office.

(2) Notwithstanding subsection (1), the Board may by notice in the *Gazette*, declare any other place to be a Registration Office for the purposes of this Act.

(3) The Registrar must, in the Registration Office, keep a register of companies in which must be recorded the registration of any company and any other matter for which provision is made in this Act.

(4) The register of companies kept by the Registrar under the repealed Act is deemed to be and to form part of the register of companies to be kept in the Registration Office.

**Registrar and delegation of power**

The Registrar may in writing delegate any of the powers and entrust any of the duties assigned to him or her by this Act, to any staff member.

**Manner of payment of fees**

1. The payment of all fees, additional fees, annual duty or other moneys payable to the Registrar as laid down by this Act must be effected in the prescribed manner.

(2) No document, form, return or notice in respect of which any fee or payment is determined under this Act, is complete unless proof of payment of the prescribed fee, additional fees, annual duty or other moneys has been delivered to the Registrar.

(3) Any fees, additional fees, annual duty and any other moneys payable under this Act to the Registrar are for the account of BIPA and any outstanding fees or other money due and payable are debt due to BIPA and are recoverable by BIPA in any competent court.

**Annual report by Registrar**

The Registrar must, in every calendar year, submit to the Board a report containing information concerning the registration of companies of each type, their authorised capitals or numbers of shares, increases in and reductions of capital, prospectuses, windings-up, judicial managements, deregistrations and dissolutions of companies, additional fees collected, prosecutions and convictions under this Act and other matters which the Board may direct.

**Directions to comply with international obligations**

(1) If it appears to the Minister —

1. that any action proposed to be taken by the Board or a recognised supervisory body or a recognised qualifying body, or a body designated by order under sections 14, 61 and 336, would be incompatible with Community obligations or any other international obligations of Namibia, or
2. that any action which that body has power to take is required for the purpose of implementing any such obligations,

the Minister may direct the body not to take or, as the case may be, to take the action in question.

1. A direction may include such supplementary or incidental requirements as the Minister thinks necessary or expedient.
2. A direction under this section given to a body designated by order under the above sections is enforceable on the application of the Minister by injunction.

PART 2

BUSINESS AND INTELLECTUAL PROPERTY AUTHORITY (BIPA)

**Objectives of the Business and Intellectual Property Authority under this Act**

1. The provisions of this section do not substitute those of the Business and Intellectual Property Authority Act, 2016 (Act No. 8 of 2016) (‘the BIPA Act’)
2. If there is an inconsistency between any provision of this Act and a provision of the BIPA Act, this Act prevails.
3. Subject to sub-section (1), the objectives of the Companies Registration Office are –

(a) the efficient and effective registration of –

(i) companies, and external companies, in terms of this Act; and

(ii) other juristic persons, in terms of any applicable legislation referred to in Schedule 6; and

(b) the maintenance of accurate, up-to-date and relevant information concerning companies, corporate entities and intellectual property rights, and the provision of that information to the public and to other organs of state;

(c) the promotion of education and awareness of company and intellectual property laws, and related matters;

(d) the promotion of compliance with this Act, and any other applicable legislation; and

the efficient, effective and widest possible enforcement of this Act, and any other legislation listed in Schedule 6.

(3) To achieve its objectives, BIPA may -

(a) have regard to international developments in the field of company and intellectual property law; or

(b) consult any person, organisation or institution with regard to any matter.

**Functions of Business and Intellectual Property Authority**

(1) In this section, “this Act” has the meaning set out in section 1, but also includes any legislation listed in Schedule 6.

(2) Other than with respect to matters within the jurisdiction of the ad hoc Takeover Regulation Panel of Experts, BIPA (in its role as the Companies Registration Office) must enforce this Act, by, among other things, —

(a) promoting voluntary resolution of disputes arising in terms of this Act between a company on the one hand and a shareholder or director on the other, as contemplated in Part 7 of Chapter 7, without intervening in, or adjudicating any such dispute;

(b) monitoring proper compliance with this Act;

(c) receiving or initiating complaints concerning alleged contraventions of this Act, evaluating those complaints, and, if in BIPA’s discretion worth investigating, initiating investigations into complaints;

(d) receiving directions from the Minister in terms of section 206, concerning investigations to be conducted into alleged contraventions of this Act, or other circumstances, and conducting any such investigation;

(e) ensuring that contraventions of this Act are promptly and properly investigated;

(f) negotiating and concluding undertakings and consent orders contemplated in section 240 of the Act;

(g) issuing and enforcing compliance notices;

(h) referring alleged offences in terms of this Act to the Office of the Prosecutor General; and

(i) referring matters to a court, and appearing before the court or the Companies Tribunal, as permitted or required by this Act.

\(3) BIPA must promote the reliability of financial statements by, among other things -

(a) monitoring patterns of compliance with, and contraventions of, financial reporting standards; and

(b) making recommendations to the Accountants’ and Auditors’ Regulatory Authority of Namibia (‘AARA’) for amendments to financial reporting standards, to secure better reliability and compliance;

(4) BIPA must -

(a) establish and maintain in the prescribed manner and form –

(i) a Companies Register, and

(ii) any other register contemplated in this Act, or in any other legislation that assigns a registry function to the Companies Registration Office;

1. receive and deposit in the registry any documents required to be filed in terms of this Act;
2. make the information in those registers efficiently and effectively available to the public, and to other organs of state;
3. register and de-register companies, directors, business names and intellectual property rights, in accordance with relevant legislation; and
4. perform any related functions assigned to it by legislation, or reasonably necessary to carry out its assigned registry functions.

(5) Subject to the provisions of subsections (6) and (7), any person, on payment of the prescribed fee, may-

(a) inspect a document filed under this Act; or

(b) obtain a certificate from BIPA as to the contents or part of the contents of any document that -

(i) has been filed under this Act in respect of any company; and

(ii) is open to inspection; or

(c) obtain a copy of or extract from any document contemplated in paragraph (b);

(d) through any electronic medium approved by BIPA -

(i) inspect, or obtain a copy of or extract from, any document contemplated in paragraph (b) that has been converted into electronic format, or

(ii) obtain a certificate contemplated in paragraph (b).

(6) Subsection (5) does not apply to any part of a filed document if that part has been determined to be confidential, or contain confidential information;

(7) BIPA -

(a) must waive any prescribed registry fee contemplated in subsection (5) if it is satisfied –

(i) that an inspection, certificate, copy or extract is required on behalf of a foreign government accredited to the Republic; and

(ii) that no fees are payable in the foreign country concerned in respect of such inspection, certificate, copy or extract required on behalf of the Republic; and

1. may waive any such fee if satisfied that any inspection, certificate, copy or extract is required for the purposes of research by or under the control of an institution for higher education.

**Reporting, research, public information and** **relations with other regulators**

(1) In addition to any other advice or reporting requirements set out in this Act, BIPA is responsible to—

(a) advise the Minister on matters of national policy relating to company and intellectual property law, and recommend to the Minister changes to bring the law and the administration of this Act up to date and in line with international best practice;

(b) report to the Minister annually on the volume and nature of registration and enforcement activities in terms of this Act; and

(c) enquire into and report to the Minister on any matter concerning the purposes of this Act, and advise the Minister in respect of any matter referred to it by the Minister.

(2) BIPA is responsible to increase knowledge of the nature and dynamics of company and intellectual property law, and to promote public awareness of company and intellectual property law matters, by—

(a) implementing education and information measures to develop public awareness of the provisions of this Act, and in particular to advance the purposes of this Act;

(b) providing guidance to the public by—

(i) issuing explanatory notices outlining its procedures, or its non-binding opinion on the interpretation of any provision of this Act; or

(ii) applying to a court for a declaratory order on the interpretation or application of any provision of this Act;

(c) conducting research relating to its mandate and activities and, from time to time, publishing the results of that research; and

(d) over time, reviewing legislation and public regulations, and reporting to the Minister concerning matters relating to company and intellectual property law.

(3) BIPA may—

(a) liaise with any regulatory authority on matters of common interest, and without limiting the generality of this paragraph, may exchange information with, and receive information from, any such regulatory authority pertaining to -

(i) matters of common interest; or

(ii) a specific complaint or investigation

(b) negotiate agreements with any regulatory authority, and exercise its authority through any such agreement, to—

(i) co-ordinate and harmonise the exercise of jurisdiction over company and intellectual property law matters within the relevant industry or sector; and

(ii) ensure the consistent application of the principles of this Act;

(c) participate in the proceedings of any regulatory authority; and

(d) advise, or receive advice from, any regulatory authority.

(4) BIPA may liaise with any foreign or international authorities having any objects similar to the functions and powers of BIPA.

(5) BIPA may refer to –

(a) the Competition Commission any concerns regarding conduct that may be prohibited or regulated in terms of the Competition Act, 2003 (Act No. 2 of 2003);

(b) the Namibian Revenue Authority any concerns regarding behaviour or conduct that may be prohibited or regulated in terms of legislation within the jurisdiction of that Authority;

(c) the Accountants’ and Auditors’ Regulatory Authority of Namibia any concerns regarding behaviour or conduct that may be prohibited or regulated in terms of the Accountants and Auditors Act, 2022 (Act No.); or

(d) any other regulatory authority any concerns regarding behaviour or conduct that may be prohibited or regulated in terms of legislation within the jurisdiction of that regulatory authority.

**Minister may direct policy and require investigation**

(1) In this section, “this Act” has the meaning set out in section 1, but also includes any legislation listed in Schedule 6.

(2) The Minister -

(a) by notice in the Gazette, may issue policy directives to BIPA with respect to the application, administration and enforcement of this Act, but any such directive must be consistent with this Act; and

(b) may at any time direct BIPA to investigate -

(i) an alleged contravention of this Act; or

(ii) any matter or circumstances with respect to the administration of 1 or more companies in terms of this Act, whether or not those circumstances appear at the time of the direction to amount to a possible contravention of this Act.

(3) BIPA may liaise with any foreign or international authorities having any objects similar to the functions and powers of BIPA.

(4) BIPA may refer to –

(a) the Competition Commission any concerns regarding conduct that may be prohibited or regulated in terms of the Competition Act, 2003 (Act No. 2 of 2003);

(b) the Namibian Revenue Authority any concerns regarding behaviour or conduct that may be prohibited or regulated in terms of legislation within the jurisdiction of that Authority;

(c) the Accountants’ and Auditors’ Regulatory Authority of Namibia any concerns regarding behaviour or conduct that may be prohibited or regulated in terms of the Accountants and Auditors Act, 2022 (Act No.); or

(d) any other regulatory authority any concerns regarding behaviour or conduct that may be prohibited or regulated in terms of legislation within the jurisdiction of that regulatory authority.

**Establishment of specialist committees**

(1) The Minister may appoint a specialist committee to advise -

(a) the Minister on any matter relating to company law or policy; or

(b) the Board on any matter concerning the implementation of company law or policy.

(2) The Minister may assign specific powers to the members of a specialist committee for the purposes of performing any function contemplated in subsection (1).

(3) The specialist committee -

(a) may be established for an indefinite term, or for a period determined by the Minister when the committee is established; and

(b) may determine its own procedures.

**Constitution of the specialist committee**

(1) A specialist committee established under section 17 must -

(a) perform its functions impartially and without fear, favour or prejudice; and.

(b) consist of -

(i) not more than 8 persons who are independent from BIPA and are appointed by the Minister to serve for a period of not more than 5 years, as determined by the Minister when the person is appointed; and

(ii) not more than 2 senior employees of BIPA designated by the Chief Executive Officer.

(2) To be appointed or designated as a member of a specialist committee in terms of this section, a person must -

(a) be a fit and proper person;

(b) have appropriate expertise or experience; and

(c) have the ability to perform effectively as a member of that committee.

(3) The members of a specialist committee must not -

(a) act in any way that is inconsistent with subsection (1)(a) or expose themselves to any situation in which the risk of a conflict may arise between their responsibilities and any personal financial interest; or

(b) use their position or any information entrusted to them to enrich themselves or improperly benefit any other person.

(4) A member ceases to be a member of a specialist committee if -

(a) the person resigns from the committee;

(b) the Minister terminates the person’s membership because the member no longer complies with subsection (2) or has contravened subsection (3); or

(c) the member’s term has expired.

(5) A member of a specialist committee who has a personal or financial interest in any matter on which the committee gives advice must disclose that interest and withdraw from the proceedings of the specialist committee when that matter is discussed.

(6) BIPA must remunerate and compensate for expenses–

(a) a member mentioned in subsection (1)(b)(i), as determined by the Minister; and

(b) a member designated as contemplated in (1)(b)(ii), to the extent that the member’s remuneration and expense compensation as an employee of BIPA does not extend to that person’s services as a member of the specialist committee.

PART 3

REGULATIONS AND NOTICES

**Regulations**

1. The Minister may, after consultation with the Minister responsible for Justice, where appropriate, make regulations -

(a) providing for the conduct and administration of BIPA and prescribing the practice and procedure to be observed in that office;

(b) prescribing the practice and procedure to be observed in the office of the Master in connection with the winding-up and business rescue of companies;

(c) providing for the reproduction of any records in BIPA or the office of the Master by microfilm, microcard, miniature photographic process or any other process deemed suitable by the Minister;

(d) providing for the use for official purposes and the admissibility in evidence in any proceedings, whether in a court of law or otherwise, of any reproduction contemplated in paragraph (c);

(e) providing for the keeping and preservation of any records, or any reproduction contemplated in paragraph (c), in the Registration Office or the office of the Master, the removal from those offices and preservation in any other place of those records or reproductions and prescribing the circumstances under which those records or reproductions may be destroyed;

(f) prescribing how records required under this Act to be kept by a company may be kept, and prescribing the circumstances under which those records may be destroyed;

(g) prescribing the procedure to be followed with respect to any matter in connection with the winding-up and business rescue of companies;

(h) prescribing the form and the contents of any return, notice or form provided for by this Act;

(i) prescribing when an additional copy or copies of documents to be lodged under the Act are to be lodged and whether the additional copy or copies are to be in the form of a copy or copies certified in the manner prescribed or are to be in duplicate original form;

(j) prescribing the matters in respect of which fees are payable and the tariff of those fees;

(k) prescribing the rate of the annual duty payable by companies and the additional fees payable for late payment of annual duty or payment of an amount less than the prescribed annual duty;

(l) providing for a table of fees, subject to taxation by the Master, which are payable to a liquidator as remuneration;

(m) prescribing a tariff of remuneration payable to any person performing on behalf of a liquidator any act relating to the winding-up of a company, and prohibiting the charging or recovery of remuneration at a higher tariff than the tariff so prescribed;

(n) as to any matter required or permitted by this Act to be prescribed by regulation; and

(o) generally, as to any matter which the Minister considers necessary or expedient to prescribe in order that the purposes of this Act may be achieved.

(2) Any regulations made under subsection (1) may prescribe penalties for any contravention thereof or failure to comply therewith not exceeding a fine of N$2 000 and shall subject the ogffender to a compliance notice by BIPA.

**Prohibition of disclosure of, and exemption from obligation to disclose, certain information**

(1) The Board may -

(a) by notice in writing prohibit any company from disclosing, or from stating on or in any document of the company;

(b) on the written application of a company to the Registrar,

exempt it, subject to any conditions or restrictions which the Board may impose, from the obligation to disclose, or to state on or in any of its documents, particular information or a particular fact concerning the affairs or business of the company, or that of any of its subsidiaries, which the company would otherwise be required under this Act to disclose or to state on or in any document.

(2) Notwithstanding subsection (1) any company must, if the Registrar in a particular case in writing requires the company to do so, submit to the Registrar information which the company would otherwise have been required to submit to the Registrar in terms of this Act.

(3) The Board must, when considering whether to impose a prohibition or grant an exemption under subsection (1), have regard to the right of the members of the company and of other persons to be informed of the state of affairs and the business and of the profit or loss of the company or of the company and its subsidiaries.

(4) Any company which contravenes a prohibition imposed under subsection (1)(a) and any director or officer of a company who contravenes that prohibition, commits an offence and is liable to a fine which does not exceed N$4 000 or to be imprisoned for a period which does not exceed one year or to both the fine and imprisonment.

(5) For the purposes of this section a company includes an external company.

**Notices amending or adding to Schedules**

(1) The Minister may by notice in the Gazette amend or add to the Schedules to this Act.

(2) Any notice referred to in subsection (1) may prescribe different provisions in respect of different types of companies.

(3) A notice referred to in subsection (1) amending or adding to -

(a) Table A or B contained in Schedule 1 does not apply in relation to any company in respect of which the Table in question applied immediately before the date on which the notice took effect;

(b) Schedule 4 does not apply in respect of any financial year of any company which ended before that date.

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PART 4

REGULATORY FRAMEWORK OF THE ACT

**Enforcement Powers of the Business and Intellectual Property Authority**

In enforcing any of the functions set out in section 11 of the Act, BIPA is empowered to issue directives and/or guidance notes, which have the status of secondary legislation.

**Appeal and/or Review of the decisions of Business and Intellectual Property Authority**

(1) All decisions of BIPA exercised in the execution of its functions in terms of this Act are appealable to any competent court having jurisdiction, the ad hoc Panel of Experts on Takeovers or the Companies Tribunal, as the case may be.

(2) All administrative decisions taken by BIPA concerning

(a) the establishment and maintenance of a Companies’ Register or any other register contemplated in this Act, or in any other legislation that assigns a registry function to BIPA;

(b) the receipt and deposit in the registry of any documents required to be filed in terms of this Act;

(c) the dissemination of the information in those registers to the public and to other organs of state;

(d) the registration and de-registration of companies, directors, names (including business names) and intellectual property rights, in accordance with relevant legislation; and

(e) the performance of any related functions assigned to it by legislation, or reasonably necessary to carry out its assigned registry functions.

may be reviewed by the Companies Tribunal, which has concurrent powers, with the high court, to review such decisions.

**Ad hoc Panel of Experts for Takeovers**

**23**.

(1) BIPA may, fhrom time to time, establish as an ad hoc Panel of Experts for Takeovers an entity outside the public service.

(2) The ad hoc Panel of Experts for Takeovers —

(a) has jurisdiction throughout the Republic;

(b) is independent, and subject only to –

(i) the Constitution and the law; and

(ii) any policy statement, directive or request issued to it by the Minister in terms of this Act;

(c) must be impartial and perform its functions without fear, favour, or prejudice; and must exercise the functions assigned to it in terms of this Act or any other law, or by the Minister, in –

(i) the most cost-efficient and effective manner; and

(ii) in accordance with the values and principles mentioned in Article 98 of the Constitution.

(3) Each organ of state must assist the ad hoc Panel of Experts for Takeovers to maintain its independence and impartiality, and to exercise its authority and perform its functions effectively.

(4) In carrying out its functions, the ad hoc Panel of Experts for Takeover may—

(a) have regard to international developments in the field of company law; or

(b) consult any person, organisation or institution with regard to any matter.

**Composition of the ad hoc Panel of Experts for Takeovers**

(1) The ad hoc Panel of Experts for Takeovers comprises –

(a) the Companies Registrar, or a person designated by the Companies Registrar;

(b) the Commissioner of the Namibian Competition Commission established by section 4 of the Competition Act, 2003 (Act No. 2 of 2003), or a person designated by that Commissioner;

(c) three persons designated by the Namibian Stock Exchange; and

(d) not more than a number, being 15 minus the total number of persons designated in terms of paragraph (c), of other persons appointed by the Minister on the basis of their knowledge and experience in the regulation of securities and takeovers.

(2) At any time, the ad hoc Panel of Experts for Takeovers may co-opt additional members for a particular purpose and a limited period.

(3) Persons designated, appointed or co-opted to be members of the ad hoc Panel of Experts for Takeovers -

(a) must have suitable qualifications;

(b) must be ‘fit and proper persons; and

(c) are subject to the appointment conditions as set out in their conditions of service to the Panel.

(4) Members of the Takeover Regulation Panel –

(a) serve on the Panel for a specified period or until the completion of the purpose for which they were assembled.

PART 5

COMPANIES TRIBUNAL AND PROCEDURES

APPLICABLE TO TRIBUNAL

**Establishment of the Companies Tribunal**

(1) There is hereby established a juristic person to be known as the Companies Tribunal, which - (a) has jurisdiction throughout Namibia;

(b) is independent, and subject only to the Constitution and the law;

(c) must exercise its functions in accordance with this Act; and

(d) must perform its functions impartially and without fear, favour, or prejudice, and in as transparent a manner as is appropriate having regard to the nature of the specific function.

(2) Each organ of state must assist the Tribunal to maintain its independence and impartiality, and to perform its functions effectively.

(3) In carrying out its functions, the Tribunal may -

(a) have regard to international developments in the field of company law; or

(b) consult any person, organisation or institution with regard to any matter.

(4) The Tribunal is consisted of a chairperson and not less than 10 other persons appointed by the Minister on a full or part-time basis.

**Appointment of members of the Companies Tribunal**

(1) The Minister must appoint -

(a) the chairperson and other members of the Tribunal no later than the date on which this Act comes into operation; and

(b) a person to fill any vacancy on the Tribunal.

(2) A person may not be -

(a) appointed as chairperson or member of the Tribunal unless the person satisfies the requirements of section 28; or

(b) reappointed to a second term as chairperson of the Tribunal.

(3) The Tribunal must comprise -

(a) persons with suitable qualifications and experience in economics, law, commerce, industry or public affairs; and

(b) sufficient persons with legal training and experience to satisfy the requirements of section 28(3)(a).

(4) The Minister must designate a member of the Tribunal as deputy chairperson of the Tribunal.

(5) The deputy chairperson performs the functions of chairperson whenever -

(a) the office of chairperson is vacant; or

(b) the chairperson is for any other reason temporarily unable to perform those functions.

(6) Sections 28 and 29 apply to the chairperson and other members of the Tribunal.

(7) The chairperson and each other member of the Tribunal serves for a term of five years and may, subject to subsection (2)(b), be reappointed for a second term.

**Functions of Companies Tribunal**

(1) The Tribunal, or a member of the Tribunal acting alone in accordance with this Act, may-

(a) adjudicate in relation to any application that may be made to it in terms of this Act, and make any order provided for in this Act in respect of such an application;

(b) assist in the resolution of disputes as contemplated in section 239; and

(c) perform any other function assigned to it by or in terms of this Act.

(2) The chairperson manages the caseload of the Tribunal, and must assign each matter referred to the Tribunal to -

(a) a member of the Tribunal, to the extent that this Act provides for a matter to be considered by a single member of the Tribunal; or

(b) a panel composed of any three members of the Tribunal, in any other case.

(3) When assigning a matter to a panel in terms of subsection (2)(b), the chairperson must -

(a) ensure that at least one member of the panel is a person who has suitable legal qualifications and experience; and

(b) designate a member of the panel to preside over the proceedings of the panel.

(4) If, because of resignation, illness, death, or withdrawal from a hearing in terms of section 25(3), a member of the panel is unable to complete the proceedings in a matter assigned to that panel, the chairperson must -

(a) direct that the hearing of that matter proceed before the remaining members of the panel, subject to the requirements of subsection (3)(a);or

(b) terminate the proceedings before that panel and constitute another panel, which may include any member of the original panel, and direct that panel to conduct a new hearing.

(5) The decision of a panel on a matter referred to it must be in writing and include reasons for that decision.

(6) A decision of a single member of the Tribunal hearing a matter as contemplated in subsection (1)(a), or of a majority of the members of a panel in any other case, is the decision of the Tribunal.

(7) A decision by the Tribunal with respect to a decision of, or a notice or order issued by BIPA is binding on BIPA, subject to any review by, or appeal to, a court.

(8) An order of the Tribunal may be filed in the High Court as an order of the court, in accordance with its rules.

(9) A member of the Tribunal may not represent any person before the Tribunal, nor can such a member represent any person before the Tribunal less than 6 months after the expiry of such member’s term on, or resignation from, the Tribunal.

(10) If, on the expiry of the term of office of a member of the Tribunal, that member is still considering a matter before the Tribunal, that member may continue to act as a member in respect of that matter only.

**Qualifications for membership of Companies Tribunal**

(1) To be eligible for appointment, designation or co-option as a member of the Tribunal and to continue to hold that office, in addition to satisfying any other specific requirements set out in this Act, a person must -

(a) not be subject to any disqualification set out in subsection (2); and

(b) submit to the Minister a written declaration stating that the person is not disqualified in terms of subsection (2).

(2) A person may not become, or continue to be, a member of the Tribunal if that person -

(a) is an office-bearer of any party, movement, organisation or body of a partisan political nature;

(b) personally or through a related person has or acquires a personal financial interest that may conflict or interfere with the proper performance of the duties of a member of the Tribunal;

(c) is disqualified in terms of section 165 from serving as a director of a company or ; or

(d) is subject to an order of a competent court holding that person to be mentally unfit or disordered.

**Conflicting interests of members of the Companies Tribunal**

1. A member of the Tribunal must promptly inform the Minister in writing after that person or a related persons acquires a personal financial interest that is, or is likely to become, an interest contemplated in this section .

(2) A member of the Tribunal may not -

(a) engage in any activity that may undermine the integrity of the Tribunal;

(b) attend, participate in or influence the proceedings during a meeting of the Tribunal, if in relation to the matter being considered, that member has a personal financial interest -

(i) contemplated in this section;or

(ii) that precludes that person from performing the functions of a member of the Tribunal in a fair, unbiased and proper manner;

(c) vote at any meeting of the Tribunal in connection with a matter contemplated in paragraph (b);

(d) make private use of, or profit from, any confidential information obtained as a result of performing the functions of that person as a member of the Tribunal; or

(e) divulge any confidential information referred to in paragraph (d) to any third party, except as contemplated in section 27(6), or -

(i) to the -

(aa) Board, Minister, or Treasury to the extent required by this Act;

(bb) Bank of Namibia;

(cc) Board for Auditors, in terms of the Public Accountants’ and Auditors’ Act;

(dd) Financial Intelligence Centre established by the Financial Intelligence Act; or

(ii) as otherwise required as part of the official functions of that person as a member of the Tribunal.

(3) If, at any time, it appears to a member of the Tribunal that a matter being considered at a meeting concerns a personal financial interest of the member or a related person, as contemplated in subsection (2)(b), the member must -

(a) immediately and fully disclose the nature of that interest to the meeting; and

(b) withdraw from the meeting to allow the remaining members to discuss the matter and determine whether the member should be prohibited from participating in any further proceedings concerning that matter.

(4) The disclosure by a person in terms of subsection (3)(a) and the decision by the Tribunal in terms of subsection (3)(b) must be expressly recorded in the minutes of the meeting in question.

(5) Any poceedings of the Tribunal and any decisions taken by a majority of the members present and entitled to participate in those decisions are valid despite the fact that a member -

(a) failed to disclose an interest as required by subsection (3); or

(b) who had such an interest attended those proceedings, participated in them in any way, or directly or indirectly influenced those proceedings.

**Resignation and removal from office and vacancies**

(1) A member of the Tribunal may resign -

(a) by giving the Minister 30 days’ written notice of intention to resign; or

(b) with the prior approval of the Minister, by giving the Minister less than 30 days’ written notice of intention to resign.

(2) The Minister, after taking the steps required by subsection (3), may remove a member of the Tribunal, if that member has -

(a) become disqualified in terms of section 28(2);

(b) acted contrary to section 29(2);

(c) failed to disclose an interest or withdraw from a meeting as required by section 29(3); or

(d) neglected to properly perform the functions of their office.

(3) Before removing a person from office in terms of subsection (2), the Minister must afford the person an opportunity to state his or her case in defence of his or her position.

**Reviews and reports to Minister**

(1) The Minister must conduct an audit review of the exercise and performance of powers and functions of the Tribunal once every five years.

(2) In addition to any other reporting requirement set out in this Act, the Tribunal must report to the Minister at least once every year on its activities.

(3) The Minister must, as soon as practicable, after receiving -

1. a report of a review contemplated in subsection (1); or
2. a report contemplated in subsection (2),

table the report in the National Assembly.

**Confidential information**

1. A person may submit confidentail information to the Board, Tribunal or an inspector or investigator appointed in terms of this Act, and may claim that all or part of that information is confidential.

(2) Any claim contemplated in subsection (1) must be supported by a written statement explaining why the information is confidential.

(3) BIPA, Tribunal, inspector or investigator, must -

(a) consider a claim made in terms of subsection (1); and

(b) as soon as practicable, make a decision on the confidentiality of the information and access to that information, and provide written reasons for that decision.

(4) Section 240, read with the changes required by the context, applies to a decision in terms of subsection (3).

(5) When making any ruling, decision or order in terms of this Act, BIPA or Tribunal may take confidential information into account.

(6) If any reason for a decision in terms of this Act would reveal any confidential information, BIPA or Tribunal, must provide a copy of the proposed reason to the party claiming confidentiality at least 10 business days before publishing those reasons.

(7) Within five business days after receiving a copy of proposed reasons in terms of subsection (6), a party may apply to a court for an appropriate order to protect the confidentiality of the relevant information.

**Employees of the Companies Tribunal and conflict of interests**

1. The Minister, with the concurrence of the Minister responsible for finance, may -

(a) appoint persons or assign staff members of the Public Service to serve the Tribunal;

(b) determine the remuneration, allowances, benefits and conditions of appointment of each employee of the Tribuanl.

1. An employee of the Tribunal may not -

(a) engage in any activity that may undermine the integrity of the Tribunal;

(b) participate in any investigation, hearing, or decision concerning a matter in respect of which that person has a personal financial interest;

(c) make personal gain from the use of any confidential information obtained as a result of his or her performance of functions; or

(d) divulge any information referred to in paragraph (c) to any third party, except when required for official functions of such person.

**Finances of Companies Tribunal**

(1) The Tribunal is financed from -

* 1. money appropriated by Parliament;
  2. any fees payable in terms of this Act;
  3. interest derived from its investment and deposit of surplus money; and

(d) other money accruing from any source with the approval of the Minister, in consultation with the Minister of Justice.

(2) The financial year of the Tribunal ends on 31 March of each year.

CHAPTER 2

TYPES AND FORMS OF COMPANIES, PRESERVATION AND CONVERSIONS

PART 1

CATEGORIES OF COMPANIES AND MODIFIED APPLICATIONS

**Categories of companies**

1. Three types of companies may be formed and incorporated under this Act, namely private companies, public companies and closely held companies.
2. A company is -

(a) a private company if -

(i) its memorandum of association -

(aa) prohibits it from offering any of its securities to the public; and

(bb) restricts the transferability of its securities;

1. it limits its shareholders to one hundred, excluding the company’s employees or former ehmployees, or its memorandum of association -

(aa) classifies it as a non-profit company.

(b) a public company if -

(i) its memorandum of association -

(aa) does not prohibit it from offering any of its securities to the public; and

(bb) does not restrict the transferability of its securities; or

(ii) its memorandum of association -

(aa) classifies it as a state-owned company;

(c) a closely held company if -

(i) it is incorporated in terms of Schedule 2 of the Act; or

(ii) it has initially been incorporated as a close corporation and has been converted into a closely held company pursuant to this Chapter and Schedule 4 of this Act; and

1. its memorandum of incorporation –

(aa) prohibits it from offering any of its securities to the public;

(bb) restricts the transferability of its securities; and

(cc) specifies that the company is regulated exclusively in terms of Schedule 2 of the Act; and

1. limits shareholdings in the company to only natural persons, and their number may not exceed 10.

**Modified application for state-owned companies**

(1) With the exception of a closely held company, a company’s memorandum of association may, with the consent of the relevant minister, contain a provision categorising the company as a state-owned company;

1. A company categorised as a state-owned company in accordance with sub-section (1) is subject to all provisions of this Act that apply to a public company, except to the extent that the Minister has granted an exemption in terms of subsection (3).

(3) The Minister responsible for -

(a) public enterprises may request the Minister to grant a total, partial or conditional exemption from one or more provisions of this Act, applicable to all state-owned companies, any class of state-owned companies, or to one or more particular state-owned company; or

(b) local government may request the Minister to grant a total, partial or conditional exemption from one or more provisions of this Act, applicable to all state-owned companies owned by a local authority, any class of such enterprises, or to one or more particular such enterprises, on the grounds that those provisions overlap or duplicate an applicable regulatory scheme established in terms of any other legislation.

(4) The Minister, by notice in the *Gazette,* after receiving the advice of BIPA, may grant an exemption contemplated in subsection (3) -

(a) only to the extent that the relevant alternative regulatory scheme ensures the achievement of the purposes of this Act at least as well as the provisions of this Act; and

(b) subject to any limits or conditions necessary to ensure the achievement of the purposes of this Act.

**Modified application for non-profit companies**

1. Every provision of this Act applies to a non-profit company, subject to the provisions, limitations, alterations or extensions set out in this section and in Table C of Schedule 1.

(2) The following provisions of this Act and any regulations made in respect of any such provisions do not apply to a non-profit company -

(a) Part 1 of Chapter 4 – Capitalisation of profit companies;

1. Part 2 of Chapter 4 – Securities registration and transfer;
2. Part 3 of Chapter 4 – Distributions by companies;
3. Part 5 of Chapter 4 – Securities other than shares;
4. Chapter 5 – Public offering of securities;
5. Section 186 – Remuneration and election of directors;
6. Part 6 of Chapter 7 – Dissenting shareholders’ appraisal rights, except to the extent that the non-profit company is itself a shareholder of a profit company.
7. Part 8 of Chapter 8 – Enhanced accountability and transparency, except to the extent that an obligation to comply with enhanced accountability and transparency provisions arises in terms of -

(i) a requirement in the articles of association of a company as contemplated in section 273(1)(c)(ii); or

(ii) regulations contemplated in section 18;

1. Chapter 9 – Fundamental transactions, takeovers and offers, except to the extent contemplated in item 2 of Table C of Schedule 1;
2. Section 345 – Rights of shareholders to approve a business rescue plan, except to the extent that the non-profit company is itself a shareholder of a profit company that is engaged in business rescue proceedings;

(3) Sections 158 to 174, read with the changes required by the context -

(a) apply to a non-profit company only if the company has voting members; and

(b) when applied to a non-profit company, are subject to the provisions of item 4 of Table C of Schedule 1.

(4) With respect to a non-profit company, a reference in this Act to “a shareholder”, “the holders of a company’s securities”, “holders of issued securities of that company” or “a holder of voting rights entitled to be voted’ is a reference to the voting members of the non-profit company.

**Modified application for personal liability companies**

(1) The memorandum of a company may:

1. in the case of a private company, provide that the directors and past directors are liable jointly and severally, together with the company, for debts and liabilities of the company which are or were contracted during their periods of office, in which case those directors and past directors are so liable.
2. A professional services company engaging in a business that is subject to regulation under another statute of the Republic may incorporate under this Act only if permitted by, and subject to all limitations of, the other statute.
3. Any private company may at any time by special resolution and with the written consent of each person being then a director of the company, incorporate in its memorandum the provision referred to in sub-section (1)(a), provided that such a provision cannot be applied retrospectively.

**Duality of corporate purpose of a state-owned company**

(1) Notwithstanding that a state-owned company is set up primarily to carry out business activities, it is authorised to pursue both economic *and* social objectives.

(2) A state-owned company’s articles of association may state a general public benefit and optional specific public benefits.

**Incorporation of certain branches of foreign companies and non-profit associations**

**40**

(1) Notwithstanding anything to the contrary contained in this Act, a branch, established in Namibia, of a company or other association of persons, incorporated outside Namibia, or an association of persons which is not incorporated and has its head office in a foreign country may be incorporated under section 56 if -

(a) the object in Namibia of that branch corresponds with the object of the company or association concerned;

(b) that branch complies with the requirements of section 56; and

(c) the whole of the business and all the property, rights and obligations in Namibia of the company or association concerned will, on incorporation under section 56, be transferred in due form to vest in and be binding on the company so incorporated.

(2) Notwithstanding anything to the contrary in any law -

(a) no transfer or stamp duty is payable in respect of the transfer of property contemplated in subsection (1)(c); and

(b) any licence, exemption, permit, certificate or authority held in terms of any law by the company or association concerned in respect of its business or property in Namibia will, with effect from the date of incorporation of the branch concerned as a company because of subsection (1), for the purposes of that law be deemed to be held by the company so incorporated in respect of that business or property.

(3) This Act in so far as it relates to external companies does not apply in the case of an external company a branch of which has been incorporated as a company by virtue of subsection (1).

PART 2

CONVERSION OF COMPANIES

**Conversion of public company into private company, and vice versa**

**41.**

(1) With the sanction of a special resolution and on compliance with the requirements of sections 35(2)(a) and 56 and with the other requirements of this Act in respect of private companies, a public company having a share capital may convert itself into a private company.

(2) With the sanction of a special resolution and on compliance with the other requirements of this Act in respect of public companies, a private company having a share capital may convert itself into a public company having a share capital.

**Conversion of company into a non-profit company**

**42.**

With the sanction of a special resolution and on compliance with the requirements of Table C of Schedule 1 and the other requirements of this Act in respect of non-profit companies, any company may convert itself into a non-profit company under section 37 and provisions of Table C of Schedule 1 to the Act, except that a company having a share capital may only so convert itself if its share capital is cancelled and the dissenting shareholders’ appraisal remedy is triggered.

**Conversion of company limited by guarantee or non-profit companies into limited liability company (i.e. private or public companies)**

**43.**

A company limited by guarantee under the repealed Act, including a non-profit association under section 21 of the repealed Act or a non-profit company incorporated under this Act, may not convert itself into a profit company

**Conversion of unlimited company**

**44.**

(1) An unlimited company referred to in section 25(1) of the repealed 1926 Companies Act (Act No. 46 of 1926), which still exists at the commencement of this section and which has not been converted as contemplated in section 25(1)] of that Act, may with the sanction of a special resolution and on compliance with section 35 and the other requirements of this Act, convert itself into a private company, but, that conversion does not affect the liability of its members in respect of any debts, liabilities or obligations incurred or contracts entered into by, with or on behalf of the company before the conversion.

(2) Until the conversion referred to in subsection (1) takes place -

(a) section 25(2) of the repealed 1926 Companies Act continues to apply to that unlimited company as if that section has not been repealed; and

(b) the obligation imposed in terms of section 25(3) of that Act, in the case of an unlimited company which is a private company, continues to bind that company as from the date of commencement of this section.

**Notice of intended conversion of company**

**45.**

(1) Any company intending to convert itself into another type or form of company must, not less than 15 days before the date of the meeting convened for the purpose of passing the required special resolution, give notice to BIPA, for publication on BIPA’s website, and on the company’s website, if it has one, of that intention, specifying the particulars of the proposed conversion and the date and place of the meeting.

(2) Subsection (1) does not apply to any private company having a share capital intending to convert itself into a public company having a share capital; nor does it apply to any private company or public company intending to convert itself into a closely held company

(3) If any company intending to convert itself into another type or form of company is a public company having a share capital, it must, in addition, send the notice referred to in subsection (1) to every creditor of the company by any traceable means of communication not less than 15 days before the date of the meeting.

**Contents and form of articles on conversion**

**46.**

When the articles of any company are to be altered for the purpose of converting the company into another type or form of company under section 42 or43, sections 84 and 85 in so far as they relate to the contents and form of articles, do, with the necessary changes, apply to the articles of that company.

**Registration of conversion**

**47.**

(1) The Registrar must, on the registration of the special resolution made under this Part and on payment of the prescribed fee and on being satisfied that the requirements of this Act have been complied with, register any conversion in the register of companies and must issue an amended certificate of incorporation, stating the date of the first registration of the company, its former name, the name as altered and the nature of the conversion.

(2) Any conversion referred to in subsection (1) takes effect as from the date of the issue of the amended certificate of incorporation as contemplated in subsection (1).

(3) The Registrar must give notice in the *Gazette* of the conversion of a company into another type or form of company.

**Effect of conversion and alteration of other registers**

**48**.

(1) The conversion of a company into another type or form of company under this Act does not affect the corporate existence of the company as from the date of its first registration, nor any of its rights, debts, liabilities, obligations incurred or contracts entered into by, with, or on its behalf at any time nor render defective any legal proceedings by or against the company, and any legal proceedings that could have been continued or commenced by or against it before the conversion, may, notwithstanding the conversion, be continued or commenced against the company as converted.

(2) If as a result of the conversion of a company into another type or form of company, any alteration in its name pursuant to the requirements of this Act is necessary, the alteration must not be regarded as a change of name for the purposes of section 67(1).

(3) On the production by a company of an amended certificate of incorporation or a certified copy to any registrar or other officer charged with the maintenance of a register under any law, and on compliance with the requirements of that registrar or officer as to the form of application, if any, and the payment of any fee prescribed by that law, if any, that registrar or other officer must make in his or her register all those alterations which are necessary because of the conversion of the company into another type or form of company.

PART 3

CONVERSION OF COMPANIES AND CLOSELY HELD COMPANIES

**Conversion of company into closely held company**

**49**.

(1) A company having 10 or fewer members all of whom qualify for membership of a closely held company in terms of section 35 and Schedule 2 may be converted into a closely held company, on condition that every member of the company becomes a member of the closely held company.

(2) In respect of a conversion, there is lodged with the Registrar –

(a) an application for conversion -

(i) in the prescribed form;

(ii) signed by all the members of the company; and

(iii) containing a statement that upon conversion the assets of the closely held company, fairly valued, will exceed its liabilities, and that after conversion the closely held company will be able to pay its debts as they become due in the ordinary course of its business;

(b) a statement in writing by the accountant or auditor of the company that –

(i) he or she has no reason to believe that a material irregularity contemplated in section 64 of the Accountants and Auditors Act, 2023, has taken place or is taking place in relation to the company; or

(ii) where steps have been taken in terms of that section mentioned in subparagraph (i), that such steps and other proceedings in terms of that subsection have been completed; and

(c) a memorandum of incorporation referred to in section 35(2)(c) lodged in accordance with Schedule 2.

(3) For the purposes of the memorandum of incorporation referred to in subsection (2)(c) -

1. there must, in regard to the requirements of section 35(2)(c), be a statement of the aggregate of the contributions of the members, which is for an amount not greater than the excess of the fair value of the assets to be acquired by the closely company over the liabilities to be assumed by the closely held company by reason of the conversion, but the closely held company may treat any portion of such excess not reflected as members’ contributions as amounts which may be distributed to its members;
2. the members’ interests stated in terms of section 12(1)(e) of the Close Corporations Act, 1988, need not necessarily be in proportion to the number of shares in the company held by the respective members at the time of the conversion.

(4) If subsection (2) has been complied with and the Registrar is satisfied that the company concerned has complied materially with the requirements of this Act, the Registrar must -

* 1. register the memorandum of incorporation in accordance with Schedule 2;
  2. simultaneously with registration of the memorandum of incorporation, cancel the registration of the constitution of the company concerned in accordance with this Act;
  3. endorse on the memorandum of incorporation a certificate of incorporation as provided by Schedule 2, but such certificate must state -

1. the fact that the closely held company has been converted from a company; and
2. the name and registration number of the former company; and

(d) give notice of conversion in the *Gazette*.

(8) Upon -

1. the production by a closely held company which has been converted from a company of a certified copy of its memorandum of incorporation referred to in subsection (4)(a), to any registrar or other officer charged with the maintenance of a register under any law;
2. compliance with all the requirements pursuant to any such law as to the form of application (if any); and
3. the payment of any required fee,

such registrar or officer must make in his or her register all such alterations as are necessary by reason of the conversion of the company into a closely held company, but no transfer or stamp duties is payable in respect of such alterations in registers.

(9) If the accountant mentioned in the memorandum of incorporation of a converted closely held company is not the person who or firm which has acted as auditor for the company, the appointment of that person or firm lapses upon the conversion into a closely held company.

**Conversion of closely held company into company**

**50.**

If a closely held company is converted into a company in accordance with this Act, the registration of the memorandum of incorporation or founding statement of the closely held company is cancelled simultaneously with the registration of the memorandum and articles of association of the company in terms of this Act.

**Effect of conversion of closely held company into company**

**51**.

(1) On the registration of a closely held company converted from a company -

1. the assets, rights, liabilities and obligations of the company must vest in the closely held company;
2. any legal proceedings instituted by or against the company before the conversion may be continued by or against the closely held company;
3. any other thing done by or in respect of the company is deemed to have been done by or in respect of the closely held company; and
4. the juristic personality that existed prior to the conversion of a company into a closely held company continues to exist but in the form of a closely held company.

(2) The conversion of a company into a closely held company does not in particular affect -

1. any liability of a director or officer of the company to the company on the ground of breach of trust or negligence, or to any other person pursuant to any provision of this Act; or
2. any liability of the company or any other person as surety.

(3) The closely held company, after its conversion from a company, must forthwith give notice in writing of the conversion to -

1. all creditors of the company at the time of conversion; and
2. all other parties to contracts or legal proceedings in which the company was involved at the time of the conversion.

PART 4

LIFTING OF LIMITATIONS ON PARTNERSHIPS AND ASSOCIATIONS FOR GAIN

**No prohibition of associations or partnerships exceeding 20 members**

**52**.

A body corporate, association, syndicate or partnership consisting of more than 20 persons may be formed in Namibia in terms of any relevant law for the purpose of carrying on any business that has as its object the acquisition of gain by that body corporate, association, syndicate or partnership, or by its individual members, even if it is not registered as a company under this Act, nor was formed in terms of the repealed Act or any law which was in existence before the repealed Act.

**Status of unregistered associations carrying on business for gain**

**53**.

Associations of persons formed after the commencement of this Act for the purpose of carrying on any business that has for its object the acquisition of gain by the association or by the individual members may trade under a business name properly reserved and approved by the Registrar in terms of this Act

**Business Names**

**54.**

The Registrar is the designated authority for the registration of business names and the process for the reservation, and registration of, business names is the same as that set out in Part 2 of Chapter 3 to the Act.

CHAPTER 3

Formation, Capacity, Powers, Names, Registration and Incorporation of Companies, Incidental Matters and Deregistration

Part 1

Formation, Capacity, LIMITATION OF CAPACITY AND RING-FENCED COMPANIES

**Mode of forming a company**

**55**.

(1) One or more persons may incorporate a company, by -

(a) completing, and each consenting in person or by power of attorney, a Memorandum and Articles of Association -

(i) in the relevant form set out in Table A, B or C of Schedule 1; or

(ii) in a form unique to the company; and

(b) filing a Notice of Incorporation, in accordance with subsection (2).

(2) The Notice of Incorporation of a company must be –

(a) filed together with the prescribed fee; and

(b) accompanied by a copy of the Memorandum and Articles of Association, if in a form unique to the company.

(3) If a company’s Memorandum of Association includes any provision contemplated in section 73 (2) (b) or (c) permitting the formation of ring-fenced companies, the Notice of Incorporation filed by the company must include a prominent statement drawing attention to each such provision, and its location in the Memorandum of Association.

(4) BIPA -

(a) may reject a Notice of Incorporation if the notice, or anything required to be filed with it, is incomplete, or improperly completed in any respect, subject to section 6 (8); and –

(b) must reject a Notice of Incorporation if –

(i) the initial directors of the company, as set out in the Notice, are fewer than required by or in terms of section 185 (2);

(ii) any of the initial directors of the company, as set out in the Notice, are disqualified in terms of section 187(2).

**Capacity, Purposes and powers of companies**

**56**.

(1) Subject to this Part a company has the capacity and powers of a natural person of full capacity in so far as a juristic person is capable of having that capacity or of exercising those powers;

(2) A company will have perpetual duration unless a provision is included in its articles of association providing for a shorter period.

(3) Every company incorporated under this Act has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the articles of association, which limitation does not affect the validity of the resulting contract;

(4) A company with articles of association which do not contain a purpose clause will have the purpose of engaging in any lawful business;

(5) If a company has a limited purpose in its articles of association, as between members and management, the company’s powers are so limited, albeit that such a limitation would not be binding on a third party without actual notice of the limit.

**Dealings between company and other persons**

**57**.

A company or a guarantor of an obligation of a company may not assert against a person dealing with the company or with a person who has acquired any property, rights or interests from the company that -

(a) a person named as a director of the company in the most recent return lodged with the Registrar in terms of this Act -

(i) is not a director of the company;

(ii) has not been duly appointed; or

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

(b) a person held out by the company as a director, officer or agent of the company -

(i) has not been duly appointed; or

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

(d) a document issued on behalf of a company by a director, an officer or agent of the company with actual or usual authority to issue the document is not valid or genuine, unless that person has, or ought reasonably to have, by virtue of his or her position with or relationship to the company, knowledge of the matters referred to in paragraphs (a), (b), (c) or (d), as the case may be.

**Internal consequences of an ultra vires act**

**58**.

(1) If a company’s Memorandum of Association limits, restricts or qualifies the capacity, purposes, powers, or activities of that company, or limits the authority of the directors to perform an act on behalf of the company, the shareholders, by a special resolution, may ratify any action by the company or the directors that is inconsistent with any such limit, restriction or qualification, subject to subsection (2).

(2) An action contemplated in subsection (1) may not be ratified if it is in contravention of this Act.

(3) One or more shareholders, directors or prescribed officers of a company may take proceedings to restrain the company from doing anything inconsistent with this Act.

(4) One or more shareholders, directors or prescribed officers of a company may take proceedings to restrain the company or the directors from doing anything inconsistent with any limitation, restriction or qualification contemplated in subsection (1), but any such proceedings are without prejudice to any rights to damages of a third party who -

(a) obtained those rights in good faith; and

(b) did not have actual knowledge of the limit, restriction or qualification.

(5) Each shareholder of a company has a claim for damages against any person who causes the company to do anything inconsistent with -

(a) this Act; or

(b) a limitation, restriction or qualification contemplated in this section, unless that action has been ratified by the shareholders in terms of subsection (1).

**No constructive knowledge**

**59**.

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

(a) is registered by, or lodged with, the Registrar; or

(b) is available for inspection or kept at the registered office of a company in accordance with this Act.

**Pre-incorporation contracts**

**60**.

(1) Any contract made in writing by a person professing to act as agent or trustee for a company not yet incorporated is capable of being ratified or adopted by or otherwise made binding upon and enforceable by that company after it has been duly incorporated as if it had been duly incorporated at the time when the contract was made and that contract had been made with its authority

(2) All persons purporting to act as or on behalf of a company, knowing there was no incorporation under this Act, are jointly and severally liable for all liabilities created while so acting, unless the company has been subsequently incorporated and the company ratifies and adopts the contract.

**Company not to be a member of its holding company**

**61**.

(1) Except as provided for in sub-sections (3) and (4), a subsidiary company may not acquire shares in, and become a member of, its holding company

(2) If shares in a company have been acquired in accordance with section 95 of the repealed Act by its subsidiary, for so long as those shares are held by the subsidiary -

(a) no voting rights attaching to those shares may be exercised; and

(b) the votes able to be cast at any meeting of shareholders must be reduced by the votes in respect of shares held by the subsidiary,

but this subsection does not apply where the shares are acquired in a subsidiary of the holding company which is also a subsidiary of the acquiring company.

(3) The prohibition in sub-section (1) does not apply where the subsidiary is concerned only—

(a) as personal representative, or

(b) as trustee,

unless, in the latter case, the holding company or a subsidiary of it is beneficially interested under the trust; and

(c) For the purpose of ascertaining whether the holding company or a subsidiary is so interested, there shall be disregarded—

(i) any interest held only by way of security for the purposes of a transaction entered into by the holding company or subsidiary in the ordinary course of a business that includes the lending of money;

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

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

(bb) 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.

1. The prohibition in sub-section (1) does not apply where the shares are held by the subsidiary

in the ordinary course of its business as an intermediary, and

1. For this purpose a person is an intermediary if he—

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

(ii) is a member of or has access to a regulated market, and

(iii) does not carry on an excluded business; a

(b) The following are excluded businesses—

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

(ii) 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;

(iii) a business that consists in insurance business;

(iv) 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;

(v) 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.

**Limitation of Company Powers and Objectives**

**62**.

If a company’s Memorandum of Association limits, restricts or qualifies the purposes, powers, or activities of that company, as contemplated in section 57(3), or limits the authority of the directors to perform an act on behalf of the company, no person may rely on any such limitation, restriction or qualification to assert that an act of the company is void, in any legal proceedings, except proceedings -

* + 1. between a company and its shareholders, directors or prescribed officers; or
    2. between the shareholders and directors or prescribed officers of a company.

PART 2

NAME REGISTRATION

**Names of companies not to be undesirable**

**63**.

(1) The Registrar –

(a) must not register a memorandum containing a name for a company to be incorporated if the Registrar reasonably believes that the name is undesirable;

(b) must assign to the company a unique registration number, if a company is presented for registration with an undesirable name and the Registrar will register it with a registration number as its name and not with the undesirable name;

(2) The name of a company is not undesirable if it is -

(a) not be the same as -

(i) the name of another company, domesticated company, registered external company, close corporation or co-operative;

(ii) a name registered for the use of a person, other than the company itself or a person controlling the company, unless the registered user of that name or business name has executed the necessary documents to transfer the registration in favour of the company;

(iii) a registered trade mark belonging to a person other than the company, or -

(aa) a mark in respect of which an application has been filed in Namibia for registration as a trade mark;

(bb) a well-known trade mark as contemplated in section 196 of the Intellectual Property Act, 2012 (Act No. 1 of 2012),

unless the registered owner of that mark has consented in writing to the use of the mark as the name of the company; or

(iv) a mark, word or expression the use of which is restricted or protected in terms of the Merchandise Marks Act, 1941 (Act No. 17 of 1941), except to the extent authorised by or in terms of that Act;

* + 1. not confusingly similar to a name, trade mark, mark, word or expression contemplated in paragraph (a) unless in the case of -
       1. names referred to in paragraph (a)(i), each company bearing any such similar name is a member of the same group of companies;
       2. a company name similar to a business name referred to in paragraph (a)(ii), the company, or a person who controls the company, is the registered owner of that defensive name or business name;
       3. a name similar to a trade mark or mark referred to in paragraph (a)(iii), the company is the registered owner of the business name, trade mark or mark, or is authorised by the registered owner to use it; or

(iv) a name similar to a mark, word or expression referred to in paragraph (a)(iv), the use of that mark, word or expression by the company is authorised by or in terms of the Merchandise Marks Act, 1941;

(c) not falsely implying or suggesting, or is such as would reasonably mislead a person to believe incorrectly, that the company -

(i) is part of, or associated with, any other person or entity;

(ii) is an organ of state or a court, or is operated, sponsored, supported or endorsed by the State or by any organ of state or a court;

(iii) is owned, managed or conducted by a person or persons having any particular educational designation or who is a regulated person or entity;

(iv) is owned, operated, sponsored, supported or endorsed by, or enjoys the patronage of, any -

(aa) foreign state, head of state, head of government, government or administration or any department of such a government or administration; or

(bb) international organisation; and

(d) not including any word, expression or symbol that, in isolation or in context within the rest of the name, may reasonably be considered to constitute -

(i) propaganda for war;

(ii) incitement of imminent violence; or

(iii) advocacy of hatred based on race, ethnicity, gender or religion, or incitement to cause harm.

(3) Subject to subsections (1) and (2), a company name -

(a) may comprise one or more words in any language, irrespective of whether the word or words are commonly used or contrived for the purpose, together with -

(i) any letters, numbers or punctuation marks;

(ii) any of the following symbols: +, &, #, @, %, =;

(iii) any other symbol prescribed under section 74; or

(iv) round brackets used in pairs to isolate any other part of the name,

alone or in any combination; or

(b) in the case of a profit company, may be the registration number of the company together with the relevant expressions required by section 74(1)(a).

**Reservation of name**

**64**.

(1) The Registrar may, on written application on the prescribed form and on payment of the prescribed fee, reserve a name or a shortened form of the name of a company, or of an association contemplated in terms of section 54, unless the name is undesirable;

(2) If the name of a company or a shortened form thereof is in a language other than the official language, a translation of the name in the official language, in so far as it is possible, must be submitted to the Registrar together with the application referred to in subsection (1).

(3) A reservation referred to in subsection (1) is, if pending the registration of a memorandum or a change of name by a company, for a period not exceeding six months or any extended period, not exceeding in all twelve months, which the Registrar, on payment of the prescribed fee, may in the special circumstances of any case allow.

(4) In any other case, the reserved name remains valid for as long as the person for whom it is reserved files annual return and pays a prescribed fee in respect of the name so reserved and registered in accordance with section 68;

**Registration of the shortened form of name or business name**

**65**.

(1) The memorandum of any company to be incorporated may contain one shortened form of the company’s name, and any association (including a company) may, on the prescribed form and on payment of the prescribed fee, apply to the Registrar for the registration of that shortened form of its name, if the shortened form of the name is not undesirable.

(2) Any person may on application on the prescribed form and on payment of the prescribed fee apply to the Registrar -

(a) to register any name as a business name; or

(b) to renew the registration of a name as a business name,

which the Registrar reasonably believes is not undesirable and in respect of which that person has furnished proof, to the satisfaction of the Registrar, that he or she has a direct and material interest.

(3) If the business name referred to in subsection (2) is in a language other than the official language, a translation in the official language, in so far as it is possible, must be submitted to the Registrar together with the application referred to in that subsection.

**Change of name and effect**

**66**.

(1) Any company may by special resolution change its name to a name which the Registrar reasonably believes not to be undesirable.

(2) Where a company changes its name, it must at the same time, if a shortened form of the name of the company has been registered under section 68(1), and that shortened form is no longer applicable to the name of the company as changed, apply on the prescribed form and on payment of the prescribed fee -

(a) to change that shortened form of the name to a new shortened form of the name approved by the Registrar; or

(b) to deregister that former shortened form of the name of the company.

(3) Where the name or shortened form of the name of a company or of another association is changed -

(a) the company or association must, if that changed name is not in the official language, submit to the Registrar, in so far as it is possible, a translation of the name in the official language; and

(b) the Registrar must -

(i) enter the new name or shortened form of the name in the register in place of the former name or shortened form of the name;

(ii) issue a certificate altered to meet the circumstances of the case or a certificate that the new name or shortened form of the name, has been entered in the register in place of the former name or shortened form of the name; and

(iii) give notice of the change of name or shortened form of the name on BIPA website;

(4) A change of name of a company does not affect any rights, debts, liabilities or obligations of the company, nor render defective any legal proceedings by or against the company, and any legal proceedings that could have been continued or commenced by or against it prior to that change of name, may, notwithstanding that change of name, be continued or commence by or against the company under its new name.

(5) On the production by a company of an amended certificate of incorporation or a certificate of the change of the name of that company or a certified copy to any registrar or other officer charged with the maintenance of a register under any law, and on compliance with the requirements of that registrar or officer as to the form of application, if any, and the payment of any fee prescribed by that law, if any, that registrar or other officer must make in his or her register all alterations which are necessitated by the change of the name of the company.

**Order to change name**

**67**.

(1) If within a period of one year after the registration of any memorandum or shortened form of a name of a company or after the registration or the renewal of the registration of a name referred to in section 68(1) or after the date of an amended certificate of incorporation or a certificate of change of name or shortened form of a name referred to in section 69(2), it appears that the name contained in the memorandum or shortened form of that name or the name referred to in section 68(2) or the changed name or the shortened form of that changed name referred to in the last-mentioned certificate is undesirable, the Registrar must within that period order the company concerned or the person referred to in section 68(2) to change the name or shortened form of the name.

(2) If within a period of one year after the registration of any memorandum or shortened form of a name of a company or a name referred to in section 68(2) or after the date of an amended certificate of incorporation or a certificate of change of name or shortened form of a name referred to in section 69(2), any person lodges an objection in writing with the Registrar against the name contained in the memorandum or shortened form of that name or the name referred to in section 68(2) or the changed name or the shortened form of that changed name referred to in the last-mentioned certificate, on the grounds that that name or shortened form of a name is calculated to cause damage to the objector or is undesirable, the Registrar may, if he or she is satisfied that the objection is sound, order the company concerned or the person referred to in section 68(2) to change the said name or shortened form of a name.

(3) Within a period of two years after the registration of any memorandum or shortened form of a name of a company or a name referred to in section 68(2) or after the date of an amended certificate of incorporation or a certificate of change of name or shortened form of a name referred to in section 69(2), a person who has not lodged any relevant objection in terms of subsection (2) may apply to the Companies Tribunal for an order directing the company concerned or the person referred to in section 68(2) to change the said name or shortened form on the grounds that the said name or shortened form is undesirable or is calculated to cause damage to the applicant, and the Companies Tribunal may on that application make an appropriate order.

(4) If, at any time, the Registrar reasonably believes that the name of a company, or the shortened form of a name of a company or of any person referred to in section 68(2), gives so misleading an indication of the nature of its activities as to be calculated to deceive the public, the Registrar may order the company or the person concerned to change its name or the shortened form of its name, as the case may be.

(5) If, at any time, the Registrar reasonably believes that the foreign name of a company, or the shortened form of a foreign name of a company or of any person has been falsely translated, the Registrar may order the company or the person concerned to change its name or the shortened form of its name, as the case may be.

**Provisions as to order to change name**

**68**

(1) The order issued by the Registrar under section 70, including the reasons for that an order, for the change of a name of a company or a shortened form of a name of a company or a name referred to in section 68(2) must be issued by the Registrar in writing and sent by registered post to the company at its registered office, or to the person referred to in section 68(2) at that person’s last-known address, and must require such company or person -

(a) to comply with the order within two months from the date of its issue; or

(b) to give reasons within two months from the date of its issue to the Registrar as to why that name or shortened form of a name should not be changed.

(2) The Registrar may, on good cause shown, extend the period of two months referred to in subsection (1) for any further period not exceeding two months.

(3) If a company or a person has submitted reasons as to why the name or shortened form of a name of a company should not be changed, the Registrar may, after consideration of those reasons, either withdraw that order or make a final order and subsections (1)(a) and (2) do, with the necessary changes, apply with regard to that final order.

(4) If a company or person referred to in subsection (1), as the case may be, fails to comply with any order issued by the Registrar under subsection (1) or (3) within the period or extended period referred to in subsection (1) or (2), as the case may be, or if that company or person has applied to the Companies Tribunal for relief under section 70 and the Companies Tribunal has upheld the Registrar’s order and that company or person fails to comply with that order within two months from the date of the final decision by the Court, that company or person will be liable for a prescribed administrative fine.

**Registrar may call for affidavits and must give reasons for decisions as to names**

**69.**

(1) The Registrar may for the purposes of any decision as to any name or shortened form of a name referred to in section 66, 67, 68, 69 or 70 call for any evidence on affidavit or otherwise which is necessary.

(2)The Registrar must with regard to any decision or order of the Registrar under section 66, 67, 68 or 69 furnish written reasons for that decision or order.

**Recourse to Companies Tribunal in matters as to names**

**70**.

Any company or person aggrieved by any decision or order of the Registrar under section 66, 67, 68, 69 or 70 may, within one month after the date of that decision or order, apply to the Companies Tribunal for relief, and the Companies Tribunal has power to consider the merits of that matter, to receive further evidence and to make any appropriate order.

**Formal requirements as to names of companies**

**71**.

(1) The following formal requirements as to names of companies apply to all companies incorporated in terms of this Act -

(a) if the name of a profit company is the registration number of the company, as contemplated in section 66(1)(b), that number is immediately followed by the expression “(Namibia)”;

(b) if the memorandum of association of the company includes any provision contemplated in section 74(2)(b) or (c) restricting or prohibiting the amendment of any particular provision of the Memorandum or Articles, the name is immediately followed by the expression “(RF)”; and

(c) a company name, irrespective of its form or language, must end with one of the following expressions, as appropriate for the category of the particular company -

(i) the word “Closely Held Company Limited” or its abbreviation “CHC Ltd.”, in the case of a closely held company;

(ii) the expression “Proprietary Limited” or its abbreviation, “(Pty) Ltd.”, in the case of a private company;

(iii) the word “Limited” or its abbreviation, “Ltd.”, in the case of a public company;

(iv) the expression “SOC Ltd.” in the case of a state-owned company;

(v) the expression “NPC”, in the case of a non-profit company;

(vi) the word “Incorporated” or its abbreviation “Inc.”, in the case of a personal liability company operating in a regulated profession that prohibits the provision of professional services through a limited liability company.

(2) If the Memorandum or Articles of Association of any company -

* + 1. include any provision -
       1. dealing with a matter that this Act does not address;
       2. altering the effect of any alterable provision of this Act; or
    2. contain any special conditions applicable to the company, and any requirement for the amendment of any such condition in addition to the requirements set out in section 189(2);

the name of the company should be immediately followed by the expression “(RF)”

(3) A person is deemed to have notice and knowledge of -

(a) any provision of a company’s Memorandum or Articles of Association contemplated in subsection (2) (b) if the company’s Notice of Incorporation or a Notice of Amendment has drawn attention to the provision, as contemplated in subsection (2)(a) and (b);

**Use and publication of name by company**

**72**.

(1) Every company and every person with a registered business name must -

(a) display its name on the outside of its registered office and every office or place in which its business is carried on, in a conspicuous position and in characters easily legible;

(2) For the purposes of subsection (1) -

(a) the abbreviations “Ltd”, “Pty”, “CHC Ltd”, “Inc.”, “SOC Ltd”, Co” and “&” may be used for the words “Limited”, “Proprietary”, “Closely Held Company”, “Incorporated”, “Company” and “and” in a company’s name; and

(b) a company or a business must not use the shortened form of its name unless it is used in conjunction with its name.

**Improper use of word “Limited,” “Incorporated” or “Closely Held” and its consequences**

**73**.

Any person trading or carrying on business under a name or title of which the word “Limited”, “Incorporated” or “Closely Held Company” are the last words will be liable to a prescribed administrative fine.

**Savings regarding certain existing name registrations**

**74**.

Any registration before the date of coming into operation of this Part in terms of a provision of the repealed Act of a name, or a translated name, of an existing company, or any shortened form of the name, in a language other than the official language, or of any name, translated name, or shortened form, of a company, containing a word or expression in the other language, is for the purposes of this Act -

(a) deemed to be proper registration under the corresponding provisions of this Act, subject to the same rights of challenge as under this Act.; and

(b) the use of that name, translated name or shortened form or any word or expression contained in that name, translated name or shortened form is deemed to be sufficient compliance with the requirements of sections 66 and 68(2)(a).

PART 3

MEMORANDUM OF ASSOCIATION

**Requirements for the memorandum of association**

**75.**

(1) The memorandum of a company must state relevant details that will enable a third party to clearly identify the company, its status and, in the case of a non-profit company, the object the company is to promote, and in addition -

(a) a corporate name for the company that satisfies the requirements of section 66;

(b) the number of shares the company is authorized to issue;;

(c) the street and mailing addresses of the company’s initial registered office and the name of its initial registered agent at that office; and

(d) the name and address of each incorporator.

(2) The memorandum of association may set forth:

(a) the names and addresses of the individuals who are to serve as the initial directors;

(b) provisions not inconsistent with law regarding:

(i) the purpose or purposes for which the company is organised;

(ii) managing the business and regulating the affairs of the company;

(iii) defining, limiting, and regulating the powers of the company, its board of directors, and shareholders;

(c) any provision that under this Act is required or permitted to be set forth in the bylaws;

(d) a provision eliminating or limiting the liability of a director to the company or its shareholders for money damages for any action taken, or any failure to take any action, as a director, except liability for (i) the amount of a financial benefit received by a director to which the director is not entitled; (ii) an intentional infliction of harm on the company or the shareholders; (iii) a violation of section 121; or (iv) an intentional violation of criminal law;

(e) a provision permitting or making obligatory indemnification of a director for liability as defined in section 1 to any person for any action taken, or any failure to take any action, as a director, except liability for (i) receipt of a financial benefit to which the director is not entitled, (ii) an intentional infliction of harm on the company or the shareholders, (iii) a violation of section 121, or (iv) an intentional violation of criminal law; and

(3) The memorandum of association need not set forth any of the corporate powers enumerated in this Act.

(4) Provisions of the memorandum of association may be made dependent upon facts objectively ascertainable outside the memorandum of association in accordance with section 1.

**Memorandum may contain special conditions and provide for unlimited liability of directors**

**76.**

The memorandum of a company may, in addition to the requirements of section 76 -

(a) contain any special conditions which apply to the company, and the requirements, if any, additional to those provided for in this Act for the alteration of those conditions.

PART 4

ALTERATION OF MEMORANDUM

**Alteration of memorandum as to special conditions and other provisions**

**77.**

(1) Subject to subsection (3) and unless prohibited by the condition itself, a special condition contained in the memorandum may be altered by special resolution or in the manner specified in that special condition.

(3) A private company may by special resolution, and upon notifying all known creditors of the company within 5 business days of the passing of the resolution, alter or remove the provision referred to in section 38(1)(a) and contained in its memorandum provided that the company has no outstanding liabilities or all creditors and contingent creditors agree and, if some creditors disagree, the dissenting creditors are afforded a right to claim from company directors.

(4) Any other provision of the memorandum of a company may be altered by special resolution.

(5) Nothing in this section authorises any alteration of a memorandum constituting a variation or abrogation of the special rights of any class of members, except that those rights may be altered or abrogated in the manner provided for in the memorandum for that variation or abrogation.

**Lodgment of altered memorandum**

**78.**

(1) The Company must, in writing, lodge with the Registrar a special resolution altering its memorandum within 14 days after the date of the amendment, together with a copy of the memorandum as so altered.

(2) Any company which fails to comply with the obligation under subsection (1) may be issued with a compliance notice and a prescribed administrative fine by the Registrar.

PART 5

ARTICLES OF ASSOCIATION

**Companies to have articles**

**79.**

(1) There must be registered with the memorandum of a company, articles of association, prescribing articles for the company.

(2) The articles of -

(a) a public company, may consist of the articles contained in Table A of Schedule 1;

(b) a private company, may consist of the articles contained in Table B of Schedule 1; and

(c) a non-profit company, may consist of the articles contained in Table C of Schedule 1,

* 1. subject to any additions, omissions and modifications which are stated in the articles, and to the extent the articles contained in the relevant Schedule do, a private company, personal liability company or non-profit company is not required to comply with the extended accountability requirements set out in Part 8 of Chapter 8, except to the extent required by the company’s Articles of Association.

**Form and signing of articles**

**80.**

(1) The articles must be and be completed in the form prescribed.

(2) The articles must be signed by each subscriber of the memorandum stating his or her full name, occupation, residential and business address, if any, in the presence of at least one witness who must attest the signature and state his or her residential and business address, if any.

**Consolidation of articles**

**81**.

A company may at any time after the registration of its articles, submit to the Registrar a document in the prescribed form, containing a consolidated and full statement of all the articles applying to the company and, on payment of the prescribed fee, the Registrar must, if satisfied that the articles of the company have been truly stated in the consolidated document, endorse on that document a certificate to the effect that the articles stated therein constitute the articles of the company as at the date of the certificate.

**Alteration of articles**

**82.**

(1) Subject to the conditions contained in its memorandum, a company may, by special resolution, alter or add to its articles and any alteration or addition so made is as valid as if originally contained therein, and is subject in like manner to alteration by special resolution.

(2) Section 81 which relates to the lodgment of a copy of an altered memorandum does, with the necessary changes, apply to the lodgment of altered articles.

PART 6

REGISTRATION, INCORPORATION AND CANCELLATION OF REGISTRATION OF MEMORANDUM AND ARTICLES

**Registration of memorandum and articles**

**83**.

(1) If a memorandum and articles complying with the requirements of this Act together with two certified copies are lodged with the Registrar in the manner prescribed, the Registrar must, on payment of the prescribed fee and any other additional prescribed fee, register that memorandum and articles and endorse the date of registration and the certificate provided for in section 88.

(2) Any memorandum and articles lodged for registration must be delivered or e-filed, at the Registration Office personally or electronically by a subscriber or by a person authorised by the subscriber in writing.

(3) On the registration of the Notice of Incorporation, together with the memorandum and articles of a company, the Registrar must allocate a registration number to the company concerned and issue a registration certificate to the company.

**Memorandum and articles to be in official language**

**84.**

(1) The memorandum and articles of a company must be in the official language.

(2) If the memorandum or articles of an existing company is in any language other than the official language, the company must, within two years after the commencement of this Act, by special resolution, substitute that existing memorandum or those articles with a translation in the official language and no fee is payable with regard to that substitution.

**Certificate of incorporation and its effect**

**85**.

(1) On the registration of the memorandum and articles of a company the Registrar must electronically endorse on the memorandum and articles, a certificate signed by him or her that the company is incorporated.

(2) A certificate of incorporation given by the Registrar in respect of any company is on its mere production, in the absence of proof of fraud, conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental to the registration, have been complied with, and that the company is a company duly incorporated under this Act.

**Effect of incorporation on the company and members**

**86**.

(1) From the date of incorporation stated in the certificate of incorporation, the subscribers of the memorandum together with other persons who may become members of the company, become a body corporate with the name stated in the memorandum, capable of exercising all the functions of an incorporated company, and having perpetual succession, but with liability, if any, on the part of the members to contribute to the assets of the company in the event of its being wound up as provided by this Act.

(2) The memorandum and articles bind the company and its members to the same extent as if they respectively had been signed by each member, to observe all the provisions of the memorandum and of the articles, subject to this Act.

**Liability for unconscionable abuse of separate legal personality**

**87**.

If, on application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may––

(a) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or of another person specified in the declaration; and

(b) make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (a).

**Rights of members to copies of the memorandum and articles**

**88**.

(1) A company must send to every member at that member’s request, at cost or any lesser amount which the company may determine, a copy of its memorandum and of its articles, or must, if so requested, afford to a member or the duly authorised agent of a member adequate facilities for making a copy of that memorandum and articles.

(2) Any company which fails to comply with any request under subsection (1), may be subject to a compliance notice and prescribed administrative penalty by the Registrar.

**Cancellation of registration of memorandum and articles**

**89**.

(1) If a company has failed, for a period of more than two years, to lodge with the Registrar an annual return in compliance with section 250, or when the Registrar has reasonable cause to believe that a company is not carrying on business or is not in operation, he or she must, in accordance with subsection (10), send to the company by certified post a letter enquiring whether it is carrying on business or is in operation.

(2) If the Registrar does not within one month after sending the letter receive any answer or receives an answer to the effect that the company is not carrying on business or is not in operation, the Registrar may publish in the *Gazette* and send to the company by certified post a notice that at the expiry of two months from the date of that notice that company will, unless good cause is shown to the contrary, be deregistered.

(3) At the expiry of the period mentioned in any notice referred to in subsection (2) or on receipt from any company of a written statement signed by every director to the effect that the company has ceased to carry on business and has no assets or liabilities, the Registrar may, unless good cause to the contrary has been shown by the company, deregister the company concerned, and must give notice to that effect in the *Gazette* and the date of the publication of that notice in the *Gazette* is deemed to be the date of deregistration.

(4) Notwithstanding the deregistration contemplated in subsection (3), the liability of every director, officer and member of the company continues and may be enforced as if the company had not been deregistered.

(5) The Registrar must cancel the registration of the memorandum and articles of a company which is deregistered under this section.

(6) When any company has been deregistered the books and papers of the company may be disposed of in any way which the Registrar may direct.

(7) After five years from the deregistration of a company, no responsibility rests on any person to whom the custody of the books and papers has been committed, because of the same not being forthcoming to a person claiming to be interested therein.

(8) The Court may, on application by any interested person or the Registrar, if it is satisfied that a company was at the time of its deregistration carrying on business or was in operation, or otherwise that it is just that the registration of the company be restored, make an order that the registration be restored accordingly, and after which the company is deemed to have continued in existence as if it had not been deregistered.

(9) An order referred to in subsection (8) may contain directions and make provision which the Court considers just for placing the company and all other persons in the position, as nearly as may be, as if the company had not been deregistered.

(10) A letter or notice under this section must be addressed to the company at its registered office, its postal address and to the care of the directors or officers and the auditor of the company or may, if there is no director, officer or auditor of the company whose name and address is known to the Registrar, be sent to each of the persons who signed the memorandum of the company, at the address mentioned in the memorandum.

PART 7

INCIDENTAL MATTERS

**Issued copies of memorandum or articles to embody alterations**

**90**.

(1) Every copy of the memorandum or articles of a company issued after the date on which any alteration has been made, must include the alteration.

(2) A company which, after the date of any alteration, issues a copy of its memorandum or articles which does not include an alteration may be issued with a compliance notice and may be liable to a prescribed administrative penalty;

(3) The penalty contemplated in subsection (2) above does not deprive any person of any right to bring proceedings against the company for failure to comply with sub-section (1)

**Contracts by companies**

**91**.

(1) Contracts on behalf of a company may be made as follows -

(a) any contract which if made between individual persons would by law be required to be in writing signed by the parties liable to be sued on that contract may be made on behalf of the company in writing signed by any person acting under its authority, expressed or implied, and may in the same manner be varied or discharged;

(b) any contract which if made between individual persons would by law be valid though made orally only and not reduced to writing, may be made orally on behalf of the company by any person acting under its authority, expressed or implied, and may in the same manner be varied or discharged.

(2) All contracts made in accordance with this section are valid and bind the company and its successors and all other parties.

**Service of documents on companies**

**92**.

Any notice, order or other document which by this Act may be or is required to be served on any company, including any external company, may be served by delivering it at the registered office of the company.

**Arbitration between companies and others**

**93**.

(1) A company may agree to refer and may refer to arbitration at the Companies Tribunal, or another accredited arbitration forum, any existing or future difference between itself and any other company or person.

(2) Companies which are parties to an arbitration may delegate to the arbitrator power to settle or determine any matter capable of being lawfully settled or determined by the companies themselves or by their directors or other managing body.

CHAPTER 4

REGULATION OF CORPORATE FINANCE AND SECURITIES

PART 1

CAPITALISATION OF PROFIT COMPANIES

**Legal nature of company shares and requirement to have shareholders**

**94.**

(1) A share issued by a company is movable property, transferable in any manner provided for or recognised by this Act or other legislation.

(2) A share does not have a nominal or par value, subject to item 6 of Schedule 7.

(3) A company may not issue shares to itself.

(4) An authorised share of a company has no rights associated with it until it has been issued.

(5) Shares of a company that have been issued and subsequently -

(a) acquired by that company, as contemplated in section 120; or

(b) surrendered to that company in the exercise of appraisal rights in terms of section Part 6 of Chapter 7,

have the same status as shares that have been authorised but not issued.

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(6) Despite the repeal of the repealed Act a share issued by a pre-existing company, and held by a shareholder immediately before the commencement date, continues to have all of the rights associated with it immediately before the commencement date, irrespective of whether those rights existed in terms of the memorandum of incorporation of the company or in terms of that Act, subject only to -

(a) amendments to that memorandum of association of the company after the commencement date;

(b) the operation of subsection (5); and

(c) the regulations contemplated in item 6(3) of Schedule 3.

**Authorisation for shares**

**95**.

(1) The memorandum of association of a company -

(a) must set out the classes of shares, and the number of shares of each class, that the company is authorised to issue;

(b) must set out, with respect to each class of shares -

(i) a distinguishing designation for that class; and

(ii) the preferences, rights, limitations and other terms associated with that class, subject to paragraph (d);

(c) may authorise a stated number of unclassified shares, which are subject to classification by the board of the company in accordance with subsection (3)(c); and

(d) may set out a class of shares -

(i) without specifying the associated preferences, rights, limitations or other terms of that class;

(ii) for which the board of the company must determine the associated preferences, rights, limitations or other terms; and

(iii) which may not be issued until the board of the company has determined the associated preferences, rights, limitations or other terms, as contemplated in subparagraph (ii).

(2) The authorisation and classification of shares, the numbers of authorised shares of each class, and the preferences, rights, limitations and other terms associated with each class of shares, as set out in the memorandum of association of a company, may be changed by -

(a) an amendment of the memorandum of association by special resolution of the shareholders; or

(b) the board of the company, in the manner contemplated in subsection (3), except to the extent that the memorandum of association provides otherwise.

(3) Except to the extent that the memorandum of association of a company provides otherwise and subject to ensuring adequate protection of class rights in relation to unclassified shares, the board of the company may -

(a) increase or decrease the number of authorised shares of any class of shares;

(b) reclassify any classified shares that have been authorised but not issued;

(c) classify any unclassified shares that have been authorised as contemplated in subsection (1)(c) but not issued; or

(d) determine the preferences, rights, limitations or other terms of shares in a class contemplated in subsection (1)(d).

(4) If the board of a company acts pursuant to its authority contemplated in subsection (3), the company must file a notice of amendment of its memorandum of association, setting out the changes effected by the board.

**Preferences, rights, limitations and other share terms**

**96**.

(1) All of the shares of any particular class authorised by a company have preferences, rights, limitations and other terms that are identical to those of other shares of the same class.

(2) Each issued share of a company, regardless of its class, has associated with it one general voting right, except to the extent provided otherwise by -

(a) this Act; or

(b) the preferences, rights, limitations and other terms determined by or in terms of the memorandum of association of the company in accordance with section 97.

(3) Despite anything to the contrary in the memorandum of association of a company -

(a) every share issued by that company has associated with it an irrevocable right of the shareholder to vote on any proposal to amend the preferences, rights, limitations and other terms associated with that share; and

(b) if that company has established only one class of shares -

(i) those shares have a right to be voted on every matter that may be decided by shareholders of the company; and

(ii) the holders of that class of shares are entitled to receive the net assets of the company upon its liquidation.

(4) If the memorandum of association of a company has established more than one class of shares the memorandum of association, in setting out the preferences, rights, limitations and other terms of those classes of shares, must provide that -

(a) for each particular matter that may be submitted for a decision to shareholders of the company, at least one class of the shares of the company has voting rights that may be exercised on that matter; and

(b) the holders of at least one class of the shares of the company, irrespective of whether it is the same as any class contemplated in paragraph (a), are entitled to receive the net assets of the company upon its liquidation.

(5) Subject to any other law, the memorandum of association of a company may establish, for any particular class of shares, preferences, rights, limitations or other terms that -

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

(b) provide for shares of that class to be redeemable, subject to the requirements of sections 145 and 147, or convertible, as specified in the memorandum of association -

(i) at the option of the company, the shareholder, or another person at any time, or upon the occurrence of any specified contingency;

(ii) for cash, indebtedness, securities or other property;

(iii) at prices and in amounts specified, or determined in accordance with a formula; or

(iv) subject to any other terms set out in the memorandum or articles of association of the company;

(c) entitle the shareholders to distributions calculated in any manner, including dividends that may be cumulative, non-cumulative, or partially cumulative, subject to the requirements of section 119; or

(d) provide for shares of that class to have preference over any other class of shares with respect to distributions, or rights upon the final liquidation of the company.

(6) The memorandum of association of a company may provide for preferences, rights, limitations or other terms of any class of shares of the company to vary in response to any objectively ascertainable external fact or facts.

(7) For the purpose of subsection (6) -

(a) “external fact” includes the occurrence of any event, a variation in any fact, benchmark or other point of reference, a determination or action by the company, its board, or any other person, an agreement to which the company is a party, or any other document; and

(b) the manner in which a fact affects the preferences, rights, limitations or other terms of shares is expressly determined by or in terms of the memorandum of association of the company, in accordance with section 135.

(8) If the memorandum of association of a company has been amended to materially and adversely alter the preferences, rights, limitations or other terms of a class of shares, any holder of those shares is entitled to seek relief in terms of Part 7 of Chapter 7 if that shareholder -

(a) notified the company in advance of the intention to oppose the resolution to amend the memorandum of association; and

(b) was present at the meeting, and voted against that resolution.

(9) A person -

(a) acquires the rights associated with any particular securities of a company -

(i) when his or her name is entered in the certificated securities register of the company; or

(ii) as determined in accordance with the rules of the Central Securities Depository, in the case of uncertificated securities; and

(b) ceases to have the rights associated with any particular securities of a company -

(i) when the transfer to another person, re-acquisition by the company, or surrender to the company has been entered in the certificated securities register of the company; or

(ii) as determined in accordance with the rules of the Central Securities Depository, in the case of uncertificated securities.

**Issuing of shares**

**97**.

(1) The board of a company may resolve to issue shares of the company at any time, but only within the classes, and to the extent that the shares have been authorised by or in terms of the memorandum of association of the company in accordance with section 97.

(2) On the effective date of this Act, any existing bearer shares that have not converted will be discontinued within the one year and will be cancelled.

(3) If a company issues shares -

(a) that have not been authorised in accordance with section 97; or

(b) in excess of the number of authorised shares of any particular class,

the issuance of those shares may be retroactively authorised in accordance with section 97 within 60 business days after the date on which the shares were issued.

(4) If a resolution seeking to retroactively authorise an issue of shares as contemplated in subsection (3) is not adopted when it is put to a vote -

(a) the issue of shares is a nullity, in pro rata to the issuance, to the extent that it exceeds any authorisation;

(b) the company must return to any person the fair value of the consideration received by the company in respect of that issue of shares to the extent that it is nullified, together with interest in accordance with the Prescribed Rate of Interest Act, 1975 (Act 55 of 1975), from the date on which the consideration for the shares was received by the company, until the date on which the company complies with this paragraph;

(c) any certificate evidencing a share so issued and nullified, and any entry in a securities register in respect of such an issue, is void; and

(d) a director of the company is liable to the extent set out in section 201(3)(e)(i) if the director -

(i) was present at a meeting when the board approved the issue of any unauthorised shares, or participated in the making of such a decision in terms of section 184; and

(ii) failed to vote against the issue of those shares, despite knowing that the shares had not been authorised in accordance with section 97.

**Subscription of shares**

**98**.

(1) This section -

(a) does not apply to a public company or state-owned company, except to the extent that the memorandum of association the company provides otherwise; and

(b) applies to a private company or personal liability company with respect to any issue of its shares, other than -

(i) shares issued -

(aa) in terms of options or conversion rights; or

(bb) as contemplated in section 100(5) to (7); or

(ii) capitalisation shares issued as contemplated in section 107.

(2) If a private company proposes to issue any shares, other than as contemplated in subsection (1)(b), each shareholder of that private company has a right, before any other person who is not a shareholder of that company, to be offered and, within a reasonable time to subscribe for, a percentage of the shares to be issued equal to the voting power of that shareholder’s general voting rights immediately before the offer was made.

(3) The memorandum of association of a private company or personal liability company may limit, negate, restrict or place conditions upon the right set out in subsection (2), with respect to any or all classes of shares of such company.

(4) Except to the extent that the memorandum of association of a private or personal liability company provides otherwise -

(a) in exercising a right in terms of subsection (2), a shareholder may subscribe for fewer shares than the shareholder would be entitled to subscribe for under that subsection; and

(b) shares not subscribed for by a shareholder within the reasonable time contemplated in subsection (2), may be offered to other persons in the event of other shareholders not being able to subscribe for additional shares in proportion to their general voting rights, and to the extent permitted by the articles of association.

**Consideration for shares**

**99**.

(1) The board of a company may issue authorised shares only -

(a) for adequate consideration to the company as determined by the board;

(b) in terms of conversion rights associated with previously issued securities of the company, for adequate consideration; or

(c) as a capitalisation share as contemplated in section 107.

(2) Before a company issues any particular shares, the board must determine the consideration for which, and the terms on which, those shares are to be issued.

(3) A determination by the board of a company in terms of subsection (2) as to the adequacy of consideration for any shares may not be challenged on any basis other than in terms of section 200, read with section 201(2), in which case such determination is null and void.

(4) Subject to subsections (5) when a company has received the consideration approved by its board for the issuance of any shares -

(a) those shares are fully paid; and

(b) the company must issue those shares and cause the name of the holder to be entered on the securities register of the company in accordance with section 110.

(5) If the consideration for any shares that are issued or to be issued is in the form of an instrument such that the value of the consideration cannot be realised by the company until a date after the time the shares are to be issued, or is in the form of an agreement for future services, future benefits or future payment by the subscribing party -

(a) the consideration for those shares is regarded as having been received by the company at any time to the extent -

(i) that the value of the consideration for any of those shares has been realised by the company; or

(ii) that the subscribing party to the agreement has fulfilled its obligations in terms of the agreement; and

(b) upon receiving the instrument or realizing the value of the consideration as per the agreement, the company must -

(i) issue the shares immediately.

**Shareholder approval for issuing shares in certain cases**

**100**.

(1) Subject to subsection (2), an issue of shares or securities convertible into shares, or a grant of options contemplated in section 141, or a grant of any other rights exercisable for securities, must be approved by a special resolution of the shareholders of a company, if the shares, securities, options or rights are issued to -

(a) a director, future director, prescribed officer, or future prescribed officer of the company;

(b) a person related or inter-related to the company, or to a director, future director ,prescribed officer or future prescribed officer of the company; or

(c) a nominee of a person contemplated in paragraph (a) or (b).

(2) Subsection (1) does not apply if the issue of shares, securities or rights is -

(a) under an agreement underwriting the shares, securities or rights;

(b) in the exercise of a pre-emptive right to be offered and to subscribe shares as contemplated in section 98;

(c) in proportion to existing holdings, and on the same terms and conditions as have been offered to all the shareholders of the company or to all the shareholders of the class or classes of shares being issued;

(d) pursuant to an employee share scheme that satisfies the requirements of section 138; or

(e) pursuant to an offer to the public, as defined in section 164(1), read with section 165.

(3) An issue of shares, securities convertible into shares, or rights exercisable for shares in a transaction, or a series of integrated transactions, requires approval of the shareholders by special resolution if the voting power of the class of shares that are issued or issuable as a result of the transaction or series of integrated transactions will be equal to or exceed 30% of the voting power of all the shares of that class held by shareholders immediately before the transaction or series of transactions.

(4) In subsection (3) -

(a) for purposes of determining the voting power of shares issued and issuable as a result of a transaction or series of integrated transactions, the voting power of shares is the greater of -

(i) the voting power of the shares to be issued; or

(ii) the voting power of the shares that would be issued after giving effect to the conversion of convertible shares and other securities and the exercise of rights to be issued;

(b) a series of transactions is integrated if -

(i) consummation of one transaction is made contingent on consummation of one or more of the other transactions; or

(ii) the transactions are entered into within a 12-month period, and involve the same parties, or related persons; and

(aa) they involve the acquisition or disposal of an interest in one particular company or asset; or

(bb) taken together, they lead to substantial involvement in a business activity that did not previously form part of the company’s principal activity.

(5) A director of a company is liable to the extent set out in section 176(3)(e)(ii) if the director -

(a) was present at a meeting when the board approved the issue of any securities as contemplated in this section, or participated in the making of such a decision in terms of section 173(2); and

(b) failed to vote against the issue of those securities, despite knowing that the issue of those securities was inconsistent with this section.

(6) In this section, “future director” or “future prescribed officer” does not include a person who becomes a director or prescribed officer of the company more than six months after acquiring a particular option or right.

(7) The conduct of any of the company directors in contravention of sub-section (5) does not render the issue of shares invalid.

**Options for subscription of securities**

**101**.

(1) A company may issue options for the allotment or subscription of authorised shares or other securities of the company.

(2) The board of a company must determine the consideration or other benefit for which, and the terms upon which -

(a) any options are issued; and

(b) the related shares or other securities are to be issued.

(3) A decision by the board that the company may issue -

(a) any options, constitutes also the decision of the board to issue any authorised shares or other securities for which the options may be exercised; or

(b) any securities convertible into shares of any class, constitutes also the decision of the board to issue the authorised shares into which the securities may be converted.

(4) A director of a company is liable to the extent set out in section 200h(3)(e)(iii) if the director -

(a) was present at a meeting when the board approved the granting of an option or a right as contemplated in this section, or participated in the making of such a decision in terms of section 137; and

(b) failed to vote against the granting of the option or right, despite knowing that any shares -

(i) for which the options could be exercised; or

(ii) into which any securities could be converted,

had not been authorised in terms of section 97.

(5) The conduct of any of the company directors in contravention of sub-section (4) does not render granting of an option or a right as contemplated in this section invalid.

**Financial assistance for subscription of securities**

**102**.

(1) In this section, “financial assistance” does not include lending money in the ordinary course of business by a company whose primary business is the lending of money.

(2) Except to the extent that the articles of association of a company provides otherwise, the board may authorise the company to provide financial assistance by way of a loan, guarantee, the provision of security or otherwise to any person -

(a) for the purpose of, or in connection with, the purchase of, or subscription for, any option, or any securities, issued or to be issued by the company or a related or inter-related company; or

(b) for the purchase of any securities of the company or a related or inter-related company, subject to subsections (3) and (4).

(3) Despite any provision of the articles of association of a company to the contrary, the board may not authorise any financial assistance contemplated in subsection (2), unless -

(a) the particular provision of financial assistance is -

(i) pursuant to an employee share scheme that satisfies the requirements of section 165; or

(ii) pursuant to a special resolution of the shareholders, adopted within the previous two years, which approved such assistance either for the specific recipient, or generally for a category of potential recipients, and the specific recipient falls within that category; and

(b) the board is satisfied that -

(i) immediately after providing the financial assistance, the company would satisfy the equity solvency test; and

(ii) the terms under which the financial assistance is proposed to be given are fair and reasonable to the company.

(4) In addition to satisfying the requirements of subsection (3), the board must ensure that any conditions or restrictions respecting the granting of financial assistance set out in the memorandum and articles of association of the company have been satisfied.

(5) A decision by the board of a company to provide financial assistance contemplated in subsection (2), or an agreement with respect to the provision of any such assistance, is void to the extent that the provision of that assistance would be inconsistent with -

(a) this section; or

(b) a prohibition, condition or requirement contemplated in subsection (4).

(6) If a resolution or an agreement is void in terms of subsection (5) a director of the company is liable to the extent set out in section 200(3)(e)(iv) if the director -

(a) was present at the meeting when the board approved the resolution or agreement, or participated in the making of such a decision in terms of section 197; and

(b) failed to vote against the resolution or agreement, despite knowing that the provision of financial assistance was inconsistent with this section or a prohibition, condition or requirement contemplated in subsection (4).

(7) The conduct of any of the company directors in contravention of sub-section (6) does not render the provision of financial assistance inconsistent with this section invalid.

**Loans and other financial assistance to directors**

**103**.

(1) In this section, “financial assistance”, includes lending money, guaranteeing a loan or other obligation, and securing any debt or obligation, but does not include -

(a) lending money in the ordinary course of business by a company whose primary business is the lending of money;

(b) an accountable advance to meet -

(i) legal expenses in relation to a matter concerning the company;

(ii) anticipated expenses to be incurred by the person on behalf of the company; or

(iii) an amount to defray the expenses of the person for removal at the request of the company.

(2) Except to the extent that the articles of association of a company provides otherwise, the board may authorise the company to provide direct or indirect financial assistance -

(a) to a director or prescribed officer of the company or of a related or inter-related company;

(b) to a related or inter-related company or corporation; or

(c) to a member of a related or inter-related corporation, or to a person related to any such company, corporation, director, prescribed officer or member, subject to subsections (3) and (4).

(3) Despite any provision of the articles of association of a company to the contrary, the board may not authorise any financial assistance contemplated in subsection (2), unless -

(a) the particular provision of financial assistance is -

(i) pursuant to an employee share scheme that satisfies the requirements of section 165; or

(ii) pursuant to a special resolution of the shareholders, adopted within the previous two years, which approved such assistance either for the specific recipient, or generally for a category of potential recipients, and the specific recipient falls within that category; and

(b) the board is satisfied that -

(i) immediately after providing the financial assistance, the company would satisfy the equity solvency test; and

(ii) the terms under which the financial assistance is proposed to be given are fair and reasonable to the company.

(4) In addition to satisfying the requirements of subsection (3), the board must ensure that any conditions or restrictions respecting the granting of financial assistance set out in the memorandum and articles of association of a company have been satisfied.

(5) If the board of a company adopts a resolution to do anything contemplated in subsection (2), the company must provide written notice of that resolution to all shareholders, unless every shareholder is also a director of the company, and to any trade union representing its employees -

(a) within 10 business days after the board adopts the resolution, if the total value of all loans, debts, obligations or assistance contemplated in that resolution, together with any previous such resolution during the financial year, exceeds one-tenth of 1% of the net worth of the company at the time of the resolution; or

(b) within 30 business days after the end of the financial year, in any other case.

(6) A resolution by the board of a company to provide financial assistance contemplated in subsection (2), or an agreement with respect to the provision of any such assistance, is void to the extent that the provision of that assistance would be inconsistent with -

(a) this section; or

(b) a prohibition, condition or requirement contemplated in subsection (4).

(7) If a resolution or agreement is void in terms of subsection (6), a director of the company is liable to the extent set out in section 200(3)(e)(v) if the director -

(a) was present at the meeting when the board approved the resolution or agreement, or participated in the making of such a decision in terms of section 197; and

(b) failed to vote against the resolution or agreement, despite knowing that the provision of financial assistance was inconsistent with this section or a prohibition, condition or requirement contemplated in subsection (4).

**Distributions to be authorised by board**

**104.**

(1) A company may not make any proposed distribution unless -

(a) the distribution -

(i) is pursuant to an existing legal obligation of the company, or a court order; or

(ii) the board of the company, by resolution, has authorised the distribution;

(b) it reasonably appears that the company will satisfy the equity solvency test immediately after completing the proposed distribution; and

(c) the board of the company, by resolution, has acknowledged that it has applied the equity solvency test, as set out in section 118, and reasonably concluded that the company will satisfy the equity solvency test immediately after completing the proposed distribution.

(2) When the board of a company has adopted a resolution contemplated in subsection (1)(c), the relevant distribution must be fully carried out, subject only to subsection (3).

(3) If the distribution contemplated in a particular board resolution, court order or existing legal obligation has not been completed within 120 business days after the board made the acknowledgement required by subsection (1)(c), or after a fresh acknowledgement being made in terms of this subsection -

(a) the board must reconsider the equity solvency test with respect to the remaining distribution to be made pursuant to the original resolution, order or obligation; and

(b) despite any law, order or agreement to the contrary, the company may not proceed with or continue with any such distribution unless the board adopts a further resolution as contemplated in subsection (1)(c).

(4) If a distribution takes the form of the incurrence of a debt or other obligation by the company, as contemplated in paragraph (b) of the definition of ‘distribution’ set out in section 1, the requirements of this section -

(a) apply at the time that the board resolves that the company may incur that debt or obligation; and

(b) do not apply to any subsequent action of the company in satisfaction of that debt or obligation, except to the extent that the resolution, or the terms and conditions of the debt or obligation, provide otherwise.

(5) If, after considering the equity solvency test as required by this section, it appears to the company that the section prohibits its immediate compliance with a court order contemplated in subsection (1)(a)(i) -

(a) the company may apply to a court for an order varying the original order; and

(b) the court may make an order that -

(i) is just and equitable, having regard to the financial circumstances of the company; and

(ii) ensures that the person to whom the company is required to make a payment in terms of the original order is paid at the earliest possible date compatible with the company satisfying its other financial obligations as they fall due and payable.

(6) A director of a company is liable to the extent set out in section 200(3)(e)(vi) if the director -

(a) was present at the meeting when the board approved a distribution as contemplated in this section, or participated in the making of such a decision in terms of section 197; and

(b) failed to vote against the distribution, despite knowing that the distribution was contrary to this section.

**Capitalisation shares**

**105**.

(1) Except to the extent that the articles of association of a company provides otherwise -

(a) the board of the company, by resolution, may approve the issuing of any authorised shares of the company as capitalisation shares on a *pro rata* basis to the shareholders of one or more classes of shares;

(b) shares of one class may be issued as a capitalisation share in respect of shares of another class; and

(c) subject to subsection (2), when resolving to award a capitalisation share, the board may at the same time resolve to permit any shareholder entitled to receive such an award to elect instead to receive a cash payment at a value determined by the board.

(2) The board of a company may not resolve to offer a cash payment *in lieu* of awarding a capitalisation share, as contemplated in subsection (1)(c), unless the board -

(a) has considered the equity solvency test as required by section 115, on the assumption that every shareholder would elect to receive cash; and

(b) is satisfied that the company would satisfy the equity solvency test immediately upon the completion of the distribution.

**Companies and subsidiaries acquiring shares of companies**

**106**.

(1) This section does not apply to -

(a) the making of a demand, tendering of shares and payment by a company to a shareholder in terms of appraisal rights of a shareholder set out in Part 6 of Chapter 7; or

(b) the redemption by the company of any redeemable securities in accordance with the terms and conditions of those securities.

(2) Subject to subsections (3) and (8), and if the decision to do so satisfies the requirements of section 107 -

(a) the board of a company may determine that the company will acquire a number of its own shares; and

(b) the board of a subsidiary company may determine that it will acquire shares of its holding company, but -

(i) not more than 10%, in aggregate, of the number of issued shares of any class of shares of a company may be held by, or for the benefit of, all of the subsidiaries of that company, taken together; and

(ii) no voting rights attached to those shares may be exercised while the shares are held by the subsidiary, and it remains a subsidiary of the company whose shares it holds.

(3) Despite any provision of any law, agreement, order or the articles of association of a company, the company may not acquire its own shares, and a subsidiary of a company may not acquire shares of that company, if, as a result of that acquisition, there would no longer be any shares of the company in issue other than -

(a) shares held by one or more subsidiaries of the company; or

(b) convertible or redeemable shares.

(4) An agreement with a company providing for the acquisition by the company of shares issued by it is enforceable against the company subject to subsections (2) and (3).

(5) If a company alleges that, as a result of the operation of subsection (2) or (3), it is unable to fulfil its obligations in terms of an agreement contemplated in subsection (4) -

(a) the company must apply to the Court for an order in terms of paragraph (c);

(b) the company has the burden of proving that fulfilment of its obligations would put it in breach of subsections (2) or (3); and

(c) if the Court is satisfied that the company is prevented from fulfilling its obligations pursuant to the agreement, the Court may make an order that -

(i) is just and equitable, having regard to the financial circumstances of the company; and

(ii) ensures that the person to whom the company is required to make a payment in terms of the agreement is paid at the earliest possible date compatible with the company satisfying its other financial obligations as they fall due and payable.

(6) If a company acquires any shares contrary to section 97, or this section, the company must, not more than two years after the acquisition, apply to the Court for an order reversing the acquisition, and the Court may order -

(a) the person from whom the shares were acquired to return the amount paid by the company; and

(b) the company to issue to that person an equivalent number of shares of the same class as those acquired.

(7) A director of a company is liable to the extent set out in section 200(3)(e)(vii) if the director -

(a) was present at the meeting when the board approved an acquisition of shares contemplated in this section, or participated in the making of such a decision in terms of section 197; and

(b) failed to vote against the acquisition of shares, despite knowing that the acquisition was contrary to this section or section 97.

(8) A decision by the board of a company contemplated in subsection (2)(a) -

(a) must be approved by a special resolution of the shareholders of the company if any shares are to be acquired by the company from a director or prescribed officer of the company, or a person related to a director or prescribed officer of the company; and

(b) is subject to the requirements of sections 293 and 294 if, considered alone, or together with other transactions in an integrated series of transactions, it involves the acquisition by the company of more than 5% of the issued shares of any particular class of shares of the company.

PART 2

SECURITIES REGISTRATIONS AND TRANSFERS

**Securities to be evidenced by certificates or uncertificated**

**107**.

(1) In this Part, “certificated” means evidenced by a certificate as contemplated in subsection (2)(a).

(2) Any securities issued by a company must be either -

(a) evidenced by certificates; or

(b) uncertificated, in which case the company may not issue certificates evidencing or purporting to evidence title to those securities subject to subsection (6).

(3) Except to the extent that this Act expressly provides otherwise -

(a) the rights and obligations of security holders are not different solely on the basis of their respective securities being certificated or uncertificated; and

(b) any provision of this Act applies with respect to any uncertificated securities in the same manner as it applies to certificated securities.

(4) Sections 113 to 116 -

(a) apply only to uncertificated securities; and

(b) prevail in the case of a conflict between any provision of those sections and any other provision of this Act, any other law, the common law, the memorandum or articles of association or any agreement of a company.

(5) Any certificated securities may cease to be evidenced by certificates and thereafter be uncertificated in which case any provision of this Act contemplated in subsection (4) applies to those securities from the date on which they ceased to be evidenced by certificates.

(6) In the manner set out in section 115, any uncertificated securities may be withdrawn from the uncertificated securities register, and certificates issued evidencing those securities, in which case from the date on which they became certificated -

(a) sections 113 to 116 cease to apply to those securities; and

(b) for greater certainty, transfer of ownership in those securities cannot be effected by a participant or central securities depository while they remain in certificated form, unless they are held in certificated form in collective custody by the participant or central securities depository.

(7) The Minister may prescribe matters that are supplementary and ancillary to the provisions of this Part.

**Register of issued securities**

**108.**

(1) A company must -

(a) establish or cause to be established a register of its issued securities in the prescribed form; and

(b) maintain its securities register in accordance with the prescribed standards.

(2) As soon as practicable after issuing any securities a company must enter or cause to be entered in its securities register, in respect of every class of securities that it has issued -

(a) the total number of those securities that are held in uncertificated form; and

(b) with respect to certificated securities -

(i) the names and addresses of the persons to whom the securities were issued;

(ii) the number of securities issued to each of them;

(iii) the number of, and prescribed circumstances relating to, any securities -

(aa) that have been placed in trust as contemplated in section 101(5)(d); or

(bb) whose transfer has been restricted;

(iv) in the case of securities contemplated in section 110 -

(aa) the number of those securities issued and outstanding; and

(bb) the names and addresses of the registered owner of the securities and any holders of a beneficial interest in the securities; and

(v) any other prescribed information.

(3) If a company has issued uncertificated securities or has issued securities that have ceased to be certificated as contemplated in section 111, a participant or central securities depository must administer and maintain a record in the prescribed form as the uncertificated securities register of the company which -

(a) forms part of that securities register of the company; and

(b) must contain, with respect to all securities contemplated in this subsection, any details -

(i) referred to in subsection (2)(b), read with the changes required by the context; or

(ii) determined by the rules of the central securities depository.

(4) A securities register, or an uncertificated securities register, maintained in accordance with this Act is sufficient proof of the facts recorded in it, in the absence of evidence to the contrary.

(5) Unless all the shares of a company rank equally for all purposes, the shares of the company, or each class of shares, and any other securities, are distinguished by an appropriate numbering system.

**Registration and transfer of certificated securities**

**109**.

(1) A certificate evidencing any certificated securities of a company -

(a) must state on its face -

(i) the name of the issuing company;

(ii) the name of the person to whom the securities were issued;

(iii) the number and class of shares and the designation of the series, if any, evidenced by that certificate; and

(iv) any restriction on the transfer of the securities evidenced by that certificate,

subject to item 6(4) of Schedule 3;

(b) must be signed by two persons authorised by the board of the company; and

(c) is proof that the named security holder owns the securities, in the absence of evidence to the contrary.

(2) A signature contemplated in subsection (1)(b) may be affixed to or placed on the certificate by autographic, mechanical or electronic means.

(3) A certificate remains valid despite the subsequent departure from office of any person who signed it.

(4) If, as contemplated in section 111(5), all of the shares of a company rank equally for all purposes and are therefore not distinguished by a numbering system -

(a) each certificate issued in respect of those shares is distinguished by a numbering system; and

(b) if the share has been transferred, the certificate is endorsed with a reference number or similar device that enables each preceding holder of the share in succession to be identified.

(5) Subject to subsection (6), a company must enter in its securities register every transfer of any certificated securities, including in the entry -

(a) the name and address of the transferee;

(b) the description of the securities or interest transferred;

(c) the date of the transfer; and

(d) the value of any consideration still to be received by the company on each share or interest in the case of a transfer of securities contemplated in section 100(5) and (6).

(6) A company may make an entry contemplated in subsection (5) if the transfer -

(a) is evidenced by a proper instrument of transfer that has been delivered to the company; or

(b) was effected by operation of law.

**Registration of uncertificated securities**

**110**.

(1) At the request of a company and on payment of the prescribed fee, if any, a participant or central securities depository as determined in accordance with the rules of the central securities depository must furnish that company with all details of uncertificated securities of the company reflected in the uncertificated securities register.

(2) A person who wishes to inspect an uncertificated securities register may do so -

(a) through the relevant company in terms of section 243; and

(b) in accordance with the rules of the central securities depository.

(3) Within five business days after the date of a request for inspection, a company must produce a record of the uncertificated securities register which record must reflect at least the details referred to in section 111(3)(b) at the close of business on the day on which the request for inspection was made.

(4) A participant or central securities depository determined in accordance with the rules of the central securities depository -

(a) must provide a regular statement at prescribed intervals to each person for whom any uncertificated securities are held in an uncertificated securities register of a company, setting out the number and identity of the uncertificated securities held on behalf of the company;

(b) may not impose a charge for a statement on the person entitled to the statement; and

(c) may impose a charge or service fee for such a statement on the relevant company in accordance with the regulations.

(5) The regulations contemplated in section 110(7) may provide for a charge or service fee for statements contemplated in subsection (4)(c).

**Transfer of uncertificated securities**

**111**.

(1) The transfer of uncertificated securities in an uncertificated securities register may be effected -

(a) by a participant or central securities depository;

(b) on receipt of -

(i) an instruction to transfer sent and properly authenticated in terms of the rules of a central securities depository; or

(ii) an order of the Court; and

(c) in accordance with this section and the rules of the central securities depository.

(2) A transfer of ownership in any uncertificated securities must be effected by -

(a) debiting the account in the uncertificated securities register from which the transfer is effected; and

(b) crediting the account in the uncertificated securities register to which the transfer is effected,

in accordance with the rules of a central securities depository.

(3) The requirements of section 112(5), read with the changes required by the context, apply with respect to a transfer of uncertificated securities.

(4) A transfer of ownership in accordance with this section occurs despite any fraud, illegality or insolvency that may -

(a) affect the relevant uncertificated securities; or

(b) have resulted in the transfer being effected,

but a transferee who was a party to or had knowledge of the fraud or illegality, or had knowledge of the insolvency, may not rely on this subsection.

(5) A court may not order the name of a transferee contemplated in this section to be removed from an uncertificated securities register, unless that person was a party to or had knowledge of a fraud or illegality as contemplated in subsection (4).

(6) Nothing in this section prejudices any power of a participant or central securities depository to effect a transfer to a person to whom the right to any uncertificated securities of a company has been transmitted by operation of law.

**Substitution of certificated and uncertificated securities**

**112**.

(1) A person who wishes to withdraw all or part of the uncertificated securities held by that person in an uncertificated securities register, and obtain a certificate in respect of those withdrawn securities, may so notify the relevant participant or central securities depository, as determined in accordance with the rules of the central securities depository, which must within five business days -

(a) notify the relevant company to provide the requested certificate; and

(b) remove the details of the uncertificated securities from the uncertificated securities register.

(2) After receiving a notice in terms of subsection (1)(a) from a participant or central securities depository, a company must -

(a) immediately enter the name of the relevant person and details of the securities held by that person in the securities register of the company and indicate on the register that the securities so withdrawn are no longer held in uncertificated form; and

(b) within 10 business days, or 20 business days in the case of a holder of securities who is not resident within Namibia -

(i) prepare and deliver to the relevant person a certificate in respect of the securities; and

(ii) notify the central securities depository that the securities are no longer held in uncertificated form.

(3) A company may charge a holder of its securities a reasonable fee to cover the actual costs of issuing a certificate as contemplated in this section.

**Liability relating to uncertificated securities**

**113**.

(1) A person who takes any unlawful action in consequence of which any of the following events occur in a securities register or uncertificated securities register, namely -

(a) the name of any person remains in, is entered in, or is removed or omitted;

(b) the number of uncertificated securities is increased, reduced, or remains unaltered; or

(c) the description of any uncertificated securities is changed,

is liable to any person who has suffered any direct loss or damage arising out of that action.

(2) A person who gives an instruction to transfer uncertificated securities must -

(a) warrant the legality and correctness of that instruction; and

(b) indemnify the company and the participant or central securities depository required to effect the transfer in accordance with the rules of the central securities depository, against any claim and against any direct loss or damage suffered by them arising out of such a transfer by virtue of an instruction referred to in this subsection.

(3) A participant or central securities depository that effect the transfer of uncertificated securities in accordance with the rules of a central securities depository must indemnify -

(a) a company against any claim made upon it and against any direct loss or damage suffered by it arising out of a transfer of any uncertificated securities; and

(b) any other person against any direct loss or damage arising out of a transfer of any uncertif\*icated securities,

if that transfer was effected by the participant or central securities depository -

(i) without instruction;

(ii) in accordance with an instruction that was not sent and properly authenticated in terms of the rules of a central securities depository; or

(iii) in a manner inconsistent with an instruction that was sent and properly authenticated in terms of the rules of a central securities depository.

**Register of beneficial owners**

**114**.

1. In this section, reference to company includes an external company and a closely held company.
2. Every company, at its incorporation, or, in respect of an external company, on its establishment of a place of business in Namibia, if later,, must keep and maintain an accurate and up-to-date register of the beneficial owners of the company and the register must be kept in Namibia at the same office at which the register of members is kept.
3. Every company must record in the register referred to in subsection (1) the following information:

(a) in respect of each beneficial owner of the company –

(i) the first name and surname and any former first name and surname of the beneficial owner;

(ii) the date of birth and identification number appearing on the identity document of the beneficial owner;

(iii) full particulars of residential address, business address, email address and postal address of the beneficial owner;

* + - 1. contact details of the beneficial owner;
      2. the nationality of the beneficial owner; and
      3. the nature and extent of the beneficial ownership; and

(b) in respect of a director or shareholder of the company who is a nominee of a beneficial owner, information referred to in paragraph (a).

(4) Every company must, on a prescribed form, file with the Registrar accurate and up-to-date information of the beneficial owner recorded in terms of subsection (3), and where the information has changed the company must within fourteen days of such changes file with the Registrar the changes to the information.

(5) A company or the Registrar, on demand by a competent authority, must make available the information of the beneficial owner held and maintained by the company or filed with the Registrar in terms of subsection (3).

(6) A company must appoint a person residing in Namibia who is –

(a) responsible for the safe keeping of the register of the beneficial owners; and

(b) authorised by the company to make the information of the beneficial owner recorded in terms of subsection (3) available to a competent authority under subsection (4).

(7) The information of the beneficial owner and other information regarding a company held by the Registrar are public information and upon request must be made available by the Registrar for inspection by a member of the public, whether electronically or physically, but the information of the beneficial owner is limited to the full name of the beneficial owner and the nature and extent of beneficial ownership.

(8) Notwithstanding any other law to the contrary, the Registrar on his or her own, the Centre on its own or the Registrar or the Centre on behalf of a competent authority may –

(a) request information of the beneficial owner or any other information regarding a company from; or

(b) provide the information referred to in paragraph (a) to,

an authority in a foreign state that has similar powers and duties as those of the Registrar or the Centre for the purposes of an investigation of money laundering or financing of terrorism or proliferation activities.

(9) The Registrar, the Centre or a competent authority that requested or provided information of the beneficial owner or other information regarding a company under subsection (7) must keep record of the information provided or requested.

(10) A company must keep and maintain records of the information of the beneficial owner of the company and the nature and extent of the beneficial ownership for a period of at least five years after the date on which the record was made.

(11) The administrator or liquidator of a company under dissolution and any other person involved in the dissolution of a company must keep and maintain records of the information of the beneficial owner of the company and the nature and extent of the beneficial ownership for a period of at least five years after the date on which the company is dissolved or otherwise ceases to exist.

(12) If the Registrar has reasonable grounds to believe that a company or a person –

(a) has failed or fails to keep and maintain a register of beneficial owners referred to in subsection (1); or

(b) has failed or fails to comply with any time period referred to in subsection (4), (10) or (11), the Registrar must in writing issue a directive to the company instructing the company to comply with subsection (2), (4), (10) or (11) within a period of three months from the date of receiving the directive.

(13) If a company or person refuses or fails to comply with a directive issued under subsection (12), the Registrar may impose the administrative penalties set out in subsection (15).

(14) In determining an appropriate administrative penalty, the Registrar must consider the following factors –

(a) the nature, duration, seriousness and extent of the relevant non-compliance.

(b) whether the company or person has previously failed to comply with this section; and

(c) any remedial steps taken by the company or person to prevent a recurrence of the non-compliance.

(15) After considering the factors referred to in subsection (14), the Registrar may impose any of the following administrative penalties on the company or person –

(a) if the company or person has failed to keep and maintain a register in terms of subsection (2) or has failed to comply with the time period referred to in subsection (4), (10) or (11), a financial penalty not exceeding N$50 000; and

(b) if the company or person after receiving a directive referred in subsection (12) fails to comply with the directive, in addition to the penalty imposed under paragraph (a), a financial penalty which does not exceed N$1 000 for every day during which the contravention continues.

(16) The Registrar must list a company that fails to comply with subsection (2), (4), (10) or (11) on an inactive list and thereafter deregister the company after six months from the date the company was listed.

(17) On imposing the administrative penalties under subsection (15), the Registrar must in writing notify the company or person –

(a) of the decision and the reasons for the decision; and

(b) of the amount payable as a penalty and any interest that may become payable and the interest rate, and the period within which the penalty must be paid.

(18) Any financial penalty imposed under subsection (15) must be paid to the Registrar.

(19) A company or a person who –

(a) contravenes or fails to comply with subsection (2), (3), (4), (5), (10) or (11);

(b) knowingly provides false or misleading information of the beneficial owner or the nature and extent of the beneficial ownership;

(c) knowingly withholds information of the beneficial owner that must be entered into the register referred to in subsection (2); or

(d) knowingly makes a false entry into the register referred to in subsection (2), commits an offence and is liable on conviction to a fine not exceeding N$10 000 000 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.

(20) The Registrar may impose an administrative penalty under this Act irrespective of any criminal liability or penalty to which the company or a person may be subjected to, but where the company or a person has been sentenced to a fine following a conviction for an offence, the Registrar must take the fine imposed into account when assessing an administrative penalty payable under this section.

(21) The Registrar must deregister a company as contemplated in section 156 (3)(b) and cause it to be removed from the companies register if

(a) the company fails, within three months of the Registrar’s demand, to make available the information of the beneficial owner held and maintained by the company.

(22) A company must keep and maintain records of the information of the beneficial owner of the company and the nature and extent of the beneficial ownership for a period of at least five years after the deregistration contemplated in subsection (21).

PART 3

DISTRIBUTIONS BY COMPANIES

**Requirements for distributions**

**115**.

(1) Except where any shares are to be acquired by the company from a director or prescribed officer of the company, or a person related to a director or prescribed officer of the company, when a company or a subsidiary reacquires its shares, no special resolution is required for a company to make a distribution;

(2) For any form of distribution to be made by a company, the equity solvency test must be satisfied

(3) For the purposes contemplated in subsection (2) -

(a) subject to paragraph (b), the board or any other person applying the equity solvency(liquidity) test to a company -

(i) must consider a fair valuation of the company’s assets and liabilities, including any reasonably foreseeable contingent assets and liabilities, irrespective whether arising as a result of the proposed distribution, or otherwise; and

(ii) may consider any other valuation of the company’s assets and liabilities that is reasonable in the circumstances; and

(b) unless the Articles of Association of the company provides otherwise, any amount that would be required, if the company were to be liquidated at the time of the distribution, to satisfy the preferential rights upon liquidation of shareholders whose preferential rights are superior to the preferential rights of those receiving the distribution, is not to be regarded as a liability.

**Company to comply with equity solvency test**

**116.**

Companies need to comply only with the equity solvency test when authorising distributions and ‘the balance sheet test’ (i.e. the solvency test) is no longer required.

**Redemption of redeemable shares**

**117.**

(1) A board of directors may authorize and the company may redeem shares issued subject to terms and conditions of their redemption subject to restriction by the articles of association and the limitation in subsection (2).

(2) No redemption may be made if, after giving it effect:

(a) the company would not be able to pay its debts as they become due in the usual course of business and in contravention of the requirements for distributions in terms of section 118.

**Consequences of acquisition with regard to shares**

**118.**

Shares issued by a company and acquired under this section must be cancelled as issued shares and restored to the status of authorised share capital of the same class and the same rights as the original issued share rather than general authorise share capital.

**Liability of shareholders and others under certain circumstances**

**119.**

(1) The directors of a company who, contrary to section 118 and 120, allow the company to acquire any share issued by it, are jointly and severally liable to restore to the company any amount so paid and not otherwise recovered by the company,

(2) A director who is liable under subsection (1) may apply to the Court for an order compelling a shareholder or former shareholder to pay to the company any consideration that was paid to that shareholder contrary to section 118 or 120.

(3) Where the acquisition by the company of shares issued by it is in contravention of section 118 or 120, any creditor who was a creditor at the time of the acquisition, or who is a creditor because of a cause of debt which arose before that acquisition, or any shareholder, may apply to the Court for an order, and the Court may, if it finds it equitable to do so -

(a) order a shareholder or former shareholder to pay to the company any money or return any consideration that was paid or given by the company to acquire the shares;

(b) order the company to issue an equivalent number of shares to the shareholder or former shareholder; or

(c) make any other appropriate order.

(4) An action to enforce a liability imposed by this section must be instituted within three years after the date of the acquisition.

(5) Nothing contained in this section limits or diminishes any liability which any person may incur under this Act or any other law, or the common law.

(6) For the purposes of this section and section 109, “director of a company” includes any director of a holding company of that company.

**Procedure of acquisition of certain shares by company**

**120**.

(1) Save as is provided in subsection (2), a company that proposes to acquire shares issued by it must -

(a) deliver a copy of the written offering circular in the prescribed form, to each registered shareholder on record as at the date of the offer in any manner which is provided in the articles of the company for the sending of any notice of a meeting of shareholders, stating the number and the class or kind of its issued shares which the company proposes to acquire, and specifying the terms and reasons for the offer;

(b) lodge a copy of the offering circular with the Registrar within 15 days of the date that it is delivered or mailed to the shareholders of the company.

(2) Subsection (1) does not apply -

(a) to the extent that it is dispensed with in terms of the special resolution passed in terms of section 109(8);

(b) in the case of a company whose shares are listed on a stock exchange within Namibia, to the acquisition by that company of shares in terms of transactions effected on that stock exchange in accordance with the rules and listing requirements of that exchange.

(3) Sections 172 to 175 relating to the civil liability of directors or promoters of a company for untrue statements in prospectuses, the civil liability of experts for untrue statements, criminal liability for untrue statements in prospectuses and the retention of liability for untrue statements under the common law respectively, do, with the necessary changes, apply to all documents issued in terms of subsection (1).

(4) Where in response to any offer to acquire shares, the shareholders propose to dispose of a greater number of shares than the company offered to acquire, the company must acquire from all of the shareholders who offered to sell, on a proportional basis as nearly as possible disregarding fractions, except that this subsection does not apply to the acquisition of shares in terms of transactions effected on a stock exchange within Namibia.

(5) A company that acquires shares issued by it must, within 30 days and in the prescribed form, notify the Registrar of the date of the acquisition, the date, number and class of shares that it has acquired.

(6) A stock exchange within Namibia may, in addition to any requirements contained in this Act, determine further requirements with which a company whose shares are listed on that exchange must comply with prior to that company acquiring its own shares.

**Enforceability of contracts for acquisition by company of certain shares**

**121**.

(1) A contract with a company providing for the acquisition of shares issued by it is enforceable against the company, except if the company cannot execute the contract without being in breach of section 118 or 120.

(2) In an action brought on a contract referred to in subsection (1), the company has the burden of proving that execution of the contract is or will be in breach of section 118 or 120.

(3) Until the company has fully performed its obligations in terms of a contract referred to in subsection (1), shareholders who dispose of their share retain the status of claimants entitled to be paid as soon as the company is lawfully able to do so or, on liquidation, to be ranked subordinate to creditors and shareholders whose claims are in priority to the claims of the class of shares which they disposed of to the company, but in priority to the claims of the other shareholders.

PART 4

MEMBERS AND REGISTER OF MEMBERS

**Members of company**

**122**.

(1) The subscribers of the memorandum of a company are deemed to have agreed to become members of a company on its incorporation, and must, as soon as reasonably possible after incorporation, be entered as members in its register of members.

(2) Every other person who agrees to become a member of a company and whose name is entered in its register of members, becomes a member of that company.

(3) A company must, subject to its articles, enter in the register as a member of the company by virtue of his or her office, the name of any person who submits proof of his or her appointment as the executor, administrator, trustee, curator or guardian in respect of the estate of a deceased member of the company or of a member whose estate has been sequestrated or of a member who is otherwise under disability or as the liquidator of any body corporate in the course of being wound up which is a member of the company, and any person whose name has been so entered in the register is for the purposes of this Act deemed to be a member of the company.

**Trusts in respect of shares**

**123**.

A company is not bound to see to the execution of any trust, whether express, implied or constructive, in respect of any share.

**Register of members**

**124**.

(1) Every company must, in the official language, keep a register of its members, and must, in that register, enter -

(a) the names and addresses of the members and, in the case of a profit company, a statement of the shares issued to each member, distinguishing each share by its number, if any, and by its class or kind, and of the amount paid or agreed to be considered as paid on the shares of each member; and

(b) in respect of each member –

(i) the date on which his or her name was entered in the register as a member; and

(ii) the date on which he or she ceased to be a member.

(2) The register of members of an existing company kept under the repealed Act and continued under this Act in a language other than the official language is deemed to be sufficient compliance with subsection (1).

**Index to register of members**

**125**.

(1) Every company having more than 50 members must, unless the register of members is in such form as to constitute in itself an index, keep an index of the names of the members of the company, and must, within 14 days after the date on which any alteration is made in the register of members, make any necessary alteration in the index.

(2) The index -

(a) may be in the form of a card index;

(b) is deemed to be a part of the register of members;

(c) must in respect of each member, contain a sufficient indication to enable the account of that member in the register to be readily found.

**Branch registers in foreign countries**

**126**.

(1) A profit company may, if so authorised by its articles, cause to be kept in any foreign country a register of members resident in any foreign country (in this Part called a “branch register”).

(2) The company referred to subsection (1) must give to the Registrar notice on the prescribed form of the situation of the office where any branch register is kept, and of any change in that situation, and of the discontinuance of the office in the event of its being discontinued.

**Provisions as to branch register**

**127**.

(1) A branch register is deemed to be part of the company’s register of members.

(2) A branch register must be kept in the same manner in which the register of members is by this Act required to be kept except that the notice referred to in section 151, must, for a reasonable period of time before the closing of the branch register, also be inserted in a newspaper circulating in the district where the branch register is kept.

(3) The company must transmit to its registered office a copy of every entry in its branch register as soon as may be after the entry is made and must cause to be kept at its registered office, duly entered up from time to time, a duplicate of its branch register, and the duplicate is, for the purposes of this Act, deemed to be part of the register of members.

(4) The company may discontinue keeping any branch register, and must, thereafter, transfer all entries in that register to some other branch register kept by the company or to the register of members.

(5) Subject to this Act and to any law relating to stamp duty or estate duty, any company may by its articles make any provision in relation to the keeping of its branch registers.

**Register of members to be evidence**

**128**.

The register of members of a company sufficient evidence of any matters directed or authorised to be entered therein by this Act.

**Where the register of members is to be kept**

**129**.

(1) Subject to this section, the register of members of a company must be kept at its registered office.

(2) A company’s register of members may be kept at any office of the company in Namibia where the work of making it up is done, instead of at the company’s registered office, and where a company arranges with some other person (in this section called “agent”) for the making up of its register of members to be undertaken on behalf of the company by the agent, the register may be kept at the office of the agent in Namibia at which the work is done instead of at an office of the company.

(3) Any index of the names of the members of a company required to be kept in terms of section 128 must at all times be kept at the same place where the register of members is kept, and where the company keeps a branch register under section 129 the duplicate of the branch register required by section 130(3) to be kept at the company’s registered office must, notwithstanding anything to the contrary contained in section 130(3), at all times be kept at the same place where the company’s register of members is kept.

(4) Any company the register of members of which is not kept at its registered office must notify the Registrar in the prescribed form of the place where that register is kept and of any change in that place.

(5) The provisions of this section relating to the register of members of a company and the provisions of this Act relating to the inspection or production of that register or to the furnishing of copies of that register or any part of that register, do apply to any agent by whom that register is kept on behalf of a company in the same manner as they apply to the company.

**Disposal of closed accounts in the register**

**130**.

The parts of the register of members of a company pertaining to persons who have ceased to be members, in whatever manner kept under section 127, may be disposed of after the end of a period of 15 years after those persons have ceased to be members.

**Penalties in respect of register of members**

**131**.

Any company which or an agent referred to in section 132 who fails to comply with section 127, 128, 129, 130 or 132, may be served with a Compliance Notice by BIPA and is liable to a prescribed fine.

**Inspection of register of members**

**132**.

(1) The register of members of a company must, except when closed under this Act and subject to any reasonable restrictions which the company in a general meeting may impose, so that not less than two hours in each day be allowed for inspection during business hours, be open to inspection by any member or that member’s authorised agent free of charge and by any other person upon payment for each inspection of the prescribed amount or any lesser amount which the company may determine.

(2) Any person may apply to a company for a copy of or an extract from the register of members and the company must either furnish that copy or extract to the applicant at cost or any lesser amount which the company may determine for every page of the required copy or extract, or afford that person adequate facilities for making a copy or extract.

(3) If access to the register of members for the purposes contemplated in subsection (1) or (2) is refused or not granted or furnished within 14 days after a written request to that effect has been delivered to the company, the company, and every director or officer of the company who knowingly is a party to the refusal or failure, is subject to a Compliance Notice and is liable to a prescribed fine.

(4) In the case of refusal or failure as contemplated in subsection (3) the Tribunal may, on application, by order compel an immediate inspection of the register and index concerned or direct that the copy or extract required be sent to the applicant requiring it and may direct that any costs of or incidental to the application be borne by the company or by any director or officer of the company responsible for the refusal or failure.

(5) This section does, with the necessary changes, apply also in respect of any register of transfers kept by a company.

**Power to close register of members**

**133**.

A public company may, after giving notice of its intention to do so in the *Gazette* and in a newspaper circulating in the district in which its registered office is situated, close its register of members, or any part of it relating to holders of any class of shares, for a period or periods not exceeding in the aggregate 14 days in any year.

**Rectification of register of members**

**134**.

(1) If -

(a) the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or

(b) default is made or unnecessary delay takes place in entering in the register the fact of any person having ceased to be a member,

the person concerned or the company or any member of the company, may apply to the Tribunal for rectification of the register.

(2) The application referred to in subsection (1) must be made in accordance with the rules of Tribunal or in any other manner which the Tribunal may direct, and the Tribunal may either refuse it or may order rectification of the register concerned and payment by the company, or by any director or officer of the company, of any damages sustained by any person concerned.

(3) On any application under this section the Tribunal may decide any question relating to the title of any person who is a party to the application to have his or her name entered in or omitted from the register concerned, whether the question arises between members or alleged members or between members or alleged members on the one hand and the company on the other hand, and generally may decide any question necessary or expedient to be decided for the rectification of the register.

PART 5

SECURITIES OTHER THAN SHARES

**Creation and issue of debt securities**

**135**.

A company, if so authorised by its memorandum or by its articles, may create and issue secured or unsecured debt securities.

**Registration of bonds and annexure to bonds and deeds of pledge**

**136**.

(1) Any mortgage bond or notarial bond in pursuance of section 139 and any related subsequent transactions must, subject to the laws governing the registration of mortgage bonds and notarial bonds, be registered in a deeds registry.

(2) If a bond is in favour of one or more debt securities’ holders, a certified copy of the debt security concerned must be annexed to that bond.

(3) If a bond is in favour of a trustee for debt securities’ holders, certified copies of the debt security concerned and of the trust deed by which the trustee is appointed and in which the rights and duties of that trustee are defined, must be annexed to that bond.

(4) Certified copies of the debt security concerned and of any trust deed, if any, must be annexed to any deed of pledge where the debt securities are secured by a pledge of movable property.

**Debt securities may be registered**

**137.**

If any debt security is executed before a notary public, it may, subject to section 140(1), be registered in a deeds registry in the same manner as if it were a notarial bond.

**Issue of debt securities at different dates and ranking of preference**

**138**.

In any bond or deed of pledge executed in favour of a trustee for debt securities’ holders generally, provision may be made that the debt securities thereby secured or to be secured may be issued from time to time and at different dates, as the company may determine, but all those debt securities, whenever issued, must rank in preference concurrently with one another as from the date on which the pledge was constituted or the bond was registered.

**Rights of debt securities’ holders**

**139**.

(1) Every holder of a debt securities secured by a pledge or a bond executed in favour of a trustee for debt securities’ holders generally is, unless it is otherwise provided by the deed of pledge, bond or trust deed and copy of the debt securities annexed to it, entitled to enforce his or her rights under that debt security as soon as it has been issued to him or her in the same manner as if he or she were himself or herself the pledgee or the holder of that bond.

(2) No notice of the cession of any debt security referred to in subsection (1) is necessary in order to confer on any cessionary the rights of the cedent.

**Director or officer not to be trustee for debt securities’ holders**

**140**.

A director or officer of a company cannot be a trustee for the holders of debt securities of that company.

**Liability of trustee for debt securities’ holders**

**141**.

(1) Subject to this section, any provision contained in a trust deed for securing an issue of debt securities, or in any contract with the holders of debt securities secured by a trust deed, is void in so far as it would have the effect of exempting a trustee from or indemnifying a trustee against liability for breach of trust where the trustee fails to show the degree of care and diligence required of him or her as trustee, having regard to the trust deed conferring on the trustee any powers, authorities or discretions.

(2) Subsection (1) does not have the effect of:

(a) invalidating any release otherwise validly given in respect of anything done or omitted to be done by a trustee before the giving of the release or any provision enabling that release to be given -

(i) with the consent of a majority of not less than three-fourths in value of the debt securities’ holders present and voting in person or by proxy at a meeting summoned for the purpose; and

(ii) with respect to specific acts or omissions or on the trustee dying or ceasing to act; or

(b) invalidating any provision in force on 1 January 1953 so long as any person then entitled to the benefit of that provision or who is afterwards given the benefit thereof under subsection (3) remains a trustee under the relevant deed; or

(c) depriving any person of any exemption or right to be indemnified in respect of anything done or omitted to be done by that person while any provision referred to in paragraph (b) was in force.

(3) So long as any trustee under a trust deed remains entitled to the benefit of a provision saved by subsection (2)(b) or (c) the benefit of that provision may be given either -

(a) to all trustees under the deed, present and future; or

(b) to any named trustee or proposed trustee,

by a resolution passed by a majority of not less than three-fourths in value of the debt securities’ holders present in person or by proxy at a meeting summoned for the purpose in accordance with the provisions of the deed or, if the deed makes no provision for summoning meetings, at a meeting summoned for the purpose in any manner approved by the Tribunal.

**Power to re-issue convertible debt securities in certain cases**

**142**.

(1) Where a company has redeemed any debt securities previously issued, it, unless –

(a) its articles or the conditions of issue of those debt securities expressly otherwise provide; or

(b) the debt securities have been redeemed in pursuance of any obligation on the part of the company to redeem them, not being an obligation enforceable only by the person to whom the redeemed debt securities were issued or that person’s successors in title,

has and is deemed at all times to have had power to keep the debt securities alive for the purpose of re-issue.

(2) Where a company has purported to exercise the power referred to in subsection (1), it has and is deemed at all times to have had power to re-issue the debt securities either by re-issuing the same debt securities or by issuing other debt securities in their place, and on that re-issue the person entitled to the debt securities has and is deemed at all times to have had the same rights and priorities as if the debt securities had not previously been issued.

(3) Where with the object of keeping debt securities alive for the purpose of re-issue, they have been transferred to a nominee of the company, a transfer from that nominee is deemed to be a re-issue for the purposes of this section.

(4) Where a company had deposited any of its debt securities to secure advances from time to time on current account or otherwise, the debt securities are not deemed to have been redeemed because the account of the company has ceased to be in debit whilst the debt securities remained so deposited.

(5) Nothing in this section prejudices any power reserved to a company by its debentures or securities, to issue debentures in the place of any debentures paid off or otherwise satisfied or extinguished.

**Debt securities to be described as secured or unsecured**

**143**.

A company must not issue a debt security certificate or prospectus relating to debentures unless the term “debt security” or some other term denoting a debt security used is qualified by the word “secured” or “unsecured”, as the case may be.

**Form of debt securities or certificates**

**144**.

(1) A company must not issue a debt security or debt security certificate unless the conditions of the debt security concerned are stated on the debt security or on the debt security certificate.

(2) Any debt security or debt security certificate must be signed by one director of the company and an officer of the company duly authorised by the directors and must specify the debt security of that company held by the person named in that debt security or debt security certificate.

(3) Any signature referred to in subsection (2) may be affixed to a debt security or debt security certificate by autographic or mechanical means.

(4) Any debt security or debt security certificate issued in terms of this section is sufficient evidence of the title of the person named in that debt security or certificate.

**Register of pledges and bonds**

**145**.

Subject to section 151, every company must keep at its registered office a register of pledges, cessions, notarial bonds, mortgage bonds and notarial debentures and enter in that register all pledges, cessions, notarial bonds, mortgage bonds and notarial debt securities affecting property of the company, giving in each case a short description of the property pledged, ceded or bound, the amount of the pledge, cession or bond and the names and addresses of the persons in whose favour any pledge, cession, bond or debt security was executed or to whom any pledge has been delivered.

**Register of debt securities’ holders**

**146**.

Subject to section 151, every company must keep at its registered office a register of debenture holders showing the number of debentures issued and outstanding and whether or not they are payable to bearer and specifying the names and addresses of the holders, other than bearers.

**Registers may be kept where made up**

**147**.

Section 136(2) and (4) relating to the keeping of a register of members and access to that register does, with the necessary changes, apply to the registers required to be kept under sections 149 and 150.

**Inspection of registers and copies and extracts**

**148**.

(1) Section 139 in so far as it relates to the inspection of the register of members does, with the necessary changes, apply to the registers to be kept under sections 149 and 150 and section 139(3) does, with the necessary changes, apply to the furnishing of a copy of a trust deed referred to in subsection (2).

(2) A copy of any trust deed for securing any issue of debentures must be transmitted to every holder of those debentures at that holder’s request on payment of an amount equal to the cost of making that copy or a lesser amount as the company may determine.

**Failure to keep registers**

**149**.

Any company which or any agent referred to in section 139(2), as applied by section 149, who fails to comply with section 149, 150 or 151, is subject to a compliance notice and is liable to a prescribed administrative fine.

PART 6

WINDING-UP OF SOLVENT COMPANIES AND

DEREGISTERING COMPANIES

**Winding-up of solvent companies**

**150.**

(1) A solvent company may be dissolved by -

(a) voluntary winding-up initiated by the company as contemplated in section 151, and conducted either by the -

(i) company; or

(ii) creditors of the company,

as determined by the resolution of the company; or

(b) winding-up and liquidation by court order as contemplated in section 152.

(2) The procedures for winding-up and liquidation of a solvent company, whether voluntary or by court order, are governed by this Part and, to the extent applicable, by the laws referred to or contemplated in item 9 of Schedule 6.

(3) If, at any time after -

(a) a company has adopted a resolution contemplated in section 151; or

(b) an application has been made to the Court as contemplated in section 152,

it is determined that the company to be wound up is or may be insolvent, the Court, on application by any interested person, may order that the company be wound up as an insolvent company in terms of the laws referred to or contemplated in item 9 of Schedule 6.

**Voluntary winding-up of solvent companies**

**151**.

(1) A solvent company may be wound up voluntarily if the company has adopted a special resolution to do so, which may provide for the winding-up to be by the company, or by its creditors.

(2) A resolution providing for the voluntary winding-up of a company is filed, together with the prescribed notice and filing fee.

(3) If a resolution contemplated in this section provides for winding-up by the company, before the resolution and notice are filed the company must -

(a) arrange for security, satisfactory to the Master, for the payment of the debts of the company within a period not exceeding 12 months after the start of the winding-up of the company; or

(b) obtain the consent of the Master to dispense with security, which the Master may do only if the company has submitted to the Master -

(i) a sworn statement by a director authorised by the board of the company, stating that the company has no debts; and

(ii) a certificate by the auditor of the company, or if it does not have an auditor, a person who meets the requirements for appointment as an auditor, and appointed for the purpose, stating that to the best of his or her knowledge and belief and according to the financial records of the company, the company appears to have no debts.

(4) Any costs incurred in furnishing the security referred to in subsection (3) may be paid by the company.

(5) A liquidator appointed in a voluntary winding-up may exercise all powers given by this Act, or a law contemplated in item 9 of Schedule 3, to a liquidator in a winding-up by the court -

(a) without requiring specific order or sanction of the Court; and

(b) subject to any directions given by -

(i) the shareholders of the company in a general meeting, in the case of a winding-up by the company; or

(ii) the creditors, in the case of a winding-up by creditors.

(6) A voluntary winding-up of a company begins when the resolution of the company has been filed in terms of subsection (2).

(7) When a resolution has been filed in terms of subsection (2), BIPA must promptly deliver a copy of it to the Master.

(8) Despite any provision to the contrary in the memorandum or articles of association of a company, the company remains a juristic person and retains all of its powers as such while it is being wound up voluntarily, but from the beginning of the winding-up of the company -

(a) it must stop carrying on its business except to the extent required for the beneficial winding-up of the company; and

(b) all of the powers of the directors of the company cease, except to the extent specifically authorised -

(i) in the case of a winding-up by the company, by the liquidator or the shareholders in a general meeting; or

(ii) in the case of a winding-up by creditors, by the liquidator or the creditors.

**Winding-up of solvent companies by court order**

**152**.

(1) A court may order a solvent company to be wound up if -

(a) the company has -

(i) resolved, by special resolution, that it be wound up by the court; or

(ii) applied to the court to have its voluntary winding-up continued by the court;

(b) the practitioner of a company appointed during business rescue proceedings has applied for liquidation in terms of section 307(2), on the grounds that there is no reasonable prospect of the company being rescued; or

(c) one or more of the creditors of the company have applied to the Court for an order to wind up the company on the grounds that -

(i) the business of the company rescue proceedings have ended in the manner contemplated in section 343 and it appears to the court that it is just and equitable in the circumstances for the company to be wound up; or

(ii) it is otherwise just and equitable for the company to be wound up;

(d) the company, one or more directors or one or more shareholders have applied to the court for an order to wind up the company on the grounds that -

(i) the directors are deadlocked in the management of the company, and the shareholders are unable to break the deadlock, and -

(aa) irreparable injury to the company is resulting, or may result, from the deadlock; or

(bb) the business of the company cannot be conducted to the advantage of shareholders generally, as a result of the deadlock;

(ii) the shareholders are deadlocked in voting power, and have failed for a period that includes at least two consecutive annual general meeting dates, to elect successors to directors whose terms have expired; or

(iii) it is otherwise just and equitable for the company to be wound up;

(e) a shareholder has applied, with leave of the Court, for an order to wind up the company on the grounds that -

(i) the directors, prescribed officers or other persons in control of the company are acting in a manner that is fraudulent or otherwise illegal; or

(ii) the assets of the company are being misapplied or wasted; or

(f) BIPA has applied to the court for an order to wind up the company on the grounds that -

(i) the company, its directors or prescribed officers or other persons in control of the company are acting or have acted in a manner that is fraudulent or otherwise illegal, BIPA has issued a compliance notice in respect of that conduct, and the company has failed to comply with that compliance notice; and

(ii) within the previous five years, enforcement procedures in terms of this Act or the Close Corporations Act, were taken against the company, its directors or prescribed officers, or other persons in control of the company for substantially the same conduct, resulting in an administrative fine, or conviction for an offence.

(2) A shareholder may not apply to the Court as contemplated in subsection (1)(d) or (e) unless the shareholder -

(a) has been a shareholder continuously for at least six months immediately before the date of the application; or

(b) became a shareholder as a result of -

(i) acquiring another shareholder; or

(ii) the distribution of the estate of a former shareholder,

and the present shareholder, and other or former shareholder, in aggregate, satisfied the requirements of paragraph (a).

(3) A court may not make an order applied for in terms of subsection (1)(e) or (f) if, before the conclusion of the Court proceedings -

(a) any of the directors have resigned, or have been removed in terms of section 197, and the court concludes that the remaining directors were not materially implicated in the conduct on which the application was based; or

(b) one or more shareholders have applied to the Court for a declaration in terms of section 427 to declare delinquent the directors, if any, responsible for the alleged misconduct, and the Court is satisfied that the removal of those directors would bring the misconduct to an end.

(4) A winding-up of a company by the Court begins when -

(a) an application has been made to the Court in terms of subsection (1)(a) or (b); or

(b) the Court has made an order applied for in terms of subsection (1)(c), (d), (e) or (f).

**Dissolution of companies and removal from register**

**153**.

(1) The Master must file a certificate of winding up of a company in the prescribed form when the affairs of the company have been completely wound up.

(2) Upon receiving a certificate in terms of subsection (1), BIPA must -

(a) record the dissolution of the company in the prescribed manner; and

(b) remove the name of the company from the companies register.

(3) In addition to the duty to deregister a company contemplated in subsection (2)(b), BIPA may otherwise remove a company from the companies register if -

(a) the company -

(i) has transferred its registration to a foreign jurisdiction in terms of subsection (5);

(ii) has failed to file an annual return in terms of section 132 for more than three months after the end of its financial year end and, on demand by BIPA, has failed -

(aa) to give satisfactory reasons for the failure to file the required annual returns; or

(bb) to show satisfactory cause for the company to remain registered; or

(iii) has failed to pay its fees, penalties charges and other costs properly to be borne by a company for a period not less than three months following a demand by BIPA

(b) BIPA -

(i) has determined in the prescribed manner that the company appears to have been inactive for at least seven years, and no person has demonstrated a reasonable interest in, or reason for, its continued existence; or

(ii) has received a request in the prescribed manner and form and has determined that the company -

(aa) has ceased to carry on business; and

(bb) has no assets or, because of the inadequacy of its assets, there is no reasonable probability of the company being liquidated.

(4) If BIPA deregisters a company as contemplated in subsection (3), any interested person may apply in the prescribed manner and form to BIPA, to reinstate the registration of the company.

(5) A company may apply to be deregistered upon the transfer of its registration to a foreign jurisdiction, if -

(a) the shareholders have adopted a special resolution approving such an application and transfer of registration; and

(b) the company has satisfied the prescribed requirements for doing so.

(6) The Minister may prescribe criteria and procedural requirements that a company must satisfy before it may be de-registered in terms of subsection (5).

**Effect of removal of company from register**

**154**.

(1) A company is dissolved as of the date its name is removed from the companies register unless the reason for the removal is that the registration of the company has been transferred to a foreign jurisdiction.

(2) The removal of the name of the company from the companies register does not affect the liability of any former director or shareholder of the company or any other person in respect of any act or omission that took place before the company was removed from the register.

(3) Any liability contemplated in subsection (2) continues and may be enforced as if the company had not been removed from the register.

(4) At any time after a company has been dissolved -

(a) the liquidator of the company, or other person with an interest in the company, may apply to the Court for an order declaring the dissolution to have been void, or any other order that is just and equitable in the circumstances; and

(b) if the Court declares the dissolution to have been void, any proceedings may be taken against the company as might have been taken if the company had not been dissolved.

(5) Any assets left in the company at the time it is removed from the Companies Register would pass to the state, represented by the Minister

(6) BIPA should notify the Minister of the existence of those assets;

(7) BIPA must keep an historic register of companies which have been registered, which register must include external companies ceasing to maintain a place of business in Namibia.

CHAPTER 5

PUBLIC OFFERING OF SECURITIES

**Application and interpretation of Chapter**

**155**

(1) In this Chapter, unless the context otherwise indicates -

“company”, in addition to the meaning set out in section 1, also includes a foreign company;

“compliance officer” means a compliance officer appointed by a company in respect of its employee share scheme;

“employee share scheme” means a scheme established by a company, whether by means of a trust or otherwise, for the purpose of offering participation therein solely to employees, officers and other persons closely involved in the business of the company or a subsidiary of the company, either -

(a) by means of the issue of shares in the company; or

(b) by the grant of options for shares in the company;

“expert” means -

(a) any person who professes -

(i) to have extensive knowledge or experience, or to exercise special skill which gives or implies authority to a statement made by that person;

“initial public offering” means an offer to the public of any securities of a company, if -

(a) no securities of that company have previously been the subject of an offer to the public; or

(b) all of the securities of that company that had previously been the subject of an offer to the public have subsequently been re-acquired by the company;

“letter of allocation” means a document conferring a right to subscribe for shares in terms of a rights offer or a public offer

“offer”, in relation to securities, means an offer made in any way by any person with respect to the acquisition, for consideration, of any securities in a company;

“offer to the public” -

(a) includes an offer of securities to be issued by a company to any section of the public, whether selected -

(i) as holders of the securities of the company;

(ii) as clients of the person issuing the prospectus;

(iii) as the holders of any particular class of property; or

(iv) in any other manner;

(b) does not include -

(i) an offer made in any of the circumstances contemplated in section 156; or

(ii) a secondary offer effected through an exchange;

“primary offering” means an offer to the public, made by or on behalf of a company, of securities to be issued by that company, or by another company -

(a) within a group of companies of which the first company is a member; or

(b) with which the first company proposes to be amalgamated or to merge;

“promoter”, in relation to civil and criminal liability in respect of an untrue statement in a prospectus, means a person who was a party to the preparation of the prospectus, or of the portion of it that contains the untrue statement, but does not include any person acting in a professional capacity for persons engaged in procuring the formation of the company or preparing the prospectus;

“registered prospectus” means a prospectus that complies with this Act and -

(a) in the case of listed securities, has been approved by the relevant exchange; or

(b) otherwise, has been filed;

“rights offer” means an offer, with or without a right to renounce in favour of other persons, made to any holders of the securities of a company for subscription of any securities of that company, or any other company within the same group of companies;

“secondary offering” means an offer for sale to the public of any securities of a company or its subsidiary made by or on behalf of a person other than that company or its subsidiary;

“specified shares” means shares, including options on shares, offered to employees of a company in terms of an employee share scheme;

“unit” means any right or interest in any securities; and

“untrue statement” includes a statement that is misleading in the form and context in which it is made subject to subsections (3) and (4).

(2) For the purposes of this Chapter, a person is to be regarded, by or in respect of a company, as being a member of the public, despite that person being a shareholder of the company or a purchaser of goods from the company.

(3) An untrue statement is regarded to have been included in a prospectus, written statement, or summary directing a person to either a prospectus or written statement, if it is contained in any report or memorandum -

(a) that appears on the face of the prospectus, written statement, or summary; or

(b) that is incorporated by reference within, or is attached to or accompanies, the prospectus, written statement or summary.

(4) An omission from a prospectus or written statement of any matter that, in the context, is calculated to mislead by omission constitutes the making of an untrue statement in that prospectus or written statement, irrespective of whether this Act requires that matter to be included in the prospectus or written statement.

(5) A provision of an agreement is void to the extent that it -

(a) requires an applicant for securities to waive compliance with a requirement of this Chapter; or

(b) purports to affect an applicant for securities with any notice of any agreement, document or matter not specifically referred to in a prospectus or written statement.

(6) Nothing in this Chapter limits any liability that a person may incur under this Act apart from this Chapter, or under any other public regulation, or under the common law.

(7) The Minister may prescribe -

(a) general or specific requirements respecting the form and content of rights offers, letters of allocation and prospectuses;

(b) the manner and form to be followed in filing and publishing of rights offers, letters of allocation and prospectuses; and

(c) related or ancillary matters concerning the offering of company securities.

**Offers that are not offers to public**

**156**.

(1) An offer is not an offer to the public -

(a) if the offer is made only to -

(i) persons whose ordinary business, or part of whose ordinary business, is to deal in securities, whether as principals or agents;

(ii) a person or entity regulated by the Bank of Namibia;

(iii) an authorised financial services provider as defined in the Financial Institutions and Markets Act;

(iv) a financial institution as defined in the Financial Institutions and Markets Act;

(v) a wholly-owned subsidiary of a person contemplated in subparagraph (iii), (iv) or (v), acting as agent in the capacity of an authorised portfolio manager for a pension fund registered in terms of the Pension Funds Act, 1956 (Act 24 of 1956), or as manager for a collective investment scheme registered in terms of Financial Institutions and Markets Act; or

(vi) any combination of persons contemplated in paragraphs (i) to (v);

(b) if the total contemplated acquisition cost of the securities, for any single addressee acting as principal, is equal to or greater than the amount prescribed in terms of subsection (2)(a);

(c) if it is a non-renounceable offer made only to -

(i) existing holders of the securities of the company; or

(ii) persons related to existing holders of the securities of the company; or

(d) if it is rights offer that satisfies the prescribed requirements, and -

(i) an exchange has granted or has agreed to grant a listing for the securities that are the subject of the offer; and

(ii) the rights offer complies with any relevant requirements of that exchange at the time the offer is made;

(e) if the offer is made only to a director or prescribed officer of the company, or a person related to a director or prescribed officer, unless the offer is renounceable in favour of a person who is not a director or prescribed officer of the company or a person related to a director or prescribed officer;

(f) if it pertains to an employee share scheme that satisfies the requirements of section 161; or

(g) if it is an offer, or one of a series of offers, for subscription, made in writing, and -

(i) no offer in the series is accompanied by or made by means of an advertisement and no selling expenses are incurred in connection with any offer in the series;

(ii) the issue of securities under any one offer in the series is finalised within six months after the date that the offer was first made;

(iii) the offer, or series of offers in aggregate, is or are accepted by a maximum of 50 persons acting as principals;

(iv) the subscription price, including any premium, of the securities issued in respect of the series of offers, does not exceed, in aggregate, the amount prescribed in terms of subsection (2)(a); and

(v) no similar offer, or offer in a series of offers, has been made by the company within the period prescribed in terms of subsection (2)(b) immediately before the offer, or first of a series of offers.

(2) The Minister, by notice in the Gazette, may prescribe -

(a) a value of not less than N$100 000, to be the minimum value for the purposes of subsection (1)(b) and the maximum value for the purposes of subsection (1)(g)(iv); and

(b) a minimum period for the purposes of subsection (1)(g)(v), which may not be less than six months.

**Standards for qualifying employee share schemes**

**157**.

(1) An employee share scheme qualifies for exemptions contemplated in sections 106(2)(d), 108(3)(a)(i) or 109(3)(a)(i) or otherwise contemplated in this Chapter, if -

(a) the company has -

(i) appointed a compliance officer for the scheme to be accountable to the directors of the company;

(ii) states in its annual financial statements the number of specified shares that it has allotted during that financial year in terms of its employee share scheme; and

(b) the compliance officer has complied with the requirements of subsection (2).

(2) A compliance officer who is appointed in respect of any employee share scheme -

(a) is responsible for the administration of that scheme;

(b) must provide a written statement to any employee who receives an offer of specified shares in terms of that employee scheme, setting out -

(i) full particulars of the nature of the transaction, including the risks associated with it;

(ii) information relating to the company, including its latest annual financial statements, the general nature of its business and its profit history over the last three years; and

(iii) full particulars of any material changes that occur in respect of any information provided in terms of subparagraph (i) or (ii);

(c) must ensure that copies of the documents containing the information referred to in paragraph (b) are filed within 20 business days after the employee share scheme has been established; and

(d) must file a certificate within 60 business days after the end of each financial year, certifying that the compliance officer has complied with the obligations in terms of this section during the past financial year.

**Advertisements relating to offers**

**158**.

(1) As an alternative to any other manner of making or presenting an offer to the public, such an offer may be made or presented by way of an advertisement that -

(a) satisfies all of the requirements of this Act with respect to a registered prospectus; and

(b) is subject to every provision of this Act relating to the making of a prospectus.

(2) In addition to making or presenting an offer to the public by publishing a prospectus, such an offer may be drawn to the attention of the public by an advertisement, but any such advertisement -

(a) must include a statement -

(i) clearly stating that it is not a prospectus; and

(ii) indicating where and how a person may obtain a copy of the full registered prospectus relating to that offer;

(b) may not contain any untrue statement or, by express statement, omission or reasonable implication, be such as would reasonably mislead a person reading the advertisement -

(i) to believe that the advertisement is a prospectus; or

(ii) as to any material particular addressed in the prospectus relating to that offer; and

(c) is subject to sections 166 to 175, read with the changes required by the context.

(3) An advertisement drawing attention to an offer to the public, as contemplated in subsection (2) -

(a) that satisfies the requirements of subsection (2)(a) and (b) is not required to be filed, or registered with an exchange; or

(b) that does not satisfy all of the requirements set out in subsection (2)(a) and (b) -

(i) is, despite any statement to the contrary contained in the advertisement, regarded as having been intended to be a prospectus issued by the person responsible for publishing or disseminating the advertisement; and

(ii) is subject to every provision of this Act relating to such a prospectus.

**General restrictions on offers to public**

**159**.

(1) A person may not offer to the public any securities of any person unless that second person -

(a) is a company; and

(b) in the case of a foreign company, a copy of its memorandum and articles of association or comparable governing document, and a list of the names and addresses of its directors, has been filed within 90 business days before the offer to the public is made.

(2) A person may not make an initial public offering unless that offer is accompanied by a registered prospectus.

(3) Except with respect to securities that are the subject of the initial public offering of a company, a person may not make -

(a) a primary offer to the public of any -

(i) listed securities of a company, otherwise than in accordance with the requirements of the relevant exchange; or

(ii) unlisted securities of a company, unless the offer is accompanied by a registered prospectus that satisfies the requirements of section 164; or

(b) secondary offer to the public of any securities of a company, unless the offer satisfies the requirements of section 165.

(4) A person may not issue, distribute, deliver or cause to be issued, distributed or delivered a letter of allocation unless it is accompanied by all documents that are required, and have been -

(a) filed, in the case of unlisted securities; or

(b) approved by the relevant exchange, in the case of listed securities.

(5) Subject to subsection (6), a person may not issue, distribute or deliver or cause to be issued, distributed or delivered, any form of application in respect of securities of a company, unless the form -

(a) is accompanied by -

(i) a registered prospectus in the case of a primary offering; or

(ii) a written statement that satisfies the requirements of section 218, in the case of a secondary offering; and

(b) bears on the face of it the date on which the prospectus in respect of those securities was filed.

(6) Subsection (5) does not apply if the form of application was issued either -

(a) in connection with a genuine invitation to enter into an underwriting agreement with respect to the securities; or

(b) in relation to securities that were not offered to the public.

(7) Despite anything contained in the articles of association of a company, the company may exclude from any rights offer any category of holders of the securities of the company who are not resident within Namibia -

(a) if BIPA has approved that exclusion in advance, on application by the company in the prescribed manner and form on the grounds that the number of those persons is insignificant relative to -

(i) the number of existing holders of the securities of the company who are resident within Namibia; and

(ii) the administrative cost and inconvenience of extending the rights offer to them; and

(b) subject to any conditions attached to the approval contemplated in paragraph (a).

(8) A person may not issue a prospectus or a document that purports to be a prospectus, or a document that may reasonably be misapprehended to be intended as a prospectus, unless it is a registered prospectus.

(9) A prospectus may not be registered unless the requirements of this Act have been complied with and it has been filed for registration, together with any prescribed documents, within 10 business days after the date of that prospectus.

(10) As soon as BIPA has registered a prospectus, it must send notice of the registration to the person who filed the prospectus for registration.

(11) A prospectus may not be issued more than three months after the date of its registration, and if a prospectus is so issued, it is regarded to be unregistered.

**Requirements concerning prospectus**

**160**.

(1) This section does not apply in respect of listed securities, except listed securities that are the subject of an initial public offering.

(2) Every prospectus is subject to the requirements and provisions of sections 219 to 228 and, in addition, must -

(a) contain all the information that an investor may reasonably require to assess -

(i) the assets and liabilities, financial position, profits and losses, cash flow and prospects of the company in which a right or interest is to be acquired; and

(ii) the securities being offered and rights attached to them; and

(b) adhere to the prescribed specifications.

(3) The date of registration of a prospectus is the date of the issue of the prospectus unless the contrary is proven.

(4) A prospectus man not be registered unless there is attached to it -

(a) a copy of any material agreement as prescribed; or

(b) in the case of an unwritten agreement, a memorandum giving full particulars of the agreement.

(5) If any part of an agreement contemplated in subsection (4) is in a language that is not an official language, a certified translation, in an official language, of that part must be attached to the agreement.

(6) A prospectus containing a statement to the effect that the whole or any portion of the issue of the securities offered to the public has been or is being underwritten may not be registered until a copy of the underwriting agreement has been filed, together with a sworn declaration stating that to the best of the deponent’s knowledge and belief the underwriter is and will be in a position to carry out the obligations contemplated in the agreement even if no shares are being applied for.

(7) A declaration contemplated in subsection (6) must be sworn by the person named as underwriter or, if the underwriter is a company, by each of two directors of that company, or if it has only one director, by that director.

(8) If an offer is made in respect of which no prospectus is required by this Act, the copy of the agreement and sworn declaration referred to in subsection (6) must be filed not later than the date of the proposed offer of shares.

(9) BIPA or an exchange in the case of listed securities on application may allow required information to be omitted from a prospectus, if BIPA or exchange is satisfied -

(a) that publication of the information would be unnecessarily burdensome for the applicant, seriously detrimental to the company whose securities are the subject of the prospectus, or against public interest; and

(b) that users not to be unduly prejudiced by the omission.

(10) An application under subsection (9) must be in writing and accompanied by the prescribed fee.

(11) As long as an initial public offering or other primary offering to the public of unlisted securities remains open, any person responsible for information in the prospectus must, when that person becomes aware of it -

(a) correct any error;

(b) report on any new matter; and

(c) report on any change of a matter included in the prospectus,

if these are relevant or material in terms of this Chapter.

(12) A correction or report under subsection (11) is registered as a supplement to the prospectus, simultaneously published to known recipients of the prospectus and included in future distributions of the prospectus.

(13) If a correction or report has been published as contemplated in subsections (11) and (12) -

(a) any person who subscribed for the issue of shares as a result of the offer, before the date of that publication, may withdraw the subscription by written notice within 20 business days after the date of publication;

(b) the offeror, upon receipt of a notice in terms of paragraph (a), may either -

(i) accept the withdrawal, and restore to the person any consideration already paid in respect of the subscription; or

(ii) apply to the court for an order in terms of paragraph (c); and

(c) the Court, on application in terms of paragraph (b)(ii), may make any order that is just and equitable in the circumstances including, but not limited to, an order -

(i) negating the right of the subscriber to withdraw the offer; or

(ii) to reverse any transaction, or restore any consideration paid or benefit received by any person in terms of the offer and subscription.

**Secondary offers to public**

**161**.

(1) This section does not apply in respect of securities that are -

(a) listed on an exchange; or

(b) in respect of which an exchange has granted permission to deal.

(2) Subject to subsection (3), a person making a secondary offering of the securities of a company must ensure that the offer is accompanied by either -

(a) the registered prospectus that accompanied the primary offering of those securities, together with any revisions required to address changes in any material matter since the date the prospectus was registered; or

(b) a written statement that satisfies the requirements of subsections (4) to (6).

(3) Subsection (2) does not apply -

(a) if the offer is made or the material is published -

(i) by a person acting in the capacity of an executor or administrator of a deceased estate or a trustee of an insolvent estate or a liquidator or trustee referred to in the Administration of Estates Act; or

(ii) for the purpose of a sale in execution or by public auction or by public tender.

(4) If an offer contemplated in this section is in respect of securities of a public company, a person publishing or making the offer -

(a) must file a copy of the written statement for registration before it is issued, distributed or published; and

(b) may not issue, distribute or publish the statement more than three months after the date on which it is registered.

(5) The written statement referred to in subsection (3) must be dated and signed by -

(a) the person making the offer or issuing, distributing or publishing the material; and

(b) if that person is a company, by every director of the company.

(6) The written statement referred to in subsection (3) -

(a) may not contain any matter other than the particulars required by this section;

(b) may not be in characters smaller or less legible than any characters used in -

(i) the written offer, if any; or

(ii) any document that accompanies the statement;

(c) is accompanied by a copy of the last annual financial statements of the company, together with any subsequent interim report or provisional annual financial statements of that company; and

(d) must contain particulars with respect to the following matters -

(i) whether the person making the offer is acting as principal or agent and, if as agent -

(aa) the name of the principal;

(bb) an address in Namibia where that principal can be served with process; and

(cc) the nature and extent of the remuneration received or receivable by the agent for the services provided;

(ii) the date on which and the country in which the company was incorporated and the address of its registered office in Namibia or, if there is no such address, the address of its principal office outside Namibia;

(iii) the classes and number of securities in each class that have been authorised, and with respect to each class of securities -

(aa) the preferences, rights, limitations and other terms associated with the class, with respect to capital, dividends and voting;

(bb) the number of securities that have been issued for cash, and the total cash consideration received by the company for those issued securities of that class; and

(cc) the number of securities that have been issued for consideration other than cash, and the value of the consideration received by the company for those issued securities of that class;

(iv) the dividends, if any, paid by the company on each class of securities during each of the five financial years immediately preceding the offer, and if no dividend has been paid in respect of securities of any particular class during any of those years, a statement to that effect;

(v) the total amount of any securities other than shares issued by the company and outstanding at the date of the statement, together with the rate of interest payable thereon;

(vi) the names and addresses of the directors of the company;

(vii) whether or not the securities are listed on an exchange, or permission to deal in those securities has been granted by an exchange, other than that referred to in subsection (1), and -

(aa) if so, a statement naming that exchange; or

(bb) if not, a statement that they are not so listed or that no such permission has been granted;

(viii) if the offer relates to units, particulars of the names and addresses of the persons in whom the securities represented by the units are vested, the date and the parties to any document defining the terms on which those securities are held, and an address in Namibia where that document or a copy of it can be inspected;

(ix) the dates on which and the prices at which the securities offered were originally issued by the company, and were acquired by the person making the offer or by the principal of that person, giving the reasons for any difference between those prices and the prices at which the securities are being offered;

(x) if any securities were issued by the company as partly paid-up shares under the repealed Act to what extent they are paid up; and

(xi) the date of registration of the written statement by BIPA.

(7) In subsection (6), the expression ‘company’ refers to the company that issued the relevant securities.

**Consent to use of name in prospectus**

**162**.

(1) In any prospectus relating to securities of a company, a person may not -

(a) name a second person as a director or proposed director of that company unless, before the registration of that prospectus -

(i) in the case of a company incorporated in Namibia, the second person consented in writing to act as a director before the prospectus was filed, and has not withdrawn the consent; and

(ii) the prescribed return reflecting the relevant particulars in regard to that second person has been filed; or

(b) include any statement made by an expert, or reference to any statement purporting to be made by an expert, unless -

(i) the expert consented in writing to the use of that statement before the prospectus was filed, and has not withdrawn the consent;

(ii) the written consent is endorsed on or attached to the copy of the filed prospectus; and

(iii) the prospectus includes a statement that the expert has consented to the use of the statement and has not withdrawn that consent.

(2) A prospectus may not name any person as the auditor, legal practitioner, banker or broker of a company, unless it is accompanied by the written consent of the named person, agreeing to -

(a) be named to act in the stated capacity; and

(b) the use of the name that person in the prospectus.

**Variation of agreement mentioned in prospectus**

**163**.

(1) Subject to subsection (2), within one year after the date of filing a prospectus, a company may not vary or agree to vary any material terms of an agreement referred to in the prospectus, other than in the ordinary course of business.

(2) A variation in the terms of an agreement as contemplated in subsection (1) may be made or agreed by a company if -

(a) the variation was contemplated and set out in the prospectus; or

(b) the specific terms of the variation are authorised or ratified by an ordinary resolution adopted at a general shareholders meeting.

**Liability and limitation thereof for untrue statements in prospectus**

**164**.

(1) If securities are offered to the public for subscription or sale pursuant to a prospectus, every -

(a) person who becomes a director between the issuing of the prospectus and the holding of the first general shareholders meeting at which directors are elected or appointed;

(b) person who has consented to be named in the prospectus as a director, or as having agreed to become a director either immediately or after an interval of time;

(c) promoter of the company; or

(d) person who -

(i) authorised the issue of the prospectus or, under this Act, is regarded as having authorised the issue of the prospectus; or

(ii) made that offer to the public,

is liable to compensate any person who acquired securities on the faith of the prospectus for any loss or damage the person may have sustained as a result of any untrue statement in the prospectus, or in any report or memorandum appearing on the face of, issued with, or incorporated by reference in, the prospectus.

(2) The liability contemplated in subsection (1) is in addition to the liability of a director of the company as set out in section 201(3)(d)(ii).

(3) Liability contemplated in this section does not attach to a person if -

(a) with respect to every untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, that person had reasonable grounds to believe, and did up to the time of the allotment of the securities or the acceptance of the offer believe that the statement was true;

(b) with respect to every untrue statement purporting to be a statement by an expert or contained in what purports to be a copy of or extract from the report or valuation of an expert -

(i) the untrue statement fairly represented the statement or was a correct and fair copy of or extract from the report or valuation; and

(ii) the person had reasonable grounds to believe and did up to the time of the issue of the prospectus believe that the expert who made the statement was competent to make it, and consented, as required by this Act, to the issue of the prospectus or the making of the offer and had not withdrawn that consent -

(aa) before the prospectus was filed; or

(bb) to the knowledge of that person, before any allotment under the prospectus, or before the acceptance of the offer;

(c) any untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document was a correct and a fair representation of the statement or copy of or extract from the document;

(d) that person consented to become a director of the company, but subsequently withdrew that consent before the issue of the prospectus, and it was issued without the consent of that person;

(e) the prospectus was issued without the knowledge or consent of that person and, on becoming aware of its issue, that person forthwith gave reasonable public notice that it was issued without the knowledge or consent of that person; or

(f) after the issue of the prospectus and before allotment or acceptance thereunder, that person, on becoming aware of any untrue statement in it, withdrew any consent to the prospectus and gave reasonable public notice of the withdrawal and of the reason for it.

(4) If a prospectus contains the name of a person as a director of the company, or as having agreed to become a director of that company, and that person –

(a) has not consented to becoming a director; or

(b) has withdrawn consent before the issue of the prospectus; and

(c) has not authorised or consented to the issue of the prospectus -

(i) the directors of the company, except any without whose knowledge or consent the prospectus was issued are liable to the extent set out in section 201(3)(d)(ii); and

(ii) any other person who issued the prospectus or authorised the issue of it, is liable, together with the directors,

to indemnify any person incorrectly named as a director against any damage, cost or expense arising as a result of that person having been so named in the prospectus, or incurred in defending against any action or legal proceedings brought in respect of having been so named in the prospectus.

(5) Subsection (4), read with the changes required by the context, applies equally in respect of any other person whose consent is required in terms of this Act in connection with anything contained in a prospectus, and who has either -

(a) not given that consent; or

(b) has withdrawn it before the issue of the prospectus.

(6) A person who, by reason of -

(a) being a director, or having been named as a director;

(b) having agreed to become a director;

(c) having authorised the issue of the prospectus; or

(d) having become a director between the issue of the prospectus and the holding of the first general shareholders meeting at which directors are elected or appointed,

has satisfied any liability under this section by making a payment to another person, may recover a contribution, as in cases of contract, from any other person, who, if sued separately, would have been liable to make the same payment, unless the person who has satisfied such liability was, and that other person was not, guilty of fraudulent misrepresentation.

**Liability of experts and others**

**165**.

(1) If a person has consented to the use of their name, or the inclusion of any material in a prospectus, as contemplated in this Chapter, that consent does not make the person liable as one who has authorised the issue of the prospectus under section 168(1)(d), either -

(a) to compensate persons purchasing on the faith of the prospectus, except in respect of any untrue statement purporting to be made by that person as an expert; or

(b) to indemnify any person against liability under section 168(6).

(2) Despite subsection (1), a person contemplated in that subsection is liable under section 168 in respect of any untrue statement purporting to be made by that person as an expert unless -

(a) the expert person withdrew that consent in writing before the prospectus was filed for registration;

(b) between the filing of the prospectus for registration and any allotment in terms of it to a complainant, that expert person became aware of the untrue statement, withdrew the consent in writing and gave reasonable public notice of the withdrawal and of the reason for it; or

(c) the expert person -

(i) was competent to make the statement; and

(ii) had reasonable ground to believe and did up to the time of the allotment of the securities or the acceptance of the offer believe that the statement was true.

(3) The defences available to a person in this subsection are in lieu of any applicable defence available in terms of section 168(3).

**Responsibility for untrue statements in prospectus**

**166**.

(1) If a prospectus contains a statement that is untrue, every person referred to in section 168(1) or (2) is equally responsible in terms of the enforcement provisions of this Act, for that untrue statement, subject to the provisions of subsections (2) and (3).

(2) If -

(a) a published prospectus contains or is accompanied by a report of an expert, or an extract from such a report;

(b) the report or extract contains a statement that is untrue; and

(c) the expert has consented to the inclusion of the statement in the prospectus in the form and context in which it appears,

the expert person is solely responsible for that statement subject to the provisions of subsection (3).

(3) A person is not responsible for an untrue statement contemplated in this section if -

(a) the untrue statement was immaterial; or

(b) liability for the untrue statement does not attach to that person for any reason set out in section 168(3).

**Time limit for allotments and acceptances**

**167**.

A company that has offered securities to the public may not allot any of those securities or accept any subscription for any of those securities, more than four months after filing the prospectus for that offer.

**Restrictions on allotments**

**168**.

(1) A company that has offered securities to the public may not allot any of those securities or accept any subscription for any of those securities unless -

(a) the subscription has been made on an application form that has been attached to or accompanied by a prospectus; or

(b) it is shown that the applicant, at the time of the application, was in fact in possession of a copy of the prospectus or was aware of its contents.

(2) A company that has offered securities to the public may not allot any of those securities unless, the amount stated in that prospectus as the minimum amount which in the opinion of the directors of the company concerned, must -

(a) be raised by the issue of securities to provide for the matters prescribed to be covered by minimum subscription; and

(b) show that the amount so stated has been paid to and received by the company.

(3) For the purposes of subsection (2) -

(a) an amount stated in any cheque received by the company may not be regarded to have been paid to it until the amount of the cheque has been unconditionally credited to its account with its bankers; and

(b) any amount paid to and received by the company must be reduced by the amount of any money, bill, promissory note or cheque that it has at any time delivered to the payer otherwise than in discharge of a debt bona fide due by the company.

(4) The minimum amount contemplated in subsection (2) is reckoned exclusively of any amount payable otherwise than in cash.

(5) Until the minimum amount contemplated in subsection (2) has been made up, any amount paid on an application contemplated in this section must -

(a) be paid into a separate account with a banking institution registered under the Banking Institutions Act, 1998 (Act No.2 of 1998); and

(b) not be used or made available for the purposes of the company or for the satisfaction of its debts.

(6) If the circumstances contemplated in subsection (2) have not been realised within 40 business days after the issue of the prospectus, all amounts received from applicants must be repaid to them promptly without interest.

(7) If any money required to be repaid to an applicant in terms of subsection (6) has not been repaid within 55 business days after the issue of the prospectus -

(a) each director and each prescribed officer of the company;

(b) with all other such directors and prescribed officers of the company,

are jointly and severally liable to repay that money with interest, in accordance with the Prescribed Rate of Interest Act, 1975 (Act 55 of 1975), from the expiration of the 55th business day, unless the default in payment was not due to any misconduct or negligence on the part of that director or prescribed officer.

**Voidable allotments**

**169**.

(1) If an allotment made by a company to an applicant, or the acceptance of an offer made by an applicant, is in contravention of section 172(2), and the relevant offer was not subsequently subscribed to the minimum extent contemplated in that section -

(a) that allotment is voidable at the instance of the applicant concerned, irrespective of whether the company concerned may be in the course of being wound up; and

(b) every director of the company concerned and, if the offeror is a company, every director of that company, is liable to the extent set out in section 201(3)(e)(vii), if the allotment or acceptance is declared void under paragraph (a).

(2) Any proceedings instituted to recover any loss, damages or costs contemplated in this section may not commence until -

(a) 20 business days after the applicant discovers the contravention; or

(b) three years after the date of the relevant allotment or acceptance.

**Minimum intervals before allotments and acceptances**

**170**.

(1) No -

(a) allotment of securities or acceptance of an offer in respect of securities of a company may be made in pursuance of a prospectus; and

(b) proceedings may be taken on applications made in pursuance of a prospectus,

until the beginning of the third day after that on which the prospectus is first issued or such later time, if any, specified in the prospectus.

(2) The reference in subsection (1) to the day on which a prospectus was first issued -

(a) is a reference to the day on which it is first issued as a newspaper advertisement; or

(b) if it is not issued as a newspaper advertisement before the third day after the day on which it is first issued in any other manner, is a reference to the day on which it is first issued in that other manner.

(3) A contravention of subsection (1) does not affect the validity of an allotment or acceptance.

**Conditional allotments if prospectus states securities to be listed**

**171**.

(1) A prospectus containing a statement to the effect that application has been or is to be made for permission for the securities offered thereby to be listed on an exchange may not be issued unless -

(a) an application has in fact been made in accordance with the requirements of the relevant exchange on or before the date of issue of that prospectus; and

(b) the prospectus names the particular exchange to which the application has been made.

(2) Any allotment of securities in pursuance of a prospectus referred to in subsection (1) is subject to the condition that -

(a) the application contemplated in subsection (1)(a) is granted; or

(b) an appeal against a refusal of such an application is upheld.

CHAPTER 6

CORPORATE GOVERNANCE AND CORPORATE LAW ENFORCEMENT

PART 1

SHAREHOLDER AND BOARD GOVERNANCE WITHIN COMPANIES

**Interpretation and application of this Part**

**172**.

(1) In this Part, “shareholder” has the meaning set out in section 1, but also includes a person who is entitled to exercise any voting rights in relation to a company, irrespective of the form, title or nature of the securities to which those voting rights are attached.

(2) If a profit company, other than a state-owned company, has only one shareholder -

(a) that shareholder may exercise any or all of the voting rights pertaining to that company on any matter, at any time, without notice or compliance with any other internal formalities, except to the extent that the articles of association of a company provides otherwise; and

(b) sections 178 to 184 do not apply to the governance of that company.

(3) If a profit company, other than a state-owned company, has only one director -

(a) that director may exercise any power or perform any function of the board at any time, without notice or compliance with any other internal formalities, except to the extent that the articles of association the company provides otherwise; and

(b) sections 190(3) to (7), 192 and 193 do not apply to the governance of that company.

(4) If every shareholder of a particular company, other than a state-owned company, is also a director of that company -

(a) any matter that is required to be referred by the board to the shareholders for decision may be decided by the shareholders at any time after being referred by the board, without notice or compliance with any other internal formalities, except to the extent that the articles of association provides otherwise, provided that -

(i) every such person was present at the board meeting when the matter was referred to them in their capacity as shareholders;

(ii) sufficient persons are present in their capacity as shareholders to satisfy the quorum requirements set out in section 183; and

(iii) a resolution adopted by those persons in their capacity as shareholders has at least the support that would have been required for it to be adopted as an ordinary or special resolution at a properly constituted meeting of shareholders; and

(b) when acting in their capacity as shareholders, those persons are not subject to sections 192 to 197 relating to the duties, obligations, liabilities and indemnification of directors.

(5) The board of a company that holds any securities of a second company may authorise any person to act as its representative at any shareholders meeting of that second company.

(6) A person authorised to act as a representative of the company as contemplated in subsection (5) may exercise the same powers as the authorising company could have exercised if it were an individual holder of securities.

(7) For greater certainty, this section applies to the exercise of authority within a company in respect of any matter arising in terms of this Act or the articles of association a company, irrespective of whether any such particular matter is expressly addressed in this Part.

**Right of shareholders to be represented by proxies**

**173**.

(1) At any time, a shareholder of a company may appoint any individual, including an individual who is not a shareholder of that company, as a proxy to -

(a) participate in, and speak and vote at, a shareholders meeting on behalf of the shareholder; or

(b) give or withhold written consent on behalf of the shareholder to a decision contemplated in section 179.

(2) A proxy appointment -

(a) must be in writing, dated and signed by the shareholder; and

(b) remains valid for -

(i) one year after the date on which it was signed; or

(ii) any longer or shorter period expressly set out in the appointment,

unless it is revoked in a manner contemplated in subsection (4)(c), or expires earlier as contemplated in subsection (8)(d).

(3) Except to the extent that the articles of association of a company provides otherwise -

(a) a shareholder of that company may appoint two or more persons concurrently as proxies, and may appoint more than one proxy to exercise voting rights attached to different securities held by the shareholder;

(b) a proxy may delegate his or her authority to act on behalf of the shareholder to another person, subject to any restriction set out in the instrument appointing the proxy; and

(c) a copy of the instrument appointing a proxy is delivered to the company, or to any other person on behalf of the company, before the proxy exercises any rights of the shareholder at a shareholders meeting.

(4) Irrespective of the form of instrument used to appoint a proxy -

(a) the appointment is suspended at any time and to the extent that the shareholder chooses to act directly and in person in the exercise of any rights as a shareholder;

(b) the appointment is revocable unless the proxy appointment expressly states otherwise; and

(c) if the appointment is revocable, a shareholder may revoke the proxy appointment by -

(i) cancelling it in writing, or making a later inconsistent appointment of a proxy; and

(ii) delivering a copy of the revocation instrument to the proxy and to the company.

(5) The revocation of a proxy appointment constitutes a complete and final cancellation of his or her authority to act on behalf of the shareholder as of the later of -

(a) the date stated in the revocation instrument, if any; or

(b) the date on which the revocation instrument was delivered as required in subsection (4)(c)(ii).

(6) If the instrument appointing a proxy or proxies has been delivered to a company, as long as that appointment remains in effect, any notice that is required by this Act or the articles of association the company to be delivered by the company to the shareholder is delivered by the company to -

(a) the shareholder; or

(b) the proxy or proxies, if the shareholder has -

(i) directed the company to do so, in writing; and

(ii) paid any reasonable fee charged by the company for doing so.

(7) A proxy is entitled to exercise, or abstain from exercising, any voting right of the shareholder without direction, except to the extent that the articles of association, or the instrument appointing the proxy, provides otherwise.

(8) If a company issues invitation to shareholders to appoint one or more persons named by the company as a proxy, or supplies a form of instrument for appointing a proxy -

(a) the invitation must be sent to every shareholder who is entitled to notice of the meeting at which the proxy is intended to be exercised;

(b) the invitation, or form of instrument supplied by the company for the purpose of appointing a proxy, must -

(i) bear a reasonably prominent summary of the rights established by this section;

(ii) contain adequate blank space, immediately preceding the name or names of any person or persons named in it, to enable a shareholder to write in the name and, if so desired, an alternative name of a proxy chosen by the shareholder; and

(iii) provide adequate space for the shareholder to indicate whether the appointed proxy is to vote in favour of or against any resolution or resolutions to be put at the meeting, or is to abstain from voting;

(c) the company may not require that the proxy appointment be made irrevocable; and

(d) the proxy appointment remains valid only until the end of the meeting at which it was intended to be used subject to subsection (5).

(9) Subsection (8)(b) and (d) do not apply if the company merely supplies a generally available standard form of proxy appointment on request by a shareholder.

**Record date for determining rights of shareholders**

**174**.

(1) The board of a company may set a record date for the purpose of determining which shareholders are entitled to -

(a) receive notice of a shareholders meeting;

(b) participate in and vote at a shareholders meeting;

(c) decide any matter by written consent or electronic communication as contemplated in section 179;

(d) exercise pre-emptive rights as contemplated in section 138(2);

(e) receive a distribution; or

(f) be allotted or exercise other rights.

(2) A record date determined by the board in terms of subsection (1) -

(a) may not be -

(i) earlier than the date on which the record date is determined; or

(ii) more than 10 business days before the date on which the event or action, for which the record date is being set, is scheduled to occur; and

(b) is published to the shareholders in a manner that satisfies any prescribed requirements.

(3) If the board does not determine a record date for any action or event, the record date is -

(a) in the case of a meeting, the latest date by which the company is required to give shareholders notice of that meeting; or

(b) the date of the action or event, in any other case,

unless the articles of association or rules of the company provide otherwise.

**Shareholders acting other than at meetings**

**175**.

(1) A resolution that could be voted on at a shareholders meeting may instead be -

(a) submitted for consideration to the shareholders entitled to exercise voting rights in relation to the resolution; and

(b) voted on in writing by shareholders entitled to exercise voting rights in relation to the resolution within 20 business days after the resolution was submitted to them.

(2) A resolution contemplated in subsection (1) -

(a) is adopted if it is supported by persons entitled to exercise sufficient voting rights for it to have been adopted as an ordinary or special resolution at a properly constituted shareholders meeting; and

(b) if adopted, has the same effect as if it had been approved by voting at a meeting.

(3) An election of a director that could be conducted at a shareholders meeting may instead be conducted by written polling of all of the shareholders entitled to exercise voting rights in relation to the election of that director.

(4) Within 10 business days after adopting a resolution or conducting an election of directors in terms of this section, the company must deliver a statement describing the results of the vote, consent process, or election to every shareholder who was entitled to vote on or consent to the resolution, or vote in the election of the director.

(5) For greater certainty, any business of a company that is required by this Act or the articles of association the company to be conducted at an annual general meeting of the company may not be conducted in the manner contemplated in this section.

**Shareholders meetings**

**176**.

(1) The board of a company or any other person specified in the articles of association of the company or rules may call a shareholders meeting at any time.

(2) Subject to section 179, a company must hold a shareholders meeting -

(a) at any time that the board is required by this Act or the articles of association to refer a matter to shareholders for decision;

(b) whenever required in terms of section 189(3) to fill a vacancy on the board; and

(c) when otherwise required -

(i) in terms of subsection (3) or (7); or

(ii) by the articles of association of the company.

(3) Subject to subsection (5) and (6), the board of a company, or any other person specified in the articles of association or rules of the company, must call a shareholders meeting if one or more written and signed demands for such a meeting are delivered to the company, and -

(a) each such demand describes the specific purpose for which the meeting is proposed; and

(b) in aggregate, demands for substantially the same purpose are made and signed by the holders, as of the earliest time specified in any of those demands, of at least 10% of the voting rights entitled to be exercised in relation to the matter proposed to be considered at the meeting.

(4) The articles of association of a company may specify a lower percentage in substitution for that set out in subsection (3)(b).

(5) A company, or any shareholder of the company, may apply to the Court for an order setting aside a demand made in terms of subsection (3) on the grounds that the demand is frivolous, calls for a meeting for no other purpose than to reconsider a matter that has already been decided by the shareholders, or is otherwise vexatious.

(6) At any time before the start of a shareholders meeting contemplated in subsection (3) -

(a) a shareholder who submitted a demand for that meeting may withdraw that demand; and

(b) the company must cancel the meeting if, as a result of one or more demands being withdrawn, the voting rights of any remaining shareholders continuing to demand the meeting, in aggregate, fall below the minimum percentage of voting rights required to call a meeting.

(7) A public company must convene an annual general meeting of its shareholders -

(a) initially, no more than 18 months after the date of incorporation of the company; and

(b) thereafter, once in every calendar year, but no more than 15 months after the date of the previous annual general meeting, or within an extended time allowed by the Tribunal, on good cause shown.

(8) A meeting convened in terms of subsection (7) must, at a minimum, provide for the following business to be transacted -

(a) presentation of -

(i) the report of the directors;

(ii) audited financial statements for the immediately preceding financial year; and

(iii) an audit committee report;

(b) election of directors, to the extent required by this Act or the articles of association of the company;

(c) appointment of -

(i) an auditor for the ensuing financial year; and

(ii) an audit committee; and

(d) any matters raised by shareholders with or without advance notice to the company.

(9) Except to the extent that the articles of association of a company provides otherwise -

(a) the board of the company may determine the location for any shareholders meeting of the company; and

(b) a shareholders meeting of the company may be held in Namibia or in any foreign country.

(10) Every shareholders meeting of a public company must be reasonably accessible within Namibia for electronic participation by shareholders in the manner contemplated in section 182(2), irrespective of whether the meeting is held in Namibia or elsewhere.

(11) If a company is unable to convene a meeting as required in terms of this section because it has no directors, or because all of its directors are incapacitated -

(a) any other person authorised by the articles of association may convene the meeting; or

(b) if no person has been authorised as contemplated in paragraph (a), the Tribunal, on a request by any shareholder, may issue an administrative order for a shareholders meeting to be convened on a date, and subject to any terms, that the Tribunal considers appropriate in the circumstances.

(12) If a company fails to convene a meeting for any reason other than as contemplated in subsection (11) -

(a) at a time required in accordance with its articles of association;

(b) when required by shareholders in terms of subsection (3); or

(c) within the time required by subsection (7),

a shareholder may apply to the Court for an order requiring the company to convene a meeting on a date, and subject to any terms, that the Court considers appropriate in the circumstances.

(13) The company must compensate a shareholder who applies to the Tribunal in terms of subsection (11), or to the Court in terms of subsection (12), respectively, for the costs of those proceedings.

(14) A failure to hold a meeting as required by this section does not affect the existence of a company, or the validity of any action by the company.

**Notice of meetings**

**177**.

(1) The company must deliver a notice of each shareholders meeting in the prescribed manner and form to all of the shareholders of the company as of the record date for the meeting, at least -

(a) 15 business days before the meeting is to begin, in the case of a public company or a non-profit company that has voting members; or

(b) 10 business days before the meeting is to begin, in any other case.

(2) The articles of association of a company may provide for longer or shorter minimum notice periods than required by subsection (1).

(3) A company may call a meeting with less notice than required by subsection (1) or by its articles of association, but such a meeting may proceed only if every person who is entitled to exercise voting rights in respect of any item on the meeting agenda -

(a) is present at the meeting; and

(b) votes to waive the required minimum notice of the meeting.

(3) A notice of a shareholders meeting must be in writing, and must include -

(a) the date, time and place for the meeting, and the record date for the meeting;

(b) the general purpose of the meeting, and any specific purpose contemplated in section 180(3)(a), if applicable;

(c) a copy of any proposed resolution of which the company has received notice, and which is to be considered at the meeting, and a notice of the percentage of voting rights that is required for that resolution to be adopted;

(d) in the case of an annual general meeting of a company -

(i) the financial statements to be presented or a summarised form thereof; and

(ii) directions for obtaining a copy of the complete annual financial statements for the preceding financial year; and

(e) a reasonably prominent statement that -

(i) a shareholder entitled to attend and vote at the meeting is entitled to appoint a proxy to attend, participate in and vote at the meeting in the place of the shareholder, or two or more proxies if the articles of association of the company so permits;

(ii) a proxy need not also be a shareholder of the company; and

(iii) section 182(1) requires that meeting participants provide satisfactory identification.

(4) If there was a material defect in the giving of the notice of a shareholders meeting, the meeting may proceed, subject to subsection (5), if every person who is entitled to exercise voting rights in respect of any item on the meeting agenda is present at the meeting and votes to approve the ratification of the defective notice.

(5) If a material defect in the form or manner of giving notice of a meeting relates only to one or more particular matters on the agenda for the meeting -

(a) any such matter may be severed from the agenda, and the notice remains valid with respect to any remaining matters on the agenda; and

(b) the meeting may proceed to consider a severed matter, if the defective notice in respect of that matter has been ratified in terms of subsection (4)(d).

(6) An immaterial defect in the form or manner of giving notice of a shareholders meeting, or an accidental or inadvertent failure in the delivery of the notice to any particular shareholder to whom it was addressed, does not invalidate any action taken at the meeting.

(7) A shareholder who is present at a meeting, either in person or by proxy -

(a) is regarded as having received or waived notice of the meeting, if at least the required minimum notice was given; and

(b) has a right to -

(i) allege a material defect in the form of notice for a particular item on the agenda for the meeting; and

(ii) participate in the determination whether to waive the requirements for notice if less than the required minimum notice was given, or to ratify a defective notice; and

(c) except to the extent set out in paragraph (b), is regarded as having waived any right based on an actual or alleged defect in the notice of the meeting.

**Conduct of meetings**

**178**.

(1) Before any person may attend or participate in a shareholders meeting -

(a) that person must present reasonably satisfactory identification; and

(b) the person presiding at the meeting must be reasonably satisfied that the right of that person to participate and vote, either as a shareholder, or as a proxy for a shareholder, has been reasonably verified.

(2) Unless prohibited by its articles of association, a company may provide for -

(a) a shareholders meeting to be conducted entirely by electronic communication; or

(b) one or more shareholders, or proxies for shareholders, to participate by electronic communication in all or part of a shareholders meeting that is being held in person,

as long as the electronic communication employed ordinarily enables all persons participating in that meeting to communicate concurrently with each other without an intermediary and to participate reasonably effectively in the meeting.

(3) If a company provides for participation in a meeting by electronic communication as contemplated in subsection (2) -

(a) the notice of that meeting must inform shareholders of the availability of that form of participation, and provide any necessary information to enable shareholders or their proxies to access the available medium or means of electronic communication; and

(b) access to the medium or means of electronic communication is at the expense of the shareholder or proxy, except to the extent that the company determines otherwise.

(4) At a meeting of shareholders, voting may either be by show of hands or polling.

(5) If voting is by show of hands, any person who is present at the meeting, whether as a shareholder or as proxy for a shareholder and entitled to exercise voting rights has one vote, irrespective of the number of voting rights that person would otherwise be entitled to exercise.

(6) If voting on a particular matter is by polling, any person who is present at the meeting, whether as a shareholder or as proxy for a shareholder, has the number of votes determined in accordance with the voting rights associated with the securities held by that shareholder.

(7) Despite any provision of the articles of association of a company or agreement to the contrary, a polled vote must be held on any particular matter to be voted on at a meeting if a demand for such a vote is made by -

(a) at least five persons having the right to vote on that matter, either as a shareholder or a proxy representing a shareholder; or

(b) a person who is, or persons who together are, entitled as a shareholder or proxy representing a shareholder to exercise at least 10% of the voting rights entitled to be voted on that matter.

**Quorum and adjournment of meetings**

**179**.

(1) Subject to subsections (2) to (8) -

(a) a shareholders meeting may not begin until sufficient persons are present at the meeting to exercise, in aggregate, at least 25% of all of the voting rights that are entitled to be exercised in respect of at least one matter to be decided at the meeting; and

(b) a matter to be decided at the meeting may not begin to be considered unless sufficient persons are present at the meeting to exercise, in aggregate, at least 25% of all of the voting rights that are entitled to be exercised on that matter at the time the matter is called on the agenda.

(2) The articles of association of a company may specify a lower or higher percentage in place of the 25% required in either or both of subsection (1)(a) or (b).

(3) Despite the percentage figures set out in subsection (1), or in any applicable provisions of the articles of association of a company, if a company has more than two shareholders, a meeting may not begin, or a matter begin to be debated, unless -

(a) at least three shareholders are present at the meeting; and

(b) the requirements of subsection (1) or the articles of association, if different, are satisfied.

(4) If, within one hour after the appointed time for a meeting to begin, the requirements of subsections (1), or (3) if applicable -

(a) for that meeting to begin have not been satisfied, the meeting is postponed without motion, vote or further notice, for one week;

(b) for consideration of a particular matter to begin have not been satisfied -

(i) if there is other business on the agenda of the meeting, consideration of that matter may be postponed to a later time in the meeting without motion or vote; or

(ii) if there is no other business on the agenda of the meeting, the meeting is adjourned for one week, without motion or vote.

(5) The person intended to preside at a meeting that cannot begin due to the operation of subsection (1)(a), or (3) if applicable, may extend the one-hour limit allowed in subsection (4) for a reasonable period on the grounds that –

(a) exceptional circumstances affecting weather, transportation or electronic communication have generally impeded or are generally impeding the ability of shareholders to be present at the meeting; or

(b) one or more particular shareholders, having been delayed, have communicated an intention to attend the meeting, and those shareholders, together with others in attendance, would satisfy the requirements of subsection (1), or (3) if applicable.

(6) The articles of association or rules of the company may specify a different time in substitution for -

(a) the period of one hour contemplated in subsections (4) and (5), respectively; or

(b) the period of one week contemplated in subsection (4).

(7) A company is not required to give further notice of a meeting that is postponed or adjourned in terms of subsection (4), unless the location for the meeting is different from -

(a) the location of the postponed or adjourned meeting; or

(b) a location announced at the time of adjournment, in the case of an adjourned meeting.

(8) If, at the time appointed in terms of this section for a postponed meeting to begin, or for an adjourned meeting to resume, the requirements of subsection (1), or (3) if applicable, have not been satisfied, the shareholders, or in the case of a non-profit company, the members of the company present in person or by proxy are deemed to constitute a quorum.

(9) Unless the articles of association or rules of the company provide otherwise, after a quorum has been established for a meeting, or for a matter to be considered at a meeting, the meeting may continue, or the matter may be considered, so long as at least one shareholder with voting rights entitled to be exercised at the meeting, or on that matter, is present at the meeting.

(10) A shareholders meeting, or the consideration of any matter being debated at the meeting, may be adjourned from time to time without further notice, subject to subsection (11), on a motion supported by persons entitled to exercise, in aggregate, a majority of the voting rights -

(a) held by all of the persons who are present at the meeting at the time; and

(b) that are entitled to be exercised on at least one matter remaining on the agenda of the meeting, or on the matter under debate.

(11) An adjournment of a meeting, or of consideration of a matter being debated at the meeting, in terms of subsection (10) -

(a) may be either -

(i) to a fixed time and place; or

(ii) until further notice,

as agreed at the meeting; and

(b) requires that a further notice be given to shareholders only if the meeting determined that the adjournment was “until further notice”, as contemplated in paragraph (a)(ii).

(12) Subject to subsection (13), a meeting may not be adjourned beyond the earlier of -

(a) the date that is 120 business days after the record date determined in accordance with section 178; or

(b) the date that is 60 business days after the date on which the adjournment occurred.

(13) The articles of association of accompany may provide for different maximum periods of adjournment of meetings than those set out in subsection (12), or for unlimited adjournment of meetings.

**Resolutions of shareholders**

**180**.

(1) Every resolution of shareholders is either an ordinary resolution or a special resolution.

(2) The board may propose any resolution to be considered by shareholders, and may determine whether that resolution is to be considered at a meeting or by vote or written consent in terms of section 179.

(3) Any two shareholders of a company -

(a) may propose a resolution concerning any matter in respect of which they are each entitled to exercise voting rights; and

(b) when proposing a resolution, may require that the resolution be submitted to shareholders for consideration -

(i) at a meeting demanded in terms of section 180(3);

(ii) at the next shareholders meeting; or

(iii) by written vote in terms of section 179.

(4) A proposed resolution must be -

(a) expressed with sufficient clarity and specificity; and

(b) accompanied by sufficient information or explanatory material,

to enable a shareholder who is entitled to vote on the resolution to determine whether to participate in the meeting and to seek to influence the outcome of the vote on the resolution.

(5) At any time before the start of the meeting at which a resolution is to be considered, a shareholder or director who believes that the form of the resolution does not satisfy the requirements of subsection (4) may seek leave to apply to the Court for an order -

(a) restraining the company from putting the proposed resolution to a vote until the requirements of subsection (4) are satisfied; and

(b) requiring the company, or the shareholders who proposed the resolution, to -

(i) take appropriate steps to alter the resolution so that it satisfies the requirements of subsection (4); and

(ii) compensate the applicant for costs of the proceedings, if successful.

(6) Once a resolution has been approved, it may not be challenged or impugned by any person in any forum on the grounds that it did not satisfy subsection (4).

(7) For an ordinary resolution to be approved by shareholders, it must be supported by more than 50% of the voting rights exercised on the resolution.

(8) Except for an ordinary resolution for the removal of a director under section 170, the articles of association of a company may require -

(a) a higher percentage of voting rights to approve an ordinary resolution; or

(b) one or more higher percentages of voting rights to approve ordinary resolutions concerning one or more particular matters, respectively,

but there must at all times be a margin of at least 10 percentage points between the highest established requirement for approval of an ordinary resolution on any matter, and the lowest established requirement for approval of a special resolution on any matter.

(9) For a special resolution to be approved by shareholders, it must be supported by at least 75% of the voting rights exercised on the resolution.

(10) The articles of association of a company may permit -

(a) a different percentage of voting rights to approve any special resolution; or

(b) one or more different percentages of voting rights to approve special resolutions concerning one or more particular matters, respectively,

provided that there must at all times be a margin of at least 10% points between the highest established requirement for approval of an ordinary resolution on any matter, and the lowest established requirement for approval of a special resolution on any matter.

(11) A special resolution is required -

(a) to amend the articles of association of a company to the extent required by section 88 and section 101;

(b) to ratify a consolidated revision of the articles of association of a company as contemplated in section 87;

(c) to ratify actions by the company or directors in excess of their authority as contemplated in section 58;

(d) to approve an issue of shares or grant of rights in the circumstances contemplated in section 106(1);

(e) to approve an issue of shares or securities as contemplated in section 106(3);

(f) to authorise the board to grant financial assistance in the circumstances contemplated in section 108(3)(a)(ii);

(g) to approve a decision of the board for re-acquisition of shares in the circumstances contemplated in section 125(8);

(h) to authorise the basis for compensation to directors of a profit company as required by section 185(9);

(i) to approve the voluntary winding up of the company as contemplated in section 352(1);

(j) to approve the winding up of a company in the circumstances contemplated in section 350(1);

(k) to approve any proposed fundamental transaction to the extent required by Chapter 9; or

(l) to revoke a resolution contemplated in Part 6 of Chapter 7.

(12) The articles of association of a company may require a special resolution to approve any other matter not contemplated in subsection (11).

**Board, directors and prescribed officers**

**181**.

(1) The business and affairs of a company are managed by or under the direction of its board which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or its articles of association provides otherwise.

(2) The board of a company must comprise -

(a) in the case of a private company, or a personal liability company, at least one director; or

(b) in the case of a public company, or a non-profit company, at least three directors,

in addition to the minimum number of directors that the company must have to satisfy any requirement, whether in terms of this Act or its articles of association, to appoint an audit committee, or a social and ethics committee as contemplated in section 198(4).

(3) The articles of association of a company may specify a higher number in substitution for the minimum number of directors required by subsection (2).

(4) The articles of association of a company -

(a) may provide for -

(i) the direct appointment and removal of one or more directors by any person who is named in, or determined in terms of, the articles of association;

(ii) a person to be an ex officio director of the company as a consequence of that person holding some other office, title, designation or similar status, subject to subsection (5)(a); or

(iii) the appointment or election of one or more persons as alternate directors of the company; and

(b) in the case of a profit company other than a state-owned company, must provide for the election by shareholders of at least 50% of the directors, and 50% of any alternate directors.

(5) A person contemplated in subsection (4)(a)(ii) -

(a) may not serve or continue to serve as an ex officio director of a company, despite holding the relevant office, title, designation or similar status, if that person is or becomes ineligible or disqualified in terms of section 168; and

(b) who holds office or acts in the capacity of an ex officio director of a company has all the -

(i) powers and functions of any other director of the company, except to the extent that its articles of association restrict the powers, functions or duties of an ex officio director; and

(ii) duties, and is subject to all of the liabilities, of any other director of the company.

(6) The election or appointment of a person as a director is a nullity if, at the time of the election or appointment that person is ineligible or disqualified in terms of section 195.

(7) A person becomes entitled to serve as a director of a company when that person -

(a) has been appointed or elected in accordance with this Part, or holds an office, title, designation or similar status entitling that person to be an ex officio director of the company, subject to subsection (5)(a); and

(b) has delivered to the company a written consent to serve as its director.

(8) Except to the extent that the articles of association of a company provide otherwise, the company may pay remuneration to its directors for their service as directors, subject to subsection (9).

(9) Remuneration contemplated in subsection (8) may be paid only in accordance with a special resolution approved by the shareholders within the previous two years.

(10) The Minister may prescribe any specific function or functions within a company to constitute a prescribed office for the purposes of this Act.

(11) Any failure by a company at any time to have the minimum number of directors required by this Act, or the articles of association of the company, does not -

(a) limit or negate the authority of the board; or

(b) invalidate anything done by the board or the company.

(12) Save as otherwise provided elsewhere in this Act or in the articles of association of a company, any particular director may be appointed to more than one committee of the company, and when calculating the minimum number of directors required for a company in terms of subsections (2) and (3), any such director who has been appointed to more than one committee is counted only once.

**First director and directors**

**182**.

(1) Each incorporator of a company -

(a) a first director of the company; and

(b) serves until sufficient other directors to satisfy the minimum requirements of this Act or the articles of association of the company, have been -

(i) first appointed as contemplated in section 185(4)(a)(i); or

(ii) first elected in accordance with section 187 or the articles of association of the company.

(2) If the number of incorporators of a company, together with any ex officio directors, or directors to be appointed as contemplated in section 185(4)(a)(i), is fewer than the minimum number of directors required for that company in terms of -

(a) this Act; or

(b) the articles of association of the company,

the board must call a shareholders meeting within 40 business days after incorporation of the company for the purpose of electing sufficient directors to fill all vacancies on the board at the time of the election.

**Election of directors of profit companies**

**183**.

(1) Subject to subsection (3), each director of a profit company, other than the first director or a director contemplated in section 185(4)(a)(i) or (ii), is elected by the persons entitled to exercise voting rights in such an election to serve for an indefinite term or for a term as set out in the articles of association.

(2) Unless the articles of association of a profit company provides otherwise, in any election of directors -

(a) the election is to be conducted as a series of votes, each of which is on the candidacy of a single individual to fill a single vacancy, with the series of votes continuing until all vacancies on the board at that time have been filled; and

(b) in each vote to fill a vacancy -

(i) each voting right entitled to be exercised may be exercised once; and

(ii) the vacancy is filled only if a majority of the voting rights exercised support the candidate.

(3) Unless the articles of association of a profit company provides otherwise, the board may appoint a person who satisfies the requirements for election as a director to fill any vacancy -

(a) to serve as a director of the company on a temporary basis until the vacancy has been filled by election in terms of subsection (2); and

(b) during that period the person so appointed has all of the powers, functions and duties, and is subject to all of the liabilities, of any other director of the company.

**Ineligibility and disqualification of persons to be directors and prescribed officers**

**184**.

(1) In this section, “director” includes an alternate director -

(a) a prescribed officer; and

(b) a person who is a member of a committee of the board of a company, or of the audit committee of a company,

irrespective of whether or not the officer or person is also a member of the board of the company.

(2) A person who is ineligible or disqualified as set out in this section may not -

(a) be appointed or elected as a director of a company, or consent to being appointed or elected as a director; or

(b) act as a director of a company.

(3) A company may not knowingly permit an ineligible or disqualified person to serve or act as a director.

(4) A person who becomes ineligible or disqualified while serving as a director of a company ceases to be entitled to continue to act as a director immediately subject to section 195(2).

(5) In addition to the provisions of this section, the articles of association of a company may impose -

(a) additional grounds of ineligibility or disqualification of directors; or

(b) minimum qualifications to be met by directors of that company.

(6) A person is ineligible to be a director of a company if the person -

(a) is a juristic person;

(b) is an unemancipated minor, or is under a similar legal disability; or

(c) does not satisfy any qualification set out in the articles of association of a company.

(7) A person is disqualified to be a director of a company if -

(a) a court has prohibited that person to be a director, or declared the person to be delinquent in terms of section 427; or

(b) subject to subsections (8) to (11), the person -

(i) is an unrehabilitated insolvent;

(ii) is prohibited in terms of any public regulation to be a director of the company;

(iii) has been removed from an office of trust, on the grounds of misconduct involving dishonesty; or

(iv) has been convicted, in Namibia or elsewhere, and imprisoned without the option of a fine, or fined more than the prescribed amount, 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, or in connection with any act contemplated in subsection (2) or (5); or

(cc) under this Act, the Close Corporations Act, 1988 (Act No. 28 of 1988), the Insolvency Act, 1936 (Act No. 24 of 1936), the Competition Act, 2003 (Act No. 2 of 2003), the Financial Intelligence Act, 2012 (Act No. 13 of 2012), Financial Institutions and Markets Act, Chapter 4 of the Anti-Corruption Act, 2004 (Act No.8 of 2003).

(8) A disqualification in terms of subsection (7)(b)(iii) or (iv) ends at the later of -

(a) five years after the date of removal from office, or the completion of the sentence imposed for the relevant offence; or

(b) at the end of one or more extensions, as determined by the Tribunal from time to time, on application by BIPA in terms of subsection (9).

(9) At any time before the expiry of the disqualification of a person in terms of subsection (8)(b)(iii) or (iv) -

(a) BIPA may apply to the Court for an extension contemplated in subsection (9)(b); and

(b) the Court may extend the disqualification for no more than five years at a time, if the Court is satisfied that an extension is necessary to protect the public, having regard to the conduct of the disqualified person up to the time of the application.

(10) The Court may exempt a person from the application of any provision of subsection (8)(b).

(11) The Registrar of the Court must, upon -

(a) the issue of a sequestration order;

(b) the issue of an order for the removal of a person from any office of trust on the grounds of misconduct involving dishonesty; or

(c) a conviction for an offence referred in subsection (8)(b)(iv),

send a copy of the relevant order or particulars of the conviction to BIPA.

(12) BIPA may notify each company which has as a director to whom the order or conviction relates, of the order or conviction.

(13) BIPA must establish and maintain in the prescribed manner a public register of persons who are disqualified from serving as a director, or who are subject to an order of probation as a director in terms of an order of the Court pursuant to this Act or any other law.

**Vacancies on board**

**185**.

(1) Subject to subsection (2), a person ceases to be a director and a vacancy arises on the board of a company

(a) when the term of office of the person as director expires, in the case of a company whose articles of association provides for fixed terms as contemplated in section 187(1); or

(b) in any case, if the person -

(i) resigns or dies;

(ii) in the case of an ex officio director, ceases to hold the office, title, designation or similar status that entitled the person to be an ex officio director;

(iii) becomes incapacitated to the extent that the person is unable to perform the functions of a director, and is unlikely to regain that capacity within a reasonable time, subject to section 190(3);

(iv) is declared delinquent by the Court, or placed on probation under conditions that are inconsistent with continuing to be a director of the company in terms of section 427;

(v) becomes ineligible or disqualified in terms of section 195, subject to section 190(3); or

(vi) is removed -

(aa) by resolution of the shareholders in terms of section 190(1);

(bb) by resolution of the board in terms of section 190 (3); or

(cc) by order of the Court in terms of section 190 (5) or (6).

(2) If, in terms of section 190 (3), the board of a company has removed a director, a vacancy on the board does not arise until the later of -

(a) the expiry of the time for filing an application for review in terms of section 190 (5); or

(b) the granting of an order by the court on such an application,

but the director is suspended from office during that time.

(3) If a vacancy arises on the board, other than as a result of an ex officio director ceasing to hold that office, it must be filled by -

(a) a new appointment, if the director was appointed as contemplated in section 185(4)(a)(i); or

(b) subject to subsection (4), by a new election conducted -

(i) at the next annual general meeting of the company, if the company is required to hold such a meeting; or

(ii) in any other case, within six months after the vacancy arose -

(aa) at a shareholders meeting called for the purpose of electing the director; or

(bb) by a poll of the persons entitled to exercise voting rights in an election of the director as contemplated in section 185(3).

(4) If, as a result of a vacancy arising on the board of a company there are no remaining directors of a company, any holder of voting rights entitled to be exercised in the election of a director may convene a meeting for the purpose of such an election.

(5) A person contemplated in subsection (4) may apply to the Court for relief, and the court may grant a supervisory order relating to a meeting convened in terms of that paragraph if the Court is satisfied that such an order is required to prevent the oppression, or preserve the rights, of any shareholder.

(6) Every company must file a notice within 10 business days after a person becomes or ceases to be a director of the company.

**Removal of directors**

**186**.

(1) Despite anything to the contrary in -

(a) the articles of association or rules of a company; or

(b) any agreement between a company and a director, or between any shareholders and a director,

a director may be removed by an ordinary resolution adopted at a shareholders meeting by the persons entitled to exercise voting rights in an election of that director, subject to subsection (2).

(2) Before the shareholders of a company may consider a resolution contemplated in subsection (1) -

(a) the director concerned must be given notice of the meeting and the resolution, at least equivalent to that which a shareholder is entitled to receive, irrespective of whether or not the director is a shareholder of the company; and

(b) the director must be afforded a reasonable opportunity to make a presentation, in person or through a representative, to the meeting, before the resolution is put to a vote.

(3) If a company has more than two directors, and a shareholder or director has alleged that a director of the company -

(a) has become -

(i) ineligible or disqualified in terms of section 188, other than on the grounds contemplated in section 188(8)(a); or

(ii) incapacitated to the extent that the director is unable to perform the functions of a director, and is unlikely to regain that capacity within a reasonable time; or

* + 1. has neglected, or been derelict in the performance of, the functions of director,

the board, other than the director concerned, must determine the matter by resolution, and may remove a director whom it has determined to be ineligible or disqualified, incapacitated, or negligent or derelict.

(4) Before the board of a company may consider a resolution contemplated in subsection (3), the director concerned must be given -

(a) notice of the meeting, including a copy of the proposed resolution and a statement setting out reasons for the resolution, with sufficient specificity to reasonably permit the director to prepare and present a response; and

(b) a reasonable opportunity to make a presentation, in person or through a representative, to the meeting before the resolution is put to a vote.

(5) If, in terms of subsection (3), the board of a company has determined that a director is ineligible or disqualified, incapacitated, or has been negligent or derelict, the director concerned, or a person who appointed that director as contemplated in section 185(4)(a)(i), if applicable, may apply within 20 business days to the Court to review the determination of the board.

(6) If, in terms of subsection (3), the board of a company has determined that a director is not ineligible or disqualified, incapacitated, or has not been negligent or derelict -

(a) any director who voted otherwise on the resolution, or any holder of voting rights entitled to be exercised in the election of that director, may apply to the Court to review the determination of the board; and

(b) the Court, on application in terms of paragraph (a), may -

(i) confirm the determination of the board; or

(ii) remove the director from office, if the Court is satisfied that the director is ineligible or disqualified, incapacitated, or has been negligent or derelict.

(7) An applicant in terms of subsection (6) must compensate the company and any other party for costs incurred in relation to the application, unless the court reverses the decision of the board.

(8) If a company has fewer than three directors -

(a) subsection (3) does not apply to the company;

(b) in any circumstances contemplated in subsection (3), any director or shareholder of the company may apply to the Tribunal, to make a determination contemplated in that subsection; and

(c) subsections (4), (5) and (6), each read with the changes required by the context, apply to the determination of the matter by the Tribunal.

(9) Nothing in this section deprives a person removed from office as a director in terms of this section of any right that person may have at common law or otherwise to apply to the Court for damages or other compensation for -

(a) loss of office as a director; or

(b) loss of any other office as a consequence of being removed as a director.

(10) This section is in addition to the right of a person in terms of section 427 to apply to the Court for an order declaring a director delinquent or placing a director on probation.

**Committees of Boards**

**187**.

(1) Except to the extent that the articles of association of a company provides otherwise, the board of a company may -

(a) appoint any number of committees of directors; and

(b) delegate to any committee any of the authority of the board.

(2) Except to the extent that the articles of association of a company, or a resolution establishing a committee, provides otherwise, the committee -

(a) may include persons who are not directors of the company, but such person -

(i) may not be ineligible or disqualified to be a director in terms of section 188; and

(ii) has no right to vote on a matter to be dehcided by the committee;

(b) may consult with or receive advice from any person; and

(c) has the full authority of the board in respect of a matter referred to it.

(3) The creation of a committee, delegation of any power to a committee, or action taken by a committee, does not alone satisfy or constitute compliance by a director with the required duty of a director to the company as set out in section 195.

(4) The Minister may prescribe -

(a) a category of companies that must each have a social and ethics committee, if it is desirable in the public interest, having regard to -

(i) annual turnover;

(ii) workforce size; or

(iii) the nature and extent of the activities of such companies;

(b) the functions to be performed by social and ethics committees required by this subsection; and

(c) rules governing the composition and conduct of social and ethics committees.

(5) A company that falls within a category of companies that are required in terms of this section and the regulations to appoint a social and ethics committee may apply to the Tribunal in the prescribed manner and form for an exemption from that requirement, and the Tribunal may grant such an exemption if it is satisfied that -

(a) the company is required in terms of other legislation to have, and does have, some form of formal mechanism within its structures that substantially performs the function that would otherwise be performed by the social and ethics committee in terms of this section and the regulations; or

(b) it is not reasonably necessary in the public interest to require the company to have a social and ethics committee, having regard to the nature and extent of the activities of the company.

(6) An exemption granted in terms of subsection (5) is valid for five years, or such shorter period as the Tribunal may determine at the time of granting the exemption, unless set aside by the Tribunal in terms of subsection (7).

(7) BIPA, on its own initiative or on request by a shareholder, or a person who was granted standing by the Tribunal at the hearing of the exemption application, may apply to the Tribunal to set aside an exemption only on the grounds that the basis on which the exemption was granted no longer applies.

(8) A social and ethics committee of a company is entitled -

(a) to require from any director or prescribed officer of the company any information or explanation necessary for the performance of the functions of the committee;

(b) to request from any employee of the company any information or explanation necessary for the performance of the functions of the committee;

(c) to attend any general shareholders meeting;

(d) to receive all notices of and other communications relating to any general shareholders meeting; and

(e) to be heard at any general shareholders meeting contemplated in this paragraph on any part of the business of the meeting that concerns the functions of the committee.

(9) A company must pay all the expenses reasonably incurred by its social and ethics committee, including, if the social and ethics committee considers it appropriate, the costs or the fees of any consultant or specialist engaged by the social and ethics committee in the performance of its functions.

(10) Section 258(5) and (6), read with the changes required by the context, applies with respect to a company that fails to appoint a social and ethics committee as required by this section and the regulations.

**Meetings of boards**

**188**.

(1) A director authorised by the board of a company -

(a) may call a meeting of the board at any time; and

(b) must call such a meeting if required to do so by at least -

(i) 25% of the directors, in the case of a board that has at least 12 members; or

(ii) two directors, in any other case.

(2) The articles of association of a company may specify a higher or lower percentage or number in substitution for those set out in subsection (1)(b).

(3) Except to the extent that this Act or the articles of association of a company provides otherwise -

(a) a meeting of the board may be conducted by electronic communication; or

(b) one or more directors may participate in a meeting by electronic communication,

so long as the electronic communication facility employed ordinarily enables all persons participating in that meeting to communicate concurrently with each other without an intermediary, and to participate effectively in the meeting.

(4) The board of a company may determine the form and time for giving notice of its meetings, but -

(a) such a determination must comply with any requirements set out in the articles of association or rules of the company; and

(b) no meeting of a board may be convened without notice to all of the directors, subject to subsection (5).

(5) Except to the extent that the articles of association of a company provides otherwise -

(a) if all of the directors of the company -

(i) acknowledge actual receipt of the notice;

(ii) are present at a meeting; or

(iii) waive notice of the meeting,

the meeting may proceed even if the company failed to give the required notice of that meeting, or there was a defect in the giving of the notice;

(b) a majority of the directors must be present at a meeting before a vote may be called at a meeting of the directors;

(c) each director has one vote on a matter before the board;

(d) a majority of the votes cast on a resolution is sufficient to approve that resolution; and

(e) in the case of a tied vote -

(i) the chair may cast a deciding vote, if the chair did not initially have or cast a vote; or

(ii) the matter being voted on fails, in any other case.

(6) A company must keep minutes of the meetings of the board, and any of its committees, and include in the minutes -

(a) any declaration given by notice or made by a director as required by section 194; and

(b) every resolution adopted by the board.

(7) A resolution adopted by the board -

(a) is dated and sequentially numbered; and

(b) is effective as of the date of the resolution, unless the resolution states otherwise.

(8) Any minutes of a meeting, or a resolution, signed by the chair of the meeting, or by the chair of the next meeting of the board, is evidence of the proceedings of that meeting, or adoption of that resolution.

**Directors acting other than at meetings**

**189**.

(1) Except to the extent that the articles of association of a company provide otherwise, a decision that could be voted on at a meeting of the board of that company may instead be adopted by written consent of a majority of the directors, given in person, or by electronic communication, on condition that each director has received notice of the matter to be decided.

(2) A decision made in the manner contemplated in this section is of the same effect as if it had been approved by voting at a meeting.

**Personal financial interests of directors**

**190**.

(1) In this section -

(a) “director”, includes -

(i) an alternate director;

(ii) a prescribed officer; and

(iii) a person who is a member of a committee of the board of a company,

irrespective of whether the person is also a member of the board of the company; and

(b) “related person”, when used in reference to a director, has the meaning set out in section 1, but also includes a second company of which the director or a related person is also a director, or a close corporation of which the director or a related person is a member.

(2) This section does not apply -

(a) to a director of a company -

(i) in respect of a decision that may generally affect -

(aa) all of the directors of the company in their capacity as directors; or

(bb) a class of persons, despite the fact that the director is one member of that class of persons, unless the only members of the class are the director or persons related or inter-related to the director; or

(ii) in respect of a proposal to remove that director from office as contemplated in section 190; or

(b) to a company or its director, if one person -

(i) holds all of the beneficial interests of all of the issued securities of the company; and

(ii) is the only director of that company.

(3) If a person is the only director of a company, but does not hold all of the beneficial interests of all of the issued securities of the company, that person may not -

(a) approve or enter into any agreement in which the person or a related person has a personal financial interest; or

(b) as a director, determine any other matter in which the person or a related person has a personal financial interest,

unless the agreement or determination is approved by an ordinary resolution of the shareholders after the director has disclosed the nature and extent of that interest to the shareholders.

(4) At any time, a director may disclose any personal financial interest in advance, by delivering to the board, or shareholders in the case of a company contemplated in subsection (3), a notice in writing setting out the nature and extent of that interest, to be used generally for the purposes of this section until changed or withdrawn by further written notice from that director.

(5) If a director of a company, other than a company contemplated in subsection (2)(b) or (3), has a personal financial interest in respect of a matter to be considered at a meeting of the board, or knows that a related person has a personal financial interest in the matter, the director -

(a) must disclose the interest and its general nature before the matter is considered at the meeting;

(b) must disclose to the meeting any material information relating to the matter, and known to the director;

(c) may disclose any observations or pertinent insights relating to the matter if requested to do so by the other directors;

(d) if present at the meeting, must leave the meeting immediately after making any disclosure contemplated in paragraph (b) or (c);

(e) may not take part in the consideration of the matter, except to the extent contemplated in paragraphs (b) and (c);

(f) while absent from the meeting in terms of this subsection -

(i) is to be regarded as being present at the meeting for the purpose of determining whether sufficient directors are present to constitute the meeting; and

(ii) is not to be regarded as being present at the meeting for the purpose of determining whether a resolution has sufficient support to be adopted; and

(g) may not execute any document on behalf of the company in relation to the matter unless specifically requested or directed to do so by the board.

(6) If a director of a company -

(a) acquires a personal financial interest in an agreement or other matter in which the company has a material interest; or

(b) knows that a related person has acquired a personal financial interest in the matter, after the agreement or other matter has been approved by the company,

the director must promptly disclose to the board, or to the shareholders in the case of a company contemplated in subsection (3), the nature and extent of that interest, and the material circumstances relating to the director or acquisition by the related person of that interest.

(7) A decision by the board, or a transaction or agreement approved by the board, or by a company as contemplated in subsection (3), is valid despite any personal financial interest of a director or person related to the director, only if -

(a) it was approved following disclosure of that interest in the manner contemplated in this section; or

(b) despite having been approved without disclosure of that interest, it -

(i) has subsequently been ratified by an ordinary resolution of the shareholders following disclosure of that interest; or

(ii) has been declared to be valid by a court in terms of subsection (8).

(8) A court, on application by any interested person, may declare valid a transaction or agreement that had been approved by the board or shareholders, despite the failure of the director to satisfy the disclosure requirements of this section.

**Standards of conduct for directors**

**191**.

(1) In this section, “director” includes -

(a) an alternate director;

(b) a prescribed officer;

(c) a person who is a member of a committee of the board of a company, or of the audit committee of a company,

irrespective of whether or not the person is also a member of the board of a company.

(2) A director of a company may not -

(a) use the position of director, or any information obtained while acting in the capacity of a director -

(i) to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company; or

(ii) to knowingly cause harm to the company or a subsidiary of the company; and

(b) communicate to the board at the earliest practicable opportunity any information that comes to the attention of the director, unless the director -

(i) reasonably believes that the information is -

(aa) immaterial to the company; or

(bb) generally available to the public, or known to the other directors; or

(ii) is bound not to disclose that information by a legal or ethical obligation of confidentiality.

(3) Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director -

(a) in good faith and for a proper purpose;

(b) in the best interests of the company;

(c) without exceeding director’s or company’s limitations of authority;

(d) with independent and unfettered discretion;

(e) by avoiding conflict between director’s personal interests and his or her duty to the company;

(f) with the degree of care and diligence that may reasonably be expected of a person carrying out the same functions in relation to the company as those carried out by that director; and

(g) with the degree of skill that may be expected of a person having the general knowledge, skill and experience of that director.

(4) In respect of any particular matter arising in the exercise of the powers or the performance of the functions of director, a particular director of a company -

(a) will have satisfied the obligations of subsection (3)(f) and (g) if -

(i) the director has taken reasonably diligent steps to become informed about the matter;

(ii) either -

(aa) the director had no material personal financial interest in the subject matter of the decision, and had no reasonable basis to know that any related person had a personal financial interest in the matter; or

(bb) the director complied with the requirements of section 194 with respect to any interest contemplated in subparagraph (aa); and

(iii) the director made a decision, or supported the decision of a committee or the board, with regard to that matter, and the director had a rational basis for believing, and did believe, that the decision was in the best interests of the company; and

(b) is entitled to rely on -

(i) the performance by any of the persons -

(aa) referred to in subsection (5); or

(bb) to whom the board may reasonably have delegated, formally or informally by course of conduct, the authority or duty to perform one or more of the functions of the board that are delegable under applicable law; and

(ii) any information, opinions, recommendations, reports or statements, including financial statements and other financial data, prepared or presented by any of the persons specified in subsection (5).

(5) To the extent contemplated in subsection (4)(b), a director is entitled to rely on -

(a) one or more employees of the company whom the director reasonably believes to be reliable and competent in the functions performed or the information, opinions, reports or statements provided;

(b) legal counsel, accountants, or other professional persons retained by the company, the board or a committee as to matters involving skills or expertise that the director reasonably believes are matters -

(i) within the professional or expert competence of the particular person; or

(ii) as to which the particular person merits confidence; or

(c) a committee of the board of which the director is not a member, unless the director has reason to believe that the actions of the committee do not merit confidence.

**Liability of directors and prescribed officers**

**192**.

(1) In this section, “director” includes -

(a) an alternate director;

(b) a prescribed officer; and

(c) a person who is a member of a committee of a board of a company, or of the audit committee of a company,

irrespective of whether or not the person is also a member of the board a company.

(2) A director of a company may be held liable -

(a) in accordance with the principles of the common law relating to breach of a fiduciary duty, for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in section 194 or 195(2) or (3)(a) or (b); or

(b) in accordance with the principles of the common law relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by the director of -

(i) a duty contemplated in section 195(3)(c);

(ii) any provision of this Act not otherwise mentioned in this section; or

(iii) any provision of the articles of association of the company.

(3) A director of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having -

(a) acted in the name of the company, signed anything on behalf of the company, or purported to bind the company or authorise the taking of any action by or on behalf of the company, despite knowing that the director lacked the authority to do so;

(b) permitted in the carrying on of the business of the company despite knowing that it was being conducted in a reckless manner or in a manner intended to defraud creditors or others;

(c) been a party to an act or omission by the company despite knowing that the act or omission was calculated to defraud a creditor, employee or shareholder of the company, or had another fraudulent purpose;

(d) signed, consented to, or authorised, the publication of -

(i) any financial statements that were false or misleading in a material respect; or

(ii) a prospectus, or a written statement contemplated in section 164, that contained -

(aa) an ‘untrue statement’ as defined and described in section 168; or

(bb) a statement to the effect that a person had consented to be a director of the company, when no such consent had been given,

despite knowing that the statement was false, misleading or untrue, but the provisions of section 196(3), read with the changes required by the context, apply to limit the liability of a director in terms of this paragraph; or

(e) been present at a meeting, or participated in the making of a decision in terms of section 193, and failed to vote against -

(i) the issuing of any unauthorised shares, despite knowing that those shares had not been authorised in accordance with section 101;

(ii) the issuing of any authorised securities, despite knowing that the issue of those securities was inconsistent with section 102;

(iii) the granting of options to any person contemplated in section 103(4), despite knowing that any shares -

(aa) for which the options could be exercised; or

(bb) into which any securities could be converted,

had not been authorised in terms of section 101;

(iv) the provision of financial assistance to any person contemplated in section 102 for the acquisition of securities of the company, despite knowing that the provision of financial assistance was inconsistent with section 105 or the articles of association of the company;

(v) the provision of financial assistance to a director for a purpose contemplated in section 105, despite knowing that the provision of financial assistance was inconsistent with that section or the articles of association of the company;

(vi) a resolution approving a distribution, despite knowing that the distribution was contrary to section 188, subject to section 189;

(vii) the acquisition by the company of any of its shares, or the shares of its holding company, despite knowing that the acquisition was contrary to section 125; or

(viii) an allotment by the company, despite knowing that the allotment was contrary to any provision of chapter 5.

(4) The liability of a director in terms of subsection (3)(e)(vi) as a consequence of the director having failed to vote against a distribution in contravention of section 188 -

(a) arises only if -

(i) immediately after making all of the distribution contemplated in a resolution in terms of section 4, the company does not satisfy the solvency and liquidity test; and

(ii) it was unreasonable at the time of the decision to conclude that the company would satisfy the solvency and liquidity test after making the relevant distribution; and

(b) does not exceed, in aggregate, the difference between -

(i) the amount by which the value of the distribution exceeded the amount that could have been distributed without causing the company to fail to satisfy the solvency and liquidity test; and

(ii) the amount, if any, recovered by the company from persons to whom the distribution was made.

(5) If the board of a company has made a decision in a manner that contravened this Act, as contemplated in subsection (3)(e) -

(a) the company, or any director who has been or may be held liable in terms of subsection (3)(e), may apply to the Court for an order setting aside the decision of the board; and

(b) the Court may make -

(i) an order setting aside the decision in whole or in part, absolutely or conditionally; and

(ii) any further order that is just and equitable in the circumstances, including an order -

(aa) to rectify the decision, reverse any transaction, or restore any consideration paid or benefit received by any person in terms of the decision of the board; and

(bb) requiring the company to indemnify any director who has been or may be held liable in terms of this section, including indemnification for the costs of the proceedings under this subsection.

(6) The liability of a person in terms of this section is joint and several with any other person who is or may be held liable for the same act.

(7) Proceedings to recover any loss, damages or costs for which a person is or may be held liable in terms of this section may not be commenced more than three years after the act or omission that gave rise to that liability.

(8) In addition to the liability set out elsewhere in this section any person who would be so liable is jointly and severally liable with all other such persons -

(a) to pay the costs of all parties in the court in a proceeding contemplated in this section unless the proceedings are abandoned, or exculpate that person; and

(b) to restore to the company any amount improperly paid by the company as a consequence of the impugned act, and not recoverable in terms of this Act.

(9) In any proceedings against a director, other than for wilful misconduct or wilful breach of trust, the Court may relieve the director, either wholly or partly, from any liability set out in this section, on any terms the Court considers just if it appears to the Court that -

(a) the director is or may be liable, but has acted honestly and reasonably; or

(b) having regard to all the circumstances of the case, including those connected with the appointment of the director, it would be fair to excuse the director.

(10) A director who has reason to apprehend that a claim may be made alleging that the director is liable, other than for wilful misconduct or wilful breach of trust, may apply to the Court for relief, and the Court may grant relief to the director on the same grounds as if the matter had come before the Court in terms of subsection (9).

**Indemnification and insurance of directors**

**193**.

(1) In this section, “director” includes -

(a) a former director and an alternate director;

(b) a prescribed officer; or

(c) a person who is a member of a committee of a board of a company, or of the audit committee of a company,

irrespective of whether or not the person is also a member of the board of a company.

(2) Subject to subsections (5) to (7), any provision of an agreement, the articles of association of a company, or a resolution adopted by a company, whether express or implied, is void to the extent that it directly or indirectly purports to -

(a) relieve a director of -

(i) a duty contemplated in section 194 or 195; or

(ii) liability contemplated in section 196; or

(b) negate, limit or restrict any legal consequences arising from an act or omission that constitutes wilful misconduct or wilful breach of trust on the part of the director.

(3) Subject to subsection (4), a company may not directly or indirectly pay any fine that may be imposed on a director of the company, or on a director of a related company, as a consequence of that director having been convicted of an offence, unless the conviction was based on strict liability.

(4) Subsection (3) does not apply to a private or personal liability company if -

(a) a single individual is the sole shareholder and sole director of that company; or

(b) two or more related individuals are the only shareholders of that company, and there are no directors of the company other than one or more of those individuals.

(5) Except to the extent that the articles of association of a company provide otherwise, the company -

(a) may advance expenses to a director to defend litigation in any proceedings arising out of the service of the director to the company; and

(b) may directly or indirectly indemnify a director for expenses contemplated in paragraph (a), irrespective of whether it has advanced those expenses, if the proceedings -

(i) are abandoned or exculpate the director; or

(ii) arise in respect of any liability for which the company may indemnify the director, in terms of subsections (6) and (7).

(6) Except to the extent that the articles of association of a company provide otherwise, a company may indemnify a director in respect of any liability arising other than as contemplated in subsection (7).

(7) A company may not indemnify a director in respect of -

(a) any liability arising -

(i) in terms of section 196(3)(a), (b) or (c); or

(ii) from wilful misconduct or wilful breach of trust on the part of the director; or

(b) any fine contemplated in subsection (3).

(8) Except to the extent that the articles of association of a company provides otherwise, a company may purchase insurance to protect -

(a) a director against any liability or expenses for which the company is permitted to indemnify a director in accordance with subsection (6); or

(b) the company against any contingency including, but not limited to -

(i) any expenses -

(aa) that the company is permitted to advance in accordance with subsection (5)(a); or

(bb) for which the company is permitted to indemnify a director in accordance with subsection (5)(b); or

](ii) any liability for which the company is permitted to indemnify a director in accordance with subsection (6).

(9) A company is entitled to claim restitution from a director of the company or of a related company for any money paid directly or indirectly by the company to or on behalf of that director in any manner inconsistent with this section.

PART 2

INTERESTS OF AND DEALINGS BY DIRECTORS AND OTHERS IN SHARES OF COMPANY

**Definitions for purposes of this Part**

**194**.

For the purposes of this Part -

“interest” includes, without derogating from the generality of the word, any option in respect of, any right to subscribe for or any right in or to any shares or debt securities;

“officer” in relation to a company, includes any employee who would be in possession of any information consequent on his or her immediate relationship with the directors of the company immediately before a public announcement is to be made under section 241;

“past director” means a person who has ceased to be a director of the company concerned for a period not exceeding six months;

“person” means a person in accordance with whose directions or instructions any of the directors of a company is accustomed to act;

“shares and debentures of the company” means the shares and debt securities of the company and of its subsidiary.

**Register of interests of directors and others in shares and debt securities of company**

**195.**

(1) Every public company must keep a register of the material interests of its directors, past directors, officers and persons in the shares and debt securities of the company and must, within seven days after receipt of any written notice referred to in section 201, cause to be entered in respect of each director, past director, officer or person -

(a) a description of and the number or amount of shares or debt securities held by each of them;

(b) the nature and extent of any material interest whatever, direct or indirect, held by each of them, directly or indirectly, in respect of those shares or debt securities;

(c) in chronological order any change, including any contract for any change in the holding of or in the interests of each of them in any shares or debt securities, specifying the consideration, if any, given or received or to be given or received; and

(d) the date on which each entry in the register is made.

(2) Section 117 in so far as it relates to the place where the register of members of a company must be kept and notice to the Registrar and section 120 in so far as it relates to the inspection of and copies of or extracts from that register, apply to the register of interests to be kept under this section.

(3) The Registrar may at any time by notice in writing require a company to transmit to him or her, within 14 days after the date of that notice, particulars of the entries made in the register for the period as may be specified in the notice.

(4) Any company which fails to comply with this section or with any requirement of the Registrar under this section and every director and officer of that company who knowingly is a party to that failure, commits an offence and is liable to a fine which does not exceed N$8 000 or to be imprisoned for a period which does not exceed two years or to both the fine and imprisonment.

**Directors to determine officers for the purpose of register**

**196**.

(1) When the directors of a company have knowledge of any information concerning a transaction or proposed transaction of the company or of the affairs of the company, which, if it becomes publicly known, may be expected materially to affect the price of the shares or debentures of the company and that information has not been publicly announced, they must as soon as is reasonably possible, by resolution determine which officers of the company, whose names have not already been entered in the register under section 238, are to be taken to be possessed or to become possessed of that information in the course of their respective duties and must cause the names of those officers to be entered in that register.

(2) Every director of a company who fails to comply with the requirements of subsection (1), commits an offence and is liable to a fine which does not exceed N$8 000 or to be imprisoned for a period which does not exceed two years or to both the fine and imprisonment.

**Duty of directors and others as to register of interests**

**197**.

(1) There must be lodged with a company by -

(a) every director, past director, officer and person of the company within one month after the date on which this section comes into operation;

(b) every director within one month after his or her appointment as a director of the company;

(c) every person within one month after he or she becomes entitled to direct or instruct any director of the company; and

(d) every officer who has been determined by the directors in terms of section 239, a written notice, dated and signed by him or her or his or her authorised agent, containing the particulars referred to in section 238(1)(a) and (b).

(2) Every director, past director, officer and person referred to in subsection (1) must, within 14 days after the occurrence of any change referred to in section 238(1)(c), lodge with the company, a written notice, dated and signed by him or her or his or her authorised agent containing the particulars of the changes.

(3) The obligation imposed by subsection (2) on any officer ceases in respect of any change occurring after the time of the public announcement referred to in section 241.

(4) Any director, past director, officer or person who contravenes this section or who makes any statement in any notice under this section knowing it to be false or recklessly makes any statement which is false, commits an offence and is liable to a fine which does not exceed N$8 000 or to be imprisoned for a period which does not exceed two years or to both the fine and imprisonment.

CHAPTER 7

REMEDIES AND INVESTIGATIONS

PART 1

RELIEF FROM OPPRESSION

**Relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of company**

**198**

* 1. A shareholder or a director of a company may apply to a court for relief if -
     1. any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;
     2. the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant, or
     3. the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.
  2. Upon considering an application in terms of subsection (1), the court may make any interim or final order it thinks fit including -
     1. an order restraining the conduct complained of;
     2. an order appointing a liquidator, if the company appears to be insolvent;
     3. an order placing the company under supervision and commencing business rescue proceedings in terms of Chapter 11, if the court is satisfied that the circumstances set out in section 326(4)(a) apply;
     4. an order to regulate the company’s affairs by directing the company to amend its memorandum or articles of association or to create or amend a unanimous shareholder agreement;
     5. an order directing an issue or exchange of shares;
     6. an order -
        1. appointing directors in place of or in addition to all or any of the directors then in office; or
        2. declaring any person delinquent or under probation, as contemplated in section 446;
     7. an order directing the company or any other person to restore to a shareholder any part of the consideration that the shareholder paid for shares, or pay the equivalent value, with or without conditions;
     8. an order varying or setting aside a transaction or an agreement to which the company is a party and compensating the company or any other party to the transaction or agreement;
     9. an order requiring the company, within a time specified by the court, to produce to the court or an interested person, financial statements in a form required by this Act, or an accounting in any other form the court may determine;
     10. an order to pay compensation to an aggrieved person, subject to any other law entitling that person to compensation;
     11. an order directing rectification of the registers or other records of a company; or
     12. an order for the trial of any issue as determined by the court.
  3. If an order made under this section directs the amendment of the company’s articles of association -
     1. the directors must promptly file a Notice of Amendment to give effect to that order, in accordance with section 85; and
     2. no further amendment altering, limiting or negating the effect of the court order may be made to the articles of association, until a court orders otherwise.

PART 2

INQUIRY INTO MEMBERSHIP AND OWNERSHIP OF SHARES AND CONTROL OF COMPANY

**Power of Registrar to request information concerning shares and members**

**199**.

(1) The Registrar may by notice in writing require a company or external company to transmit to him or her within 14 days after the date of that notice particulars of the transfer of any share or shares and a list of persons for the time being members of the company and of all persons who ceased to be members as from a particular date.

(2) Any company or external company which fails to comply with any requirement of the Registrar under subsection (1) and every director or officer of that company who knowingly is a party to the failure, may be subject to a compliance notice and will be liable to pay a prescribed fine.

**Appointment and powers of inspectors to investigate financial interest in and control of company**

**200**.

(1) BIPA may -

(a) where it is reasonable to do so, appoint one or more inspectors to investigate and report to it on the membership of any company and otherwise with respect to that company for the purpose of determining the true persons who are or have been financially interested in the success or failure of the company or able to control or materially to influence the policy of the company;

(b) on an application complying with section 208 in respect of an application under that section, for an investigation with respect to particular shares or debt securities of a company, appoint an inspector to carry out that investigation.

(2) BIPA must, when appointing an inspector under this section, define the scope of the investigation to be carried out, whether in respect of the matters to be investigated or the period in respect of which the investigation is to be undertaken or otherwise, and may provide for an investigation to be confined to particular shares or debt securities.

(3) An application under subsection (1)(b) must not be refused unless BIPA is satisfied that the application is vexatious, and there must not be excluded from the scope of the investigation by an inspector appointed in pursuance of that application any matter which the applicant seeks to have included, except in so far as BIPA determines that it would be unreasonable for that matter to be investigated.

(4) The powers of an inspector do, subject to the terms of his or her appointment, extend to the investigation of any circumstances suggesting the existence of an arrangement or understanding which, though not legally binding, is or was observed or likely to be observed in practice and which is relevant to any matter to be investigated.

(5) Sections 210 insofar as it relates to the investigation of a subsidiary or holding company of the company under investigation, 211 insofar as it relates to the powers of an inspector and 212 insofar as it relates to submission of reports to BIPA do, with the necessary changes, apply with reference to any investigation under this section.

**Power to require information as to interest in shares or debt securities**

**201**.

(1) If it appears to BIPA that there is good reason to investigate any interest in shares or debt securities of a company, he or she may by written notice require -

(a) any director or officer of the company; or

(b) any person whom BIPA has reason to believe -

(i) to have or to have had any interest in those shares or debt securities; or

(ii) to be acting or to have acted in relation to those shares or debt securities as the trustee or agent or nominee of someone having any interest in the shares,

to furnish the Board in writing, within 21 days after the date of the notice, with any information which he or she has or can reasonably be expected to obtain as to any present or past interest in those shares or debt securities and the name and address of the interested person concerned and of any person who is acting or has acted on his or her behalf in relation to those shares or debt securities.

(2) For the purposes of this section, a person is deemed to have an interest in a share or debt security of a company if he or she has any right as against any member of or any holder of a debt security of the company in respect of dividends, interest or capital received from the company by that member or holder, or if he or she has any right to acquire or dispose of the share or debt security or any interest in the share or debt security or to vote in respect of the share or debt security or is able materially to influence the exercise of that voting right, or if his or her consent is necessary for the exercise of any of the rights of a member or any other person having an interest in the share or debt security, or if a member or any other person having an interest in the share or debt security can be required or is accustomed to exercise his or her rights in accordance with his or her instructions, or if he or she is a beneficiary, of whatever nature, in relation to that share or debt security.

(3) Any person who fails to give any information required of him or her under this section and which he or she is able to give or can reasonably obtain, or who in giving that information knowingly or recklessly makes any statement which is false in any material particular, commits an offence and is liable to a prescribed penalty

**Power to impose restrictions on shares or debt securities**

**202**.

(1) Where in connection with an investigation under section 205 or 206 it appears to BIPA that there is difficulty in finding out the relevant facts about any shares of a company, and that the difficulty is due wholly or mainly to the unwillingness of the persons concerned or any of them to assist in the investigation, BIPA may, by notice published in the *Gazette* and delivered to the company at its registered office, declare that the shares are, as from the date of publication of the notice in the *Gazette*, subject to the restrictions imposed by this section.

(2) BIPA may in like manner withdraw or amend the notice referred to in subsection (1).

(3) As long as any notice is in force -

(a) any transfer of the shares to which it relates or, in the case of unissued shares, any transfer of the right to be issued or any issue of the share, is void;

(b) voting rights are not exercisable in respect of those shares;

(c) further shares must not be issued in pursuance of any right attached to those shares or in pursuance of any offer made to the holder of the shares; and

(d) except in a winding-up, payment must not be made of any sums due from the company in respect of those shares, whether in respect of capital or otherwise.

(4) Where BIPA has by notice referred to in subsection (1) declared that shares are subject to the restrictions imposed by subsection (3), or refuses to withdraw or amend that notice, any person aggrieved by the notice may apply to the Tribunal, and the Tribunal may direct that the shares cease to be subject to those restrictions or to any one or more of them.

(5) Any notice of BIPA or order of the Tribunal directing that shares must cease to be subject to any of the restrictions referred to in subsection (3), which is expressed to be made with a view to permitting a transfer of those shares, may continue the restrictions referred to in paragraphs (c) and (d) of that subsection, either in whole or in part, in so far as they relate to any right acquired or offer made before the transfer.

(6) Any person who -

(a) exercises or purports to exercise any right to dispose of any shares which to his or her knowledge are subject to the restrictions mentioned in subsection (3) or of any right to be issued with those shares;

(b) votes in respect of the shares, referred to in paragraph (a) whether as holder or proxy, or appoints a proxy to vote in respect of the shares; or

(c) being the holder of any shares, fails to give notice of their being subject to restrictions to any person whom he or she does not know to be aware of that fact, but does know to be entitled, apart from those restrictions, to vote in respect of those shares, whether as holder or proxy,

commits an offence and is liable to a prescribed fine or to be imprisoned for a period which does not exceed two years or to both the fine and imprisonment.

(7) Where shares of any company are issued in contravention of the restrictions referred to in subsection (3), the company, and every director or officer who knowingly takes part in the contravention, commits an offence and is liable to a prescribed fine.

(8) This section applies in relation to debt securities as it applies in relation to shares.

PART 3

INVESTIGATION INTO AFFAIRS OF COMPANY

**Inspection of affairs of company on application of members**

**203**.

(1) BIPA may appoint one or more inspectors to investigate the affairs of a company and to report to BIPA in any manner which he or she may direct -

(a) in the case of a profit company, on the application of not less than 100 shareholders or of shareholders holding not less than one-twentieth of the shares issued; or

(b) in the case of a non-profit company, on the application of not less than one-tenth of the number of persons on the register of members, if any, or of the board.

(2) The application referred to in subsection (1) must be supported by any evidence which BIPA may require showing that the applicants have good reason for desiring an investigation, and BIPA may, before appointing an inspector on that application, require the applicants to give security to its satisfaction in an amount prescribed by Regulations or any amount which BIPA may determine towards the cost of the investigation.

(3) Before appointing an inspector under subsection (1), BIPA must, unless it is of the opinion that to do so would defeat the objects of this section, furnish in writing to the company concerned a statement setting out the substance of the complaint made and afford it a reasonable opportunity to reply.

**Investigation of affairs of company in other cases**

**204**.

(1) When a company by special resolution resolves or the Tribunal by order declares that the affairs of a company ought to be investigated, BIPA must appoint one or more inspectors to investigate the affairs of that company and to report to BIPA in any manner which it may direct.

(2) BIPA may appoint one or more inspectors to investigate the affairs of a company and to report to BIPA in any manner which it may direct, if it appears to BIPA that there are circumstances suggesting -

(a) that the business of the company is being conducted with intent to defraud its creditors or the creditors of any other person or otherwise for a fraudulent or an unlawful purpose or in a manner oppressive or unreasonably prejudicial or unjust or inequitable to any part of its members or that it was formed for any fraudulent or unlawful purpose;

(b) that persons concerned with its formation or the management of its affairs have in that connection committed any fraud, delict or other misconduct towards it or towards its members; or

(c) that its members have not been given all the information with respect to its affairs they might reasonably expect.

(3) Section 208(3) in so far as it relates to the furnishing of a statement of complaint by BIPA to a company does, with the necessary changes, apply in respect of an investigation under this section.

**Power of inspector to conduct investigation into affairs of related companies**

**205**.

An inspector appointed to investigate the affairs of a company may, if he or she considers it necessary for the purpose, with the approval of BIPA, also investigate the affairs of any other company or other body corporate which is or has at any relevant time been the first-mentioned company’s subsidiary or holding company or a subsidiary of its holding company and must in that event report on the affairs of that other company or other body corporate so far as the results of his or her investigation are in his or her opinion relevant to the investigation of the affairs of the first-mentioned company.

**Production of documents and evidence on investigation**

**206**.

(1) Any director, officer or agent of a company or other body corporate whose affairs are being investigated by an inspector under this Act, must at the request of that inspector produce all books and documents of or relating to the company or other body corporate, in his or her custody or under his or her control, and afford the inspector any assistance within his or her power in connection with the investigation as the inspector may require.

(2) An inspector may for the purpose of any investigation conducted by him or her -

(a) summon any director, officer, employee, member or agent of the company or other body corporate to appear before him or her at a time and place specified in the summons, to be questioned or to produce any book or document so specified;

(b) administer an oath to or accept an affirmation from any person appearing before him or her in pursuance of a summons, and question that person and require that person to produce any book or document;

(c) retain for examination any book or document produced to him or her in pursuance of a summons for a period not exceeding two months or for any further period or periods which BIPA may on good cause shown, permit.

(3) A summons for the attendance of any person before an inspector or for the production of any book or document may be in any form which the inspector may determine, must be signed by the inspector, and must be served in the same manner as a subpoena in a criminal case issued by a magistrate’s court.

(4) Any person duly summoned to appear before an inspector who, without lawful excuse or sufficient cause -

(a) fails to attend at the time and place specified in the summons or to remain in attendance until excused by the inspector from further attendance; or

(b) refuses, on being required to do so by the inspector, to take an oath or to affirm as a witness or refuses or fails to produce any book or document which he or she has been required to produce or to answer fully and satisfactorily to the best of his or her knowledge and belief all questions put to him or her by the inspector concerning the affairs of the company or other body corporate whose affairs are being investigated, is subject to a compliance notice and may be liable to pay a prescribed fee, but, in relation to the questioning of that person, or the production of any book or document, the law relating to privilege, as applicable to a witness subpoenaed to give evidence or to produce any book or document before a court of law, applies.

(5) If an inspector considers it necessary for the purposes of his or her investigation that a person whom he or she has no power to examine on oath should be so examined, the inspector may apply to the Tribunal for an order calling on that person to appear before it for examination and the Tribunal may order that person to attend before it to be examined on oath on any matter relevant to the investigation, and on that examination -

(a) the inspector may take part in the proceedings either personally or may be represented by a legal practitioner;

(b) the Tribunal may put any relevant questions to the person examined;

(c) the person examined must answer all questions which the Tribunal may put or allow to be put to him or her.

(6) The Court may allow the person who attends an examination pursuant to subsection (5) costs and any costs so allowed must be paid as part of the costs of the investigation.

(7) In this section -

(a) any reference to a director, officer, employee, member or agent of a company or other body corporate, includes a reference to a past director, officer, employee, member or agent of that company or other body corporate;

(b) any reference to an agent of a company or other body corporate, includes a reference to the bankers, legal practitioners and auditor of the company or other body corporate.

(8) Any person examined under this section may at his or her own cost employ a legal practitioner, who is at liberty to put to him or her any questions which the inspector or the Tribunal may deem just for the purpose of enabling him or her to explain or qualify any answers given by him or her.

**Report of inspector**

**207**.

(1) An inspector who may make interim reports to BIPA in regard to any investigation conducted by him or her, must make those reports if BIPA so directs, and must at the conclusion of the investigation make a final report to BIPA.

(2) Any report referred to in subsection (1) must be written or printed as BIPA may direct.

(3) The Board must direct BIPA -

(a) to send a copy of any report made by an inspector to the registered office of the company or other body corporate concerned;

(b) to furnish a copy of that report on request and on payment of any fee that may be prescribed, to any person who is a member of the company or of any other body corporate dealt with in the report or whose interests as a creditor of the company or that other body corporate appear to the Board to be affected;

(c) where the inspector is appointed under section 208, to furnish a copy of the report to the applicants concerned at their request; and

(d) where the inspector is appointed under section 209 in pursuance of an order of the Tribunal, to furnish a copy of the report to the Tribunal,

and may direct BIPA to cause any report to be printed and published.

**Proceedings on report of inspector**

**208**.

(1) If, in the case of any company or other body corporate liable to be wound up under this Act, it appears to BIPA from any report that it is expedient to do so because of any circumstance referred to in section 209(2)(a) or (b), BIPA may, unless the company or other body corporate is already being wound up by the Court, make an application to the Court for it to be so wound up, or an application for the order referred to in section 203 or both an application for an order that it be wound up and an application for the order referred to in that section, and the Court may make an appropriate order.

(2) If, from any report, it appears to the Board that proceedings ought, in the public interest, to be brought by any company or other body corporate dealt with by the report for the recovery of damages in respect of any fraud, delict or other misconduct in connection with the promotion or formation of that company or other body corporate or the management of its affairs, or for the recovery of any property of the company or other body corporate which has been misapplied or wrongfully retained, the Board may bring proceedings for that purpose in the name of the company or other body corporate.

(3) The Board must indemnify the company or other body corporate against any costs or expenses incurred by it in or in connection with any proceedings brought under subsection (2).

PART 4

MATTERS INCIDENTAL TO INVESTIGATIONS

**Expenses of and incidental to investigation of affairs of company**

**209**.

(1) BIPA must in the first instance defray the expenses of and incidental to an investigation under section 208 or 209, but the following persons are, to the extent stated, liable to repay BIPA -

(a) any person convicted of an offence disclosed by the investigation or ordered to pay damages or to restore any property in proceedings instituted under section 213(2), is liable for an amount, if any, determined by the Court when convicting that person or ordering the payment of damages or the restoration of property;

(b) in any case where no proceedings are instituted in respect of any offence and no order for the payment of damages or the restoration of property is made -

(i) any body corporate whose affairs were the subject of the investigation; and

(ii) in the case of an investigation under section 208, the applicants concerned, are liable for any amount which the Board may in each case determine;

(c) any body corporate in whose name proceedings are instituted under section 213(2), is liable for the balance, if any, of any expenditure not recovered under paragraph (a), but not for an amount exceeding the amount or value of any property recovered in those proceedings.

(2) The amount determined under subsection (1)(a) may be the full amount of the expenditure in question or any lesser amount or proportion which the Court considers just.

(3) Subsection (1)(b)(i) does not apply in any case where it appears from the relevant report that there was no substance in the allegations which gave rise to the investigation to which the report relates.

(4) Any amount for which a body corporate may be liable because of subsection (1) constitutes a first charge on the amount or value of any property recovered in proceedings referred to in subsection (1)(c).

(5) An inspector may, if he or she considers it proper, and must, if BIPA so directs, include in his or her report on any investigation a recommendation as to the amount, if any, which in its opinion should, under subsection (1)(b), be ordered to be paid by any body corporate or the applicants referred to in that subsection.

(6) For the purposes of this section any costs or expenses incurred by BIPA in or in connection with proceedings instituted by him or her under section 213(2), including any amount which may become payable by him or her in terms of subsection (3) of that section, must be regarded as part of the expenditure incurred by him or her in respect of the investigation giving rise to the proceedings.

**Saving in respect of legal practitioners and bankers**

**210**.

(1) Nothing in this Act is to be construed as requiring the disclosure to BIPA or to an inspector -

(a) by a legal practitioner of any privileged communication made to him or her in his or her capacity as such, except as respects the name and address of his or her client; or

(b) by a banker of any information as to the affairs of any of his or her customers except -

(i) a company or its nominee and any other body corporate whose affairs are being investigated; and

(ii) any person having an interest in shares held in the name of the banker’s nominee.

**Report of inspectors to be evidence**

**211.**

A copy of the report of any inspector appointed under this Act is admissible in any legal proceedings as evidence of the opinion of the inspector in relation to any matter contained in the report.

PART 5

PROCEEDINGS ON BEHALF OF COMPANIES

**Initiation of proceedings on behalf of company by member (derivative action proceedings)**

**212**.

(1) For the purposes of this section, section 218 and 219, “independent investigator” means a person who investigates a complaint by a member as referred to in this section and otherwise does not participate in legal proceedings on behalf of a company.

(2) Where a company has suffered damages or loss or has been deprived of any benefit as a result of any wrong, breach of trust or breach of faith committed by any director or officer of that company or by any past director or officer while a director or officer of that company and the company has not instituted proceedings for the recovery of the damages, loss or benefit, any member of the company may initiate proceedings on behalf of the company against that director or officer or past director or officer in the manner provided for by this section notwithstanding that the company has in any way ratified or condoned that wrong, breach of trust or breach of faith or any act or omission relating to the breach or wrong.

(3) The member referred to in subsection (2) must, before initiating any proceedings under subsection (2), serve a written notice on the company calling on the company to institute those proceedings within one month from the date of service of the notice and stating that if the company fails to do so, an application to the Court under subsection (4) will be made.

(4) If the company fails to institute proceedings within the period contemplated in subsection (3), the member may make application to the Tribunal for an order appointing an independent investigator for the purpose of investigating the member’s demand, and report to the board on -

* + - 1. any facts or circumstances -
         1. that may gave rise to a cause of action contemplated in the demand; or
         2. that may relate to any proceedings contemplated in the demand;
      2. the probable costs that would be incurred if the company pursued any such proceedings or continued any such proceedings;
      3. whether it appears to be in the best interests of the company to pursue any such cause of action or continue any such proceedings.

1. Within 60 business days after being served with the demand, or within a longer time as a court, on application by the company, may allow, the company may either –
2. initiate or continue legal proceedings, or take related legal steps for the recovery of the damages, loss or benefit, as contemplated in subsection (2); or
3. serve a notice on the person who made the demand, refusing to comply with it.

(6) On receipt of the notice from the company, as contemplated in subsection (5) the member may apply to the Court, which, if it is satisfied -

(a) that the company has not instituted the proceedings;

(b) that there are sufficient grounds for the proceedings; and

(c) that an investigation into the grounds and into the desirability of the institution of those proceedings is justified,

grant a provisional order to the person who served a demand on the company to bring or continue proceedings in the name and on behalf of the company.

(6) The Court may on the return day discharge the provisional order referred to in subsection (6) or confirm the leave for the member to bring or continue proceedings in the name and on behalf of the company and issue directions as to the institution of proceedings in the name of the company and the conduct of the proceedings on behalf of the company by the member, which it considers necessary and may order that any resolution ratifying or condoning the wrong, breach of trust or breach of faith or any act or omission is of no force or effect.

**Powers of independent investigator**

**213**.

(1) An independent investigator appointed by the Tribunal under section 217(4) has, in addition to the powers expressly granted by section 217(4)(a) and (b) in connection with the investigation of the member’s demand, the same powers as an inspector under section 211, and that section does, subject to subsection (2), with the necessary changes, apply to the independent investigator and to the directors, officers, employees, members and agents of the company concerned.

(2) If the disclosure of any information about the affairs of a company to an independent investigator would, in the opinion of the company, be harmful to the interests of the company, the Court may on an application for relief by that company, if it is satisfied that the information is not relevant to the investigation, grant that relief.

**Security for costs by applicant for appointment of an independent investigator**

**214**.

The Court may, if it appears that there is reason to believe that the applicant in respect of an application under section 217(2) will be unable to pay the costs of the respondent company if successful in its opposition, require sufficient security to be given for those costs and costs of the independent investigator before a provisional order is made.

PART 6

DISSENTING SHAREHOLDERS’ APPRAISAL RIGHTS

**Exemptions**

**215**.

This Part does not apply in any circumstances relating to a transaction, agreement or offer pursuant to a business rescue plan that was approved by shareholders of a company, in terms of section 342.

**Trigger events**

**216**.

(1) If a company has given notice to shareholders of a meeting to consider adopting a resolution to—

(a) amend its Memorandum or articles of association by altering the preferences, rights, limitations or other terms of any class of its shares in any manner materially adverse to the rights or interests of holders of that class of shares, as contemplated in section 80; or

(b) enter into a transaction contemplated in section 281, 282, or 283,

that notice must include a statement informing shareholders of their rights under this Part.

**Notice by dissenting shareholder**

**217**.

At any time before a resolution referred to in section 216 is to be voted on, a dissenting shareholder may give the company a written notice objecting to the resolution.

**Company Notice**

**218**.

Within 10 business days after a company has adopted a resolution contemplated in section 216, the company must send a notice that the resolution has been adopted to each shareholder who—

(a) gave the company a written notice of objection in terms of section 217; and

(b)has neither—

(i) withdrawn that notice; or

(ii) voted in support of the resolution.

**A shareholder’s demand**

**219**.

(1) A shareholder may demand that the company pay the shareholder the fair value for all of the shares of the company held by that person if—

(a) the shareholder—

(i) sent the company a notice of objection, subject to section 220; and

(ii) in the case of an amendment to the company’s Memorandum or articles of association, holds shares of a class that is materially and adversely affected by the amendment;

(b) the company has adopted the resolution contemplated in section 216; and

(2) The shareholder—

(a) voted against that resolution; and

(b) has complied with all of the procedural requirements of this section.

**Limitations to Shareholder’s demand**

**220**.

The requirement of section 219(1)(a)(i) does not apply if the company failed to give notice of the meeting, or failed to include in that notice a statement of the shareholders rights under this section.

**Process for making the shareholder’s demand**

**221**.

A shareholder who satisfies the requirements of section 219 may make a demand contemplated in that section by delivering a written notice to the company within—

(a) 20 business days after receiving a notice under section 218; or

(b) if the shareholder does not receive a notice under section 218, within 20 business days after learning that the resolution has been adopted.

**Delivery of the Shareholder’s demand to BIPA**

**222**.

A demand delivered in terms of sections 219 to 221 must also be delivered to BIPA, and must state—

(a) the shareholder’s name and address;

(b) the number and class of shares in respect of which the shareholder seeks payment; and

(c) a demand for payment of the fair value of those shares.

**Waiver of any further rights in respect of shares**

**223.**

A shareholder who has sent a demand in terms of sections 219 - 221 has no further rights in respect of those shares, other than to be paid their fair value, unless—

(a) the shareholder withdraws that demand before the company makes an offer under section 225, or allows an offer made by the company to lapse, as contemplated in subsection 226;

(b) the company fails to make an offer in accordance with 225 and the shareholder withdraws the demand; or

(c) the company, by a subsequent special resolution, revokes the adopted resolution that gave rise to the shareholder’s rights under this section.

**Re-institution of Shareholder’s rights**

**224.**

If any of the events contemplated in section 223 occur, all of the shareholder’s rights in respect of the shares are reinstated without interruption.

**Company’s offer to pay fair value of the relevant shares**

**225**.

Within five business days after the later of—

*(a)* the day on which the action approved by the resolution is effective;

*(b)* the last day for the receipt of demands in terms of section 221; or

*(c)* the day the company received a demand as contemplated in section 219, if applicable, the company must send to each shareholder who has sent such a demand a written offer to pay an amount considered by the company’s directors to be the fair value of the relevant shares, subject to 231, accompanied by a statement showing how that value was determined.

**Terms and lapsing of the company’s offer**

**226**.

Every offer made under section 225—

(a) in respect of shares of the same class or series must be on the same terms; and

(b) lapses if it has not been accepted within 30 business days after it was made.

**Acceptance of offer by shareholder**

**227**.

If a shareholder accepts an offer made under subsection 225—

(a) the shareholder must either in the case of—

(i) shares evidenced by certificates, tender the relevant share certificates to the company or the company’s transfer agent; or

(ii) uncertificated shares, take the steps required in terms of section 111 to direct the transfer of those shares to the company or the company’s transfer agent; and

(b) the company must pay that shareholder the agreed amount within 10 business days after the shareholder accepted the offer and—

(i) tendered the share certificates; or

(ii) directed the transfer to the company of uncertificated shares.

**Application to Companies Tribunal to determine a fair value in respect of shares**

**228**.

A shareholder who has made a demand in terms of 219 to 221 may apply to the Tribunal to determine a fair value in respect of the shares that were the subject of that demand, and an order requiring the company to pay the shareholder the fair value so determined, if the company has—

(a) failed to make an offer under section 225; or

(b) made an offer that the shareholder considers to be inadequate, and that offer has not lapsed.

**Application procedure to the Companies Tribunal**

**229**.

On an application to the Tribunal under section 228 —

(a) all dissenting shareholders who have not accepted an offer from the company as at the date of the application must be joined as parties and are bound by the decision of the Tribunal;

(b) the company must notify each affected dissenting shareholder of the date, place and consequences of the application and of their right to participate in the Tribunal proceedings; and

(c) the Tribunal—

(i) may determine whether any other person is a dissenting shareholder who should be joined as a party;

(ii) must determine a fair value in respect of the shares of all dissenting shareholders, subject to section 231;

(iii) in its discretion may—

(aa) appoint one or more appraisers to assist it in determining the fair value in respect of the shares; or

(bb) allow a reasonable rate of interest on the amount payable to each dissenting shareholder from the date the action approved by the resolution is effective, until the date of payment;

(iv) may make an appropriate order of costs, having regard to any offer made by the company, and the final determination of the fair value by the Tribunal; and

(v) must make an order requiring—

(aa) the dissenting shareholders to either withdraw their respective demands or to comply with section 230(a); and

(bb) the company to pay the fair value in respect of their shares to each dissenting shareholder who complies with section 230(a), subject to any conditions the Tribunal considers necessary to ensure that the company fulfils its obligations under this Part.

**Shareholder’s acceptance of the offer before an order by the Companies Tribunal**

**230**.

At any time before the Tribunal has made an order contemplated in section 229, a dissenting shareholder may accept the offer made by the company in terms of section 225, in which case––

(a) that shareholder must comply with the requirements of section 228(a); and

(b) the company must comply with the requirements of section 228(b).

**The date for the determination of the fair value in respect of shares**

**231**.

The fair value in respect of any shares must be determined as at the date on which, and time immediately before, the company adopted the resolution that gave rise to a shareholder’s rights under this Part.

**Failure to satisfy the equity solvency test as a result of the order of the Companies Tribunal**

**232**.

If there are reasonable grounds to believe that compliance by a company with 228(b), or with a Tribunal’s order in terms of section 229, would result in the company being unable to pays its debts as they fall due and payable for the foreseeable future—

(a) the company may apply to a court for an order varying the company’s obligations in terms of the relevant section; and

(b) the court may make an order that—

(i) is just and equitable, having regard to the financial circumstances of the company; and

(ii) ensures that the person to whom the company owes money in terms of this Part is paid at the earliest possible date compatible with the company satisfying its other financial obligations as they fall due and payable.

**The effect of amalgamation or merger on the shareholder’s appraisal rights**

**233**.

If the resolution that gave rise to a shareholder’s rights under this Part authorised the company to amalgamate or merge with one or more other companies, such that the company whose shares are the subject of a demand in terms of this Part has ceased to exist, the obligations of that company under this section are obligations of the successor to that company resulting from the amalgamation or merger.

**Payment by Company in terms of this Part not a distribution**

**234**.

The making of a demand, tendering of shares and payment by a company to a shareholder in terms of this Part do not constitute a distribution by the company, or an acquisition of its shares by the company within the meaning of section 106, and therefore are not subject to—

(a) the provisions of that section; or

(b) the application by the company of the equity solvency test set out in section 115.

**No obligation to make a comparable offer**

**235**.

Except to the extent––

(a) expressly provided in this section; or

(b) that the Panel rules otherwise in a particular case,

a payment by a company to a shareholder in terms of this section does not obligate any person to make a comparable offer under section 294 to any other person.

PART 7

VOLUNTARY RESOLUTION OF DISPUTES

**Alternative dispute resolution**

**236**.

(1) As an alternative to applying for relief to a court, or filing a complaint with the BIPA in terms of Part 2 of Chapter 7, a person who would be entitled to apply for relief, or file a complaint in terms of this Act, may refer a matter that could be the subject of such an application or complaint for resolution by mediation, conciliation or arbitration to—

*(a)* the Companies Tribunal;

*(b)* an accredited entity, as defined in subsection (3); or

*(c)* any other person.

(2) If the Companies Tribunal, or an accredited entity, to whom a matter is referred for alternative dispute resolution concludes that either party to the conciliation, mediation or arbitration is not participating in that process in good faith, or that there is no reasonable probability of the parties resolving their dispute through that process, the Companies Tribunal or accredited entity must issue a certificate in the prescribed form stating that the process has failed.

(3) In this section, **‘‘accredited entity’’** means—

*(a)* a juristic person or an association of persons accredited by BIPA in terms of subsection (4); or

*(b)* an organ of state, or entity established by or in terms of a public regulation that—

(i) is mandated, among other things, to perform mediation, conciliation or arbitration; and

(ii) has been designated by the Minister in terms of subsection (5) as an accredited entity for the purposes of this Part.

(4) For the purposes of this Part, BIPA—

*(a)* may accredit, with or without conditions, a juristic person or an association that—

(i) functions predominantly to provide conciliation, mediation or arbitration services;

(ii) has the demonstrated capacity to perform such services within the context of company law; and

(iii) satisfies the prescribed requirements for accreditation;

*(b)* must monitor the effectiveness of any accredited person or an association relative to the purposes and policies of this Act; and

*(c)* may—

(i) reasonably require any person or association accredited by it to provide information necessary for the purpose of monitoring in terms of paragraph *(b)*; and

(ii) with reasonable notice, withdraw any accreditation granted by it in terms of this section if the person or association no longer satisfies the criteria set out in paragraph *(a)*.

(5) The Minister, after consulting BIPA—

*(a)* may designate any organ of state or other entity contemplated in subsection (3)*(b)* as an accredited entity for the purposes of this Part; and

*(b)* must prescribe criteria for BIPA to follow in assessing whether an applicant for accreditation in terms of subsection (4) meets the requirements of this section.

**Dispute resolution may result in consent order**

**237.**

(1) If the Companies Tribunal, or an entity accredited in terms of section 241, has resolved, or assisted parties in resolving, a dispute in terms of this Part the Tribunal or accredited entity may—

(a) record the resolution of that dispute in the form of an order; and

(b) if the parties to the dispute consent to that order, submit it to a court to be confirmed as a consent order, in terms of its rules.

(2) After hearing an application for a consent order, the court may—

(a) make the order as agreed and proposed in the application;

(b) indicate any changes that must be made to the draft order before it will be made an order of the court; or

(c) refuse to make the order.

(3) A consent order confirmed in terms of subsection (2)—

(a) may include an award of damages; and

(b) does not preclude a person applying for an award of civil damages, unless the consent order includes an award of damages to that person.

(4) A court hearing any proceedings concerning a dispute arising out of a consent order may order the proceedings closed to the public if it is the interest of the confidentiality of the parties to the consent order to do so.

CHAPTER 8

ACCOUNTABILITY AND TRANSPARENCY

PART 1

COMPANY RECORDS

**Form and standards for records of companies**

**238**.

(1) Any documents, accounts, books, writing, records or other information that a company is required to keep in terms of this Act or any other public regulation must be kept—

(a) in written form, or other form or manner that allows that information to be converted into written form within a reasonable time; and

(b) for a period of seven years, or any longer period of time specified in any other applicable public regulation, subject to subsection (2).

(2) If a company has existed for a shorter time than contemplated in subsection (1)(b), the company is required to retain records for that shorter time.

(3) Every company must maintain—

(a) a copy of its Memorandum and Articles of Association, and any amendments or alterations thereto;

(b) a record of its directors, including—

(i) all the information required in terms of subsection (5) in respect of each current director at any particular time; and

(ii) with respect to each past director, the information required in terms of sub-paragraph (i), which must be retained for seven years after the past director retired from the company;

(c) copies of all—

(i) reports presented at an annual general meeting of the company, for a period of seven years after the date of any such meeting;

(ii) annual financial statements required by this Act, for seven years after the date on which each such particular statements were issued; and

(iii) accounting records required by this Act, for the current financial year and for the previous seven completed financial years of the company;

(d) notice and minutes of all shareholders meetings, including—

(i) all resolutions adopted by them; and

(ii) any document that was made available by the company to the holders of

securities in relation to each such resolution,

for seven years after the date each such resolution was adopted;

(e) copies of any written communications sent generally by the company to all holders of any class of the company’s securities, for a period of seven years after the date on which each such communication was issued; and

(f) minutes of all meetings and resolutions of directors, or directors’ committees, or the audit committee, if any, for a period of seven years after the date—

(i) of each such meeting; or

(ii) on which each such resolution was adopted.

(4) In addition to the requirements of subsection (3), every company must maintain—

(a) a securities register or its equivalent, as required by section 111, in the case of a profit company, or a member’s register in the case of a non-profit company that has members; and

(b) the records required in terms of section 279, if that section applies to the Company.

(5) A company’s record of directors must include, in respect of each director, that person’s—

(a) full name, and any former names;

(b) identity number or, if the person does not have an identity number, the person’s date of birth;

(c) nationality and passport number, if the person is not a Namibian;

(d) occupation;

(e) date of their most recent election or appointment as director of the company;

(f) name and registration number of every other company or foreign company of which the person is a director, and in the case of a foreign company, the nationality of that company; and

(g) any other prescribed information.

(6) To protect personal privacy, the Minister, by notice in the *Gazette*, may exempt from the application of subsection (5)*(a)* categories of names as formerly used by any person—

(a) before attaining majority, or by persons who have been adopted, married, divorced or widowed; or

(b) in other circumstances prescribed by the Minister.

**Location of records of companies**

**239**.

(1) The records referred to in section 242 must be accessible at or from the company’s registered office or another location, or other locations, within the Republic.

(2) A company must file a notice, setting out the location or locations at which any particular records referred to in section 242 are kept or from which they are accessible if those records—

(a) are not kept at or made accessible from the company’s registered office, as contemplated in subsection (1); or

(b) are moved from one location to another.

**Access to records of companies**

**240**.

(1) A person who holds or has a beneficial interest in any securities issued by a profit company-, or who is a member of a non-profit company, has a right to inspect and copy, without any charge for any such inspection or upon payment of no more than the prescribed maximum charge for any such copy, the information contained in the following records of the company:

(a) the company’s Memorandum or Articles of Association and any amendments thereto;

(b) the records in respect of the company’s directors, as mentioned in section 242(3)(b)

(c) the reports to annual meetings, and annual financial statements, as mentioned in section 242(3)(c)(i) and (ii);

(d) the notices and minutes of annual meetings, and communications mentioned in section 242(3)(d) and (e), but the reference in section 242(3)(d) to shareholders meetings, and the reference in section 242(3)(e) to communications sent to holders of a company’s securities, must be regarded in the case of a non-profit company as referring to a meeting of members, or communication to members, respectively; and

(e) the securities register of a profit company, or the members register of a non-profit company that has members, as mentioned in section 242(4).

(2) A person not contemplated in subsection (1) has a right to inspect or copy the securities register of a profit company, or the members register of a non-profit company that has members, or the register of directors of a company, upon payment of an amount not exceeding the prescribed maximum fee for any such inspection.

(3) In addition to the information rights set out in subsections (1) and (2), the Memorandum or Articles of Association of a company may establish additional information rights of any person, with respect to any information pertaining to the company, but no such right may negate or diminish any mandatory protection of any record required by or in terms of Part 3 of the Access to Information Act, 2022 (Act No. 8 of 2022).

(4) A person may exercise the rights set out in subsection (1) or (2), or contemplated in subsection (3)––

(a) for a reasonable period during business hours;

(b) by direct request made to a company in the prescribed manner, either in person or through a legal practitioner or other personal representative designated in writing; and

(c) in accordance with the Access to Information Act, 2022 (Act No. 8 of 2022).

(5) Where a company receives a request in terms of subsection (4)(b) it must within 14 business days comply with the request by providing the opportunity to inspect or copy the register concerned to the person making such request.

(6) The register of members and register of directors of a company, must, during business hours for reasonable periods be open to inspection by any member, free of charge and by any other person, upon payment for each inspection of an amount not more than NAD100,00.

(7) The rights of access to information set out in this section are in addition to, and not in substitution for, any rights a person may have to access information in terms of—

(a) chapter 3 of the Constitution;

(b) the Access to Information Act, 2022 (Act No. 8 of 2022); or

(c) any other public regulation.

(8) The Minister may make regulations respecting the exercise of the rights set out in this section.

(9) It is an offence for a company to—

(a) fail to accommodate any reasonable request for access, or to unreasonably refuse access, to any record that a person has a right to inspect or copy in terms of this section or section 249; or

(b) to otherwise impede, interfere with, or attempt to frustrate, the reasonable exercise by any person of the rights set out in this section or section 249.

**Financial year of companies**

**241**.

(1) A company must have a financial year, ending on a date set out in the company’s Memorandum of Association, subject to any change made in terms of subsection (4).

(2) The first financial year of a company—

(a) begins on the date that the incorporation of the company is registered, as stated in its registration certificate; and

(b) ends on the date set out in the Memorandum of Association, which may not be more than 15 months after the date contemplated in paragraph (a).

(3) The second and each subsequent financial year of a company—

(a) begins when the preceding financial year ends; and

(b) ends on the first anniversary of the date contemplated in paragraph (a), unless the financial year end has been changed as contemplated in subsection (4).

(4) The board of a company may change its financial year end at any time, by filing a notice of that change, but—

(a) it may not do so more than once during any financial year;

(b) the newly established financial year end must be later than the date on which the notice is filed; and

(c) the date as changed may not result in a financial year ending more than 15 months after the end of the preceding financial year.

(5) Despite subsection (2)(b)or (3), the financial year of a company that has changed the date contemplated in subsection (1) ends on the date as changed.

(7) The financial year of the company is its annual accounting period.

**Accounting records**

**242**.

(1) Every company must keep, in the official language, accounting records which are necessary fairly to present the state of affairs and business of the company and to explain the transactions and financial position of the trade or business of the company, including -

(a) records showing the assets and liabilities of the company;

(b) a register of fixed assets showing the respective dates of acquisition and the cost, depreciation, if any, the date of any revaluation and the revalued amount, the respective dates of any disposals and the consideration received;

(c) records containing entries from day to day in sufficient detail of all cash received and paid out and of the matters in respect of which receipts and payments take place;

(d) where the trade or business of the company has involved dealings in goods, records of all goods sold and purchased and, except in the case of ordinary retail trade, records showing the goods and the buyers and the sellers in sufficient detail to enable the nature of those goods and those buyers and sellers to be identified; and

(e) statements of the annual stocktaking.

(2) A company must keep accurate and complete accounting records in the official language of the Republic—

(a) as necessary to enable the company to satisfy its obligations in terms of this Act or any other law with respect to the preparation of financial statements; and

(b) including any prescribed accounting records, which must be kept in the prescribed manner and form.

(3) A company’s accounting records must be kept at, or be accessible from, the registered office of the company.

(4) It is an offence for—

(a) a company—

(i) with an intention to deceive or mislead any person—

(aa) to fail to keep accurate or complete accounting records;

(bb) to keep records other than in the prescribed manner and form, if any; or

(ii) to falsify any of its accounting records, or permit any person to do so; or

(b) any person to falsify a company’s accounting records.

(5) For greater certainty, BIPA may issue a compliance notice, as contemplated in section 13, to a company in respect of any failure by the company to comply with the requirements of this section, irrespective whether that failure constitutes an offence in terms of subsection (3).

**Financial statements**

**243**.

(1) If a company provides any financial statements, including any annual financial statements, to any person for any reason, those statements must—

(a) satisfy the financial reporting standards as to form and content, if any such standards are prescribed;

(b) present fairly the state of affairs and business of the company, and explain the transactions and financial position of the business of the company;

(c) show the company’s assets, liabilities and equity, as well as its income and expenses, and any other prescribed information;

(d) set out the date on which the statements were published, and the accounting period to which the statements apply; and

(e) bear, on the first page of the statements, a prominent notice indicating—

(i) whether the statements—

(aa) have been audited in compliance with any applicable requirements of this Act;

(bb) if not audited, have been independently reviewed in compliance with any applicable requirements of this Act; or

(cc) have not been audited or independently reviewed; and

(ii) the name, and professional designation, if any, of the individual who prepared, or supervised the preparation of, those statements.

(2) Any financial statements prepared by a company, including any annual financial statements of a company as contemplated in section 248, must not be—

(a) false or misleading in any material respect; or

(b) incomplete in any material particular, subject only to subsection (3).

(3) A company may provide any person with a summary of any particular financial statements, but—

(a) any such summary must comply with any prescribed requirements; and

(b) the first page of the summary must bear a prominent notice—

(i) stating that it is a summary of particular financial statements prepared by the company, and setting out the date of those statements;

(ii) stating whether the financial statements that it summarises have been audited, independently reviewed, or are unaudited, as contemplated in subsection (1)*(e)*;

(iii) stating the name, and professional designation, if any, of the individual who prepared, or supervised the preparation of, the financial statements that it summarises; and

(iv) setting out the steps required to obtain a copy of the financial statements that it summarises.

(4) Subject to subsection (5), the Minister, after consulting the Accountants’ and Auditors’ Regulatory Authority of Namibia, may make regulations prescribing—

(a) financial reporting standards contemplated in this Part; or

(b) form and content requirements for summaries contemplated in subsection (3).

(5) Any regulations contemplated in subsection (4)—

(a) must promote sound and consistent accounting practices;

(b) in the case of financial reporting standards for public companies, must be in accordance with the standards prescribed by the Accountants’ and Auditors’ Regulatory Authority of Namibia, in respect of such companies; and

(c) may establish different standards applicable to—

(i) profit and non-profit companies; and

(ii) different categories of profit companies.

(6) Subject to subsection (7), a person is guilty of an offence if the person is a party to the preparation, approval, dissemination or publication of—

(a) any financial statements, including any annual financial statements contemplated

in section 248, knowing that those statements—

(i) fail in a material way to comply with the requirements of subsection (1); or

(ii) are materially false or misleading, as contemplated in subsection (2); or

(b) a summary of any financial statements, knowing that—

(i) the statements that it summarises do not comply with the requirements of subsection (1), or are materially false or misleading, as contemplated in subsection (2); or

(ii) the summary does not comply with the requirements of subsection (3), or is materially false or misleading.

(7) For the purposes of subsection (6), a person is a party to the preparation of a document contemplated in that subsection if—

(a) the document includes or is otherwise based on a scheme, structure or form of words or numbers devised, prepared or recommended by that person; and

(b) the scheme, structure or form of words is of such a nature that the person knew, or ought reasonably to have known, that its inclusion or other use in connection with the preparation of the document would cause it to be false or misleading.

**Annual financial statements of companies**

**244**.

(1) Each year, a company must prepare annual financial statements within six months after the end of its financial year, or such shorter period as may be appropriate to provide the required notice of an annual general meeting in terms of section 61(7).

(2) The annual financial statements must—

(a) be audited, in the case of a public company; or

(b) in the case of any private company or non-profit company—

(i) be audited, if so required by the regulations made in terms of subsection

(7) taking into account whether it is desirable in the public interest, having regard to the economic or social significance of the company, as indicated by any relevant factors, including—

(aa) its annual turnover;

(bb) the size of its workforce; or

(cc) the nature and extent of its activities; or

(ii) be either—

(aa) audited voluntarily if the company’s Articles of Association, or a shareholders resolution, so requires or if the Company’s board has so determined; or

(bb) independently reviewed in a manner that satisfies the regulations made in terms of subsection (7), subject to subsection (2A)

(2A) If, with respect to a particular company, every person who is a holder of, or has a beneficial interest in, any securities issued by that company is also a director of the company, that company is exempt from the requirements in this section to have its annual financial statements audited or independently reviewed, but this exemption—

(a) does not apply to the company if it falls into a class of company that is required to have its annual financial statement audited in terms of the regulations contemplated in subsection (7)(a); and

(b) does not relieve the company of any requirement to have its financial statements audited or reviewed in terms of another law, or in terms of any agreement to which the company is a party.

(3) The annual financial statements of a company must—

(a) include an auditor’s report, if the statements are audited;

(b) include a report by the directors with respect to the state of affairs, the business and profit or loss of the company, or of the group of companies, if the company is part of a group, including—

(i) any matter material for the shareholders to appreciate the company’s state of affairs; and

(ii) any prescribed information;

(c) be approved by the board and signed by an authorised director; and

(d) be presented to the first shareholders meeting after the statements have been approved by the board.

(4) The annual financial statements of each company that is required in terms of this Act to have its annual financial statements audited, must include particulars showing—

(a) the remuneration, as defined in subsection (6), and benefits received by each director, or individual holding any prescribed office in the company;

(b) the amount of—

(i) any pensions paid by the company to or receivable by current or past directors or individuals who hold or have held any prescribed office in the company;

(ii) any amount paid or payable by the company to a pension scheme with respect to current or past directors or individuals who hold or have held any prescribed office in the company;

(c) the amount of any compensation paid in respect of loss of office to current or past directors or individuals who hold or have held any prescribed office in the company;

(d) the number and class of any securities issued to a director or person holding any prescribed office in the company, or to any person related to any of them, and the consideration received by the company for those securities; and

(e) details of service contracts of current directors and individuals who hold any prescribed office in the company.

(5) The information to be disclosed under subsection (4) must satisfy the prescribed standards, and must show the amount of any remuneration or benefits paid to or receivable by persons in respect of—

(a) services rendered as directors or prescribed officers of the company; or

(b) services rendered while being directors or prescribed officers of the company—

(i) as directors or prescribed officers of any other company within the same group of companies; or

(ii) otherwise in connection with the carrying on of the affairs of the company or any other company within the same group of companies.

(6) For the purposes of subsections (4) and (5), ‘remuneration’ includes—

(a) fees paid to directors for services rendered by them to or on behalf of the company, including any amount paid to a person in respect of the person’s accepting the office of director;

(b) salary, bonuses and performance-related payments;

(c) expense allowances, to the extent that the director is not required to account for the allowance;

(d) contributions paid under any pension scheme not otherwise required to be

disclosed in terms of subsection (4)(b);

(e) the value of any option or right given directly or indirectly to a director, past director or future director, or person related to any of them, as contemplated in section 103;

(f) financial assistance to a director, past director or future director, or person related to any of them, for the subscription of options or securities, or the purchase of securities, as contemplated in section 105; and

(g) with respect to any loan or other financial assistance by the company to a director, past director or future director, or a person related to any of them, or any loan made by a third party to any such person, as contemplated in section 106, if the company is a guarantor of that loan, the value of—

(i) any interest deferred, waived or forgiven; or

(ii) the difference in value between—

(aa) the interest that would reasonably be charged in comparable circumstances at fair market rates in an arm’s length transaction; and

(bb) the interest actually charged to the borrower, if less.

(7) The Minister may make regulations, including different requirements for different categories of companies, prescribing—

(a) the categories of any profit or non-profit companies that are required to have their respective annual financial statements audited, as contemplated in subsection (2)(b)(i); and

(b) the manner, form and procedures for the conduct of an independent review under subsection (2)*(b)*(ii)*(bb)*, as well as the professional qualifications, if any, and duties of persons who may conduct such reviews and the accreditation of professions whose members may conduct such reviews.

(8) Despite section 1 of the Accountants’ and Auditors’ Act, an independent review of a company’s annual financial statements required by this section does not constitute an audit within the meaning of that Act.

**Access to financial statements and related information**

**245**.

(1) In addition to the rights set out in section 244, a person who holds or has a beneficial interest in any securities issued by a company, is entitled—

(a) without demand to receive a notice of the publication of any annual financial statements of the company required by this Act, setting out the steps required to obtain a copy of those statements; and

(b) on demand to receive without charge one copy of any annual financial statements of the company required by this Act.

(2) If a judgment creditor of a company has been informed, by a person whose duty it is to execute the judgment, that there appears to be insufficient disposable property to satisfy that judgment, the judgment creditor is entitled within five business days after making a demand, to receive without charge, one copy of the most recent annual financial statements of the company.

(3) Trade unions must, through BIPA and under conditions as determined by BIPA, be given access to company financial statements for purposes of initiating a business rescue process.

(4) It is an offence for a company to—

(a) fail to accommodate any reasonable request for access, or to unreasonably refuse access, to any record that a person has a right to inspect or copy in terms of this section; or

(b) otherwise impede, interfere with, or attempt to frustrate the reasonable exercise by any person of the rights set out in this section.

**Use of names and registration numbers of companies**

**246**.

(1) A company or external company must—

(a) provide its full registered name or registration number to any person on demand; and

(b) not misstate its name or registration number in a manner likely to mislead or deceive any person.

(2) If BIPA has issued to a company a registration certificate with an interim name, as contemplated in section 66(1)*(b)*, the company must use its interim name, until its name has been amended.

(3) A person must not—

(a) use the name or registration number of a company in a manner likely to convey an impression that the person is acting or communicating on behalf of that company, unless the company has authorised that person to do so; or

(b) use a form of name for any purpose if, in the circumstances, the use of that form of name is likely to convey a false impression that the name is the name of a company.

(4) Every company must have its name and registration number mentioned in legible characters in all notices and other official publications of the company, including such notices and publications in electronic format as contemplated in the Electronic Transactions Act, 2019 (Act No. 4 of 2019) and in all bills of exchange, promissory notes, cheques and orders for money or goods and in all letters, delivery notes, invoices, receipts and letters of credit of the company.

(5) Contravention of subsection (1), (2), (3) or (4) is an offence.

**Annual return**

**247**.

(1) Every company must file an annual return in the prescribed form with the prescribed fee, and within the prescribed period after the end of the anniversary of the date of its incorporation, including in that return—

(a) a copy of its annual financial statements, if it is required to have such statements audited in terms of section 248(2) or the regulations contemplated in section 248(7); and

(b) any other prescribed information.

(2) Every external company must file an annual return in the prescribed form with the prescribed fee, and within the prescribed period after the anniversary of the date on which it was registered in terms of Chapter 10.

(3) Each year, in its annual return filed in terms of subsection (1), every company must designate a director, employee or other person who is responsible for the company’s compliance with the requirements of this Part, and Part 8, if it applies to the company.

**Additional accountability requirements for certain companies**

**248**.

(1) In addition to complying with the requirements of this Part, a public company or state-owned company must also comply with the extended accountability requirements set out in Part 8 of this chapter.

(2) A private company, personal liability company or non-profit company is not required to comply with the extended accountability requirements set out in Part 8, except to the extent contemplated in section 279(1)(c), or as required by the company’s Articles of Association.

PART 2

ACCOUNTING RECORDS

**Determination of financial year of company**

**249**.

(1) The financial year of a company is, subject to this section and any other law, its annual accounting period, the commencing date of which and the date on which it ends in the next succeeding calendar year, must be determined on the incorporation of the company, but, the first financial year of a company is, where the commencing date so determined -

(a) is a date more than three months after that incorporation, the period commencing on the incorporation and ending on the date immediately preceding the commencing date so determined; or

(b) is a date not more than three months after that incorporation, the period commencing on the incorporation and ending on the date so determined as the end of the financial year in the next calendar year.

(2) A company may at any time before the end of its current financial year on payment of the prescribed fee and on lodgment with the Registrar of the prescribed form -

(a) change the end of that financial year to a date being not more than six months earlier; or

(b) with the approval of the Registrar given on good cause shown, change the end of that financial year to a date being not more than six months later,

and in that case every subsequent financial year of the company ends, subject to this section, on the date as so changed.

(3) Any reference in this Act to the financial year of a company must be construed as including a reference to any period which in terms of this section is stated to be a financial year of that company.

**Issue of incomplete financial statements and circulars**

**250**.

If any financial statements or circulars of a company which are incomplete in any material particular or otherwise do not comply with the requirements of this Act, are issued, circulated or published, the company and every director or officer who is a party to that issue, circulation or publication, commits an offence and is liable to a fine which does not exceed N$100 000 or to be imprisoned for a period which does not exceed three years or to both the fine and imprisonment.

PART 2

ACCOUNTING BY HOLDING COMPANIES

**Obligation to present group statements before annual general meeting**

**251.**

(1) Where at the end of its financial year a company, which is not a wholly owned subsidiary of another company incorporated in Namibia, including an external company which is a subsidiary of a company incorporated in Namibia, has subsidiaries, group annual financial statements must be made out and must be presented before the annual general meeting of the company before which its own annual financial statements are so presented under section 248(1).

(2) Subject to section 258, the group annual financial statements referred to in subsection (1) must, together with the company’s own annual financial statements in conformity with prescribed financial reporting standards approved, from time to time, by the Accountants’ and Auditors’ Regulatory Authority of Namibia, fairly present the state of affairs and business of the company and all its subsidiaries at the end of the financial year concerned and the profit or loss of the company and all its subsidiaries for that financial year, as a whole so far as concerns the members of the company and must, for that purpose, include at least the matters prescribed by Part 8 of this Chapter, in so far as they are applicable and comply with any other requirements of this Act.

(3) Any director or officer of a company who fails to take all reasonable steps to comply or to secure compliance with this section or with any other requirements of this Act as to matters to be stated in group annual financial statements, may be subject to a compliance notice and to a prescribed administrative penalty.

(4) In any proceedings against any director or officer of a company in respect of an allegation consisting of a failure to take reasonable steps to secure compliance by a company with this section, it is a defence to prove that the accused had reasonable grounds for believing and did believe that a competent and reliable person was charged with the duty of seeing that this section was complied with and was in a position to discharge that duty and that the director or officer had no reason to believe that that person had failed in any way to discharge that duty.

**Group annual financial statements**

**252**.

(1) Subject to section 257, group annual financial statements may consist of consolidated annual financial statements in accordance with section 248 and being -

(a) a consolidated balance sheet dealing with the state of affairs of the company and all the subsidiaries to be dealt with in group annual financial statements;

(b) a consolidated income statement dealing with the profit or loss of the company and those subsidiaries; and

(c) a consolidated cash flow statement of the company and those subsidiaries.

(2) Where consolidated annual financial statements under subsection (1) are not made out, group annual financial statements may consist of -

(a) more than one set of consolidated annual financial statements, that is to say, one set dealing with the company and one group of subsidiaries and one or more sets dealing with other groups of subsidiaries;

(b) separate annual financial statements dealing with each of the subsidiaries;

(c) statements annexed to the company’s own annual financial statements expanding the information therein contained about the subsidiaries; or

(d) any combination of the matters in paragraphs (a), (b) or (c).

(3) Group annual financial statements may be wholly or partly incorporated in the company’s own annual financial statements.

**Where annual financial statements are to be consolidated**

**253**.

Consolidated annual financial statements must be made out unless the directors of the company are of the opinion that the required information about the state of affairs, business and profit or loss of the company and its subsidiaries would be presented more effectively and meaningfully in the manner contemplated in section 256(2).

**Where group annual financial statements need not deal with subsidiary**

**254**.

(1) Group annual financial statements need not deal with a subsidiary if the directors of the company are of the opinion that it is impracticable or would be of no real value to members of the company, in view of the insignificant amounts involved, or would entail expense or delay out of proportion to the value to members of the company and, if the directors are of that opinion about each of the company’s subsidiaries, group annual financial statements are not required.

(2) If the directors of a company are of the opinion that -

(a) if a subsidiary were to be dealt with in group annual financial statements, the result would be misleading or harmful to the business of the company or any of its subsidiaries; or

(b) the business of the company and that of a subsidiary are so different that they cannot reasonably be treated as a single undertaking or are of that opinion about each of the company’s subsidiaries, group annual financial statements need not deal with that subsidiary, or, as the case may be, no group annual financial statements is required, if the Registrar approves.

(3) A company must apply to the Registrar for approval under subsection (2) on the prescribed form and the application must be accompanied by a report by the auditor of the company on the opinion and decision of the directors.

(4) Any approval given under this section by the Registrar expires after two years but may be renewed on application by the company.

(5) Any director or officer of a company who fails to comply with subsection (3), may be subject to a Compliance Notice and is liable to a prescribed administrative fine.

**Accounting periods of company and subsidiary to be the same**

**255**.

The directors of any subsidiary must, notwithstanding anything to the contrary in this Act or in its articles, cause annual financial statements as required by section 248 to be made out so as to cover an accounting period or accounting periods ending on the same date or dates as the period or periods covered by the annual financial statements of its holding company or holding companies.

**Duty of auditor to report on decisions of directors on group annual financial statements**

**256**.

In every case where the directors of a holding company have decided not to make out consolidated annual financial statements under section 257, or not to deal with any subsidiary in group annual financial statements under section 258(1), the auditor of the holding company must report to the members of the company on that decision of the directors.

PART 4

DISCLOSURE OF CERTAIN MATTERS IN FINANCIAL STATEMENTS AND FURTHER REQUIREMENTS

**Disclosure of loans to and security for benefit of directors and managers**

**257**.

(1) The annual financial statements of a company must state -

(a) the amount and particulars of every loan referred to in section 248(6)(g) which has during the relevant financial year been made by virtue of section 106, including every loan which has, during that financial year, been repaid;

(b) the particulars of every security, together with details of the transaction to which it relates, referred to in section 102(1), which has during the relevant financial year been provided by virtue of section 101 (subject to section 102(1)), including every security which has, during that financial year, been cancelled;

(c) the balance outstanding of every loan described in paragraph (a), made at any time before that financial year and outstanding at the end of it; and

(d) the particulars of every security, together with details of the transaction to which it relates, described in paragraph (b), provided at any time before that financial year and still in existence at the end of the year including, if applicable, the balance outstanding on the transaction to which it relates.

(2) If a company which has made a loan or provided any security referred to in subsection (1) is a subsidiary and its holding company is by this Act required to make out group annual financial statements or otherwise to furnish particulars of that subsidiary, there must be included in the statements the information provided for in subsection (1).

(3) Where a loan is a loan of shares, debt securities or other property, or where any security is provided in respect of a loan of shares, debt securities or other property, the requirements of this section may be complied with by stating the particulars in the directors’ report or by way of a note to the annual financial statements.

(4) If this section is not complied with in respect of the annual financial statements of a company, the auditor of the company must, in his or her report relating to those annual financial statements, include a statement containing any information in regard to the matter which he or she is reasonably able to furnish.

(5) Any director or officer or past director or officer of a company or of its holding company or of any other subsidiary of that holding company must, at the written request of the first-mentioned company or its auditor, in writing give that information, including particulars relating to his or her control of a company or body corporate contemplated in section 106, as the company or its auditor may require for compliance with this section.

(6) Any director or officer or past director or officer referred to in subsection (5) who fails to comply with that request within one month from the date of the request, may be subject to a compliance notice and is liable to a prescribed administrative penalty.

**Disclosure of loans made to and security provided for benefit of directors or managers before their appointment**

**258**.

(1) The annual financial statements of a company must state -

(a) the amount and particulars of every loan which has at any time been made by the company to any person before his or her appointment as director or manager of the company, if -

(i) the loan was still in existence at the date of the appointment; and

(ii) the appointment was made at any time during the financial year concerned; and

(b) the particulars of every security, together with details of the transaction to which it relates, which has at any time been provided by the company for the benefit of any person before his or her appointment as director or manager of the company, if -

(i) the security was still in existence at the date of the appointment; and

(ii) the appointment was made at any time during the financial year concerned.

(2) For the purposes of subsection (1) -

(a) “loan” includes -

(i) a loan of money, shares, debt securities or any other property; and

(ii) any credit extended by a company where the debt concerned is not payable or being paid in accordance with normal business practice in respect of payment of debts of the same kind;

(b) “security” includes a guarantee.

(3) Section 248(4), (5) and (6) in so far as it relates to the contents of annual financial statements, the manner of showing loans and other securities in the statements and the duty of the auditor to report does, with the necessary changes, apply with reference to loans and securities contemplated in this section.

(4) This section does not apply in respect of a loan made or security provided in good faith in the ordinary course of the business of a company actually and regularly carrying on the business of the making of loans or the provision of security.

**Approval and signing of financial statements**

**259**.

(1) The annual financial statements of a company other than the auditor’s report, must be approved by its directors and signed on their behalf by two of the directors or, if there is only one director, by that director, and group annual financial statements must similarly be approved and signed by the directors of the holding company.

(2) If a copy of any annual financial statements, or group annual financial statements which have not been approved and signed as required by subsection (1), is issued, circulated or published, every director or officer of the company concerned who is a party to that issue, circulation or publication commits an offence and is liable to a prescribed administrative fine.

**Duty of company to send annual financial statements to members and Registrar**

**260**.

(1) A copy of the annual financial statements of a company and the group annual financial statements, if any, must, not less than 20 business days before the date of the annual general meeting of the company, be sent to every member of the company and every holder of debt securities of the company, whether or not that member or holder of debt securities is entitled to receive notices of general meetings of the company, and to all persons other than members or holders of debt securities of the company who are entitled to receive those notices.

(2) Where a member, holder of debt securities or other person referred to in subsection (1) has indicated in writing the manner in which he or she wishes to receive the annual financial statements, the company is deemed to have sent the annual financial statements to that member, holder of debt securities or person if the company makes the annual financial statements so available not less than 20 business days before the date of the annual general meeting.

(3) Subsection (1) must not be construed as requiring a copy of those statements to be sent –

(a) in the case of a non-profit company, to any member or holder of debt securities of the company who is not entitled to receive notices of general meetings of the company;

(b) to any member or holder of debt securities of a company who is entitled to receive those notices and whose address is not known to the company;

(c) to more than one of the joint holders of any shares or debt securities of a company none of whom is entitled to receive those notices;

(d) in the case of joint holders of any shares or debt securities of whom some are and others are not entitled to receive those notices, to any joint holder who is not so entitled.

(4) Any copy of the annual financial statements not sent to members and debt securities’ holders and other persons referred to in subsection (1) at least 20 business days before the date of the relevant meeting is deemed to have been so sent if it is so agreed by all the members entitled to attend and vote at the meeting.

(5) A public company must, on the day on which it sends copies to its members as provided in subsection (1), send, on the prescribed form, to the Registrar a copy, certified to be a true copy by a director and the secretary of the company of -

(a) the annual financial statements and group annual financial statements, if any; and

(b) the annual financial statements of every private company which is a subsidiary of that public company.

(6) The Registrar may, on application by any public company made on the prescribed form, on good cause shown and on payment of the prescribed fee, exempt that public company from the requirements of subsection (5)(b).

(7) Any exemption made under subsection (6) by the Registrar expires after two years but may be renewed on application by the company.

(8) If default is made in complying with subsection (1) or (5), the company concerned, and every director who knowingly is a party to the default, is subject to a compliance notice and is liable to a prescribed administrative fine.

**Report of directors**

**261**.

(1) Except in the case of a company which is a wholly-owned subsidiary of any other company incorporated in Namibia, every company must, as part of its annual financial statements, present before the annual general meeting a report by the directors with respect to the state of affairs, the business and the profit or loss of the company or of the company and its subsidiaries, if any.

(2) The directors’ report must deal with every matter which is material for the appreciation by the members of the company of the state of affairs, the business and the profit or loss of the company or of the company and its subsidiaries, if any, and must for that purpose be in accordance with and include at least the matters set out in Part 7 of this Chapter, in so far as these are applicable, and comply with any other requirements of this Act.

PART 5

DUTIES OF AUDITOR AS TO ANNUAL FINANCIAL STATEMENTS

**Duties of auditor as to annual financial statements and other matters**

**262**.

It is the duty of the auditor of a company -

(a) to examine the annual financial statements and group annual financial statements to be presented before its annual general meeting;

(b) to satisfy himself or herself that proper accounting records, as required by this Act have been kept by the company and that proper returns adequate for the purposes of his or her audit have been received from branches not visited by him or her;

(c) to satisfy himself or herself that a register of interests in contracts as required by section 127 has been kept and that the entries are in accordance with the minutes of directors’ meetings;

(d) to examine or satisfy himself or herself as to the existence of any securities of the company;

(e) to obtain all the information and explanations which to the best of his or her knowledge and belief are necessary for the purposes of carrying out his or her duties;

(f) to satisfy himself or herself that the company’s annual financial statements are in agreement with its accounting records and returns;

(g) to examine group annual financial statements and satisfy himself or herself that they comply with the requirements of this Act;

(h) to undertake any other auditing procedures which he or she considers necessary in order to satisfy himself or herself that the annual financial statements or group annual financial statements fairly present the financial position of the company or of the company and its subsidiaries and the results of its operations and those of its subsidiaries, in conformity with the prescribed financial reporting standards;

(i) to satisfy himself or herself that statements made by the directors in their reports do not conflict with a fair interpretation or distort the meaning of the annual financial statements and accompanying notes;

(j) to comply with any other duty imposed on him or her by this Act; and

(k) to comply with any applicable requirements of the Public Accountants' and Auditors' Act, 1951 (Act No. 51 of 1951) (as amended) or any successor legislation.

**Report of auditor**

**263**.

(1) When the auditor of a company has complied with the requirements of, and has satisfied himself or herself as to the matters stated in, section 266, and has carried out the audit free from any restrictions whatsoever, the auditor must make a report to the members of the company to the effect that he or she has examined the annual financial statements and group annual financial statements and that in his or her opinion they fairly present the financial position of the company and its subsidiaries and the results of its operations and that of its subsidiaries in the manner required by this Act.

(2) If the auditor is unable to make the report referred to in subsection (1) or to make it without qualification, the auditor must include in his or her report a statement to that effect and set out the facts or circumstances which prevent him or her from so making his or her report or from making it without qualification.

(3) The auditor’s report under subsection (1) must, unless all the members present agree to the contrary, be read out at the annual general meeting.

PART 6

INTERIM ACCOUNTING

**Half-yearly interim reports**

**264**.

(1) Every public company, other than a wholly owned subsidiary, must, not later than three months after the expiry of the first period of six months of its financial year, send to every member and holder of debt securities of the company an interim report fairly presenting the business and operations of the company, or in the case of a holding company, of the company and its subsidiaries, during that period of six months, and the results, but -

(a) the first interim report to be sent to members and holders of debt securities of a company after its incorporation must -

(i) in any case where section 253(1)(a) applies and where the period of the first financial year of the company exceeds nine months, be in respect of a period of six months commencing on the date of incorporation of the company; and

(ii) in any case where section 253(1)(b) applies, be in respect of a period commencing on the date of incorporation of the company and ending six months before the end of its first financial year;

(b) where a company has changed the end of its financial year under section 253(2)(b) an additional interim report must be made out for the period from the beginning of the financial year so changed to the date of the end of the financial year before it was so changed.

(2) Section 264(2) in so far as it relates to the manner in which annual financial statements are to be send to members of a company applies to half-yearly reports.

**Provisional annual financial statements**

**265**.

(1) Every public company having a share capital, other than a wholly owned subsidiary, which does not within three months after the end of its financial year issue copies of its annual financial statements in terms of section 248(1) must, not later than the date on which that period of three months expires, send to every member and holder of debentures of the company a copy of the provisional annual financial statements of the company fairly presenting the business and operations of the company or, in the case of a holding company, of the company and its subsidiaries during that accounting period.

(2) Section 264(2), in so far as it relates to the manner in which annual financial statements are to be sent to members of a company, applies to provisional financial statements.

(3) If any other company required to do so has not issued its annual financial statements in terms of section 264(1) within nine months after the end of its financial year, the Registrar may, on application in the prescribed manner, by any member of that company, and on good cause shown, require that company by written notice to lodge with him or her provisional annual financial statements as referred to in subsection (1) within a period of 30 days from the date of that notice and that company must, unless it issues its annual financial statements within that period, lodge provisional annual financial statements with the Registrar within that period.

**Form and contents of interim report and provisional annual financial statements**

**266**.

(1) For the purposes of sections 268 and 269 interim reports and provisional annual financial statements must, respectively, be in accordance with and include at least the matters prescribed by Part 8 of this Chapter, in so far as they are applicable and must comply with the other requirements of this Act.

(2) Provisional annual financial statements are not required to be audited.

(3) Every interim report and all provisional annual financial statements of a company must be approved by the directors and signed on their behalf by two of the directors, or, if there is only one director, by that director.

**Copies of interim report and provisional annual financial statements to be lodged with Registrar**

**267**.

Every company which issues an interim report or provisional annual financial statements must, within seven days from the date of issue and on the prescribed form, lodge a copy of that interim report or provisional annual financial statements with the Registrar.

**Registrar may grant exemptions and extensions of time**

**268**.

(1) If the Registrar approves, no half-yearly interim reports are required under section 268 if the directors of the company are of the opinion that those reports -

(a) would be misleading to the members of the company or harmful to the business of the company; or

(b) would entail unnecessary expense or for any other reason would serve no useful purpose.

(2) Section 258(3) in so far as it relates to applications for the Registrar’s approval does, with the necessary changes, apply with reference to any application of the company for the Registrar’s approval under subsection (1) and to the period of any exemption.

(3) The Registrar may on application by any company made to him or her before the expiry of the periods in which an interim report under section 268 or provisional annual financial statements under section 269 are required to be issued, on good cause shown and on payment of the prescribed fee, extend those periods respectively by period which he or she considers appropriate.

PART 7

RIGHT OF MEMBERS AND OTHERS TO COPIES OF ANNUAL FINANCIAL STATEMENTS AND INTERIM REPORTS

**Right of members and others to copies of annual financial statements and interim reports**

**269**.

(1) Any member or holder of debt securities of a company is entitled to be furnished, on demand without charge, with a copy of the last annual financial statements, including group annual financial statements, and provisional annual financial statements and of the last interim report of the company.

(2) A judgment creditor of a private company is, where it appears from the return of the person whose duty it is to execute the judgment in question that insufficient disposable property to satisfy that judgment was found, entitled to be furnished on demand without charge with a copy of the last annual financial statement of the company.

(3) Any company which fails to comply with a demand under this section within seven days after the making of the demand, and any director of the company who knowingly is a party to the default, shall be subject to a compliance notice and a prescribed administrative penalty for every day during which the contravention continues.

(4) It is a defence to an alleged contravention under subsection (3) to prove that the person concerned had previously demanded a copy of the document to which the charge relates and that that copy had been supplied.

PART 8

ENHANCED ACCOUNTABILITY AND TRANSPARENCY

**Application and general requirements of Part**

**270**.

(1) This Chapter applies to -

(a) every public company, subject to subsection (2);

(b) every company that is a state-owned company -

(i) except to the extent that the company has been exempted from the application of this Chapter in terms of section 36(3); and

(ii) subject to subsection (3); and

(c) a private company, a personal liability company or a non-profit company -

(i) if the company is required by this Act or the regulations to have its annual financial statements audited every year; or

(ii) to the extent that the articles of association of the company so requires.

(2) In the case of a state-owned company -

(a) If there is a conflict between a provision of this Chapter and a provision of the State Finance Act, 1991 (Act No. 31 of 1991), the provisions of that Act prevail;

(b) despite the provisions of this Chapter to the contrary, the state-owned company is not required to appoint an auditor for any financial year in respect of which the Auditor-General has elected, in terms of the State Finance Act, 1991,to conduct an audit of that enterprise; and

(c) in any year in which the state-owned company is required by this Chapter to appoint an auditor, any requirement in terms of the State Finance Act, to have the appointment of the company’s auditor approved by the Auditor-General applies to that company, in addition to the relevant provisions of this Chapter.

(3) Every company contemplated in subsection (1)(a) or (b) must appoint a person to serve as -

(a) company secretary, in the manner and for the purposes contemplated in section 272;

(b) auditor, in the manner and for the purposes contemplated in section 276; and

(c) an audit committee, in the manner and for the purposes contemplated in section 281.

(4) A person who is disqualified in terms of section 188 to serve as a director of any particular company may not be appointed or continue to serve that company in any capacity mentioned in subsection (3), irrespective of whether that appointment is made -

(a) as required by this Chapter; or

(b) voluntarily.

(5) If the board of a company fails to make an appointment as required by this Part -

(a) BIPA may issue a notice to that company to show cause why BIPA should not proceed to convene a shareholders meeting for the purpose of making that appointment; and

(b) if the company fails to respond to a notice contemplated in paragraph (a) or, in responding, fails to satisfy BIPA that the board will make the appointment, or convene a shareholders meeting to make the appointment, within an acceptable period, BIPA may -

(i) give notice to the holders of the company’s securities of a general meeting, and convene such a meeting, to make that appointment; and

(ii) assess a pro-rata share of the cost of convening the general meeting to each director of the company who knowingly permitted the company to fail to make the appointment in accordance with this Part.

(6) A company that has been given notice contemplated in subsection (5)(a),or a director who has been assessed any portion of the costs of a meeting, as contemplated in subsection (5)(b), may apply to the Tribunal to set aside the notice, or the assessment, in whole or in part.

**Registration of company secretaries and auditors**

**271**.

(1) Every company, that makes an appointment contemplated in section 270(3), irrespective of whether the company does so as required by that section or voluntarily, must -

(a) maintain a record of its company secretaries and auditors, including, in respect of each person appointed as company secretary or auditor of the company -

(i) the name, including any former name, of each such person; and

(ii) the date of every such appointment; and

(b) if a firm or juristic person is appointed -

(i) the name, registration number and registered office address of that firm or juristic person; and

(ii) the name of any individual contemplated in section 270(3), if that section is applicable; and

(c) any changes in the particulars referred to in paragraphs (a) and (b), as they occur, with the date and nature of each such change.

(2) To protect personal privacy, the Minister, by notice in the Gazette, may exempt from the application of subsection (1)(a) categories of names as formerly used by any person -

(a) before attaining majority, or by persons who have been adopted, married, divorced or widowed; or

(b) in other circumstances prescribed by the Minister.

(3) Within 10 business days after making an appointment contemplated in subsection (1), or after the termination of service of such an appointment, a company must file a notice of the appointment or termination, as the case may be, subject to subsection (4).

(4) The incorporators of a company may file a notice of the appointment of the first company secretary, auditor or audit committee as part of the Memorandum of Association of the Company.

**Appointment of company secretary**

**272**.

(1) A public company or state-owned company must appoint a company secretary.

(2) Every company secretary, irrespective of whether the appointment is made as required by subsection (1) or in terms of a requirement in the articles of association of the company, must -

(a) have the requisite knowledge of, or experience in, relevant laws; and

(b) be a permanent resident of Namibia and remain so while serving in that capacity.

(3) The first company secretary of a public company or state-owned company may be appointed by -

(a) the incorporators of the company; or

(b) within 40 business days after the incorporation of the company, by either -

(i) the directors of the company; or

(ii) an ordinary resolution of the holders of the company’s securities.

(4) The first company secretary of a company that is required only in terms of its articles of association to appoint a company secretary must be appointed -

(a) in accordance with subsection (3), if the requirement to appoint a company secretary applies to that company when it is incorporated; or

(b) within 40 business days after the date on which the requirement first applies to the company, by either -

(i) the directors of the company; or

(ii) an ordinary resolution of the holders of the company’s securities

(4) Within 60 business days after a vacancy arises in the office of company secretary, the board must fill the vacancy by appointing a person whom the directors consider to have the requisite knowledge and experience.

**Appointment of juristic persons and partnerships as company secretaries**

**273**.

(1) A juristic person or partnership may be appointed to hold the office of company secretary, but -

(a) every employee of that juristic person who provides company secretary services, or partner and employee of that partnership satisfies the requirements contemplated in section 272(2); and

(b) at least one employee of that juristic person, or one partner or employee of that partnership, satisfies the requirements contemplated in section 272(2).

(2) A change in the membership of a juristic person or partnership that holds office as company secretary does not constitute a casual vacancy in the office of company secretary, if the juristic person or partnership continues to satisfy the requirements of subsection (1).

(3) If at any time a juristic person or partnership holds office as company secretary of a particular company -

(a) the juristic person or partnership must immediately notify the directors of the company if the juristic person or partnership no longer satisfies the requirements of subsection (1), and is regarded to have resigned as company secretary upon giving that notice to the company;

(b) the company is entitled to assume that the juristic person or partnership satisfies the requirements of subsection (1), until the company has received a notice contemplated in paragraph (a); and

(c) any action taken by the juristic person or partnership in performance of its functions as company secretary is not invalidated merely because the juristic person or partnership had ceased to satisfy the requirements of subsection (1) at the time of that action.

**Duties of company secretaries**

**274**.

(1) A company secretary is accountable to the board of the company.

(2) The duties of the company secretary include, but are not restricted to -

(a) providing the directors of the company collectively and individually with guidance as to their duties, responsibilities and powers;

(b) making the directors aware of any law relevant to or affecting the company;

(c) reporting to the board of the company on any failure on the part of the company or a director to comply with the Memorandum or Articles of Association of the company or this Act;

(d) ensuring that minutes of all shareholders’ meetings, board meetings and the meetings of any committees of the directors, or of the audit committee of the company, are properly recorded in accordance with this Act;

(e) certifying in the company’s annual financial statements whether the company has filed required returns and notices in terms of this Act, and whether all such returns and notices appear to be true, correct and up to date;

(f) ensuring that a copy of the company’s annual financial statements is sent, in accordance with this Act, to every person who is entitled to it; and

(g) carrying out the functions of a person designated in terms of section 251(3).

**Resignation and removal of company secretaries**

**275**.

(1) A company secretary may resign from office by giving the company -

(a) a 30 days’ written notice; or

(b) less than 30 days’ written notice, with the prior approval of the board.

(2) If the company secretary is removed from office by the board, the company secretary may require the company to include a statement in its annual financial statements relating to that financial year, not exceeding a reasonable length, setting out the company secretary’s contention as to the circumstances that resulted in the removal.

(3) If the company secretary wishes to exercise the power referred to in subsection (2), the company secretary must give written notice to that effect to the company by not later than the end of the financial year in which the removal took place, and that notice must include the statement referred to in subsection (2).

(4) The statement of the company secretary referred to in subsection (2) must be included in the report of the directors in the annual financial statements of the company.

**Appointment of auditors**

**276**.

(1) Upon its incorporation, and each year at its annual general meeting, a public company or state-owned company must appoint an auditor.

(2) A company referred to in section 270(1), or a company that is required only in terms of its articles of association, must appoint an auditor -

(a) in accordance with subsection (1), if the requirement to have its annual financial statements audited applies to that company when it is incorporated; or

(b) at the annual general meeting at which the requirement first applies to the company, and each annual general meeting thereafter.

(3) To be appointed as an auditor of a company, whether as required by subsection (1) or as contemplated in sub-section (2), a person or firm -

(a) must be a registered auditor;

(b) may not be -

(i) a director or prescribed officer of the company;

(ii) an employee or consultant of the company who was or has been engaged for more than 12 months in the maintenance of any of the financial records of the company or the preparation of any of its financial statements;

(iii) a director, officer or employee of a person appointed as company secretary in terms of section 276;

(iv) a person who, alone or with a partner or employees, habitually or regularly performs the duties of accountant or bookkeeper, or performs related secretarial work, for the company;

(v) a person who, at any time during the five financial years immediately preceding the date of appointment, was a person contemplated in any of subparagraphs (i) to (iv); or

(vi) a person related to a person contemplated in subparagraphs (i) to (v); and

(c) must be acceptable to the audit committee as being independent of the company, having regard to the matters enumerated in section 285(6), in the case of a company that has appointed an audit committee, whether as required by section 270(2), or voluntarily.

(4) If a company appoints a firm as an auditor, the individual determined by that firm to be responsible for performing the functions of auditor must satisfy the requirements of subsection (2).

(5) If a company that is required to appoint an auditor does not do so when it registers the incorporation of the company, the directors of the company must appoint the first auditor of the company within 40 business days after the date of incorporation of the company.

(6) The first auditor of a company holds office until the conclusion of the first annual general meeting of the company.

(7) A retiring auditor may be automatically reappointed at an annual general meeting without any resolution being passed, unless -

(a) the retiring auditor is -

(i) no longer qualified for appointment;

(ii) no longer willing to accept the appointment, and has so notified the company; or

(iii) required to cease serving as auditor in terms of section 281;

(b) an audit committee appointed objects to the reappointment; or

(c) the company has notice of an intended resolution to appoint some other person or persons in place of the retiring auditor.

(8) If an annual general meeting of a company does not appoint or reappoint an auditor the directors must fill the vacancy in accordance with the procedure contemplated in this section within 40 business days after the date of the meeting.

**Resignation of auditors and vacancies**

**277**.

(1) The auditor of a company may at any time during his or her period of office resign from office by delivering to the company a written notice of resignation.

(2) The resignation of an auditor is effective when the notice is filed with the Registrar.

(3) Subject to subsection (4), if a vacancy arises in the office of auditor of a company, the board of that company -

(a) must appoint a new auditor within 40 business days, if there was only one incumbent auditor of the company; and

(b) may appoint a new auditor at any time, if there was more than one incumbent, but while any such vacancy continues, the surviving or continuing auditor may act as auditor of the company.

(4) Before making an appointment in terms of subsection (3) -

(a) the board must propose to the company’s audit committee, within 15 business days after the vacancy occurs, the name of at least one registered auditor to be considered for appointment as the new auditor; and

(b) may proceed to make an appointment of a person proposed in terms of paragraph (a) if, within five business days after delivering the proposal, the audit committee does not give notice in writing to the board rejecting the proposed auditor.

(5) If a company appoints a firm as its auditor, any change in the composition of the members of that firm does not by itself create a vacancy in the office of auditor for that year, subject to subsection (6).

(6) If, by comparison with the membership of a firm at the time of its latest appointment, less than one half of the members remain after a change contemplated in subsection (5), that change constitutes the resignation of the firm as auditor of the company, giving rise to a vacancy.

(7) Section 279, read with the changes required by the context, applies with respect to an auditor of a company, but a reference in that section to “company secretary” must be regarded as referring to the auditor of the company.

**Rotation of auditors**

**278**.

(1) A person may not serve as the auditor or designated auditor of a company for more than five consecutive financial years.

(2) If a person has served as the auditor or designated auditor of a company for two or more consecutive financial years and then ceases to be the auditor or designated auditor, the individual may not be appointed again as the auditor or designated auditor of that company until after the expiry of at least two further financial years.

(3) If a company has appointed two or more persons as joint auditors, the company must manage the rotation required by this section in such a manner that all of the joint auditors do not relinquish office in the same year.

**Audit committees**

**279**.

(1) At each annual general meeting, a public company, state-owned company or other company that is required only by its articles of association to have an audit committee, must elect an audit committee comprising at least three members, unless -

(a) the company is a subsidiary of another company that has an audit committee; and

(b) the audit committee of that other company will perform the functions required under this section on behalf of that subsidiary company.

(2) The first members of the audit committee may be appointed by-

(a) the incorporators of a company; or

(b) by the board, within 40 business days after the incorporation of the company.

(3) Each member of an audit committee of a company must -

(a) be a director of the company, who satisfies any applicable requirements prescribed in terms of subsection (4);

(b) not be involved in the day-to-day management of the company’s business or have been so involved at any time during the previous financial year;

(c) not be a prescribed officer, or full-time employee, of the company or another related or inter-related company, or have been such an officer or employee at any time during the previous three financial years; or

(d) a material supplier or customer of the company, such that a reasonable and informed third party would conclude in the circumstances that the integrity, impartiality or objectivity of that director is compromised by that relationship; and

(e) not be related to any person who falls within any of the criteria set out in paragraph (b),(c) or (d).

(4) The Minister may prescribe minimum qualification requirements for members of an audit committee as necessary to ensure that any such committee, taken as a whole, comprises persons with adequate relevant knowledge and experience to equip the committee to perform its functions.

(5) The board of a company contemplated in section 170(1) must appoint a person to fill any vacancy on the audit committee within 40 business days after the vacancy arises.

(6) In considering whether, for the purposes of this Part, a registered auditor is independent of a company, the audit committee of that company must -

(a) ascertain that the auditor does not receive any direct or indirect remuneration or other benefit from the company, except -

(i) as auditor; or

(ii) for rendering other services to the company, to the extent permitted in terms of section 286(1)(d);

(b) consider whether the auditors’ independence may have been prejudiced -

(i) as a result of any previous appointment as auditor; or

(ii) having regard to the extent of any consultancy, advisory or other work undertaken by the auditor for the company; and

(c) consider compliance with other criteria relating to independence or conflict of interest as prescribed, in relation to the company, and if the company is a member of a group of companies, any other company within that group.

(7) Nothing in this section precludes the appointment by a company at its annual general meeting of an auditor other than one nominated by the audit committee, but if such an auditor is appointed, the appointment is valid only if the audit committee is satisfied that the proposed auditor is independent of the company.

(8) Neither the appointment nor the duties of an audit committee reduce the functions and duties of the board or the directors of the company, except with respect to the appointment, fees and terms of engagement of the auditor.

(9) A company must pay all expenses reasonably incurred by its audit committee, including, if the audit committee considers it appropriate, the fees of any consultant or specialist engaged by the audit committee to assist it in the performance of its functions.

**Duties of audit committees**

**280**.

(1) An audit committee of a company has the following duties -

(a) to nominate, for appointment as auditor of the company under section 280, a registered auditor who, in the opinion of the audit committee, is independent of the company;

(b) to determine the fees to be paid to the auditor and the terms of engagement of the auditor;

(c) to ensure that the appointment of the auditor complies with the provisions of this Act and any other legislation relating to the appointment of auditors;

(d) to determine, subject to the provisions of this Chapter, the nature and extent of any non-audit services that the auditor may provide to the company, or that the auditor may not provide to the company, or a related company;

(e) to pre-approve any proposed agreement with the auditor for the provision of non-audit services to the company;

(f) to prepare a report, to be included in the annual financial statements for that financial year -

(i) describing how the audit committee carried out its functions;

(ii) stating whether the audit committee is satisfied that the auditor was independent of the company; and

(iii) commenting in any way the committee considers appropriate on the financial statements, the accounting practices and the internal financial control of the company;

(g) to receive and deal appropriately with any concerns or complaints, whether from within or outside the company, or on its own initiative, relating to -

(i) the accounting practices and internal audit of the company;

(ii) the content or auditing of the financial statements of the company;

(iii) the internal financial controls of the company; or

(iv) any related matter;

(h) to make submissions to the board on any matter concerning the accounting policies, financial control, records and reporting of the company; and

(i) to perform such other oversight functions as may be determined by the board.

CHAPTER 9

FUNDAMENTAL TRANSACTIONS, TAKEOVERS AND OFFERS

PART 1

FUNDAMENTAL TRANSACTIONS

**Proposals to dispose of all and greater part of assets and undertaking**

**281**.

(1) This section and section 286 do not apply to a proposal to dispose of all or the greater part of the assets or undertaking of a company, if that disposal would constitute a transaction -

(a) that is pursuant to or contemplated in a business rescue plan adopted in accordance with section 342;

(b) between a wholly-owned subsidiary and its holding company; or

(c) between or among -

(i) two or more wholly-owned subsidiaries of the same holding company; or

(ii) a wholly-owned subsidiary of a holding company, on the one hand, and its holding company and one or more wholly-owned subsidiaries of that holding company, on the other hand.

(2) A company may not dispose of all or the greater part of its assets or undertaking unless -

(a) the disposal has been approved by a special resolution of the shareholders in accordance with section 290; and

(b) the company has satisfied all other requirements set out in section 290, to the extent those requirements are applicable to such a disposal by that company.

(3) A notice of a shareholders meeting to consider a resolution to approve a disposal contemplated in subsection (2)(a) must -

(a) be delivered within the prescribed time, and in the prescribed manner, to each shareholder of the company, subject to section 181 read with any changes required by the context;

(b) include or be accompanied by a written summary of -

(i) the precise terms of the transaction or series of transactions, to be considered at the meeting; and

(ii) the provisions of sections 290 and Part 6 of Chapter 7, in a manner that satisfies the prescribed standards.

(4) Any part of the undertaking or assets of a company to be disposed of, as contemplated in this section, must be fairly valued, as calculated in the prescribed manner, as at the date of the proposal, which date must be determined in the prescribed manner.

(5) A resolution contemplated in subsection (2)(a) is effective only to the extent that it authorises a specific transaction

**Proposals for amalgamation and merger**

**282**

(1) Two or more profit companies, including holding and subsidiary companies, may amalgamate or merge if, upon implementation of the amalgamation or merger, each amalgamated or merged company will satisfy the solvency and liquidity test.

(2) Two or more companies proposing to amalgamate or merge must enter into a written agreement setting out the terms and means of effecting the amalgamation or merger and, in particular, setting out -

(a) the proposed memorandum and articles of association of any new company to be formed by the amalgamation or merger;

(b) the name and identity number of each proposed director of any proposed amalgamated or merged company;

(c) the manner in which the securities of each amalgamating or merging company are to be converted into securities of any proposed amalgamated or merged company, or exchanged for other property;

(d) if any securities of any of the amalgamating or merging companies are not to be converted into securities of any proposed amalgamated or merged company, the consideration that the holders of those securities are to receive in addition to or instead of securities of any proposed amalgamated or merged company;

(e) the manner of payment of any consideration instead of the issue of fractional securities of an amalgamated or merged company or of any other juristic person the securities of which are to be received in the amalgamation or merger;

(f) details of the proposed allocation of the assets and liabilities of the amalgamating or merging companies among the companies that will be formed or continue to exist when the amalgamation or merger agreement has been implemented;

(g) details of any arrangement or strategy necessary to complete the amalgamation or merger, and to provide for the subsequent management and operation of the proposed amalgamated or merged company or companies; and

(h) the estimated cost of the proposed amalgamation or merger.

(3) If the securities of one of the amalgamating or merging companies are held by or on behalf of another of the amalgamating or merging companies, the agreement required by subsection (2) must provide for the cancellation of those securities when the amalgamation or merger becomes effective, but -

(a) without any repayment of capital in respect thereof; and

(b) no provision may be made in the agreement for the conversion of those securities into securities of an amalgamated or merged company.

(4) Subject to subsection (6), the board of each amalgamating or merging company -

(a) must consider whether, upon implementation of the agreement, each proposed amalgamated or merged company will satisfy the solvency and liquidity test; and

(b) if the board reasonably believes that each proposed amalgamated or merged company will satisfy the solvency and liquidity test, it may submit the agreement for consideration at a shareholders meeting of that amalgamating or merging company, in accordance with section 290.

(5) Subject to subsection (6), a notice of a shareholders meeting contemplated in subsection (4)(b) must be delivered to each shareholder of each respective amalgamating or merging company, and must include or be accompanied by a copy or summary of -

(a) the amalgamation or merger agreement; and

(b) the provisions of sections 290 and Part 6 of Chapter 7 in a manner that satisfies prescribed standards.

(6) The requirements of subsections (4) and (5) do not apply to a company engaged in business rescue proceedings, in respect of any transaction that is pursuant to or contemplated in the company’s business rescue plan that has been adopted in accordance with Chapter 11.

**Proposals for scheme of arrangement**

**283**.

(1) Unless it is in liquidation, or in the course of business rescue proceedings in terms of Chapter 11, the board of a company, may propose and, subject to approval in terms of this chapter, implement any arrangement between the company and holders of any class of its securities, including a reorganisation of the share capital of the company by way of, among other things -

(a) a consolidation of securities of different classes;

(b) a division of securities into different classes;

(c) an expropriation of securities from the holders;

(d) exchanging any of its securities for other securities;

(e) a re-acquisition by the company of its securities; or

(f) a combination of the methods contemplated in this subsection.

(2) The company, or the offeror contemplated in subsection (1), if any, must retain an independent expert, who meets the following requirements, to compile a report as required by subsection (3) -

(a) the person to be retained must be -

(i) qualified, and have the competence and experience necessary to -

(aa) understand the type of arrangement proposed;

(bb) evaluate the consequences of the arrangement; and

(cc) assess the effect of the arrangement on the value of securities and on the rights and interests of a holder of any securities, or a creditor of the company; and

(ii) able to express opinions, exercise judgment and make decisions impartially.

(b) the person to be retained may not -

(i) have any other relationship with the company or with a proponent of the arrangement, such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship;

(ii) have had any relationship contemplated in subparagraph (i) within the immediately preceding two years; or

(iii) be related to a person who has or has had a relationship contemplated in subparagraph (i) or (ii).

(3) The person retained in terms of subsection (2) must prepare a report to the board, and cause it to be distributed to all holders of the company’s securities, concerning the proposed arrangement, which must, at a minimum -

(a) state all prescribed information relevant to the value of the securities affected by the proposed arrangement;

(b) identify every type and class of holders of the company’s securities affected by the proposed arrangement;

(c) describe the material effects that the proposed arrangement will have on the rights and interests of the persons mentioned in paragraph (b);

(d) evaluate any material adverse effects of the proposed arrangement against -

(i) the compensation that any of those persons will receive in terms of that arrangement; and

(ii) any reasonably probable beneficial and significant effect of that arrangement on the business and prospects of the company;

(e) state any material interest of any director of the company or trustee for security holders, and state the effect of the arrangement on those interests and persons;

(f) state the effect of the proposed arrangement on the interest and person contemplated in paragraph (e); and (g) include a copy of sections 290 and Part 6 of Chapter 7.

**Required approval for transactions**

**284**.

(1) Despite any provision of the articles of association of a company, or any resolution adopted by its board or holders of its securities, to the contrary, a company may not dispose of, or give effect to an agreement or series of agreements to dispose of, all or the greater part of its assets or undertaking, implement an amalgamation or a merger, or implement a scheme of arrangement, unless -

(a) the disposal, amalgamation or merger, or scheme of arrangement -

(i) has been approved in terms of this section; or

(ii) is pursuant to or contemplated in an approved business rescue plan for that company approved in accordance with section 346; and

(b) to the extent that this Chapter and the Takeover Regulations apply to a company that proposes to -

(i) dispose of all or the greater part of the assets or undertaking; or

(ii) amalgamate or merge with another company;

(2) A proposed transaction contemplated in subsection (1) must be approved -

(a) by a special resolution adopted by persons entitled to exercise voting rights on such a matter, at a meeting called for that purpose and at which sufficient persons are present to exercise, in aggregate, at least 25% of all of the voting rights that are entitled to be exercised on that matter; and

(b) by a special resolution, also adopted in the manner required by paragraph (a), by the shareholders of the company’s holding company if any, if -

(i) the holding company is a company or an external company;

(ii) the proposed transaction concerns a disposal of all or the greater part of the assets or undertaking of the subsidiary; and

(iii) having regard to the consolidated financial statements of the holding company, the disposal by the subsidiary substantially constitutes a disposal of all or the greater part of the assets or undertaking of the holding company; and

(c) by the court, to the extent required in the circumstances and manner contemplated in subsections (3) to (6).

(3) Despite a resolution having been adopted as contemplated in subsections (2)(a)and (b), a company may not proceed to implement that resolution without the approval of a court if -

(a) the resolution was opposed by at least 15% of the voting rights that were exercised on that resolution, and any person who voted against the resolution requires the company to seek court approval; or

(b) the court, on an application by any person who voted against the resolution, grants that person leave, in terms of subsection (6), to apply to a court for a review of the transaction in accordance with subsection (7).

(4) For the purposes of subsections (2) and (3), any voting rights controlled by an acquiring party, a person related to an acquiring party, or a person acting in concert with either of them, may not be included in calculating the percentage of voting rights -

(a) present in satisfaction of the quorum requirement; or

(b) voted in support of a resolution.

(5) If a resolution requires approval by a court as contemplated in terms of subsection (3)(a), the company must either -

(a) apply to the court for approval, and bear the costs of that application; or

(b) treat the resolution as a nullity.

(6) On an application contemplated in subsection (3)(b), the court may grant leave only if it is satisfied that the applicant

(a) is acting in good faith;

(b) appears prepared and able to sustain the proceedings; and

(c) has alleged facts which, if proved, would support an order in terms of subsection (7).

(7) On reviewing a resolution that is the subject of an application in terms of subsection (5)(a), or after granting leave in terms of subsection (6), the court may set aside the resolution only if -

(a) the resolution is manifestly unfair to any class of holders of the company’s securities; or

(b) the vote was materially tainted by conflict of interest, inadequate disclosure, failure to comply with the Act, the Memorandum or Articles of association of the company, or other significant and material procedural irregularity.

(8) The holder of any voting rights in a company is entitled to seek relief in terms of Part 6 of Chapter 7 if that person -

(a) notified the company in advance of the intention to oppose a special resolution contemplated in this section; and

(b) was present at the meeting and voted against that special resolution.

(9) If a transaction contemplated in this chapter has been approved, any person to whom assets are, or an undertaking is, to be transferred, may apply to a court for an order to effect -

(a) the transfer of the whole or any part of the undertaking, assets and liabilities of a company contemplated in that transaction;

(b) the allotment and appropriation of any shares or similar interests to be allotted or appropriated as a consequence of the transaction;

(c) the transfer of shares from one person to another;

(d) the dissolution, without winding-up, of a company, as contemplated in the transaction;

(e) incidental, consequential and supplemental matters that are necessary for the effectiveness and completion of the transaction; or

(f) any other relief that may be necessary or appropriate to give effect to, and properly implement, the amalgamation or merger.

**Implementation of amalgamation and merger**

**285**.

(1) Subject to subsection (2), after a resolution approving an amalgamation or merger has been adopted by each company that is a party to the agreement, and the transaction has satisfied all of the applicable requirements set out in section 290 -

(a) each of the amalgamating or merging companies must cause a notice of the amalgamation or merger to be given in the prescribed manner and form to every known creditor of that company;

(b) within 15 business days after delivery of a notice required by paragraph (a), a creditor may seek leave to apply to a court for a review of the amalgamation or merger only on the grounds that the creditor will be materially prejudiced by the amalgamation or merger; and

(c) a court may grant leave contemplated in paragraph (b) only if it is satisfied that -

(i) the applicant for leave is acting in good faith;

(ii) if implemented, the amalgamation or merger would materially prejudice the creditor; and

(iii) there are no other remedies available to the creditor.

(2) Subsection (1) does not apply to a company engaged in business rescue proceedings, in respect of any transaction pursuant to or contemplated in the company’s business rescue plan adopted in accordance with section 346.

(3) A notice of amalgamation or merger must be filed -

(a) after the time contemplated in subsection (1)(b), if no application has been made to the court in terms of that subsection; or

(b) in any other case -

(i) after the court has disposed of any proceedings arising in terms of subsection (1)(b) and (c); and

(ii) subject to the order of the court.

(4) A notice of amalgamation or merger must include -

(a) confirmation that the amalgamation or merger -

(i) has satisfied the requirements of sections 287 and 289;

(ii) has been approved in terms of the Competition Act, if so required by that Act;

(iii) is not subject to -

(aa) further approval by any regulatory authority; or

(bb) any unfulfilled conditions imposed by or in terms of any law administered by a regulatory authority; and

(b) the memorandum and articles of association of any company newly incorporated in terms of the agreement.

(5) After receiving a notice of amalgamation or merger, the Registrar must -

(a) issue a registration certificate for each company, if any, that has been newly incorporated in terms of the amalgamation or merger agreement; and

(b) deregister any of the amalgamating or merging companies that did not survive the amalgamation or merger.

(6) An amalgamation or merger -

(a) takes effect in accordance with, and subject to any conditions set out in the amalgamation or merger agreement;

(b) does not affect any -

(i) existing liability of a party to the agreement, or of a director of any of the amalgamating or merging companies, to be prosecuted in terms of any applicable law;

(ii) civil, criminal or administrative action or proceeding pending by or against an amalgamating or merging company, and any such proceeding may continue to be prosecuted by or against any of the amalgamated or merged company; or

(iii) conviction against, or ruling, order or judgment in favour of or against, an amalgamating or merging company, and any such ruling, order or judgement may be enforced by or against any of the amalgamated or merged, company.

(7) When an amalgamation or merger agreement has been implemented -

(a) the property of each amalgamating or merging company becomes property of the newly amalgamated, or surviving merged, company or companies; and

(b) each newly amalgamated, or surviving merged company is liable for all of the obligations of every amalgamating or merging company,

subject to subsection (8), the requirements of section 290(1), and any provision of the merger agreement, or any other agreement.

(8) If, as a consequence of an amalgamation or merger, any property that is registered in terms of any public regulation is to be transferred from an amalgamating or merging company to an amalgamated or merged company, a copy of -

(a) the amalgamation or merger agreement; and

(b) the filed notice of amalgamation or merger,

constitutes sufficient evidence for the keeper of the relevant property registry to effect a transfer of the registration of that property.

PART 2

TAKEOVER REGULATIONS, AFFECTED TRANSACTIONS AND OFFERS

**Definitions for this Part**

**286**.

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

“acquisition” includes an acquisition by a regulated company of its own securities as contemplated in section 106, but does not include the return of any securities of a regulated company to that company pursuant to the exercise of appraisal rights in terms of Part 6 of Chapter 7;

“act in concert” means any action pursuant to an agreement between or among two or more persons in terms of which any of them co-operate for the purpose of entering into or proposing an affected transaction or offer;

“ad-hoc Panel” means the ad-hoc Panel of Experts on Takeover Regulation

“affected transaction” means -

(a) a transaction or series of transactions amounting to the disposal of all or the greater part of the assets or undertaking of a regulated company, as contemplated in section 283, subject to section 291(3);

(b) an amalgamation or merger, as contemplated in section 284, if it involves at least one regulated company, subject to section 291(3);

(c) a scheme of arrangement between a regulated company and its shareholders, as contemplated in section 285, subject to section 291(3);

(d) the acquisition of, or announced intention to acquire, a beneficial interest in any voting securities of a regulated company to the extent and in the circumstances contemplated in section 296;

(e) the announced intention to acquire a beneficial interest in the remaining voting securities of a regulated company not already held by a person or persons acting in concert;

(f) a mandatory offer contemplated in section 294; or

(g) compulsory acquisition contemplated in section 295;

“holder” includes a person who holds a beneficial interest in any securities of a regulated company;

“offer”, when used as a noun, means a proposal of any sort, including a partial offer, which, if accepted, would result in an affected transaction other than such a transaction that is exempted in terms of section 293(3);

“offer period” means the period from the time when an announcement is made or ought to have been made, of a proposed or possible offer until the first closing date or, if later, the date when the offer becomes or is declared unconditional as to acceptances or lapses;

“partial offer” means an offer that, if fully accepted, would result in the offeror, alone or together with a related or inter-related person, or a person acting in concert with any of them, holding less than 100% of the voting securities of the company whose securities are the subject of the offer;

“regulated company” means a company to which this Part, Part 3 and the Takeover Regulations apply, as determined in accordance with section 293(1) and (2); and

“securities” has the meaning referred to in section 1, but does not include any instrument issued by a regulated company unless that instrument -

(a) has associated with it the right to vote generally at a general shareholders meeting; or

(b) is convertible to an instrument that satisfies the criteria set out in paragraph (a).

(2) For the purposes of this Part, two or more related or inter-related persons are regarded to have acted in concert, unless there is satisfactory evidence that they acted independently in any particular matter.

**Application of this Part**

**287**.

(1) Subject to subsections (2) to (4), this Part applies with respect to an affected transaction or offer involving a profit company or its securities if the company is -

(a) a public company; and

(b) a state-owned company, except to the extent that any such company has been exempted in terms of section 36(3);

(2) The Minister, after consulting BIPA, may prescribe a minimum percentage, being not less than 10%, of the issued securities of a private company which, if transferred within a 24-month period as contemplated in subsection (1)(c)(i), would bring that company and its securities within the application of this Part in terms of that subsection.

(3) Despite the definition of ‘affected transaction’ set out in section 292(1)(c), this Part does not apply to -

(a) a proposal to dispose, or disposal, of all or the greater part of the assets or undertaking of a regulated company;

(b) a proposed amalgamation or merger involving at least one regulated company; or

(c) a scheme of arrangement proposed by a regulated company,

to the extent that any such affected transaction is pursuant to or contemplated in a business rescue plan approved in accordance with section 346.

(4) If there is a conflict between any provision of this Part and any provision of another public regulation -

(a) the conflicting provisions apply concurrently to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second; and

(b) to the extent that it is impossible to apply or comply with one of the inconsistent provisions without contravening the second, the provisions of the other public regulation prevail.

(5) A person granted an option to acquire shares with a voting right in a regulated company is presumed to have acted in concert with the grantor of the option, unless the voting rights are retained by the grantor.

(6) A presumption under subsection (5) may be rebutted by evidence to the contrary.

**Takeover regulations**

**288.**

The Minister, with the concurrence of BIPA, must prescribe regulations to be known as the Takeover Regulations to give effect to the purposes of this Part including, among other things, regulations providing for -

(a) compliance with and enforcement of the provisions of this Part respecting affected transactions and offers;

(b) prescribed fees and levies imposed in terms of any Act of Parliament on certain companies; and

(c) any other matters relating to the powers and functions of BIPA in relation to affected transactions and offers.

**Regulating of affected transactions by the ad-hoc Panel**

**289**.

(1) The ad-hoc Panel must regulate any affected transaction or offer in accordance with this Part, but without regard to the commercial advantages or disadvantages of any transaction or proposed transaction, to -

(a) ensure the integrity of the marketplace and fairness to the holders of the securities of regulated companies;

(b) ensure the provision of -

(i) necessary information to holders of securities of regulated companies, to the extent required to facilitate the making of fair and informed decisions; and

(ii) adequate time for regulated companies and holders of their securities to obtain and provide advice with respect to offers; and

(c) prevent actions by a regulated company designed to impede, frustrate, or defeat an offer, or the making of fair and informed decisions by the holders of the securities of that company.

(2) Subject to subsection (6), the ad-hoc panel must regulate any affected transaction or offer, and the conduct of the parties in respect of any such transaction or offer, in a manner that promotes the objects set out in subsection (1) and, without limiting the generality of that subsection, ensures that -

(a) no person may enter into an affected transaction unless that person is ready, able and willing to implement that transaction;

(b) all holders of -

(i) any particular class of voting securities of an offeree regulated company are afforded equivalent treatment; and

(ii) voting securities of an offeree regulated company are afforded equitable treatment, having regard to the circumstances;

(c) no relevant information is withheld from the holders of relevant securities; and

(d) all holders of relevant securities -

(i) receive the same information from an offeror, potential offeror, or offeree regulated company during the course of an affected transaction, or when an affected transaction is contemplated; and

(ii) are provided sufficient information, and permitted sufficient time, to enable them to reach a properly informed decision.

(3) Subsection (2)(d) may not be construed or applied to prohibit -

(a) the furnishing of information in confidence by an offeree company to a bona fide potential offeror or vice versa; or

(b) the issue of circulars by brokers or advisers to any party to the transaction to their own investment clients,

with the prior approval of the ad-hoc Panel.

(4) In carrying out its mandate, the ad-hoc Panel may -

(a) require the filing, for approval or otherwise, of any document with respect to an affected transaction or offer, if the document is required to be prepared in terms of this Part;

(b) issue compliance certificates, if the ad-hoc Panel is satisfied that the offer or transaction satisfies the requirements of this Part; and

(c) initiate or receive complaints, conduct investigations, and issue compliance notices, with respect to any affected transaction or offer, in accordance with the Act and the Takeover Regulations.

(5) To the extent necessary to ensure compliance with this Part and to fulfil the purposes contemplated in subsection (1), a compliance notice contemplated in subsection (4)(c) may, among other things -

(a) prohibit or require any action by a person; or

(b) order a person to -

(i) divest of an acquired asset; or

(ii) account for profits.

(6) BIPA may wholly or partially, and with or without conditions, exempt an offeror to an affected transaction or an offer from the application of this Part, if -

(a) there is no reasonable potential of the affected transaction prejudicing the interests of any existing holder of the securities of a regulated company;

(b) the cost of compliance is disproportionate relative to the value of the affected transaction; or

(c) doing so is otherwise reasonable and justifiable in the circumstances having regard to the principles and purposes of this Part.

**General requirements concerning transactions and offers**

**290**.

A person making an offer -

(a) must comply with all reporting or approval requirements, whether set out in this Part or in the Takeover Regulations, except to the extent that the ad-hoc Panel has granted the person an exemption from any such requirement; and

(b) may not give effect to an affected transaction unless the ad-hoc Panel has -

(i) issued a compliance certificate with respect to the transaction; or

(ii) granted an exemption for that transaction.

**Required disclosure concerning certain share transactions**

**291**.

(1) A person may notify a regulated company in the prescribed manner and form within three business days after that person -

(a) acquires a beneficial interest in sufficient securities of a class issued by that company such that, as a result of the acquisition, the person holds a beneficial interest in securities amounting to 5%, 10%, 15%, or any further whole multiple of 5%, of the issued securities of that class; or

(b) disposes of a beneficial interest in sufficient securities of a class issued by a company such that, as a result of the disposition, the person no longer holds a beneficial interest in securities amounting to a particular multiple of 5% of the issued securities of that class.

(2) The requirements set out in subsection (1) apply to a person irrespective of whether -

(a) the person acquires or disposes of any securities -

(i) directly or indirectly; or

(ii) individually, or in concert with any other person or persons; or

(b) the stipulated percentage of issued securities is held by that person alone, or in aggregate by that person together with any -

(i) related or inter-related person; and

(ii) person who has acted in concert with any other person.

(3) A regulated company that has received a notice in terms of this section must -

(a) file a copy with the ad-hoc Panel; and

(b) report the information to the holders of the relevant class of securities unless the notice concerned a disposition of less than 1% of the class of securities.

(4) For the purposes of this section -

(a) when determining the number of issued securities of a class, a person is entitled to rely on the most recently published statement by the company, unless that person knows or has reason to believe that the statement is inaccurate; and

(b) when determining the number of securities held by -

(i) a person or persons contemplated in subsection (1) -

(aa) to the extent that the person has the entire, or a partial or shared, beneficial interest in any securities, those interests must be aggregated, irrespective of the nature of the interest of the person; and

(bb) any securities that may be acquired by the person if they exercised any options, conversion privileges or similar rights, are to be included; and

(ii) any other person, any securities that may be acquired by that other person if they exercised any options, conversion privileges or similar rights, are to be excluded.

**Mandatory offers**

**292**.

(1) In this section, “prescribed percentage” means the percentage prescribed by the Minister in terms of subsection (5).

(2) This section applies if -

(a) either -

(i) a regulated company reacquires any of its voting securities as contemplated in section 106 or in terms of a scheme of arrangement contemplated in section 285; or

(ii) a person acting alone has, or two or more related or inter-related persons, or two or more persons acting in concert have, acquired a beneficial interest in voting rights attached to any securities issued by a regulated company;

(b) before that acquisition a person was, or persons contemplated in paragraph (a)(ii) together were, able to exercise less than the prescribed percentage of all the voting rights attached to securities of that company; and

(c) as a result of that acquisition, together with any other securities of the company already held by the person or persons contemplated in paragraph (a)(ii), they are able to exercise at least the prescribed percentage of all the voting rights attached to securities of that company.

(3) Within one business day after the date of an acquisition contemplated in subsection (2), the person or persons in whom the prescribed percentage, or more, of the voting rights beneficially vests must give notice in the prescribed manner to the holders of the remaining securities, including in that notice -

(a) a statement that they are in a position to exercise at least the prescribed percentage of all the voting rights attached to securities of that regulated company; and

(b) offering to acquire any remaining such securities on terms determined in accordance with this Act and the Takeover Regulations.

(4) Within 30 days after giving notice in terms of subsection (3), the person or persons contemplated in subsection (2) must deliver a written offer to the holders of the remaining securities of that company to acquire those securities -

(a) on the terms contemplated in subsection (3)(b); and

(b) in compliance with the Takeover Regulations.

(5) For the purposes contemplated in this section, the Minister, on the advice of BIPA, may prescribe a percentage not exceeding 35% of the voting securities of a company.

**Compulsory acquisitions and squeeze out**

**293**.

(1) If, within four months after the date of an offer for the acquisition of any class of securities of a regulated company, the offer has been accepted by the holders of at least 90% of that class of securities, other than any such securities held before the offer by the offeror, a related or inter-related person, or persons acting in concert, or a nominee or subsidiary of any such person or persons -

(a) within two further months, the offeror may notify the holders of the remaining securities of the class, in the prescribed manner and form -

(i) that the offer has been accepted to that extent; and

(ii) that the offeror desires to acquire all remaining securities of that class; and

(b) subject to subsection (2), after giving notice in terms of paragraph (a), the offeror is entitled, and bound, to acquire the securities concerned on the same terms that applied to securities whose holders accepted the original offer.

(2) Within 30 business days after receiving a notice in terms of subsection (1)(a), a person may apply to the Court for an order -

(a) that the offeror is not entitled to acquire the securities of the applicant of that class; or

(b) imposing conditions of acquisition different from those of the original offer.

(3) If an offer to acquire the securities of a particular class has not been accepted to the extent contemplated in subsection (1) -

(a) the offeror may apply to the Court for an order authorising the offeror to give a notice contemplated in subsection (1)(a); and

(b) the Court may make the order applied for, if -

(i) after making reasonable enquiries, the offeror has been unable to trace one or more of the persons holding securities to which the offer relates;

(ii) by virtue of acceptances of the original offer, the securities that are the subject of the application, together with the securities held by the person or persons referred to in subparagraph (i), amount to not less than the minimum specified in subsection (1);

(iii) the consideration offered is fair and reasonable; and

(iv) the Court is satisfied that it is just and equitable to make the order, having regard, in particular, to the number of holders of securities who have been traced but who have not accepted the offer.

(4) If an offer for the acquisition of any class of securities of a regulated company has resulted in the acquisition by -

(a) the offeror or a nominee or subsidiary of the offeror; or

(b) a related or inter-related person of any of such person mentioned in paragraph (a), individually or in aggregate,

of sufficient securities of that class such that, together with any other securities of that class already held by that person, or those persons in aggregate, they then hold at least 90% of the securities of that class -

(i) the offeror may notify the holders of the remaining securities of the class that the offer has been accepted to that extent;

(ii) within three months after receiving a notice in terms of subparagraph (i), a person may demand that the offeror acquire all of the securities of the applicant of the class concerned; and

(iii) after receiving a demand in terms of subparagraph (ii), the offeror is entitled, and bound, to acquire the securities concerned on the same terms that applied to securities whose holders accepted the original offer.

(5) If an offeror has given notice in terms of subsection (1), and no order has been made in terms of subsection (3), or if the offeror has received a demand in terms of subsection (4)(ii) -

(a) six weeks after the date on which the notice was given or, if an application to a court is then pending, after the application has been disposed of, or after the date on which the demand was received, the offeror must -

(i) transmit a copy of the notice to the regulated company whose securities are the subject of the offer, together with an instrument of transfer, executed on behalf of the holder of those securities by any person appointed by the offeror; and

(ii) pay or transfer to that company the consideration representing the price payable by the offeror for the securities concerned;

(b) subject to the payment of prescribed fees or duties, the company must thereupon register the offeror as the holder of those securities.

(6) An instrument of transfer contemplated in subsection (5) is not required for any securities for which a share warrant is for the time being outstanding.

(7) A regulated company must deposit any consideration received under this section into a separate interest bearing bank account with a banking institution registered under the Banking Institutions Act and, subject to subsection (8), those deposits must be -

(a) held in trust by the company for the person entitled to the securities in respect of which the consideration was received; and

(b) paid on demand to the person contemplated in paragraph (a), with interest to the date of payment.

(8) If a person contemplated in subsection (7)(a) fails for more than three years to demand payment of an amount held in terms of that paragraph, the amount, together with any accumulated interest, is paid to the benefit of the Guardian’s Fund of the Master of the High Court, to be held and dealt with in accordance with the rules of that Fund.

(9) In this section any reference to a “holder of securities who has not accepted the offer” includes any holder who has failed or refused to transfer their securities to the offeror in accordance with the offer.

**Comparable and partial offers**

**294**.

(1) In this section -

(a) “independent holder of voting rights” mean a person who -

(i) holds any securities of a company that entitle that person to exercise general voting rights; and

(ii) is independent of an offeror or any related or inter-related person, or person acting in concert with any of them; and

(b) “prescribed percentage” means the percentage prescribed in terms of section 300(5).

(2) If -

(a) a regulated company that has more than one class of issued securities re-acquires any of its voting securities of a particular class or one or more particular classes, as contemplated in section 106 or in terms of a scheme of arrangement contemplated in section 285 and, as a result, a person or a number of related persons hold securities of the company entitling the person or persons to exercise more than the prescribed percentage of the general voting rights associated with all the issued securities of the company; or

(b) a person acting alone, or two or more persons acting in concert, make an offer for any securities of a regulated company that has more than one class of issued securities, which, if accepted, could result in a person, or a number of related or inter-related persons holding securities of the company entitling the person or persons to exercise more than the prescribed percentage of the general voting rights associated with all issued securities of the company,

that person or those persons acting in concert must make a comparable offer to acquire securities of each class of issued securities of that company.

(3) A person making a partial offer for any class of issued securities of a company must -

(a) make the offer to all of the holders of that class of securities;

(b) if the offer could result in the person, together with any related or inter-related person or person acting in concert with any of them, holding securities of the company entitling the person or persons to exercise more than the prescribed percentage of the general voting rights of all issued securities of the company, make the offer conditional on -

(i) a specified number of acceptances being received; and

(ii) the offer being approved by the independent holders of issued securities of that class, if all such independent holders, in aggregate, control more than 50% of the general voting rights of all issued securities of that class;

(c) state in the offer the precise number of shares offered for, if the offer could result in the person, together with any related or inter-related person or person acting in concert with any of them, holding securities of the company entitling the persons or persons to exercise more than the prescribed percentage, but less than 50%, of the general voting rights of all issued securities of the company; and

(d) if the offer could result in the person, together with any related or inter-related person or person acting in concert with any of them, holding securities of the company entitling the person or persons to exercise more than the prescribed percentage of the general voting rights of all issued securities of the company, include a specific and prominent notice that the offer could result in such circumstances.

(4) An offer that is conditional, as contemplated in subsection (3)(b), may not be declared to be unconditional as to acceptances unless it has been accepted to the extent specified in terms of subsection (3)(b)(i).

(5) If a partial offer has been made for a class of securities -

(a) any holder of those securities is entitled to accept the offer in full for the relevant percentage of the holding of that person; and

(b) any securities tendered in excess of the relevant percentage must be accepted by the offeror from each holder of securities in the same proportion to the number tendered as will enable the offeror to obtain the total number of shares for which it has offered.

**Restrictions on frustrating actions**

**295**.

(1) If the board of a regulated company believes that a bona fide offer might be imminent, or has received such an offer, the board may not -

(a) take any action in relation to the affairs of the company that could effectively result in -

(i) a bona fide offer being frustrated; or

(ii) the holders of relevant securities being denied an opportunity to decide on its merits;

(b) issue any authorised but unissued securities;

(c) issue or grant options in respect of any unissued securities;

(d) authorise or issue, or permit the authorisation or issue of, any securities carrying rights of conversion into or subscription for other securities;

(e) sell, dispose of or acquire, or agree to sell, dispose of or acquire, assets of a material amount except in the ordinary course of business;

(f) enter into contracts otherwise than in the ordinary course of business; or

(g) make a distribution that is abnormal as to timing and amount,

without the prior written approval of ad-hoc Panel, and the approval of the holders of relevant securities, or in terms of a pre-existing obligation or agreement entered into before the time contemplated in this subsection.

(2) If a regulated company believes that it is subject to a pre-existing obligation contemplated in subsection (1), it may apply to the ad-hoc Panel for consent to proceed.

**Prohibited dealings before and during offers**

**296**.

(1) During an offer, or when one is reasonably in contemplation, an offeror or a person acting in concert with that offeror, may not -

(a) make arrangements with any holders of the relevant securities;

(b) deal in, or enter into arrangements to deal in, securities of the offeree regulated company; or

(c) enter into arrangements which involve acceptance of an offer,

if there are favourable conditions attached that are not being extended to all holders of the relevant securities.

(2) During an offer period, an offeror or a person acting in concert with that offeror may not -

(a) sell any securities in the offeree company, unless -

(i) BIPA has consented in advance to that sale;

(ii) the person selling those securities has given at least 24 hours’ notice to the public that sales of that type might be made in the manner and form required by the Takeover Regulations; and

(iii) the sale is on the same terms and conditions as the offer; or

(b) acquire any securities in the offeree company after giving the notice contemplated in paragraph (a)(ii).

(3) If an offer has been announced or posted, but has not become or been declared unconditional, and has, as a result, subsequently been withdrawn or lapsed, then for a period of 12 months after the date on which the offer was withdrawn or lapsed, the offeror, any person who acted in concert with the offeror in the course of the original offer, or any person who is subsequently acting in concert with any of them, may not -

(a) make an offer for the relevant securities of the offeree company; or

(b) acquire any securities of the offeree company, if as a result of that acquisition, either the offeror or that person would be required to make a mandatory offer in terms of section 298.

(4) Subsection (3) applies equally to a partial offer whether or not the offer has become or been declared unconditional, but the period of 12 months runs from that date on which that offer became or was declared to be unconditional, or is withdrawn or lapsed.

(5) For a period of six months immediately following the later of the closing date of an offer, or the date on which the offer became unconditional -

(a) the offeror;

(b) any person who acted in concert with the offeror; or

(c) any person who is subsequently acting in concert with a person contemplated in paragraph (a) or (b),

may not make a second offer to any holder of securities of the target company, or acquire any interest in any such securities, on more favourable terms than those made under the original offer.

CHAPTER 10

EXTERNAL COMPANIES

PART 1

REGISTRATION

**Registration of memorandum of external company**

**297.**

(1) Every external company must, within 20 business days after the establishment of a place of business in Namibia, lodge, in the prescribed manner, with the Registrar -

(a) a certified copy of the memorandum of the company, and if that memorandum is not in the official language, a certified translation of it, in the official language;

(b) the notice, in the prescribed form, referred to in section 56(2);

(c) the consent of and the name and address of the auditor of the company in Namibia;

(d) a notice of the financial year of the company as contemplated in section 249;

(e) a list, in the prescribed form, containing the following particulars -

(i) the full forenames and surname and any former forenames and surname, nationality, current country of residence, occupation, residential, business and postal addresses and the date of appointment of each director, and section 223(3) in so far as it describes what constitutes former forenames and surnames does, with the necessary changes, apply to a former forename and surname of a director;

(ii) the full forenames and surname, nationality, occupation, residential, business and postal addresses, the date of appointment, of the local manager and secretary, and in the case of any local manager or secretary being a corporate body, its registered office;

(iii) the name and address of the auditor of the company in Namibia;

(f) a notice, in the prescribed form, of the name and address of the person authorised by the company to accept service on behalf of the company under section 95; and

(g) proof of payment of the annual duty payable under section 250.

(2) The Registrar must, on payment of the prescribed fee, register the memorandum of the company in the register kept under section 4, distinguishing the registration from the registrations in respect of companies incorporated in Namibia, and must issue a certificate of registration signed by him or her and under his or her seal to the company.

(3) An external company in respect of which a notice has been published under section 31(2)(b) of the Registration and Incorporation of Companies in South West Africa Proclamation, 1978 (Proclamation 234 of 1978), in the Gazette, is deemed to be registered under this section as an external company from the date mentioned in the notice.

(4) Section 304(1), and (2) in so far as it provides for the legal effects of the registration of an external company in Namibia does, with the necessary changes, apply in respect of a company referred to in subsection (3).

(5) On the registration of the memorandum of an external company the Registrar must allocate a registration number to the company concerned.

**Effect of registration of memorandum of external company**

**298**.

(1) On the registration of the memorandum of an external company the external company becomes a body corporate in Namibia subject to the applicable provisions of this Act.

(2) A certificate of registration given by the Registrar in respect of any external company is, on its mere production, in the absence of proof of fraud, conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental have been complied with.

**Power of external company to own immovable property in Namibia**

**299**.

(1) Save as may be expressly provided in any other law, an external company of which the memorandum has been registered under section 303 has the same power to own immovable property in Namibia as if it were a company incorporated in Namibia.

(2) No external company is capable of acquiring the ownership of immovable property in Namibia unless its memorandum has been or is deemed to be registered under section 303.

PART 2

ADMINISTRATIVE AND OTHER DUTIES OF EXTERNAL COMPANIES

**External company to have auditor**

**300**.

(1) Every external company must appoint and must, at all times, have an auditor within the meaning of this Act and must, not later than 14 days after that appointment or any change in the office of auditor and in the prescribed form, lodge with the Registrar a notice stating the name and address of that auditor or the change in the office.

(2) The auditor of any external company may at any time resign as such and section 280 which relates to the power of the Board to appoint a joint auditor does, with the necessary changes, apply with reference to the appointment of an auditor after a resignation.

(3) If an external company fails to appoint an auditor as provided in subsection (1), the Registrar must appoint the auditor.

(4) Subsection (1) does not apply where the sole purpose of the external company in establishing a place of business in Namibia is to establish a share registration office or a share transfer office.

**External company to have person authorised to accept service**

**301**.

(1) Notwithstanding section 303, every external company must appoint and must, at all times, have one or more persons resident in Namibia authorised by the company to accept on its behalf service of process and any notices required to be served on the company.

(2) The authorised person referred to in subsection (1) is entitled to withdraw from that authorisation after having given one month’s written notice of the withdrawal to the company and must, at the same time, lodge, in the prescribed form, two copies of the notice with the Registrar.

(3) Every external company must, within 21 days after receipt of the notice referred to in subsection (2) or after the termination of an authorisation in any other manner, lodge, in the prescribed form, with the Registrar a notice stating the alteration and the name and address of the new authorised person appointed by the company.

**Register of directors and managers and secretaries and power of Registrar to request particulars**

**302**.

(1) Sections 185(7), 308 and 312 in so far as they relate to the giving of written consent by a director or officer of a company, the keeping, by a company, of a register of directors or officers and the duty of a director or officer to furnish a company with his or her particulars respectively do, with the necessary changes, apply to a director, local manager and local secretary of an external company, but -

(a) if a director is not resident in Namibia -

(i) the entries referred to in section 303 must be made in the register not later than the end of the financial year of the company and the return referred to in section 311 must be lodged with the Registrar within 14 days after the date of those entries; and

(ii) the form of consent provided for under section 185(7) may be signed by the director or his or her duly authorised agent on his or her behalf;

(b) section 185(7)(b) in so for as it relates to the prescribed form does not apply where the sole purpose of the company in establishing a place of business in Namibia is to establish a share registration office or a share transfer office.

(2) Every external company must, within 21 days after the date of a written request by the Registrar to that effect, lodge with the Registrar complete particulars of the present residential, business and postal addresses of every director not resident in Namibia, together with a complete list containing the names and registered offices of companies incorporated in Namibia and other external companies of which that director is also a director.

**Changes in memorandum of external company**

**303**.

If any alteration is made in the memorandum of an external company, the company must, within three months of that alteration, lodge, on the prescribed form, with the Registrar for registration, a certified copy of the instrument showing the alteration, and if the instrument is in a language other than the official language, a certified translation of it in the official language.

**External company to keep accounting records and lodge annual financial statements and interim report**

**304**.

(1) Every external company must keep, in the official language, accounting records, including the matters referred to in section 292(1)(a) to (e) inclusive, which are necessary fairly to present the state of affairs and business of the company in Namibia and to explain the transactions concerning its trade and business and its financial position in Namibia.

(2) The accounting records of an existing company, which is an external company, kept under the repealed Act in a language other than the official language are deemed to be sufficient compliance with subsection (1).

(3) Sections 293 and 310 in so far as they relate to the determination of the financial year of a company and the sending by a company to its members of an interim report respectively do, with the necessary changes, apply to every external company.

(4) Every external company must, within six months after the end of every financial year, lodge, on the prescribed form, with the Registrar, a copy of its annual financial statements together with the report of the auditor of the company, in respect of its financial position, trade and business in Namibia.

(5) Sections 289, 290 and 291 do, in so far as they relate to the rights of an auditor, duties of an auditor and the remuneration of an auditor respectively and Chapter 8 does, in so far as it relates to the financial statements of companies, with the necessary changes, apply to the financial statement and report required by subsection (4) in respect of every external company.

(6) Every external company must, within six months after the end of its financial year, lodge with the Registrar a certified copy of its latest complete annual financial statements as prepared under the requirements of the foreign jurisdiction in which it was incorporated, and, if those statements are in a language other than the official language, a certified translation of the financial transactions in the official language.

(7) The Board may, where necessary in the public interest, exempt an external company from all or any of the obligations imposed by this section and may also do so on application by that external company on the ground that the required disclosure of information or of any particular information will be harmful to the company or will be impracticable or will be of no real benefit to the members of the company in Namibia in view of the insignificant amounts involved and that application must be renewed every two years.

**External companies to lodge annual return**

**305**.

(1) Every external company must, not later than one month after the end of its financial year, lodge, in the prescribed form, with the Registrar a return, specifying the particulars prescribed by the Minister by regulation, in regard to the company, as at the date of the end of its financial year.

(2) The annual return referred to in subsection (1) must be signed by one of the resident directors or local managers.

**Further administrative duties of external company**

**306**.

(1) Every external company must -

(a) conspicuously exhibit outside all its places of business in Namibia the name of the company and the foreign country in which the company is incorporated; and

(b) have the name of the company and of the foreign country in which the company is incorporated, as well as the registration number referred to in section 328(5), mentioned in legible characters in all bill-heads and letter-heads and in all notices, advertisements and other official publications of the company, and for the purposes of this subsection, section 56 which relates to use and publication of the name of a company does, with the necessary changes, apply.

(2) An external company which fails to comply with subsection (1) commits an offence and is liable to a fine which does not exceed N$4 000.

(3) An external company must not issue or send to any person in Namibia any trade catalogue, trade circular or business letter bearing the company’s name unless the names of its directors, their nationality if not Namibian nationals, the names of its local managers and its local secretary are stated in that catalogue, circular or letter.

**Deregistration of external company**

**307**.

(1) If any external company ceases to have a place of business in Namibia, it must, as soon as possible, give notice of that fact to the Registrar.

(2) If the Registrar has reasonable cause to believe that an external company has ceased to have a place of business in Namibia, he or she must send by certified post to the company at its postal address and at the address of its registered office, to the person authorised to accept service on its behalf and to its auditor, letters requiring details of its place of business, if any.

(3) If the Registrar does not, within one month of sending the letters referred to in subsection (2), receive any answer or receives an answer to the effect that the company has ceased to have a place of business in Namibia, he or she may publish in the Gazette and may by certified post send to the company at its postal address and at the address of its registered office, to the person authorised to accept service on its behalf and to its auditor, a notice to the effect that at the expiry of a period of two months from the date of that notice that company will, unless good cause is shown to the contrary, be deregistered.

(4) At the expiry of the period of two months mentioned in any notice referred to in subsection (3) or on receipt from any external company of a notice contemplated in subsection (1), the Registrar may, unless good cause to the contrary has been shown by the company, deregister the company and must, if he or she so deregisters the company, give notice to that effect in the Gazette and the date of the publication of that notice in the Gazette is deemed to be the date of deregistration, but, the liability, if any, of every director, officer and member of the company continues and may be enforced as if the company had not been deregistered.

(5) The Registrar must cancel the memorandum of an external company which has been deregistered under this section.

**Statutory transgressions in respect of external companies**

**308**.

(1) Any company incorporated outside Namibia which establishes a place of business in Namibia without complying with section 303(1), and every director, officer or agent of that company, shall be served with a Compliance notice and be liable to a prescribed administrative penalty.

(2) Every external company which and every director or officer of that company who fails to comply with section 306, 307, 308, 309, 310, 311 or 312 commits an offence and is liable to a compliance notice and a prescribed administrative penalty.

**Transfer of undertaking of external company and exemption from transfer duty under scheme**

**309**.

(1) Where an external company which is registered under this Act is being or is about to be wound up voluntarily or dissolved or whose shares have or are about to be acquired for the purpose of winding up or dissolution, the Registrar must submit a certificate to that effect to the Court.

(2) On receipt of the certificate referred to in subsection (1) the Court may, notwithstanding anything to the contrary contained in any law, if an external company satisfies the Court that it carries on its principal business within Namibia and that -

(a) it is being or is about to be wound up voluntarily or dissolved for the purpose of transferring the whole of its business and all its rights, obligations and property, wherever situate, to a company which has been or will be incorporated under this Act (in this section referred to as “the new company”) for the purpose of taking over and acquiring that business, rights, obligations and property; or

(b) all the issued shares of that external company have been, are being or are about to be acquired by the new company under a scheme in terms of which the transfer to the new company is to take place; and

(c) in both cases of paragraphs (a) and (b) -

(i) the sole consideration for that transfer or acquisition is the issue to the members of the external company of shares of the new company in proportion to their shareholdings in the external company; and

(ii) no shares in the new company will be available for issue to any persons other than the members of the external company,

make the orders specified in subsection (3).

(3) After considering the matters referred to in subsection (2) the Court may order that -

(a) the new company has been incorporated and is entitled to commence business and that the shares of the new company have been issued in proportion to the members of the external company;

(b) as from a date specified by it, the whole of the business and all rights, obligations and property of the external company, wherever situated, must be transferred to, vest in and are binding on the new company;

(c) no transfer or stamp duty is payable in respect of the transfer of any property from the external company to the new company; and

(d) any licence, exemption, permit, certificate or authority held in terms of any law by the external company in respect of its business or property, is, with effect from the date specified under paragraph (b), deemed for the purposes of that law to be held by the new company in respect of the business or property so transferred.

**Registration of external companies as companies in Namibia**

**310**.

(1) Any external company, having a share capital, which has a place of business in Namibia and which has complied with section 328 may, subject to this section, make an application for registration under Chapter 4.

(2) If an external company, making an application referred to in subsection (1), satisfies the Board that -

(a) it conducts the whole or the major portion of its business in Namibia and that the greater part of its assets, other than interests in subsidiary companies incorporated outside Namibia, are situated in Namibia;

(b) the majority of its directors are or will be Namibian nationals;

(c) the majority of its shareholders are resident in Namibia and that the company has resolved to make an application under this section;

(d) its registration and incorporation in the foreign country concerned will, on registration in Namibia, be terminated in accordance with the laws of that foreign country;

(e) it has lodged with the Registrar documents necessary for registration under this Act as the Registrar may require, and that it has paid all fees and duties payable under this Act or any other Act; and

(f) it has complied with any other requirements which the Registrar may deem necessary,

the Board may by notice in the Gazette declare that that external company is, subject to compliance with subsection (3), deemed, with effect from the date of termination of its registration and incorporation in the foreign country concerned, to be a company incorporated under this Act.

(3) The Registrar must, with effect from the date of termination of its registration and incorporation in the foreign country, effect the necessary registration in respect of that company in the manner and form prescribed by and subject to the applicable provisions of Chapter 4 and must simultaneously cancel the registration in respect of the external company under section 328.

(4) On the registration of an external company the Registrar must issue to that company a certificate, signed and sealed by him or her, to the effect that registration has taken place and that the company has been incorporated under this Act.

(5) If at the date of the registration any action, arbitration or proceeding or any cause of action, arbitration or proceeding are pending or existing by or against or in favour of the external company the same must not abate or be discontinued or be in any way prejudicially affected because of the registration but may be continued, prosecuted and enforced by, against or in favour of the external company as if that registration had not taken place.

(6) All contracts, agreements, conveyances, deeds, leases, and other instruments affecting the external company and in force at the date of registration under this section are, as from that date as binding and of as full force against or in favour of the company and may be enforced by, against or in favour of the company as fully and effectually as if the external company had at all material times been incorporated under this Act.

(7) All books, registers and documents which if registration under this section had not taken place would have been evidence in respect of any matter for or against the external company are, on and after the date of the registration, admissible in evidence in respect of the same or a like matter for or against the company.

**Effect of registration of memorandum of external company**

**311.**

(1) A company that has registered its memorandum in accordance with the provisions of this chapter is entitled to have its name included in the Companies Register.

(2) The inclusion of the external company’s name in the Companies Register does not affect the liability of any director or shareholder of the company or any other person in respect of any act or omission that took place before the company was included in the Register.

(3) Any liability contemplated in subsection (2) continues and may be enforced as if the company had not been registered as an external company.

(4) At any time after a company registered as an external company –

(a) any director, officer, shareholder of the company, or other person with an interest in the company may apply to a court for an order declaring the registration of a company as an external company to have been void, or any other order that is just and equitable in the circumstances; and

(b) if the court declares the registration to have been void, any proceedings may be taken against the company as might have been taken if the company had been lawfully registered.

CHAPTER 11

BUSINESS RESCUE

PART 1

BUSINESS RESCUE PROCEEDINGS

**Application and Definitions applicable only to this Chapter**

**312**

(1) In this Chapter –

(a) ‘affected person’, in relation to a company, means –

(i) a shareholder, creditor, employee (or their representative) or a registered trade union, if any, representing employees of the company;

(ii) if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives;

(b) ‘business rescue’ means proceedings to facilitate the rehabilitation of a viable company that is financially distressed, by allowing it to reorganise and restructure its affairs, assets, equity, debts, property, and liabilities, and may include–

(i) the temporary supervision of the company, and of the management of its affairs, business and property;

(ii) the temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and

(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvency basis or, if it is not possible for the company to so continue in existence, results in a better return for the company’s creditors or shareholders than would result from the immediate liquidation of the company;

(d) ‘business rescue fund’ means a fund established by the Development Bank of Namibia to aid financially-distressed companies during the business rescue proceedings.

(e) ‘business rescue lender’ means a lender contemplated in section 325(6)(a);

(f) ‘business rescue plan’ means a plan contemplated in Part 4 of this Chapter;

(g) ‘court’, depending on the context, means either –

(i) the High Court that has jurisdiction over the matter; or

(ii) either –

(aa) a designated Judge of the High Court that has jurisdiction over the matter, if the Chief Justice has designated any Judges in terms of subsection…]; or

(bb) a Judge of the High Court that has jurisdiction over the matter, as assigned by the Chief Justice to hear the particular matter, if the Chief Justice has not designated any judges in terms of subsection…;

(h) ‘financially-distressed’, in reference to a particular company at any particular time, means that –

(i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the reasonably foreseeable future immediately ensuing six months; or

(ii) it appears to be reasonably likely that the company will become insolvent within the reasonably foreseeable future immediately ensuing six months;

(iii) a company operates in a sector of strategic importance in the economy;

(iv) the impact on unemployment should the company be placed in liquidation;

(v) potential future viability of the company with respect to markets, sales pipeline, management, financing and other critical resources to generate sufficient cash flow;

(vi) opportunities to cut costs, sell-off unproductive parts or assets in the business, streamline the business.

(i) ‘independent creditor’ means a person who –

(i) a person who is a creditor of the business (which can also include an employee of a business to the extent that such employee is also a creditor of the business) and not related to the business, a director of the business company or the business rescue practitioner of the business/company; and

(ii) is not related to the company, a director, or the practitioner, subject to subsection…;

(j) ‘Minister” means the Minister responsible for the oversight of BIPA;

(k) post-commencement finance’ means finance or credit granted to a company that is a subject of business rescue proceedings. This financial relief ranks after the business rescue practitioner’s remuneration and other costs, but before secured, preferent and unsecured pre-Business Rescue claims;

(l) ‘practitioner’ means a suitably qualified and accredited person (whether natural or juristic), or two or more persons jointly appointed as contemplated by section 328, to oversee a business during business rescue and to prepare a business rescue plan that achieves all the objectives of business rescue. “Practitioner” may include a Board of the company;

(m) ‘rescuing company’ means achieving the goals set out in the definition of ‘business rescue’ in subsection(1)(c);

(n) ‘supervision’ means the oversight imposed on a company during its business rescue proceedings; and

(o) ‘tribunal’ means a specialist Tribunal to be established BIPA to adjudicate over, and issue directives on applications for the institution of business rescue proceedings.

(p) ‘voting interest’ means an interest as recognised, appraised and valued in terms of section 338(4);

(2) For the purposes of subsection (1)(i), an employee of a company is not related to that company solely as a result of being a member of a trade union that holds securities of that company.

(3) For the purposes contemplated in subsection (1) (g) or in any other law, the Judge President of a High Court may designate any judge of that court generally as a specialist to determine issues relating to commercial matters, commercial insolvencies and business rescue.

**Company resolution to begin business rescue**

**313**

(1) Subject to subsection (2)(a), the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe that –

(a) the company is financially distressed;

(b) there appears to be a reasonable prospect of rescuing a company;

(c) a company operates in a sector of strategic importance in the economy;

(d) the impact on unemployment should the company be placed in liquidation;

(e) potential future viability of the company with respect to markets, sales pipeline, management, financing and other critical resources to generate sufficient cash flow;

(f) opportunities to cut costs, sell-off unproductive parts or assets in the business, streamline the business;

(2) A resolution contemplated in subsection (1) –

(a) may not be adopted if liquidation proceedings have been initiated by or against the company;

(b) has no force or effect until it has been filed.

(3) Within five business days after a company has adopted and filed a resolution, as contemplated in subsection (1), or such longer time as BIPA, on application by the company, may allow, the company must –

(a) publish a notice of the resolution, and its effective date, including with the notice a sworn statement of the facts relevant to the grounds on which the board resolution was founded; and

(b) temporarily appoint a business rescue practitioner who satisfies the requirements of section 328, and who has consented in writing to accept the appointment.

(4) After temporarily appointing a practitioner as prescribed by subsection(3)(b), a company must -

(a) file a notice of the appointment of a practitioner with the Court within two business days after making the appointment; and

(b) publish a copy of the notice of appointment to each affected person within five business days after the appointment of a practitioner was confirmed by the court.

(5) If a company fails to comply with any provision of subsection (3) and (4) –

(a) its resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity; and

(b) the company may not file a further resolution contemplated in subsection (1) for a period of three months after the date on which the lapsed resolution was adopted, unless a court, on good cause shown on an ex parte application, approved the company filing a further resolution.

(6) A company that has adopted a resolution contemplated in this section may not adopt a resolution to begin liquidation proceedings, unless the resolution has lapsed in terms of subsection (5), or until the business rescue proceedings have ended as determined in accordance with section 342.

(7) If the board of a company has reasonable grounds to believe that the company is financially distressed, but the board has not adopted a resolution contemplated in this section, the board must deliver a written notice to each affected person, setting out the criteria referred to in subsection (1)(h) that are applicable to the company, and its reasons for not adopting a resolution contemplated in this section.

**Objections to company resolution**

**314**

(1) Subject to subsection (2), at any time after the adoption of a resolution in terms of section 319, until the adoption of a business rescue plan in terms of section 342, an affected person may apply to BIPA for a directive–

(a) setting aside the resolution, on the grounds that –

(i) there is no reasonable basis for believing that the company is financially distressed;

(ii) there is no reasonable prospect for rescuing the company; or

(iii) the company has failed to satisfy the procedural requirements set out in section 318;

(b) setting aside the temporary appointment of the practitioner, on the grounds that the practitioner –

(i) does not satisfy the requirements of section 322;

(ii) is not independent of the company or its management; or

(iii) lacks the necessary skills, having regard to the company’s circumstances; or

(c) requiring the practitioner to provide security in an amount and on terms and conditions that BIPA considers necessary to secure the interests of the company and any affected persons.

(2) An affected person who, as a director of a company, voted in favour of a resolution contemplated in section 318 may not apply to BIPA in terms of –

(a) subsection(1)(a) to set aside that resolution; or

(b) subsection 1(b) to set aside the appointment of the practitioner, unless that person satisfies BIPA that the person, in supporting the resolution, acted in good faith on the basis of information that has subsequently been found to be false and misleading.

(3) An applicant in terms of subsection (1) must –

(a) serve a copy of the application on the company; and

(b) notify each affected person of the application in a prescribed manner.

(4) Each affected person has a right to participate in the hearing of an application in terms of subsection(1)(a).

(5) When considering an application in terms of subsection (1)(a) to set aside the company’s resolution, BIPA may, through its Tribunal –

(a) dismiss the application;

(b) set aside the resolution –

(i) on any grounds set out in subsection (1); or

(ii) if, having regard to all of the evidence, BIPA considers that it is otherwise just and equitable to do so;

(c) afford a practitioner sufficient time to form an opinion on whether or not –

(i) a company appears to be financially distressed; or

(ii) there is a reasonable prospect of rescuing the company, and after receiving a report from the practitioner, may set aside the company’s resolution if the Authority concludes that the company is not financially distressed, or there is no reasonable prospect of rescuing the company; and

(d) if it issues a directive under paragraph (a) or (b) setting aside the company’s resolution, may issue any further necessary and appropriate directive, including –

(i) a directive that the company be placed under liquidation; or

(ii) if BIPA has found that there were no reasonable grounds for believing that the company would be unlikely to pay all of its debts as they became due and payable, a directive of costs against any director who voted in favour of the resolution to commence business rescue proceedings, unless BIPA is satisfied that the director acted in good faith and on the basis of information that the director was entitled to rely on in terms of section 194(4)(b) of the Act.

(6) If, after considering an application in terms of subsection (1)(b), BIPA issues a directive setting aside the appointment of a practitioner –

(a) BIPA may appoint an alternate practitioner who satisfies the requirements of section 328, recommended by, or acceptable to, the holders of a majority of the independent creditors’ voting interests who were represented in the hearing before the court; and

(b) the provisions of subsection(5)(b), if relevant, apply to the practitioner appointed in terms of subsection (a).

**BIPA directives to begin business rescue proceedings**

**315**

(1) Unless a company has adopted a resolution contemplated in section 318, an affected party may apply to BIPA for a directive placing the company under supervision and commencing business rescue proceedings.

(2) An Applicant in terms of subsection (1) must –

(a) serve a copy of the application on the company; and

(b) notify each affected person on the application in the prescribed manner.

(3) Each affected person has a right to participate in the hearing of an application in terms of this section.

(4) After considering an application in terms of subsection (1), BIPA may, through the Tribunal –

(a) issue a directive order placing the company under supervision and commencing business rescue proceedings, if BIPA is satisfied that -

(i) the company is financially distressed;

(ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or

(iii) it is otherwise just and equitable to do so for financial reasons,

and there is a reasonable prospect of rescuing the company; or

(b) dismissing the application, together with any other necessary and appropriate directive, including a directive placing the company under liquidation.

(5) If BIPA makes an order in terms of subsection(4)(a), BIPA may make a further order appointing as interim practitioner a person who satisfies the requirements of section 328 , and who has been nominated by the affected person who applied in terms of subsection(1), subject to ratification by the holders of a majority of independent creditors’ voting interests at the first meeting of creditors, as contemplated in section 340.

(6) If liquidation proceedings have already been commenced by or against the company at the time the application is made in terms of subsection (1), the application will suspend those liquidation proceedings until –

(a) BIPA has adjudicated upon the application; or

(b) the business rescue proceedings end, if BIPA makes the order applied for.

(7) In addition to the powers of BIPA on an application contemplated in this section, BIPA may issue a directive contemplated in subsection (4), or (5) if applicable, at any time during the course of any liquidation proceedings or proceedings to enforce any security against the company.

(8) A company that has been placed under supervision in terms of this section –

(a) may not adopt a resolution placing itself in liquidation until the business rescue proceedings have ended as determined in accordance with section 231(2); and

(b) must notify each affected person of the order within five business days after the date of the order.

**Review of BIPA’s directives**

**316**

(1) At any time after the issuing of a directive by BIPA in terms of section 360 or 361, an affected person may apply to the Companies Tribunal or the court for a review of BIPA’s directive as contemplated in section 319(5) and 320(4).

(2) An applicant in terms of subsection (1) must –

(a) serve a copy of the application on the company; and

(b) notify each affected person of the application in a prescribed manner.

(3) Each affected person has a right to participate in the hearing of an application in terms of subsection (1).

(4) An application in terms of this section shall have the effect of staying the business rescue proceedings until the court has made a determination in terms of subsection (5)

(5) After considering an application in terms of subsection (1), the court may –

(a) remit the matter back to BIPA for consideration under a different Chairperson; or

(b) make an order placing the company under supervision and commencing business rescue proceedings, including the appointment of a practitioner that meets the requirements for appointment; or

(c) dismissing the application, together with any other necessary and appropriate order, including a directive placing the company under liquidation.

**Duration of business rescue proceedings**

**317**

(1) Business rescue proceedings begin when –

(a) the company –

(i) files s resolution to place itself under supervision in terms of section 318(3); or

(ii) applies to BIPA for consent to file a resolution in terms of section 318(5)(b);

(b) an affected person applies to BIPA for a directive order placing the company under supervision in terms of section 320(1); or

(c) the Authority makes an order placing a company under supervision during the course of liquidation proceedings, or proceedings to enforce a security interest, as contemplated in section 320(7)

(2) Business rescue proceedings end when –

(a) BIPA –

(i) sets aside the resolution or order that began those proceedings; or

(ii) has converted the proceedings to liquidation proceedings;

(b) the court, on review -

(i) sets aside the resolution or order that began those proceedings has converted the proceedings to liquidation proceedings; or

(ii) has converted the proceedings to liquidation proceedings;

(c) the practitioner has filed with BIPA a notice of termination of business rescue proceedings; or

(d) a business rescue plan has been –

(i) proposed and rejected in terms of Part D of this Chapter, an no affected person has acted to extend the proceedings in any manner contemplated in section 343(5); or

(ii) adopted in terms of part D of this Chapter, and the practitioner has subsequently filed a notice of substantial implementation of that plan.

(3) If the company’s business rescue proceedings have not ended within three months after the start of those proceedings, or such longer time as BIPA, on application by the practitioner, may allow, the practitioner must –

(a) prepare a report on the progress of the business rescue proceedings, and update it at the end of each subsequent month until the end of those proceedings; and

(b) deliver the report and each update in the prescribed manner to each affected person, and to the -

(i) court, if the proceedings have been the subject of a court order; or

(ii) BIPA, in any other case.

**General moratorium on legal proceedings against the company**

**318**

(1) During business rescue proceedings, no legal proceedings, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except –

(a) with the written consent of the practitioner;

(b) with the leave of the court and in accordance with any terms the court considers suitable;

(c) as a set-off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced before or after the business rescue proceedings began;

(d) criminal proceedings against the company or any of its directors or officers;

(e) proceedings concerning any property or right over which the company exercises the powers of a trustee; or

(f) proceedings by any regulatory authority in the execution of its duties after written notification to the business rescue practitioner.

(2) During business rescue proceedings, a guarantee or surety by a company in favour of any other person may not be enforced by any person against the company except with leave of the court and in accordance with any terms the court considers just and equitable in the circumstances.

(3) If any right to commence proceedings or otherwise assert a claim against a company is subject to a time limit, the measurement of that time must be suspended during the company’s business rescue proceedings.

**Protection of property interests**

**319**

(1) Subject to subsection (2) and (3), during a company’s business rescue proceedings –

(a) the company may dispose, or agree to dispose, of property only –

(i) in the ordinary course of its business;

(ii) in a bona fide transaction at arm’s length for fair value approved in advance and in writing by the practitioner; or

(iii) in a transaction contemplated within, and undertaken as part of the implementation of, a business rescue plan that has been approved in terms of section 342;

(b) any person who, as a result of an agreement made in the ordinary course of the company’s business before the business rescue proceedings began, is in lawful possession of any property owned by the company may continue to exercise any right in respect of that property as contemplated in that agreement, subject to section 326; and

(c) despite any provision of an agreement to the contrary, no person may exercise any right in respect of any property in the lawful possession of the company, irrespective of whether the property is owned by the company, except to the extent that the practitioner consents in writing.

(2) The practitioner may not unreasonably withhold consent in terms of subsection (1) ( c) having regard to –

(a) the purpose of this Chapter;

(b) the circumstances of the company; and

(c) the nature of the property, and the nature claimed in respect of it.

(3) If during the company’s business rescue proceedings, the company wishes to dispose of any property over which another person has any security or title interest, the company must –

(a) obtain the prior consent of that other person, unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person’s security or title interest; and

(b) promptly –

(i) pay that other person the sale proceeds attributable to that property up to the amount of the company’s indebtedness to that other person; or

(ii) provide security for the amount of those proceeds, to the reasonable satisfaction of that other person.

**Post commencement finance- the Business Rescue Fund**

**320**

(1) It is hereby established the Business Rescue Fund through which companies in financial distress may apply for post - commencement finance for purposes of recapitalisation and restructuring.

(2) The Business Rescue Fund shall be under the control of the Development Bank of Namibia through a Board of Trustees made up of representatives from all providers of capital; or outsourced by the Development Bank of Namibia to a professional fund manager in the private sector.

(3) The Business Rescue Fund shall operate in terms of a clear mandate with clear guidelines which shall include, but not limited to- on qualifying criteria (i.e. which entities can be assisted), minimum required return, frequency of progress reports, etc.

(a) qualifying criteria for entities requiring post-commencement funding;

(b) post-funding reporting by companies in distress that have received funding;

(c) appointment of a Fund Manager;

(d) development of a risk management policy; and

(e) development and enforcement of corporate governance requirements.

(4) The funding of the Business Rescue Fund shall be through innovative multiple financial sources and funding solutions with respect to debt and equity recapitalization.

(5) The Business Rescue Fund shall develop a framework that provides fair protection as to the companies in distress, creditors (secured and unsecured) and financiers of post- commencement funding, which shall include, but not limited to –

(a) clear incentives to unsecured creditors;

(b) preferential ranking of creditors;

(6) During its business rescue proceedings, the company may obtain financing other than as contemplated in subsection (1) and (2), and any such financing –

(a) may be secured to the lender by utilising any asset of the company to the extent that it is not otherwise encumbered; and

(b) will be paid in order of preference set out in subsection(3)(b).

(7) Access by companies in distress to the either the Business Rescue Fund contemplated by subsection (1), or any other approved business rescue lender contemplated by subsection (6) shall be subject to certain conditions, which shall include (but not limited) to -

(a) submission of a comprehensive business rescue plan, which shall include, inter alia, the following-

(i) a comprehensive restructuring/reorganisation plan.

(b) registration of movable assets as collateral for funds or assets for companies in distress, to be recorded in a collateral registry maintained by the Business Rescue Fund.

(8) After payment of the practitioner’s remuneration and expenses referred to in section 337, and other claims arising out of the costs of the business rescue proceedings, all claims contemplated –

(a) in subsection (1) will be treated equally, but will have preference over –

(i) all claims contemplated in subsection (2), irrespective of whether or not they are secured; and

(ii) all unsecured claims against the company; or

(b) in subsection (2), will have preference in the order in which they were incurred over all unsecured claims against the company.

(9) To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment becomes due and payable by a company to an employee during the company’s business rescue proceedings, but is not paid to the employee –

(a) the money is regarded to be post-commencement financing; and

(b) will be paid in the order of preference set out in subsection (3)(a).

(10) If the business recue proceedings are superseded by a liquidation order, the preference conferred in terms of this section will remain in force, except to the extent of any claims arising out of the costs of liquidation.

**Effect of business rescue on employees and contracts**

**321**

(1) Despite any provision of an agreement to the contrary –

(a) during a company’s business rescue proceedings, employees of the company immediately before the beginning of those proceedings continue to be so employed on the same terms and conditions, except to the extent that –

(i) changes occur un the ordinary course of attrition; or

(ii) the employees and the company, in accordance with applicable labour laws, agree different terms and conditions; and

(b) any retrenchment of any such employees contemplated in the company’s business rescue plan is subject to applicable employment related legislation.

(2) Subject to sub-section (2A), and despite any provision of an agreement to the contrary, during business rescue proceedings, the practitioner may –

(a) entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that –

(i) arises under an agreement to which the company was a party at the commencement of the business rescue proceedings; and

(ii) would otherwise become due during those proceedings; or

(b) apply urgently to the court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any obligation of the company contemplated in paragraph (a).

(2A) When acting in terms of subsection (2) –

(a) a practitioner must not suspend any provision of –

(i) an employment contract; or

(ii) an agreement to which sections …. and …. of the Insolvency Act would have applied had the company been liquidated;

(b) a court may not cancel any provision of –

(i) an employment contract, except as contemplated in subsection (1); or

(ii) an agreement to which the Insolvency Act, would have applied had the company been liquidated; and

(c) if a business practitioner suspends a provision of an agreement relating to security granted by the company, that provision nevertheless continues to apply for the purpose of section 323, with respect to any proposal disposal of the company.

(3) Any party to an agreement that has been suspended or cancelled, or any provision which has been suspended or cancelled, in terms of subsection (2), may assert a claim against the company only for damages.

(4) If liquidation proceedings have been converted into business rescue proceedings, the liquidator is a creditor of the company to an extent of any outstanding claim by the liquidator for any remuneration due to work performed, or compensation for expenses incurred, before the business rescue proceedings began.

**Effect on shareholders and directors**

**322**

(1) During business rescue proceedings, an alteration in the classification or status of any issued securities of a company, other than by way of a transfer of securities in the ordinary course of business, is invalid except to the extent –

(a) that the court otherwise directs; or

(b) contemplated in an approved business rescue plan.

(2) During a company’s business rescue proceedings, each director of the company—

(a) must continue to exercise the functions of director, subject to the authority of the practitioner;

(b) has a duty to the company to exercise any management function within the company in accordance with the express instructions or direction of the practitioner, to the extent that it is reasonable to do so;

(c) remains bound by the requirements of section 193 concerning personal financial interests of the director or a related person; and

(d) to the extent that the director acts in accordance with paragraphs (b) and (c), is relieved from the duties of a director as set out in section 194 of the Act except where he/she acquiesced in the carrying on of prohibited business of the company, knowing that it is prohibited.

(3) During a company’s business rescue proceedings, each director of the company must attend to the requests of the practitioner at all times, and provide the practitioner with any information about the company’s affairs as may reasonably be required.

(4) If, during a company’s business rescue proceedings, the board, or one or more directors of the company, purports to take any action on behalf of the company that requires the approval of the practitioner, that action is void unless approved by the practitioner.

(5) At any time during the business rescue proceedings, the practitioner may apply to court for an order removing a director from office on the grounds that the director -

(a) failed to comply with the requirements of this Chapter; or

(b) by act or omission, has impeded, or is impeding –

(i) the practitioner in the performance of the powers and functions of a practitioner;

(ii) the management of the company by the practitioner; or

(iii) the development or implementation of a business rescue plan in accordance with this Chapter.

(6) Subsection (5) is in addition to any right of a person to apply to a court for an order contemplated in Part 11 of Chapter 12 (on delinquent directors).

PART 2

PRACTITIONER’S FUNCTIONS AND TERMS OF APPOINTMENT AND THE CONTINUED ROLE OF BOARD AND MANAGEMENT OF COMPANY DURING BUSINESS RESCUE

**Qualifications of practitioners**

**323**

(1) A person may be appointed as the practitioner of a company only if the person—

(a) is a member in good standing of a profession subject to regulation by a regulatory authority prescribed by the Minister in terms of subsection (2);

(b) has been licensed as such by BIPA;

(c) is not subject to an order of probation in terms of section ….(with reference to a clause in the Bill dealing with directors being placed on probation);

(d) would not be disqualified from acting as a director of the company in terms of section … (one that deals with the eligibility and qualification to be a director);

(e) does not have any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship; and

(f) is not related to a person who has a relationship contemplated in subsection (d).

(2) The Minister may designate one person or association within the Republic to regulate the practice of persons as practitioners in terms of this Act, if that person or association -

(a) is committed to achieving the purposes of this Chapter;

(b) functions predominantly to promote sound principles and good practice of business turnaround or rescue; and

(c) has sufficient human, financial and operational resources, and adequate administrative procedures and safeguards, to enable it to function efficiently and to effectively carry out its functions in terms of this Chapter, or presents to the Minister a credible plan to acquire or develop those resources.

(3) The Minister may—

(a) impose reasonable conditions upon a person or association designated by the Minister in terms of subsection (2) with respect to the carrying out of its functions and powers in terms of this Chapter; and

(b) make regulations prescribing -

(i) minimum qualifications for admission of a person to the practice of a business rescue practitioner; and

(ii) procedures to be followed by a person or association designated by the Minister in terms of subsection (2) in carrying out its functions and powers in terms of this Chapter.

**Removal and replacement of practitioner**

**324**

(1) A practitioner may be removed only—

(a) by a court order in terms of section 319; or

(b) as provided for in this section.

(2) Upon the application of an affected person, or on its own accord, the court may remove a practitioner from office on any of the following grounds-

(a) incompetence or failure to perform duties;

(b) failure to exercise the proper degree of care in the performance of the practitioner’s functions;

(c) engaging in illegal acts or conduct;

(d) if the practitioner no longer satisfies the requirements set out in section 328(1);

(e) conflict of interest or lack of independence; or

(f) the practitioner is incapacitated and unable to perform the functions of that office, and is unlikely to regain that capacity within a reasonable time.

(3) The company, or the creditor who nominated the practitioner, as the case may be, must appoint a new practitioner if a practitioner dies, resigns or is removed from office, subject to the right of an affected person to bring a fresh application in terms of section 319(1)(b) to set aside that new appointment.

**General powers and duties of practitioners**

**325**

(1) During a company’s business rescue proceedings, the practitioner, in addition to any other powers and duties set out in this Chapter—

(a) has full management control of the company in substitution for its board and pre-existing management;

(b) may delegate any power or function of the practitioner to a person who was part of the board or pre-existing management of the company;

(c) may—

(i) remove from office any person who forms part of the pre-existing management of the company; or

(ii) appoint a person as part of the management of a company, whether to fill a vacancy or not, subject to subsection (2); and

(d) is responsible to—

(i) develop a business rescue plan to be considered by affected persons, in accordance with Part D of this Chapter; and

(ii) implement any business rescue plan that has been adopted in accordance with Part D of this Chapter.

(1A) The practitioner must, as soon as practicable after appointment, inform the relevant regulatory authorities having authority in respect of the activities of the company, of the fact that the company has been placed under business rescue proceedings and of his or her appointment.

(2) Except with the approval of the court on application by the practitioner, a practitioner may not appoint a person as part of the management of the company, or an advisor to the company or to the practitioner, if that person—

(a) has any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship;

(b) is related to a person who has a relationship contemplated in subsection (a).

(3) During a company’s business rescue proceedings, the practitioner—

(a) is an officer of the court, and must report to the court in accordance with any applicable rules of, or orders made by, the court;

(b) has the responsibilities, duties and liabilities of a director of the company, as set out in sections ……(which deal with duties and liabilities of a directors);

(c) other than as contemplated in subsection (b) —

(i) is not liable for any act or omission in good faith in the course of the exercise of the powers and performance of the functions of practitioner; but

(ii) may be held liable in accordance with any relevant law for the consequences of any act or omission amounting to gross negligence in the exercise of the powers and performance of the functions of practitioner.

(4) If the business rescue process concludes with an order placing the company in liquidation, any person who has acted as practitioner during the business rescue process may not be appointed as liquidator of the company.

**Role of board and management during business rescue**

**326**

(1) During a company’s business rescue proceedings, the practitioner, in addition to any other powers and duties set out in the Act, has full management control of the company in substitution for its board and pre-existing management.

(2) During a company’s business rescue proceedings, the practitioner may delegate any power or function of the practitioner to a person who was part of the board or pre-existing management of the company.

(3) During the company’s business rescue proceedings, each director and management of the company –

(a) must continue to exercise the functions of director, subject to the authority of the practitioner;

(b) has a duty to the company to exercise any management function within the company in accordance with the express instructions or direction of the practitioner, to the extent that it is reasonable to do so;

(c) remains bound by the requirements of section 193 concerning personal financial interests of the director or a related person; and

(d) To the extent that the director acts in accordance with paragraphs (b) and (c), is relieved from the duties of a director as set out in section 194(1) up to sub-section (3), and the liabilities set out in section 196 other than section 193.

**Terms and conditions for the continued role of board and management during business rescue**

**327**

(1) If at any time during the business rescue proceedings, the director has-

(a) failed to comply with a requirement of Chapter 11; or

(b) by act or omission, has impeded, or is impeding-

(i) the practitioner in the performance of the powers and functions of practitioner;

(ii) the management of the company by the practitioner;

(iii) the development or implementation of a business rescue plan in accordance with this Chapter 11 of the Act,

then the practitioner may, in terms of section 169(6) of the Act, apply to a court for an order removing a director from office.

(2) If at any time during the business rescue proceedings, a member of management has-

(a) failed to comply with a requirement of Chapter 11; or

(b) by act or omission, has impeded, or is impeding-

(i) the practitioner in the performance of the powers and functions of practitioner;

(ii) the management of the company by the practitioner;

(iii) the development or implementation of a business rescue plan in accordance with this Chapter 11 of the Act;

then the practitioner may institute disciplinary proceedings against such a member.

(3) A director or a member of management that has acted in the manner set out in subsection (1) and (2), then a director or a member of management shall be liable to any person who has suffered any loss or damage as a result thereof.

**General powers and duties of company’s board during business rescue**

**328**

(1) Subject to section g328, the general powers and duties of company’s board of directors during business rescue shall, with the Practitioner’s approval, include-

(a) filing informational reports as required by BIPA or the court, whatever the case may be, including monthly operating reports;

(b) employment of attorneys, accountants, appraisers, auctioneers, or other professional persons to assist the company during the business rescue proceedings;

(c) filing tax returns and reports which are either necessary or ordered by BIPA after confirmation by the Practitioner.

(2) The Practitioner shall be responsible for monitoring the compliance by the board with the reporting requirements entrusted upon it.

**Investigation of the affairs of the company**

**329**

(1) During the company’s business rescue proceedings, only the Practitioner shall have the power to conduct any investigation related to the business rescue proceedings.

(2) The Practitioner shall have the power to institute any action necessary to deal with director or member of management found to be conducting investigation related to the business rescue proceedings.

**Directors of company to co-operate with the Court and Practitioner during business rescue**

**330**

(1) During the company’s business rescue proceedings, each director of the company must attend to the requests of a practitioner at all times, and provide the practitioner with any information about the company’s affairs as may reasonably be required.

(2) If, during a company’s business rescue proceedings, the board, or one or more of the directors of the company, purports to take any action on behalf of the company that requires the approval of the practitioner, that action is void unless approved by the practitioner.

(3) As soon as practicable after business rescue proceedings begin, each director must deliver to the Practitioner all books and records that relate to the affairs of the company and which are in director’s possession.

(4) Any director of a company who knows where other books and records relating to the company are being kept, must inform the practitioner as to the whereabouts of these books and records.

(5) Within five business days after business rescue proceedings begin, or such longer period as the practitioner allows, the directors of a company must provide the practitioner with a statement of affairs containing, at a minimum, particulars of the following -

(a) any material transactions involving a company or the assets of the company, and occurring within twelve months immediately before the business rescue proceedings began;

(b) any court, arbitration or administrative proceedings, including pending enforcement proceedings, involving the company;

(c) the assets and liabilities of the company, and its income and disbursements within the immediately preceding twelve months;

(d) the number of employees, and any collective agreements relating to the rights of employees;

(e) any debtors and their obligations to the company; and

(f) any creditors and their rights or claims against the company.

(6) No person is entitled, as against the practitioner of a company, to retain possession of any books or records of the company, or to claim or enforce a lien over any such books or records, unless such books or records are in the lawful possession of such a person and he or she has made copies available to the practitioner or has afforded the practitioner a reasonable opportunity to inspect the books or records concerned.

**Remuneration of directors and practitioners during business rescue**

**331**

(1) During the company’s business rescue proceedings, the pre-commencement status quo in relation to the remuneration of the board shall remain.

(2) The practitioner is entitled to charge an amount to the company for the remuneration and expenses of the practitioner in accordance with the tariff prescribed in terms of subsection (7).

(3) The practitioner may propose an agreement with the company providing for further remuneration, additional to that contemplated in subsection (1), to be calculated on the basis of a contingency related to—

(a) the adoption of a business rescue plan at all, or within a particular time, or the inclusion of any particular matter within such a plan; or

(b) the attainment of any particular result or combination of results relating to the business rescue proceedings.

(4) Subject to subsection (5), an agreement contemplated in subsection (3) is final and binding on the company if it is approved by—

(a) the holders of a majority of the creditors’ voting interests, as determined in accordance with section 380(4) to (6), present and voting at a meeting called for the purpose of considering the proposed agreement; and

(b) the holders of a majority of the voting rights attached to any shares of the company that entitle the shareholder to a portion of the residual value of the company on winding-up, present and voting at a meeting called for the purpose of considering the proposed agreement.

(5) A creditor or shareholder who voted against a proposal contemplated in this section may apply to BIPA within ten business days after the date of voting on that proposal, for a directive setting aside the agreement on the grounds that –

(a) the agreement is not just and equitable; or

(b) that the remuneration provided for in the agreement is egregiously unreason able having regard to the financial circumstances of the company.

(6) The decision of BIPA to the application by as contemplated by subsection (5) shall be final.

(7) To the extent that the practitioner’s remuneration and expenses are not fully paid, the practitioner’s claim for those amounts will rank in priority before the claims of all other secured and unsecured creditors.

(8) The Minister may make regulations prescribing a tariff of fees and expenses for the purpose of subsection (1).

PART 3

RIGHTS OF AFFECTED PERSONS DURING BUSINESS RESCUE

**Rights of employees**

**332**

(1) During a company’s business rescue proceedings any employees of the company who are –

(a) represented by a registered and representative trade union many exercise any rights set out in this Chapter –

(i) collectively through their trade union; and

(ii) in accordance with applicable labour law; or

(b) no represented by a registered and representative trade union may elect to exercise any rights set out in this Chapter either directly or by proxy through an employee organisation or representative.

(2) To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment became due and payable by a company to an employee at any time before the beginning if business rescue proceedings, and had not been paid to that employee immediately before the beginning of those proceedings, the employee is a preferred unsecured creditor of the company for the purposes of this Chapter.

(3) During a company’s business rescue process, every registered trade union representing any employee of the company and any employee who is not represented, is entitled to –

(a) a notice, which must be given in a prescribed manner and form to employees at their workplace, and served at the head office of the relevant trade union, of each BIPA and court proceeding, decision, meeting, or other relevant event concerning the business recue proceedings;

(b) participate in any court or tribunal proceedings arising during the business rescue proceedings;

(c) form a committee of employees’ representatives;

(d) be consulted by the practitioner during the development of the business rescue plan, and afforded sufficient opportunity to review any such plan and prepare a submission contemplated in section 346;

(e) be present and make submissions to the meeting of the holders of voting interests before a vote is taken on any proposed business rescue plan, as contemplated is section 346;

(f) vote with creditors on a motion to approve a proposed business plan, to the extent that the employee is a creditor, as contemplated in subsection (2); and

(g) if the proposed business rescue plan is rejected, to

(i) to propose the development of an alternative plan, in the manner contemplated in section 347.

(ii) Propose an offer to acquire the terests of one or more affected persons in the manner contemplated in section 347.

(4) A medical scheme, or a pension scheme including a provident scheme, for the benefit of the past or present employees of a company is an unsecured creditor of the company for the purposes of this Chapter to the extent of-

(a) any amount that was due and payable by the company to the trustees of the scheme at any time before the beginning of the company’s business rescue proceedings, and that had not been paid immediately before the beginning of those proceedings; and

(b) in the case of a defined benefit pension scheme, the present value at the commencement of the business rescue proceedings of any unfunded liability under that scheme.

(5) The rights set out in this section are in addition to any other rights arising or accruing in terms of any law, contract, collective agreement, shareholding, security or court order.

**Participation by creditors through committee of creditors**

**333**

(1) Each creditor is entitled to-

(a) notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings;

(b) participate in any court proceedings arising during the business rescue proceedings;

(c) formally participate in a company’s business rescue proceedings to the extent provided for in this Chapter; and

(d) informally participate in those proceedings by making proposals for a business rescue plan to the practitioner.

(2) In addition to the rights set out in subsection (1), each creditor has –

(a) the right to vote to amend, approve or reject a proposed business rescue plan, in the manner contemplated in section 346; and

(b) if the proposed business rescue plan is rejected, a further right to-

(i) propose the development of an alternative plan, in the manner contemplated in section 346;

(ii) present an offer to acquire the interests of any or all of the other creditors in the manner contemplated in section 346.

(3) The creditors of a company are entitled to form a creditors’ committee, and through that committee are entitled to be consulted by the practitioner during the development of the business rescue plan.

(4) In respect of any decision contemplated in this Chapter that requires the support of the holders of creditors’ voting interests-

(a) a secured or unsecured creditor has a voting interest equal to the value of the amount owed to that creditor by the company; and

(b) a concurrent creditor who would be subordinated in a liquidation has a voting interest, as independently and expertly appraised and valued at the request of the practitioner, equal to the amount, if any, that the creditor could reasonably expect to receive in such a liquidation of the company.

(5) The practitioner must-

(a) determine whether a creditor is independent for the purposes of this Chapter;

(b) request a suitably qualified person to independently and expertly appraise and value an interest contemplated in subsection (4)(b); and

(c) give a written notice of the determination, or appraisal and valuation, to the person concerned at least 15 business days before the date of the meeting to be convened in terms of section (on meeting to determine the future of the company).

(6) Within five business days after receiving a notice of a determination contemplated in subsection (5), a person may apply to a court to—

(a) review the practitioner’s determination that the person is, or is not, an independent creditor; or

(b) review, re-appraise and re-value that person’s voting interest, as determined in terms of subsection (5)(b).

**Participation by holders of company’s securities**

**334**

(1) During a company’s business rescue proceedings, each holder of any issued security of the company is entitled to-

(a) notice of each BIPA and court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings;

(b) participate in any BIPA or court proceedings arising during the business rescue proceedings;

(c) formally participate in a company’s business rescue proceedings to the extent provided for in this Chapter;

(d) vote to approve or reject a proposed business rescue plan in the manner contemplated in section 342 (on the consideration of the BRP), if the plan would alter the rights associated with the class of securities held by that person; and

(e) if the business rescue plan is rejected, to -

(i) propose the development of an alternative plan, in the manner contemplated in section 346; or

(ii) present an offer to acquire the interests of any or all of the creditors or other holders of the company’s securities in the manner contemplated in section 346.

**First meeting of creditors**

**335**

(1) Within 10 business days after being appointed, the practitioner must convene, and preside over, a first meeting of creditors, at which –

(a) the practitioner—

(i) must inform the creditors whether the practitioner believes that there is a reasonable prospect of rescuing the company; and

(ii) may receive proof of claims by creditors; and

(b) the creditors may determine whether or not a committee of creditors should be appointed and, if so, may appoint the members of the committee.

(2) The practitioner must give notice of the first meeting of creditors to every creditor of the company whose name and address is known to, or can reasonably be obtained by, the practitioner, setting out the —

(a) date, time and place of the meeting; and

(b) agenda for the meeting.

(3) At any meeting of creditors, other than the meeting contemplated in section…(on meeting to determine the future of the company), a decision supported by the holders of a simple majority of the independent creditors’ voting interests voted on a matter, is the decision of the meeting on that matter.

**First meeting of employees’ representatives**

**336**

(1) Within ten business days after being appointed, the practitioner must convene, and preside over, a first meeting of employees’ representatives, at which —

(a) the practitioner must inform the employees’ representatives whether the practitioner believes that there is a reasonable prospect of rescuing the company; and

(b) the employees’ representatives may determine whether or not an employees’ committee should be appointed and, if so, may appoint the members of the committee.

(2) The practitioner must give notice of the meeting to every registered trade union representing employees of the company and, if there are any employees who are not represented by such a registered trade union, to those employees, or their representatives, setting out the—

(a) date, time and place of the meeting; and

(b) agenda for the meeting.

**Functions, duties and membership of committees of affected persons**

**337**

(1) A committee of employees, or of creditors, appointed in terms of section 341 or 342, respectively—

(a) may consult with the practitioner about any matter relating to the business rescue proceedings, but may not direct or instruct the practitioner;

(b) may, on behalf of the general body of creditors or employees, respectively, receive and consider reports relating to the business rescue proceedings; and

(c) must act independently of the practitioner to ensure fair and unbiased representation of creditors’ or employees’ interests.

(2) A person may be a member of a committee of creditors or employees, respectively, only if the person is—

(a) an independent creditor, or an employee, of the company;

(b) an agent, proxy or attorney of an independent creditor or employee, or other person acting under a general power of attorney; or (c) authorised in writing by an independent creditor or employee to be a member.

PART 4

DEVELOPMENT AND APPROVAL OF BUSINESS RESCUE PLAN

**Proposal of a business rescue plan**

**338**

(1) The practitioner, after consulting the creditors, other affected persons, the Board and the management of the company, must prepare a business rescue plan for consideration and possible adoption at a meeting held in terms of section 342.

(2) The business rescue plan must contain all the information reasonably required to facilitate affected persons in deciding whether or not to accept or reject the plan, and must be divided into three Parts, as follows:

(a) Part A – Background, which must include at least –

(i) a complete list of all the material assets of the company, as well as an indication as to which assets were held as security by creditors when the business rescue proceedings began;

(ii) a complete list of the creditors of the company when the business rescue proceedings began, as well as an indication as to which creditors would qualify as secured, statutory preferent and concurrent in terms of the laws of insolvency, and an indication of which of the creditors have proved their claims;

(iii) the probable dividend that would be received by creditors, in their specific classes, if the company were to be placed in liquidation;

(iv) a complete list of the holders of the company’s issued securities;

(v) a copy of the written agreement concerning the practitioner’s remuneration; and

(vi) a statement whether the business rescue plan includes a proposal made informally by a creditor of the company.

(b) Part B—Proposals, which must include at least-

(i) the nature and duration of any moratorium for which the business rescue plan makes provision;

(ii) the extent to which the company is to be released from the payment of its debts, and the extent to which any debt is proposed to be converted to equity in the company, or another company;

(iii) the ongoing role of the company, and the treatment of any existing agreements;

(iv) the property of the company that is to be available to pay creditors’ claims in terms of the business rescue plan;

(v) the order of preference in which the proceeds of property will be applied to pay creditors if the business rescue plan is adopted;

(vi) the benefits of adopting the business rescue plan as opposed to the benefits that would be received by creditors if the company were to be placed in liquidation; and

(vii) the effect that the business rescue plan will have on the holders of each class of the company’s issued securities.

(c) Part C—Assumptions and conditions, which must include at least-

(i) a statement of the conditions that must be satisfied, if any, for the business rescue plan to—

(aa) come into operation; and

(bb) be fully implemented;

(ii) the effect, if any, that the business rescue plan contemplates on the number of employees, and their terms and conditions of employment;

(iii) the circumstances in which the business rescue plan will end; and

(iv) a projected—

(aa) balance sheet for the company; and

(bb) statement of income and expenses for the ensuing three years,

prepared on the assumption that the proposed business plan is adopted.

(3) The projected balance sheet and statement required by subsection (2)(c)(iv) –

(a) must include a notice of any material assumptions on which the projections are based; and

(b) may include alternative projections based on varying assumptions and contingencies.

(4) A proposed business rescue plan must conclude with a certificate by the practitioner stating that any—

(a) actual information provided appears to be accurate, complete, and up to date; and

(b) projections provided are estimates made in good faith on the basis of factual information and assumptions as set out in the statement.

(5) The business rescue plan must be published by the company within twenty-five business days after the date on which the practitioner was appointed, or such longer time as may be allowed by—

(a) BIPA, on application by the company; or

(b) the holders of a majority of the creditors’ voting interests.

**Meeting to determine future of company**

**339**

(1) The practitioner must convene and preside over a meeting of creditors and any other holders of a voting interest, called for the purpose of considering the proposed rescue plan within 10 business days after the publication of that plan in terms of section 343.

(2) At least five business days before the meeting contemplated in subsection (1), the practitioner must deliver a notice of the meeting to all affected persons, setting out –

(a) the date, time and place of the meeting;

(b) the agenda of the meeting; and

(c) a summary of the rights of affected persons to participate in and vote at the meeting.

(3) The meeting contemplated in this section may be adjourned from time to time, as necessary or expedient, until a decision regarding the company’s future has been taken in accordance with this section and section 344.

**Consideration of the business rescue plan**

**340**

(1) At a meeting convened in terms of section 386, the practitioner must—

(a) introduce the proposed business rescue plan for consideration by the creditors, and if applicable, by the shareholders;

(b) inform the meeting whether the practitioner continues to believe that there is a reasonable prospect of the company being rescued;

(c) provide an opportunity for the employees’ representatives to address the meeting;

(d) invite discussion, and entertain and conduct a vote, on any motions to—

(i) amend the proposed plan, in any manner moved and seconded by holders of creditors’ voting interests, and satisfactory to the practitioner; or

(ii) direct the practitioner to adjourn the meeting in order to revise the plan for further consideration; and

(e) call for a vote for preliminary approval of the proposed plan, as amended if applicable, unless the meeting has first been adjourned in accordance with subsection (d)(ii).

(2) In a vote called in terms of subsection (1)(d), the proposed business rescue plan will be approved on a preliminary basis if—

(a) it was supported by the holders of more than 75% of the creditors’ voting interests that were voted; and

(b) the votes in support of the proposed plan included at least 50% of the independent creditors’ voting interests, if any, that were voted.

(3) If a proposed business rescue plan—

(a) is not approved on a preliminary basis, as contemplated in subsection (2), the plan is rejected, and may be considered further only in terms of section 388;

(b) does not alter the rights of the holders of any class of the company’s securities, approval of that plan on a preliminary basis in terms of subsection (2) constitutes also the final adoption of that plan, subject to satisfaction of any conditions on which that plan is contingent; or

(c) does alter the rights of any class of holders of the company’s securities—

(i) the practitioner must immediately hold a meeting of holders of the class, or classes of securities who rights would be altered by the plan, and call for a vote by them to approve the adoption of the proposed business rescue plan; and

(ii) if, in a vote contemplated in subparagraph (i), a majority of the voting rights that were exercised—

(aa) support adoption of the plan, it will have been finally adopted, subject only to satisfaction of any conditions on which it is contingent; or

(bb) oppose adoption of the plan, the plan is rejected, and may be considered further only in terms of section 346.

(4) A business rescue plan that has been adopted is binding on the company, and on each of the creditors of the company and every holder of the company’s securities, whether or not such a person—

(a) was present at the meeting;

(b) voted in favour of adoption of the plan; or

(c) in the case of creditors, had proven their claims against the company.

(5) The company, under the direction of the practitioner, must take all necessary steps to—

(a) attempt to satisfy any conditions on which the business rescue plan is contingent; and

(b) implement the plan as adopted.

(6) To the extent necessary to implement an adopted business rescue plan—

(a) the practitioner may, in accordance with that plan, determine the consideration for, and issue, any authorised securities of the company, despite sections (sections dealing with the issuing and consideration of shares in the Bill) to the contrary; and

(b) if the business rescue plan was approved by the shareholders of the company, as contemplated in subsection (3)(c), the practitioner may amend the company’s Memorandum and Articles of Association to authorise, and determine the preferences, rights, limitations and other terms of, any securities that are not otherwise authorised, but are contemplated to be issued in terms the business rescue plan, despite any provision of section 77 and 78 (on amending the Memorandum and Articles of association), section 95 (on authorisation of shares) or section 96 (on preferences, rights, limitations and other terms attaching to shares) to the contrary.

(7) Except to the extent that an approved business rescue plan provides otherwise, a pre-emptive right of any shareholder of the company, as contemplated in section 98, does not apply with respect to an issue of shares by the company in terms of the business rescue plan.

(8) When the business rescue plan has been substantially implemented, the practitioner must file a notice of the substantial implementation of the business rescue plan.

**Failure to adopt business rescue plan**

**341**

(1) If a business rescue plan is rejected the practitioner may—

(a) seek a vote of approval from the holders of voting interests to prepare and publish a revised plan; or

(b) advise the meeting that the company will apply to a court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate.

(2) If the practitioner does not take any action contemplated in paragraph (a)—

(a) any affected person present at the meeting may—

(i) call for a vote of approval from the holders of voting interests requiring the practitioner to prepare and publish a revised plan; or

(ii) apply to the court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate; or

(b) any affected person, or combination of affected persons, may make a binding offer to purchase the voting interests of one or more persons who opposed adoption of the business rescue plan, at a value independently and expertly determined, on the request of the practitioner, to be a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated.

(3) If the practitioner, acting in terms of subsection (1)(b), or an affected person, acting in terms of subsection (2)(a)(ii), informs the meeting that an application will be made to the court as contemplated in those provisions, the practitioner must adjourn the meeting—

(a) for five business days, unless the contemplated application is made to the court during that time; or

(b) until the court has disposed of the contemplated application.

(4) If, on the request of the practitioner in terms of subsection (1)(a), or a call by an affected person in terms of subsection (2)(a)(i), the meeting directs the practitioner to prepare and publish a revised business rescue plan—

(a) the practitioner must—

(i) conclude the meeting after that vote; and

(ii) prepare and publish a new or revised business rescue plan within 10 business days; and

(b) the provisions of this Part apply afresh to the publishing and consideration of that new or revised plan.

(5) If an affected person makes an offer contemplated in subsection (2)(b), the practitioner must—

(a) adjourn the meeting for no more than five business days, as necessary to afford the practitioner an opportunity to make any necessary revisions to the business rescue plan to appropriately reflect the results of the offer; and

(b) set a date for resumption of the meeting, without further notice, at which the provisions of section 152 and this section will apply afresh.

(6) If no person takes any action contemplated in section (1), the practitioner must promptly file a notice of the termination of the business rescue proceedings.

(7) A holder of a voting interest, or a person acquiring that interest in terms of a binding offer, may apply to a court to review, re-appraise and re-value a determination by an independent expert in terms of subsection (2)(b).

(8) On an application contemplated in section 1(b) or 2(b), a court may order that the vote on a business rescue plan be set aside if the court is satisfied that it is reasonable and just to do so, having regard to –

(a) the interests represented by the person or persons who voted against the proposed business rescue plan;

(b) the provision, if any, made in the proposed business rescue plan with respect to the interests of that person or those persons;

(c) a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated.

**Discharge of debts and claims**

**342**

(1) A business rescue plan may provide that, if it is implemented in accordance with its terms and conditions, a creditor who has acceded to the discharge of the whole or part of a debt owing to that creditor will lose the right to enforce the relevant debt or part of it.

(2) If a business rescue plan has been approved and implemented in accordance with this Chapter, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process, except to the extent provided for in the business rescue plan.

PART 5

COMPROMISE WITH CREDITORS

**Compromise between company and creditors**

**343**

(1) This section applies to a company, irrespective of whether or not it is financially distressed as defined in section 318(1)(h), unless it is engaged in business rescue proceedings in terms of this Chapter.

(2) The board of a company, or the liquidator of such a company if it is being wound up, may propose an arrangement or a compromise of its financial obligations to all of its creditors, or to all of the members of any class of its creditors, by delivering a copy of the proposal, and notice of meeting to consider the proposal, to—

(a) every creditor of the company, or every member of the relevant class of creditors whose name or address is known to, or can reasonably be obtained by, the company; and

(b) BIPA.

(3) A proposal contemplated in subsection (2) must contain all information reasonably required to facilitate creditors in deciding whether or not to accept or reject the proposal, and must be divided into three parts, as follows-

(a) Part A—Background, which must include at least—

(i) a complete list of all the material assets of the company, as well as an indication as to which assets are held as security by creditors as of the date of the proposal;

(ii) a complete list of the creditors of the company as of the date of the proposal, as well as an indication as to which creditors would qualify as secured, statutory preferent and concurrent in terms of the laws of insolvency, and an indication of which of the creditors have proved their claims;

(iii) the probable dividend that would be received by creditors, in their specific classes, if the company were to be placed in liquidation;

(iv) a complete list of the holders of the company issued securities, and the effect that the proposal would have on them, if any; and

(v) whether the proposal includes a proposal made informally by a creditor of the company.

(b) Part B—Proposals, which must include at least—

(i) the nature and duration of any proposed debt moratorium;

(ii) the extent to which the company is to be released from the payment of its debts, and the extent to which any debt is proposed to be converted to equity in the company, or another company;

(iii) the treatment of contracts and ongoing role of the company;

(iv) the property of the company that is proposed to be available to pay creditors’ claims;

(v) the order of preference in which the proceeds of property of the company will be applied to pay creditors if the proposal is adopted; and

(vi) the benefits of adopting the proposal as opposed to the benefits that would be received by creditors if the company were to be placed in liquidation.

(c) Part C—Assumptions and conditions, which must include at least—

(i) a statement of the conditions that must be satisfied, if any, for the proposal to -

(aa) come into operation;

(bb) be fully implemented;

(ii) the effect, if any, that the plan contemplates on the number of employees, and their terms and conditions of employment; and

(iii) a projected—

(aa) balance sheet for the company; and

(bb) statement of income and expenses for the ensuing three years, prepared on the assumption that the proposal is accepted.

(4) The projected balance sheet and statement required by subsection (3)(c)(iii)—

(a) must include a notice of any significant assumptions on which the projections are based; and

(b) may include alternative projections based on varying assumptions and contingencies.

(5) A proposal must conclude with a certificate by an authorised director or prescribed officer of the company stating that any—

(a) factual information provided appears to be accurate, complete, and up to the date; and

(b) projections provided are estimates made in good faith on the basis of factual information and assumptions as set out in the statement.

(6) A proposal contemplated in this section will have been adopted by the creditors of the company, or the members of a relevant class of creditors, if it is supported by a majority in number, representing at least 75% in value of the creditors or class, as the case may be, present and voting in person or by proxy, at a meeting called for that purpose.

(7) If a proposal is adopted as contemplated in subsection (6)—

(a) the company may apply to the court for an order approving the proposal; and

(b) the court, on an application in terms of paragraph (a) may sanction the compromise as set out in the adopted proposal, if it considers it just and equitable to do so, having regard to—

(i) the number of creditors of any affected class of creditors, who were present or represented at the meeting, and who voted in favour of the proposal; and

(ii) in the case of a compromise in respect of a company being wound up, the report of the Master required in terms of the laws contemplated in item 9 of Schedule 5.

(8) A copy of an order of the court sanctioning a compromise—

(a) must be filed by the company within five business days;

(b) must be attached to each copy of the company’s Memorandum of Association that is kept at the company’s registered office, or elsewhere as contemplated in section 244; and

(c) is final and binding on all of the company’s creditors or all of members of the relevant class of creditors, as the case may be, as of the date on which it is filed. (9) An arrangement or a compromise contemplated in this section does not affect the liability of any person who is a surety of the company.

CHAPTER 12

MARKET ABUSE

PART 1

INTERPRETATION

**Definitions**

**344**.

In this Chapter, unless the context indicates otherwise—

‘‘claims officer’’ means the person appointed in terms of s 357(2)(d) to be responsible for

considering and determining claims in terms of section 355;

‘‘deal’’ includes conveying or giving an instruction to deal;

“Enforcement Committee” means the Market Abuse Enforcement Committee within the Financial Intelligence Centre of Namibia, established in terms of the Financial Intelligence Act, 2012 (Act No 13 of 2012);

‘‘executive director’’ means a person appointed as such in terms of section 358(3)(a);

“Financial Intelligence Centre” (‘FIC’) means the Financial Intelligence Centre established in terms of the Financial Intelligence Act, 2012 (Act No 13 of 2012);

‘‘inside information’’ means specific or precise information, which has not been

made public and which—

(a) is obtained or learned as an insider; and

(b) if it were made public, would be likely to have a material effect on the price or value of any security listed on a regulated market;

‘‘insider’’ means a person who has inside information—

(a) through—

(i) being a director, employee or shareholder of an issuer of securities listed

on a regulated market to which the inside information relates; or

(ii) having access to such information by virtue of employment, office or

profession; or

(b) where such person knows that the direct or indirect source of the information was a person contemplated in paragraph (a);

‘‘market abuse rules’’ means the rules made under section 357(2)(f);

‘‘market corner’’ means any arrangement, agreement, commitment or understanding involving the purchasing, selling or issuing of securities listed on a regulated market—

(a) by which a person, or a group of persons acting in concert, acquires direct or indirect beneficial ownership of, or exercises control over, or is able to influence the price of, securities listed on a regulated market; and

(b) where the effect of the arrangement, agreement, commitment or understanding is or is likely to be that the trading price of the securities listed on a regulated market, as reflected through the facilities of a regulated market, is or is likely to be abnormally influenced or dictated by such person or group of persons in that the said trading price deviates or is likely to deviate from the trading price which would otherwise likely have been reflected through the facilities of the regulated market on which the particular securities are traded;

‘‘person’’ includes a partnership and any trust; and

‘‘regulated market’’ means any market, domestic or foreign, which is regulated in terms of the laws of the country in which the market conducts business as a market for dealing in securities listed on that market.

PART 2

INSIDER TRADING

**Insider Trading**

**345**

(1)

(a) An insider who knows that he or she has inside information and who deals directly or indirectly or through an agent for his or her own account in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it, commits an offence.

(b) An insider is, despite paragraph (a), not guilty of any offence contemplated in that

paragraph if such insider proves on a balance of probabilities that he or she—

(i) only became an insider after he or she had given the instruction to deal to an authorised user and the instruction was not changed in any manner after he or she became an insider; or

(ii) was acting in pursuit of a transaction in respect of which—

* + - * 1. all the parties to the transaction had possession of the same inside information;
        2. trading was limited to the parties referred to in subparagraph (aa); and
        3. the transaction was not aimed at securing a benefit from exposure to

movement in the price of the security, or a related security, resulting from the inside information.

(2)

(a) An insider who knows that he or she has inside information and who deals, directly or indirectly or through an agent for any other person in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it, commits an offence.

(b) An insider is, despite paragraph (a), not guilty of any offence contemplated in that

paragraph if such insider proves on a balance of probabilities that he or she—

(i) is an authorised user and was acting on specific instructions from a client, and did not know that the client was an insider at the time;

(ii) only became an insider after he or she had given the instruction to deal to an authorised user and the instruction was not changed in any manner after he or she became an insider; or

(iii) was acting in pursuit of a transaction in respect of which—

* + - * 1. all the parties to the transaction had possession of the same inside

information;

(bb) trading was limited to the parties referred to in subparagraph (aa); and

(cc) the transaction was not aimed at securing a benefit from exposure to

movement in the price of the security, or a related security, resulting from the inside information.

(3)

(a) Any person who deals for an insider directly or indirectly or through an agent

in the securities listed on a regulated market to which the inside information possessed by the insider relates or which are likely to be affected by it, who knew that such person is an insider, commits an offence.

(b) A person is, despite paragraph (a), not guilty of any offence contemplated in that

paragraph if the person on whose behalf the dealing was done had any of the defences available to him or her as set out in subsection (2)(b)(ii) and (iii).

(4)

(a) An insider who knows that he or she has inside information and who discloses

the inside information to another person, commits an offence.

(b) An insider is, despite paragraph (a), not guilty of the offence contemplated in that paragraph if such insider proves on a balance of probabilities that he or she disclosed the inside information because it was necessary to do so for the purpose of the proper performance of the functions of his or her employment, office or profession in circumstances unrelated to dealing in any security listed on a regulated market and that he or she at the same time disclosed that the information was inside information.

(5) An insider who knows that he or she has inside information and who encourages or causes another person to deal or discourages or stops another person from dealing in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it, commits an offence.

PART 3

PUBLICATION

**Publication**

**346**

For the purposes of the definition of ‘‘inside information’’, information is regarded as having been made public in circumstances which include, but are not limited to, the following:

(a) When the information is published in accordance with the rules of the relevant

regulated market; or

(b) when the information is contained in records which by virtue of any enactment are open to inspection by the public; or

(c) when the information can be readily acquired by those likely to deal in any

listed securities—

(i) to which the information relates; or

(ii) of an issuer to which the information relates; or

(d) when the information is derived from information which has been made public.

PART 4

PROHIBITED TRADING PRACTICES

**Prohibited Trading Practices**

**347**

(1) No person—

(a) may, either for such person’s own account or on behalf of another person, knowingly directly or indirectly use or participate in any practice which has created or is likely to have the effect of creating—

(i) a false or deceptive appearance of the demand for, supply of, or trading

activity in connection with; or

(ii) an artificial price for, that security;

(b) who ought reasonably to have known that he or she is participating in a practice referred to in subparagraph (a), may participate in such practice.

(2) A person who contravenes subsection (1)(a), commits an offence.

(3) Without limiting the generality of subsection (1), the following are contraventions

of subsection (1):

(a) Approving or entering on a regulated market an order to buy or sell a security listed on that market which involves no change in the beneficial ownership of that security, with the intention of creating—

(i) a false or deceptive appearance of the trading activity in; or

(ii) an artificial market price for that security;

(b) approving or entering on a regulated market an order to buy or sell a security listed on that market with the knowledge that an opposite order or orders at

substantially the same price, have been or will be entered by or for the same or different persons with the intention of creating—

(i) a false or deceptive appearance of the trading activity in; or

(ii) an artificial market price for, that security;

(c) approving or entering on a regulated market orders to buy a security listed on

that market at successively higher prices or orders to sell a security listed on that market at successively lower prices for the purpose of unduly influencing the market price of such security;

(d) approving or entering on a regulated market an order at or near the close of the

market, the primary purpose of which is to change or maintain the closing price of a security listed on that market;

(e) approving or entering on a regulated market an order to buy or sell any security which order will be included in any auction during an auction call period and cancelling such order immediately prior to the auction matching, for the purpose of creating—

(i) a false or deceptive appearance of the demand for or supply of such security; or

(ii) an artificial price for such security;

(f) effecting or assisting in effecting a market corner;

(g) maintaining, at a level that is artificial, the price of a security listed on a

regulated market.

(4) For the purpose of subsection (1), the employment of price-stabilising mechanisms that are regulated in terms of the rules or listing requirements of an exchange does not constitute a practice which creates an artificial price for securities which are subject to such price-stabilising mechanisms.

(5) For the purposes of subsection 3(a), a purchase or sale of listed securities does not involve a change in beneficial ownership if a person who had an interest in the securities before the purchase or sale, or a person associated with that person in relation to those securities, has an interest in the securities after the purchase or sale.

PART 5

FALSE, MISLEADING OR DECEPTIVE STATEMENTS, PROMISES AND FORECASTS

**348**

(1) No person may, directly or indirectly, make or publish in respect of securities traded on a regulated market, or in respect of the past or future performance of a company whose securities are listed on a regulated market—

(a) any statement, promise or forecast which is, at the time and in the light of the circumstances in which it is made, false or misleading or deceptive in respect of any material fact and which the person knows, or ought reasonably to know, is false, misleading or deceptive; or

(b) any statement, promise or forecast which is, by reason of the omission of a material fact, rendered false, misleading or deceptive and which the person knows, or ought reasonably to know, is rendered false, misleading or deceptive by reason of the omission of that fact.

(2) A person who has made a statement as contemplated in subsection (1) and who was unaware that the statement was false, misleading or deceptive, and who becomes aware of the fact that such statement was false, misleading or deceptive, must, without delay, publish a full and frank correction with regard to such statement.

(3) A person who contravenes subsection (1), or who fails to comply with subsection (2), commits an offence.

PART 6

INSIDER TRADING SANCTION: LIABILITY RESULTING FROM INSIDER TRADING

**349**.

(1) Subject to subsection (3), any person who contravenes section 351(1), (2) or (3) of this Act is liable to pay an administrative sanction not exceeding —

(a) the equivalent of t]he profit that the person, such other person or such insider, as the case may be, made or would have made if he or she had sold the securities at any stage; or the loss avoided, through such dealing;

(b) an amount of up to NAD$1million, to be adjusted by the registrar annually to

reflect the Consumer Price Index, as published by Namibia Statistics Agency, plus

three times the amount referred to in paragraph (a);

(c) interest; and

(d) cost of suit, including investigation costs, on such scale as determined by the

Enforcement Committee.

(2) Subject to subsection (3), any person who contravenes section 351(4) or (5) of this Act is liable to pay an administrative sanction not exceeding—

(a) the equivalent of the profit that such other person made or would have made if he or she had sold the securities at any stage, or the loss avoided, through such dealing, if the recipient of the information, or such other person, as the case may be, dealt directly or indirectly in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it;

(b) an amount of up to NAD$1 million, to be adjusted by the registrar annually to reflect the Consumer Price Index, as published by Namibia Statistics Agency, plus three times the amount referred to in paragraph (a);

(c) interest;

(d) cost of suit, including investigation costs, on such scale as determined by the

Enforcement Committee; and

(e) the commission or consideration received for such disclosure, encouragement

or discouragement.

(3) If the other person referred to in section 351(2), (3), (4) and (5) is liable as an insider in terms of section 351(1), the insider referred to in section 351(2), (3), (4) and (5) is jointly and severally liable together with that other person to pay the amounts set out in subsections (1)(a), (c), (d) and (2)(a), (c) and (d), as the case may be.

(4) Any amount recovered by the FIC as a result of the proceedings contemplated in this section must be deposited by the FIC directly into a specially designated trust account and—

(a) the FIC is, as a first charge against the trust account, entitled to reimbursement of all expenses reasonably incurred by it in bringing such proceedings and in administering the distributions made to claimants in terms of subsection (5);

(b) the balance, if any, must be distributed by the claims officer to the claimants referred to in subsection (5) in accordance with subsection (6);

(c) any amount not paid out in terms of paragraph (b) accrues to the board.

(5) The balance referred to in subsection (4)(b) must be distributed to all claimants who—

(a) submit claims to the directorate within 90 days from the date of publication of a notice in one national newspaper or on the official website inviting persons who are affected by the dealings referred to in section 351(1) to (5) to submit their claims; and

(b) prove to the reasonable satisfaction of the claims officer that—

(i) they were affected by the dealings referred to in section 351(1) to (5); and

(ii) in the case where the inside information was made public within five trading days from the time the insider referred to in section 351(1), (2) and (3), or the other person referred to in section 351(4) and (5) dealt, they dealt in the same securities at the same time or any time after the insider or other person so dealt and before the inside information was made public; or

(iii) in every other case, they dealt in the same securities at the same time or any time thereafter on the same day as the insider or other person referred to in subparagraph (ii);

(iv) it would be equitable for their claim to be included in a distribution in terms of subsection (4)(b).

(6) Subject to subsection (7), a claimant must receive an amount—

(a) equal to the difference between the price at which the claimant dealt and the price, determined by the Enforcement Committee, that the claimant would have dealt at if the inside information had been published at the time of dealing; or

(b) equal to the pro rata portion of the balance referred to in subsection (2)(b), calculated according to the relationship which the amount contemplated in paragraph (a) bears to all amounts proved in terms of subsection (3) by claimants, whichever is the lesser, unless the claims officer in his or her discretion determines that the claimant should receive a lesser or no amount.

(7) An amount awarded in proceedings contemplated in section 360 must be deducted

from any amount claimed in terms of this section.

(8) The common law principles of vicarious liability apply to the liability established

by this section.

PART 7

PROCEDURAL MATTERS

ATTACHMENTS AND INTERDICTS

**350**.

On application by the FIC, a court may in relation to any matter referred to in Chapter 12 grant an interdict or order the attachment of assets or evidence to prevent their concealment, removal, dissipation or destruction.

Administration of the Chapter

**Powers and duties of Financial Intelligence Centre**

**351**.

(1) The FIC is responsible for the supervision of compliance with this Chapter.

(2) In addition to its powers in terms of the Financial Intelligence Centre Act the FIC

may, subject to section 358—

(a) investigate any matter relating to an offence or contravention referred to in sections 351, 352 and 353, including insider trading in terms of the Companies Act, 2004 (Act No. 24 of 2004), and the offences referred to therein, committed before the repeal of that Act;

(b) at the request of the BIPA, investigate or assist BIPA in an investigation into possible offences similar to those referred to in paragraph (a), regulated in terms of the laws of a country other than the Republic that BIPA administers;

(c) institute such proceedings as are contemplated in this Chapter;

(d) administer the proof of claims and distribution of payments, with the assistance of the Claims officer, in terms of section 355;

(e) by notice on the official website or by means of any other appropriate public media, make known—

(i) the status and outcome of an investigation referred to under paragraph (a)

or (b);

(ii) the details of an investigation if disclosure is in the public interest;

(f) make market abuse rules after consultation with BIPA—

(i) concerning the administration of this Chapter by the FIC and the

Enforcement Committee;

(ii) concerning the manner in which investigations in terms of this Chapter

are to be conducted;

(iii) concerning the notification of amounts received in terms of section 355, the procedure for the lodging and proof of claims, the administration of trust accounts and the distribution of payments in respect of claims;

(iv) concerning meetings of the Enforcement Committee;

(v) which are generally designed to ensure that the FIC and the Enforcement Committee are able to perform their functions in terms of this Chapter;

(vi) dealing with the manner in which inside information should be disclosed and, generally, with the conduct expected of persons with regard to such information;

(g) after consultation with the relevant regulated markets in the Republic, require such markets to implement such systems as are necessary for the effective monitoring and identification of possible contraventions of this Chapter.

(3) Despite the provisions of any other Act, the FIC, when investigating a matter

referred to in subsection (2)(a) and (b), may—

(a) summon any person who is believed to be able to furnish any information on the subject of any investigation or to have in such person’s possession or under such person’s control any document which has bearing upon that subject, to lodge such document with the board, or to appear at a time and place specified in the summons, to be interrogated or to produce such document; and

(b) interrogate any such person under oath or affirmation duly administered, and examine or retain for examination any such document: Provided that any person from whom any document has been taken and retained under this subsection must, so long as such document is in possession of the FIC, at that person’s request and expense be allowed to make copies thereof or to take extracts therefrom at any reasonable time and under the supervision of the person in charge of the investigation;

(c) in relation to a matter investigated, on the authority of a warrant, without prior

notice—

(i) enter any premises and require the production of any document;

(ii) enter and search any premises for any document;

(iii) open any strongroom, safe or other container which he or she suspects contains any document;

(iv) examine, make extracts from and copy any document or, against the issue of a receipt, remove such document temporarily for that purpose;

(v) against the issue of a receipt, seize any document;

(vi) retain any seized document for as long as it may be required for criminal

or other proceedings, but the board may proceed without a warrant, if the person in control of any premises consents to the actions contemplated in this paragraph.

(4)

(a) Any person who has been duly summoned under subsection (3)(a) and who, without sufficient cause—

(i) fails to appear at the time and place specified in the summons;

(ii) fails to remain in attendance until excused from further attendance;

(iii) refuses to take the oath or to make an affirmation as contemplated in subsection (3)(b);

(iv) fails to answer fully and satisfactorily any question lawfully put to him or her under subsection (3)(b); or

(v) fails to furnish information or to produce a document in terms of subsection

(3)(a), commits an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years or to both a fine and such imprisonment.

(b) A warrant contemplated in subsection (3)(c) may be issued, on application by the

FIC, by a judge or magistrate who has jurisdiction in the area where the premises in question are located.

(c) Such a warrant may only be issued if it appears from information under oath that

there is reason to believe that a document relating to the matter being investigated in terms of subsection (2)(a) or (b) is kept at the premises in question.

(d) Any entry upon or search of any premises in terms of subsection (3)(c) must be

conducted with strict regard to decency and good order, including—

(i) a person’s right to, respect for and the protection of dignity;

(ii) the right of a person to freedom and security; and

(iii) the right of a person to personal privacy.

(e) An investigator may be accompanied and assisted by a police officer during the

entry and search of any premises under subsection (3)(c).

(f) Any entry and search under subsection (3)(c) must be executed by day, unless the

execution thereof by night is justifiable and necessary.

(g) Any person from whom a document has been seized under subsection (3)(c)(v), or

such person’s authorised representative, may examine such document and make extracts therefrom under the supervision of the board during normal office hours.

(5) The FIC may, subject to the conditions it may determine, delegate the power to

investigate an alleged contravention of this Chapter to any fit person.

(6) The FIC must cause the publication in the Gazette of a notice of any proposed market abuse rule or amendment of such a rule, calling upon all interested persons who have any objections to the proposed rule or amendment, to lodge their objections with the board within 14 days from the date of publication of the notice.

(7) If there are no such objections or if the board has, after consultation with the directorate, considered the objections and has decided to introduce the proposed rule or amendment in the form published in the Gazette in terms of subsection (6), the rule or amendment comes into operation on a date determined by the board by notice in the Gazette.

(8) If the FIC has, after considering such objections, decided after consultation with the BIPA to amend the proposed rule or amendment as published in the Gazette in terms of subsection (6), the proposed rule or amendment thus amended must be published by the FIC in the Gazette and comes into operation on a date determined by the FIC by notice in the Gazette.

(9) A rule made under subsection (2)(f) is binding on regulated persons and members

of the public.

(10) If the Director of Public Prosecutions declines to prosecute for an alleged offence in terms of this Chapter, the FIC may prosecute in respect of such offence in any court competent to try that offence, and section 8(2) and (3) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), does not apply to such a prosecution.

(11) The board must, at the request of the directorate, investigate any matter and summon and interrogate any person in respect of the matters referred to in subsection (2)(a) and (b).

(12) No self-incriminating answer given or statement made to a person exercising any

power in terms of this Act is admissible as evidence against the person who gave the answer or made the statement in any criminal proceedings, except in criminal proceedings for perjury or in which that person is tried for an offence contemplated in this section, and then only to the extent that the answer or statement is relevant to prove the offence charged.

**Composition and functions of the Enforcement Committee**

**352.**

(1)

(a) The Market Abuse Enforcement Committee is hereby established within the Financial Intelligence Centre, established in terms of the Financial Intelligence Centre Act, 2012 (Act No. 13 of 2012);

(b) A reference to the Insider Trading in Companies Act, 2004 (Act No. 28 of 2004) must, unless clearly inappropriate, be construed as a reference to Insider Trading as part of Market Abuse regulation under this Act.

(c) The Enforcement Committee exercises the powers of the FIC—

(i) to institute any civil proceedings as contemplated in this Chapter;

(ii) to investigate any matter relating to an offence referred to in section 351(2)(a) and (b); and

(iii) to institute proceedings contemplated in section 351(2)(c) in the name of the

board.

(d) The Enforcement committee is not intended to act as an administrative body when exercising its powers referred to in paragraph (c).

(2)

(a) The Enforcement committee consists of the chairperson and other members and alternate members appointed by the Minister of Finance;

(b) A member and an alternate member hold office for such period, not exceeding three years, as the Minister of Finance may determine at the time of his or her appointment and is eligible for reappointment upon the expiry of his or her term of office: Provided that if on the expiry of the term of office of a member reappointment is not made or a new member is not appointed, the former member must remain in office for a further period of not more than six months.

(c) The Minister of Finance may remove the chairperson from his or her office or terminate the membership of any other member on good cause shown and after having given the chairperson or member, as the case may be, sufficient opportunity to show why he or she should not be removed or why his or her membership should not be terminated.

(3) The Minister of Finance must appoint as members of the Enforcement Committee—

(a) the executive officer of the FIC or his or her deputy, and may appoint both;

(b) one person and an alternate from each of the licensed exchanges in the Republic;

(c) one commercial lawyer of appropriate experience and an alternate;

(d) one accountant of appropriate experience and an alternate;

(e) one person of appropriate experience and an alternate from the insurance

industry;

(f) one person of appropriate experience and an alternate from the banking

industry;

(g) one person of appropriate experience and an alternate from the fund

management industry;

(h) one person of appropriate experience and an alternate nominated by any

organisation that represents shareholders’ rights or any other similar organisation chosen by the Minister of Finance;

(i) one person of appropriate experience and an alternate nominated by Bank of Namibia; and

(j) two other persons of appropriate experience and alternates.

(4) The persons referred to in subsection (3) are nominated by reason of their availability and knowledge of financial markets and may not be practising authorised users.

(5) The Enforcement Committee must designate from its members a deputy chairperson who performs the functions of the chairperson when the office of chairperson is vacant or when the chairperson is unable to perform his or her functions.

(6) The members of the Enforcement Committee may co-opt one or more persons as additional

members of the Enforcement Committee.

(7) All members of the Enforcement Committee, other than the additional members, have one vote in respect of matters considered by the Enforcement Committee, but an alternate member only has a vote in the absence from a meeting of the member whom the alternate is representing.

(8) The meetings of the Enforcement Committee are held at such times and places as the chairperson may determine, but four members of the Enforcement Committee may by notice in writing to the chairperson of the Enforcement Committee demand that a meeting of the Enforcement Committee be held within seven business days of the date of such notice.

(9) The chairperson must determine the procedure of a meeting of the directorate.

(10) The decision of a majority of the members of the Enforcement Committee constitutes the decision of the Enforcement Committee.

(11) No proceedings of the Enforcement Committee are invalid by reason only of the fact that a vacancy existed on the Enforcement Committee or that any member was not present during such proceedings or any part thereof.

(12) The Enforcement Committee is, in the performance of its functions, assisted by an executive director who is appointed by the FIC after consultation with the Enforcement Committee and who may attend all meetings of the Enforcement Committee but may not vote at such meetings.

**Financing of the Enforcement Committee**

**353**.

The costs of performing the functions of the FIC and those of the Enforcement Committee in

terms of this Chapter are paid out of levies imposed by the Namibia Financial Institutions Supervisory Authority (NAMFISA) on exchanges under section 25 of the Namibia Financial Institutions Supervisory Authority Act, 2001 (Act No. 3 of 2001).

PART 8

GENERAL PROVISIONS

**Protection of existing rights**

**354**.

Nothing in this Chapter prejudices the common law rights of any person aggrieved by any dealing or offence contemplated in this Chapter to claim any amount save to the extent that any portion of such amount has been recovered by such person under section 354.

**Confidentiality and sharing of information**

**355**.

The Enforcement Committee may share information concerning any matter dealt with in terms

of this Chapter with the institutions which have nominated persons to the Enforcement Committee, the ad hoc Panel on Takeover Regulation, established by this Act, Bank of Namibia, the Accountants’ and Auditors’ Regulatory Authority of Namibia (“AARA”) constituted in

terms of the Accountants and Auditors Act, 2022, a licensed exchange, a licensed central securities

depository, or a licensed independent clearing house, the Financial Intelligence Centre

established by the Financial Intelligence Centre Act, the National Treasury, the Minister

and the persons, inside the Republic or elsewhere, responsible for regulating, investigating or prosecuting insider trading, prohibited trading practices and other market abuses.

CHAPTER 13

CONTROL OF POLITICAL DONATIONS AND EXPENDITURE BY COMPANIES

PART 1

INTERPRETATION

**Introductory**

**356**

This Part has effect for controlling—

(a) political donations made by companies to political parties, to other political organisations and to independent election candidates, and

(b) political expenditure incurred by companies.

PART 2

DONATIONS AND EXPENDITURE TO WHICH THIS PART APPLIES

**Political parties, organisations etc. to which this Chapter applies**

**357**

(1) This Part applies to a political party if—

(a) it is registered under Chapter 4 of the Electoral Act 2014 (Act No. 5 of 2014), or

(b) it carries on, or proposes to carry on, activities for the purposes of or in connection with the participation of the party in any election or elections to public office held in any region of the republic or in the Republic generally.

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(2) This Part applies to an organisation (a “political organisation”) if it carries on, or proposes to carry on, activities that are capable of being reasonably regarded as intended—

(a) to affect public support for a political party to which, or an independent election candidate to whom, this Part applies, or

(b) to influence voters in relation to any national or regional referendum held under the law of the Republic.

(3) This Part applies to an independent election candidate at any election to public

office held in the Republic or another regional authority.

(4) Any reference in the following provisions of this Part to a political party, political organisation or independent election candidate, or to political expenditure, is to a party, organisation, independent candidate or expenditure to which this Part applies.

**Meaning of “political donation”**

**358**

(1) In relation to a political party or other political organisation—

(a) “political donation,” in relation to a registered party, means—

(i) any gift to the party of money or other property;

(ii) any sponsorship provided in relation to the party;

(iii) any subscription or other fee paid for affiliation to, or membership of, the party;

(iv) any money spent (otherwise than by or on behalf of the party) in paying any expenses incurred directly or indirectly by the party;

(v) the provision otherwise than on commercial terms of any property, services or facilities for the use or benefit of the party (including the services of any person).—

**Meaning of “political expenditure”**

**359**

(1) In this Chapter “political expenditure”, in relation to a company, means expenditure incurred by the company on—

(a) the preparation, publication or dissemination of advertising or other promotional or publicity material—

(i) of whatever nature, and

(ii) however published or otherwise disseminated,

that, at the time of publication or dissemination, is capable of being reasonably regarded as intended to affect public support for a political party or other political organisation, or an independent election candidate, or

(b) activities on the part of the company that are capable of being reasonably regarded as intended—

(i) to affect public support for a political party or other political organisation, or an independent election candidate, or

(ii) to influence voters in relation to any national or regional referendum held under the law of the Republic.

(2) For the purposes of this Chapter a political donation does not count as political expenditure.

PART 3

AUTHORISATION REQUIRED FOR DONATIONS OR EXPENDITURE

**Authorisation required for donations or expenditure**

**360**

(1) A company must not—

(a) make a political donation to a political party or other political organisation, or to an independent election candidate, or

(b) incur any political expenditure, unless the donation or expenditure is authorised in accordance with the following provisions.

(2) The donation or expenditure must be authorised—

(a) in the case of a company that is not a subsidiary of another company, by a resolution of the shareholders of the company;

(b) in the case of a company that is a subsidiary of another company by—

(i) a resolution of the holding company, and

(ii) a resolution of the members of any relevant holding company.

(3) No resolution is required on the part of a company that is a wholly-owned

subsidiary of a Namibian-registered company.

(4) For the purposes of subsection (2)(b)(ii) a “relevant holding company” means a company that, at the time the donation was made or the expenditure was incurred—

(a) was a holding company of the company by which the donation was

made or the expenditure was incurred,

(b) was a Namibian-registered company, and

(c) was not a subsidiary of another Namibian-registered company.

(5) The resolution or resolutions required by this section—

(a) must comply with section 367 (form of authorising resolution), and

(b) must be passed before the donation is made or the expenditure

incurred.

(6) Nothing in this section enables a company to be authorised to do anything that it could not lawfully do apart from this section.

**Form of authorising resolution**

**361**

(1) A resolution conferring authorisation for the purposes of this Chapter may relate to—

(a) the company passing the resolution,

(b) one or more subsidiaries of that company, or

(c) the company passing the resolution and one or more subsidiaries of

that company.

(2) A resolution may be expressed to relate to all companies that are subsidiaries

of the company passing the resolution—

(a) at the time the resolution is passed, or

(b) at any time during the period for which the resolution has effect, without identifying them individually.

(3) The resolution may authorise donations or expenditure under one or more of

the following heads—

(a) donations to political parties or independent election candidates;

(b) donations to political organisations other than political parties;

(c) political expenditure.

(4) The resolution must specify a head or heads—

(a) in the case of a resolution under subsection (2), for all of the companies to which it relates taken together;

(b) in the case of any other resolution, for each company to which it relates.

(5) The resolution must be expressed in general terms conforming with subsection (2) and must not purport to authorise particular donations or expenditure.

(6) For each of the specified heads the resolution must authorise donations or, as the case may be, expenditure up to a specified amount in the period for which the resolution has effect (see section 368).

(7) The resolution must specify such amounts—

(a) in the case of a resolution under subsection (2), for all of the companies to which it relates taken together;

(b) in the case of any other resolution, for each company to which it relates.

**Period for which resolution has effect**

**362**

(1) A resolution conferring authorisation for the purposes of this Chapter has effect for

a period of four years beginning with the date on which it is passed unless the directors determine, or the articles require, that it is to have effect for a shorter period beginning with that date.

(2) The power of the directors to make a determination under this section is subject to any provision of the articles that operates to prevent them from doing so.

PART 4

REMEDIES IN CASE OF UNAUTHORISED DONATIONS OR EXPENDITURE

**Liability of directors in case of unauthorised donation or expenditure**

**363**

(1) This section applies where a company has made a political donation or incurred political expenditure without the authorisation required by this Chapter.

(2) The directors in default are jointly and severally liable—

(a) to make good to the company the amount of the unauthorised donation or expenditure, with interest, and

(b) to compensate the company for any loss or damage sustained by it as a result of the unauthorised donation or expenditure having been made.

(3) The directors in default are—

(a) those who, at the time the unauthorised donation was made or the unauthorised expenditure was incurred, were directors of the company by which the donation was made or the expenditure was incurred, and

(b) where—

(i) that company was a subsidiary of a relevant holding company, and

(ii) the directors of the relevant holding company failed to take all reasonable steps to prevent the donation being made or the expenditure being incurred, the directors of the relevant holding company.

(4) For the purposes of subsection (3)(b) a “relevant holding company” means a company that, at the time the donation was made or the expenditure was incurred—

(a) was a holding company of the company by which the donation was made or the expenditure was incurred,

(b) was a Namibian-registered company, and

(c) was not a subsidiary of another Namibian-registered company.

(5) The interest referred to in subsection (2)(a) is interest on the amount of the unauthorised donation or expenditure, so far as not made good to the company—

(a) in respect of the period beginning with the date when the donation was made or the expenditure was incurred, and

(b) at such rate as the Minister may prescribe by regulations.

(6) Where only part of a donation or expenditure was unauthorised, this section applies only to so much of it as was unauthorised.

**Enforcement of directors’ liabilities by shareholder action**

**364**

(1) Any liability of a director under section 369 is enforceable—

(a) in the case of a liability of a director of a company to that company, by proceedings brought under this section in the name of the company by an authorised group of its members;

(b) in the case of a liability of a director of a holding company to a subsidiary, by proceedings brought under this section in the name of the subsidiary by—

(i) an authorised group of members of the subsidiary, or

(ii) an authorised group of members of the holding company.

(2) This is in addition to the right of the company to which the liability is owed to

bring proceedings itself to enforce the liability.

(3) An “authorised group” of members of a company means—

(a) the holders of not less than 5% of the voting rights of the company’s

issued shares,

(b) if the company is not limited by shares, not less than 5% of its members, or

(c) not less than 50 of the company’s members.

(4) The right to bring proceedings under this section is subject to the provisions of section 461.

(5) Nothing in this section affects any right of a member of a company to bring or continue proceedings under Part 5 of Chapter 7 (i.e. s216 – derivative proceedings).

**Enforcement of directors’ liabilities by shareholder action: supplementary**

**365**

(1) A group of members may not bring proceedings under section 370 in the name of a company unless—

(a) the group has given written notice to the company stating—

(i) the cause of action and a summary of the facts on which the proceedings are to be based,

(ii) the names and addresses of the members comprising the group, and

(iii) the grounds on which it is alleged that those members constitute an authorised group; and

(b) not less than 28 days have elapsed between the date of the giving of the

notice to the company and the bringing of the proceedings.

(2) Where such a notice is given to a company, any director of the company may apply to the court within the period of 28 days beginning with the date of the giving of the notice for an order directing that the proposed proceedings shall not be brought, on one or more of the following grounds—

(a) that the unauthorised amount has been made good to the company;

(b) that proceedings to enforce the liability have been brought, and are being pursued with due diligence, by the company;

(c) that the members proposing to bring proceedings under this section do

not constitute an authorised group.

(3) Where an application is made on the ground mentioned in subsection (2)(b), the court may as an alternative to directing that the proposed proceedings under section 370 are not to be brought, direct—

(a) that such proceedings may be brought on such terms and conditions as the court thinks fit, and

(b) that the proceedings brought by the company—

(i) shall be discontinued, or

(ii) may be continued on such terms and conditions as the court thinks fit.

(4) The members by whom proceedings are brought under section 370 owe to the company in whose name they are brought the same duties in relation to the proceedings as would be owed by the company’s directors if the proceedings were being brought by the company: But proceedings to enforce any such duty may be brought by the company only with the permission of the court.

5) Proceedings brought under section 370 may not be discontinued or settled by the group except with the permission of the court, which may be given on such terms as the court thinks fit.

**Costs of shareholder action**

**366**

(1) This section applies in relation to proceedings brought under section 370 in the name of a company (“the company”) by an authorised group (“the group”).

(2) The group may apply to the court for an order directing the company to indemnify the group in respect of costs incurred or to be incurred by the group in connection with the proceedings and the court may make such an order on such terms as it thinks fit.

(3) The group is not entitled to be paid any such costs out of the assets of the company except by virtue of such an order.

(4) If no such order has been made with respect to the proceedings, then—

(a) if the company is awarded costs in connection with the proceedings, or it is agreed that costs incurred by the company in connection with the proceedings should be paid by any defendant, the costs shall be paid to the group; and

(b) if any defendant is awarded costs in connection with the proceedings, or it is agreed that any defendant should be paid costs incurred by him in connection with the proceedings, the costs shall be paid by the group.

**Information for purposes of shareholder action**

**367**

(1) Where proceedings have been brought under section 370 in the name of a company by an authorised group, the group is entitled to require the company to provide it with all information relating to the subject matter of the proceedings that is in the company’s possession or under its control or which is reasonably obtainable by it.

(2) If the company, having been required by the group to do so, refuses to provide the group with all or any of that information, the court may, on an application made by the group, make an order directing—

(a) the company, and

(b) any of its officers or employees specified in the application,

to provide the group with the information in question in such form and by such means as the court may direct.

PART 5

EXEMPTIONS

**Trade unions**

**368**

(1) A donation to a trade union, other than a contribution to the union’s political fund, is not a political donation for the purposes of this Chapter.

(2) A trade union is not a political organisation for the purposes of section 365 (meaning of “political expenditure”).

(3) In this section—

“trade union” has the meaning given by section 1 of Labour Act 1992;

“political fund” means the fund from which payments by a trade union in the furtherance of political objects are made.

**Subscription for membership of trade association**

**369**

(1) A subscription paid to a trade association for membership of the association is not a political donation for the purposes of this Chapter.

(2) For this purpose—

“trade association” means an organisation formed for the purpose of furthering the trade interests of its members, or of persons represented by its members, and

“subscription” does not include a payment to the association to the extent that it is made for the purpose of financing any particular activity of the association.

**All-party parliamentary groups**

**370**

(1) An all-party parliamentary group is not a political organisation for the purposes of this Chapter.

(2) An “all-party parliamentary group” means an all-party group composed of members of one or both of the Houses of Parliament (or of such members and other persons).

**Political expenditure exempted by order**

**371**

(1) Authorisation under this chapter is not needed for political expenditure that is exempt by virtue of an order of the Minister under this section.

(2) An order may confer an exemption in relation to—

(a) companies of any description or category specified in the order, or

(b) expenditure of any description or category so specified (whether framed by reference to goods, services or other matters in respect of which such expenditure is incurred or otherwise), or both.

(3) If or to the extent that expenditure is exempt from the requirement of authorisation under this Chapter by virtue of an order under this section, it shall be disregarded in determining what donations are authorised by any resolution of the company passed for the purposes of this Chapter.

(4) An order under this section is subject to affirmative resolution procedure.

**Donations not amounting to more than NAD$115,000 in any twelve month period**

**372**

(1) Authorisation under this Chapter is not needed for a donation except to the extent

that the total amount of—

(a) that donation, and

(b) other relevant donations made in the period of 12 months ending with

the date on which that donation is made,

exceeds NAD$115,000.

(2) In this section—

“donation” means a donation to a political party or other political organisation or to an independent election candidate; and “other relevant donations” means—

(a) in relation to a donation made by a company that is not a subsidiary, any other donations made by that company or by any of its subsidiaries;

(b) in relation to a donation made by a company that is a subsidiary, any other donations made by that company, by any holding company of that company or by any other subsidiary of

any such holding company.

(3) If or to the extent that a donation is exempt by virtue of this section from the requirement of authorisation under this Chapter, it shall be disregarded in determining what donations are authorised by any resolution passed for the purposes of this Chapter.

CHAPTER 14

TRANSITIONAL AND MISCELLANEOUS PROVISIONS

**Conversion of closely held companies into companies**

**373**.

(1) A closely held company intending to convert into a company may, at any time, file a notice of conversion in the prescribed manner and form.

(2) A notice of conversion and the effect of conversion on legal status of the converted company are as set out in Schedule 2.

**Preservation of rights**

**374**.

(1) Any right or entitlement enjoyed by, or obligation imposed on, any person in terms of any provision of the previous Act, that had not been spent or fulfilled immediately before the effective date is a valid right or entitlement of, or obligation imposed on, that person in terms of any comparable provision of this Act, as from the date that the right, entitlement or obligation first arose, subject to the provisions of this Act.

(2) A notice given by any person to another person in terms of any provision of the previous Act must be considered as notice given in terms of any comparable provision of this Act, as from the date that the notice was given under the previous Act.

(3) A document that, before the effective date, had been served in accordance with the previous Act must be regarded as having been satisfactorily served for any comparable purpose of this Act.

(4) An order given by an inspector, in terms of any provision of the previous Act, and in effect immediately before the effective date, continues in effect, subject to the provisions of this Act.

**Transitional provisions as to unlimited companies, companies limited by guarantee, close corporations and par value shares**

**375**.

(1) Any existing company which is an unlimited company within the meaning of the Companies Act, 1926 and which is not converted into a type of company under the repealed Act or this Act, must remain on the register of companies as an unlimited company and the Companies Act, 1926 must, save as is otherwise provided in this Act, continue to apply to that company as if that Act had not been repealed.

(2) Any company limited by guarantee, including associations not for gain (i.e. section 21 companies) are deemed to have been converted into not for profit companies upon the effective implementation of this Act.

(3) A close corporation incorporated under the Close Corporations Act is deemed to have been incorporated as a closely held company under the corresponding provision of this Act and Schedule 2 to the Act and must -

(a) at the commencement of this Act, assume a new name as “closely held company”; and

(b) not later than a date determined by the Minister by notice in the Gazette, change all its official documentation, signs, logos, insignias, date stamps and any other thing depicting the word “close corporation” to “closely held company”.

(4) Anything done under the Close Corporations Act and which could have been done under a corresponding provision of this act is deemed to have been done under that corresponding provision.

(5) A matter pending before the Registrar under the Close Corporations Act before the date of commencement and not fully addressed at that time must be concluded by the Registrar in terms of that Act, despite its repeal.

(6) The Close Corporations Act continues to apply to any winding-up or liquidation of a closely held company proceedings commenced before the date of commencement of this Act, as if that Act had not been repealed.

(7) Any proceedings in any court in terms of the Close Corporations Act immediately before the commencement date are continued in terms of that Act as if it had not been repealed.

(8) Any order of a court in terms of the Close Corporations Act and in force immediately before the commencement date continues to have the same force and effect as if that Act had not been repealed, subject to any further order of the court.

(9) Notwithstanding the discontinuance of nominal or par value in terms of section 96(2) of this Act, previously issued shares with a nominal or par value continue to exist for a period prescribed by Regulations, after which those shares are deemed to be issued with no par value.

**Regulations under repealed Act relating to winding up and judicial management**

**376.**

Regulations made under the repealed Act relating to the winding-up and judicial management of companies, including former rules not repealed by regulation 26 of the Regulations in terms of section 15 of the repealed Act, for the Winding-up and Judicial Management of Companies, promulgated by GN No R. 2490 of 28 December 1973 and which have in terms of section 16(1) of the repealed Act been deemed to have been made under section 15 of that Act, as they exist immediately prior to the coming into operation of this section, must notwithstanding section 479 remain in force and are deemed to be regulations made under section 18 of this Act.

CHAPTER 15

REPEAL OF LAWS AND COMMENCEMENT OF ACT

**Repeal of laws**

**377**.

(1) The Companies Act, 2004 (Act No. 28 of 2004) is hereby repealed, subject to subsection (3).

(2) The laws referred to in Schedule 5 are hereby amended in the manner set out in that Schedule.

(3) The repeal of the Companies Act, 2004 (Act No. 28 of 2004) does not affect the transitional arrangements, which are set out in Schedule 7.

**Short title and commencement**

**378.**

(1) This Act is called the Corporate Laws Act, 2025, and comes into operation on a date fixed by the President by proclamation in the Gazette.

(2) Different dates may be determined under subsection (1) in respect of different provisions of the Act.

(3) Any reference in this Act to the commencement of this Act must be construed as a reference to the date determined under subsection (2).

**SCHEDULES**

**SCHEDULE 1: Forms of Articles of Association**

TABLE A – ARTICLES OF ASSOCIATION FOR A PUBLIC COMPANY

1. INTRODUCTION

1.1 The Articles of Association set out herein apply automatically to any public company incorporated in the Republic of Namibia unless the Company adopts a company-specific set of Articles of Association.

1.2 These Articles do not:

1.2.1 contain any restrictive conditions contemplated in section 59(1) of the Act;

1.2.2 contain any requirement for the amendment of any particular provision of these Articles in addition to the requirements of the Act; and

1.2.3 prohibit the amendment of any particular provision of these Articles.

1.3 The Company is incorporated as a public company in terms of the Act and,

accordingly:

1.3.1 the Company is not prohibited from offering its securities to the public; and

1.3.2 the transfer of the Company’s securities is unrestricted.[Section 35(2)(b)]

1. **INTERPRETATION**

In these Articles, including the introduction above, and unless the context requires

otherwise:

2.1 words importing any one gender shall include the other two genders;

2.2 the singular shall include the plural and vice versa;

2.3 any word which is defined in the Act and is not defined in 2.5, shall bear that statutory

meaning in these Articles;

2.4 the headings have been inserted for convenience only and shall not be used for or

assist or affect their interpretation;

2.5 each of the following words and expressions shall have the meaning stated opposite it

and cognate expressions shall have a corresponding meaning, namely:

2.5.1 “the Act” means the Corporate Laws Act, 2023, together

with the Corporate Laws Regulations, 2023, as amended or substituted from time to time;

2.5.2 “Board” means the board of directors of the Company from time to time;

2.5.3 “Chairman” means the chairman of the directors appointed in accordance with 7.6;

2.5.4 “Deputy Chairman” means the deputy chairman of the directors appointed in accordance with 7.6;

2.5.5 “Group” means the Company and its subsidiaries from time to time and “a member of the Group” means any one of them;

2.5.6 “NSE” means the Namibian Stock Exchange, a non-profit company operating under licence from the Ministry of Finance in terms of the Stock Exchanges Control Act, 1985 (as amended);

2.5.7 “legal representative” means any person who has submitted the necessary proof of his appointment as –

2.5.7.1 an executor of the estate of a deceased member or trustee, curator or guardian of a member whose estate has been sequestrated or who is otherwise under disability;

2.5.7.2 the liquidator of any member which is a body corporate in the course of being wound-up; or

2.5.7.3 the business rescue practitioner of any member which is a company under business rescue;

2.5.8 “Listings Requirements” means the Listings Requirements of the NSE, as

amended or substituted from time to time;

2.5.9 “these Articles” means these Articles of Association and include their Annexures, which forms their part; and

2.5.10 “the Republic” means the Republic of Namibia.

3. GENERAL

3.1 Liability of incorporators, shareholders or directors

These Articles do not impose any liability on any person for the liabilities or obligations of the Company, solely by reason of such person being an incorporator, shareholder or director of the Company as contemplated by section 57(1) of the Act.

3.2 Powers of the Company

These Articles do not restrict, limit or qualify the legal powers or capacity of the Company in section 59(1) of the Act.[Section 59(1)]

3.3 Articles of Association and Governance Rules

3.3.1 The Board shall not have the power to make, amend or repeal any necessary

or incidental rules relating to the governance of the Company in respect of matters that are not addressed in the Act or these Articles.

3.3.2 These Articles do not contain any restrictive conditions applicable to the Company as contemplated in section 74(2)(b).

3.3.3 These Articles may only be altered or amended by a special resolution of the ordinary shareholders of the Company.

3.3.4 An amendment of these Articles shall include, but not be restricted to, the

following:

3.3.4.1 the creation of any class of shares;

3.3.4.2 the variation of any preferences, rights, limitation and other share

terms attaching to any class of shares;

3.3.4.3 the conversion of one class of shares into one or more other classes

of shares;

3.3.4.4 any increase in the number of shares;

3.3.4.5 the consolidation of shares;

3.3.4.6 the subdivision of shares; and/or

3.3.4.7 the change of name of the company;

3.3.5 In addition, if there are listed cumulative and/or non-cumulative preference

shares in the capital of the Company, then the following right shall be attached to such shares:

“No further securities ranking on priority to, or pari passu with, existing shares, of any class, shall be created without a special resolution passed at a separate general meeting of such preference shareholders”.

3.3.6 If the Board, or any individual authorised by the Board, alters these Articles in any manner necessary to correct a patent error in spelling, punctuation, reference, grammar or similar defect on the face of the document, it must publish a notice of such alteration by publishing the alterations on the Company’s website, and must file a notice of alteration in

the manner prescribed by the Act.[Section 81(1)]

3.4 Financial assistance to related persons

These Articles do not limit, restrict or qualify the authority of the Board to authorise the Company to provide direct or indirect financial assistance to any person contemplated in section 105 of the Act. [Section 105(2)]

3.5 Solvency and liquidity test

These Articles do not alter the application of the solvency and liquidity test provided in section 1 of the Act, except in so far as the application of equity solvency test in relation to the requirements for distributions in terms of section 118. [Section 118(2)]

3.6 Annual Financial Statements

A copy of the annual financial statements must be distributed to shareholders at least 15 business days before the date of the annual general meeting at which they will be considered.

2

3.7 Ratification of Ultra Vires Acts

The proposal of any resolution to shareholders in terms of sections 20(2) and 20(6) of

the Act which would lead to the ratification of an act that is contrary to the Listings Requirements, shall be prohibited, unless otherwise agreed with the NSE.

4. SECURITIES OF THE COMPANY

4.1 Authorisation for shares

4.1.1 The Company is authorised to issue the shares specified in the Annexure 1 to these Articles of Association provided that, if required by the Act or the Listings Requirements, the Company may only issue:

4.1.1.1 unissued shares to shareholders of a particular class of shares, pro rata to the shareholders’ existing shareholding unless such shares were issued for an acquisition of assets, subject to the Listings Requirements;

4.1.1.2 unissued shares or options for cash, as the Board in its discretion think fit, if approved by shareholders in general meeting, subject to the Listings Requirements; and

4.1.1.3 shares that are fully paid up and freely transferrable, unless otherwise required by the Listings Requirements.

4.1.2 Any amendment to these Articles must be approved by a special resolution of ordinary shareholders [section 184(11)(a)], save where an amendment is ordered by a court in terms of sections 202(3) and may, inter alia, effect

4.1.2.1 the creation of any class of shares;

4.1.2.2 the variation of any preferences, rights, limitations and other terms attaching to any class of shares;

4.1.2.3 an increase in the number of securities of a class;

4.1.2.4 a consolidation of securities;

4.1.2.5 a sub-division of securities; and/or

4.1.2.6 the change of the name of the company.

4.1.3 Securities of each class of shares for which listing is applied shall rank pari passu I n respect of all rights.

4.1.4 The preferences, rights, limitations or other terms of any class of shares in the Company may not be varied and no resolution may be proposed to shareholders for rights to include such variation in response to an objectively ascertainable external fact or facts, as provided for in section 1.

4.2 Capitalisation shares

These Articles do not limit, restrict or qualify the authority of the Board, in terms

of section 108 of the Act, to:

4.2.1 approve the issue of any authorised shares of the Company as capitalisation shares, on a pro rata basis to the shareholders of one or more classes of shares;

4.2.2 approve the issue of shares of one class as capitalisation shares in respect of

shares of another class; or

4.2.3 permit shareholders to elect to receive a cash payment in lieu of a capitalisation share, at a value determined by the Board.[Sections 108(1)(c)] provided that the requirements of section 108 are met. [Section 108(2)(a) and (b)]

4.3 Payments to securities holders

4.3.1 Without derogating from any of the other provision in these Articles, all payments made to holders of securities listed on the NSE must be provided for in accordance with the Listings Requirements and may not provide for capital to be repaid on the basis that it may be called up again.

4.3.2 Any acquisition by the Company or a subsidiary company of the Company’s shares and any distribution to shareholders will be subject to the provisions of the Act and the Listings Requirements.

4.4 Debt instruments

These Articles do not limit, restrict or qualify the authority of the Board to authorise the Company to issue secured or unsecured debt instruments, provided that the Board may not grant special privileges regarding the attending and voting at general meetings of the Company or the appointment of directors in respect of such debt instruments.[Sections 138]

4.5 Registration of beneficial interests

These Articles do not limit or restrict the holding of the Company’s issued securities by, or the registration of the Company’s issued securities in the name of, one person for the beneficial interest of another.[Section 117]

4.6 Joint holders of securities

Where two or more persons are registered as the holders of any security, they shall

be deemed to hold that security jointly, and:

4.6.1 notwithstanding anything to the contrary in these Articles, on the death, sequestration, liquidation or legal disability of any one of such joint holders, the remaining joint holders may be recognised, at the discretion of the Board, as the only persons having title to such security;

4.6.2 any one of such joint holders may give effectual receipts for any dividends, bonuses or returns of capital or other accruals payable to such joint holders;

4.6.3 only the joint holder whose name stands first in the securities register of the Company shall be entitled to delivery of the certificate relating to that security, or to receive notices from the Company (and any notice given to such joint holder shall be deemed to be notice to all of the joint holders); and

4.6.4 any one of the joint holders of any security conferring a right to vote may vote either personally or by proxy at any shareholders’ meeting in respect of such security as if he were solely entitled thereto, and if more than one of such joint holders is present at any shareholders’ meeting, either personally or by proxy, the joint holder who tenders a vote and whose name stands in the securities register of the Company before the other joint holders who are present in person or by proxy shall be entitled to vote in respect of that security.

4.7 Legal Representatives

A legal representative (not being one of several joint holders) shall be the only person recognised by the Company as a shareholder or having any title to a security registered in the name of the shareholder whom he represents. The legal representative shall provide proof of his capacity as such in a form reasonably satisfactory to the Company or the Chairman, as the case may be.

4.8 Commission

4.8.1 The Company may not pay commission of more than 10% (ten per centum) of the subscription price at which securities are issued to any person in consideration for such person subscribing or agreeing to subscribe, absolutely or conditionally, or for procuring or agreeing to procure subscriptions, absolute or conditional, for such securities.

4.8.2 Such commission may be paid in whole or in part by fully paid up securities, provided that the prior approval of Shareholders by means of an ordinary resolution shall be required before any commission or portion thereof is paid in shares.

4.9 Authority to sign transfer deeds

All authorities to sign transfer deeds granted by holders of securities for the purpose

of transferring securities that may be lodged, produced or exhibited with or to the

Company at any of its transfer offices shall, as between the Company and the grantor

of such authorities, be taken and deemed to continue and remain in full force and

effect, and the Company may allow the same to be acted upon until such time as

express notice in writing of the revocation of the same shall have been given and

lodged at the Company’s transfer offices at which the authority was lodged, produced

or exhibited. Even after the giving and lodging of such notices, the Company shall be

entitled to give effect to any instruments signed under the authority to sign, and

certified by any officer of the Company, as being in order before the giving and

lodging of such notice.

4.10 Securities not subject to lien

Securities shall not be subject to any lien in favour of the Company and shall be freely

transferable.

4.11 Transmission

These Articles may not contain a provision to the effect that securities registered

in the name of a deceased or insolvent holder shall be forfeited if the executor fails to

register them in his own name or in the name of the heir(s) or legatees, when called

upon by the directors of the Company to do so.

5. SHAREHOLDER RIGHTS AND PROXY FORMS

5.1 Shareholders’ right to information

These Articles do not establish any information rights of any person in addition

to the information rights provided in sections 242(1) - (6) of the Act.[Section 244]

5.2 Representation by concurrent proxies

These Articles do not limit or restrict the right of a shareholder to appoint two or

more persons concurrently as proxies, or to appoint more than one proxy to exercise

voting rights attached to different securities held by that shareholder.[Section

177]

5.3 Authority of proxy to delegate

These Articles do not limit or restrict the right of a proxy to delegate the proxy’s authority to act on behalf of the shareholder appointing him to another person, subject to such restrictions as may be set out in the instrument appointing the proxy. [Section 177(3)(b)]

5.4 Requirement to deliver proxy instrument to the Company

A copy of the instrument appointing a proxy must be delivered to the registered office of the Company, or to any other person specified by the Company, not less than 48 (forty eight) hours (or such lesser period as the directors may determine in relation to a particular meeting)before the time appointed for the holding of the meeting (including an adjourned meeting) at which the person(s) named in the proxy form proposes to vote and if the instrument of proxy is not so delivered, the form of proxy shall not be treated as valid.[Section 177(3)(c)]

5.5 Record date for exercise of shareholder rights

A record date for any action or event shall be determined in accordance with the Act and the Listings Requirements.[Section 178(1)]

6. SHAREHOLDERS MEETINGS

6.1 Convening of shareholders’ meetings

These Articles do not specify any person other than the Board who may call a shareholders’ meeting.[Sections 180(1) and 180(3)]

6.2 Shareholders’ right to requisition a meeting

These Articles do not specify a lower percentage of voting rights than the

percentage specified in section 184(7) and (9) of the Act required for the requisition by

shareholders of a shareholder’s meeting.[Section 180]

6.3 Location of shareholders meetings

These Articles do not limit, restrict or qualify the authority of the Board to determine the location of any shareholders meeting, which may be in Namibia or in any foreign country.[Section 180(10)]

6.4 Notice of shareholders meetings

6.4.1 These Articles do not provide a different period of notice of shareholders meetings to the period prescribed by the Act..[Sections 181(1)and (2)]

6.4.2 Notice of shareholder meetings shall be sent to each shareholder entitled to

vote at such meeting and who has elected to receive such notice.

6.5 Shareholders meetings conducted by electronic communication

These Articles do not authorise the Company to provide for any shareholders meeting generally to be conducted by electronic communication, or for one or more shareholders, or proxies for shareholders, to participate in any shareholders meeting by electronic communication, unless the Board authorises it in respect of any particular meeting.[Section 182(2)]

6.6 Quorum for shareholders meetings

6.6.1 These Articles do not specify a different percentage of voting rights in

terms of section 183(1) of the Act and accordingly at least 25% (twenty five per centum) of all the voting rights that are entitled to be exercised in respect of:

6.6.1.1 at least one matter to be decided at any shareholders’ meeting must be present for that meeting to begin; and

6.6.1.2 for the consideration of any matter to be decided at any shareholders’ meeting. provided that 3 (three) shareholders entitled to attend and vote are present at the meeting referred to in 6.6.1.1 and 6.6.1.2.[Sections 183(3)]

6.6.2 These Articles specify30 (thirty) minutes as a different time to the 1 (one) hour provided in sections 183(4) and (5) of the Act for a quorum to be established before a shareholders’ meeting may be adjourned.[Sections 183(4), (5) and 6)].

6.6.3 These Articles do not specify a different period than the period of 1 (one) week provided in section 183(4) for the adjournment of a shareholders meeting.[Sections 183(4)(a) and 183(6)(b)]

6.6.4 These Articles prohibit the continuation of any shareholders’ meeting or the consideration of any matter to be considered at any shareholders’ meeting after a quorum has been established for commencement of such meeting if such quorum is not present for that matter to be considered. [Section 183(9)]

6.7 Adjournment of shareholders meetings

These Articles not provide different maximum periods for adjournment of shareholders’ meetings than those specified in section 183(12) of the Act. [Sections 183(12) and 13)]

6.8 Shareholders’ resolutions

6.8.1 These Articles do not require a higher percentage of voting rights to approve an ordinary resolution than the percentage voting rights specified in the Act.[Sections 184(7) and (8)]

6.8.2 These Articles do not require a different percentage of voting rights to approve a special resolution than the percentage voting rights specified in the Act.[Section 184(9) and (10)]

6.8.3 Subject to the Listings Requirements and the Act, these Articles do not require a special resolution for any other matter not contemplated in section 184(11) of the Act.[Section 184(12)].

6.9 Shareholders meetings in terms of the Listings Requirements

6.9.1 Shareholders meetings that are called for the purpose of passing any resolution required in terms of the Listings Requirements may not be voted on in writing as provided for in section 179 of the Act, unless permitted by the Listings Requirements.

6.9.2 These Articles do not prohibit or restrict the Company from calling any meeting for the purposes of adhering to the Listings Requirements.

6.10 Notice of shareholders meetings to the NSE

6.10.1 A copy of all notices of shareholders’ meetings must be sent to the NSE at the same time as notices are sent to shareholders if required in terms of the Listings Requirements.

6.10.2 All notices of shareholders meetings must also be announced through the official news service of the NSE at the same time as notices are sent to shareholders, or as soon thereafter as is practicable.

7. DIRECTORS AND OFFICERS

7.1 Composition of the board of directors

7.1.1 Subject to the Listings Requirements, the Articles specify 4 (four) as the minimum number of directors of the Company, being a higher number in substitution for the minimum number of directors required in terms of section 185(2) of the Act. [Sections 185(2) and (3)].

7.1.2 Subject to 7.1.7 and the Listings Requirements, the shareholders shall elect the directors, and shall be entitled to elect one or more alternate directors, in accordance with the provisions of section 187(1) of the Act.[Sections 187(1)]

7.1.3 These Articles do not provide for:

7.1.3.1 the direct appointment or removal of any director or alternate director by any particular person; or[Section 185(4)(a)(i) and (iii)]

7.1.3.2 the appointment of any person as an ex officio director of the Company.[Section 185(4)(a)(ii)]

7.1.4 These Articles do not stipulate any additional qualifications or eligibility requirements than those set out in the Act for a person to become or remain a director or a prescribed officer of the Company, provided that, for as long as the Listings Requirements requires it, the Board, through the nomination committee, should recommend eligibility of directors, taking into account past performance and contributions.[Section 188(6)]

7.1.5 Subject to the Act and these Articles, at every annual general meeting one third of the non-executive directors(or such other number of directors determined in terms of the Listings Requirements) for the time being or, if their number is not a multiple of 3 (three) (or such other number determined in terms of the Listings Requirements), then the number nearest to, but not less than one third (or such other number determined in terms of the Listings Requirements), or if there are less than three (or such other number determined in terms of the Listings Requirements), then all of the nonexecutive directors, shall retire from office. The non-executive directors (determined in terms of the Listings Requirements) so to retire at every annual general meeting shall be those who have been longest in office since their last election, but as between persons who become or were last elected directors on the same day, those to retire shall (unless they otherwise agree among themselves) be determined by lot, provided that notwithstanding anything in these Articles:

7.1.5.1 if at the date of any annual general meeting any director shall have held office for a period of 3 (three) years since his last election or appointment (or such other period determined in terms of the Listings Requirements), he shall retire at such meeting either as one of the directors to retire in pursuance of the foregoing or additionally thereto;

7.1.5.2 a director who intends to retire voluntarily at the meeting may be

taken into account in determining the number of directors to retire at such meeting in terms of the Listings Requirements;

7.1.5.3 the identity of the directors to retire at such annual general meeting shall be determined as at the date of the notice convening such meeting; and

7.1.5.4 the length of time a director has been in office shall be computed from his last election, appointment or date upon which he was deemed re-elected. A director retiring at a meeting shall retain office until the close or adjournment of the meeting.[Section 187(1)]

7.1.6 Retiring directors shall be eligible for re-election but no person, other than a director retiring at the meeting, shall, unless recommended by the directors, be eligible for election to the office of a director at any shareholders meeting.

7.1.7 The Board may appoint any person who satisfies the requirements for election as a director or alternate director to fill any vacancy and serve as a director or alternate director on a temporary basis until the vacancy is filled by election in accordance with section 187(1) of the Act.[Section 187(3)]

7.1.8 Life directorships and directorships for an indefinite period are not permissible.

7.2 Vacancies

If the number of directors falls below the minimum provided for in these Articles or those required in terms of the Listings Requirements, the remaining directors must as soon as possible and in any event not later than 3 (three) months from the date that the number of directors falls below the minimum, fill the vacancies or call a general meeting for the purpose of filling the vacancies. If required by the Listings Requirements:

7.2.1 the appointment of a director to fill a vacancy or as an addition to the Board must be confirmed by shareholders at the next annual general meeting; and

7.2.2 after the expiry of the 3 (three) month period referred to above, the remaining directors shall only be permitted to act for the purpose of filling vacancies or calling general meetings of shareholders.

7.3 Authority of the board of directors

The authority of the Board to manage and direct the business and affairs of the Company, as contemplated in section 185(1) of the Act, is not limited, restricted or qualified by these Articles.[Section 66(1)]

7.4 Directors compensation and financial assistance to directors

7.4.1 These Articles do not limit, restrict or qualify the power of the Company to pay remuneration to its directors for their service as directors in accordance with section 185(9) of the Act.[Section 185(8)]

7.4.2 The appointment and remuneration of directors employed in any other capacity in the Company or as a director or employee of a company controlled by, or itself a major subsidiary of, the Company must be determined by a disinterested quorum of directors.

7.4.3 The directors may be paid all their travelling and other expenses, properly and necessarily incurred by them in and about the business of the Company, and in attending meetings of the Board or of committees thereof; and, if any director is required to perform extra services, to reside abroad or be specifically occupied about the Company’s business, he may be entitled to receive such remuneration as is determined by a disinterested quorum of directors, which may be either in addition to or in substitution for any other remuneration payable.

7.5 Indemnification of directors

7.5.1 These Articles do not limit, restrict or qualify the ability of the Company to advance expenses to a director to defend any legal proceedings arising from his service to the Company, or to indemnify a director against such expenses if the proceedings are abandoned or exculpate the director or arise in respect of any liability for which the Company may indemnify the director in terms of sections 197(5)(a) of the Act. [Section 197(5)(a)]

7.5.2 These Articles do not limit, restrict or qualify the power of the Company to indemnify a director in respect of any liability arising out of the director’s service to the Company to the fullest extent permitted by the Act.[Section 78(5)(b)]

7.5.3 These Articles do not limit, restrict or qualify the power of the Company to purchase insurance to protect a director against any liability or expenses for which the Company is permitted to indemnify a director in terms of the Act and these Articles, or the Company against any contingency.[Section 197(8)]

7.5.4 Every director, alternate director, manager, secretary and other officer of the Company and any person employed by the Company as its auditor shall be indemnified out of the Company’s funds against all liability incurred by him in defending any proceedings (whether civil or criminal) arising out of any actual or alleged negligence, default, breach of duty or breach of trust on his part in relation to the Company in which judgment is given in his favour or in which he is acquitted or in connection with any matter in which relief is granted to him by the court in terms of the Act.

7.6 Chairman

7.6.1 The directors may elect from their number a Chairman and a Deputy Chairman, or two or more Deputy Chairmen, and decide the period for which each is to hold office. The directors may also remove any of them from such office at any time. If neither a Chairman nor a Deputy Chairman has been appointed or if at any meeting of the directors, neither the Chairman nor a Deputy Chairman is present within five minutes after the time appointed for holding the meeting, the directors present may choose one of their number to be chairman of the meeting.

7.6.2 If at any time there is more than one Deputy Chairman, the right in the

absence of the Chairman to preside at a meeting of the directors or of the Company shall be determined as between the Deputy Chairmen present, if more than one, by seniority in length of appointment or otherwise as resolved by the Directors.

7.7 Directors’ meetings

7.7.1 These Articles do not restrict the directors from acting otherwise than at a meeting, as contemplated in section 193(1) of the Act. [Section 193(1)]

7.7.2 These Articles do not specify a different percentage or number of directors upon whose request a meeting of the Board must be called in terms of section 192(1) of the Act. [Sections 192(1) and (2)]

7.7.3 These Articles do not restrict the Board from conducting meetings, or

directors from participating in meetings, by electronic communication, as contemplated in section 192(3) of the Act. [Section 192(3)]

7.7.4 These Articles do not limit, restrict or qualify the authority of the Board to determine the manner and form of giving notice of its meetings. [Section 192(4)]

7.7.5 These Articles do not limit, restrict or qualify the authority of the Board to proceed with a Board meeting in accordance with the requirements of section 192(5)(a) of the Act, despite a failure or defect in giving notice of the meeting. [Section 192(5)(a)]

7.7.6 The quorum requirement for a directors’ meeting to begin, the voting rights at such a meeting, and the requirements for approval of a resolution at such a meeting, as set out in section 192(5) of the Act, are not varied by these Articles. [Sections 192(5)(b),(c), (d) and (e)]

7.7.7 Subject to the Listings Requirements, in the case of an equality of votes at any meeting of the directors, the Chairman shall have a second or casting vote, except where the necessary quorum for a directors’ meeting is 2 (two), in which event the Chairman shall not be permitted to have a casting vote if only two directors are present at a directors’ meeting.

7.7.8 A decision that could be voted on at a meeting of the board of directors of the Company may instead be adopted by written consent of a majority of the directors, given in person, or by electronic communication, provided that each director has received notice of the matter to be decided. Such resolution, inserted in the minute book, shall be as valid and effective as if it has been passed at a meeting of directors. Any such resolution may consist of several documents and shall be deemed to have been passed on the date on which it was signed by the last director who signed it (unless a statement to the contrary is made in that resolution).

7.8 Committees of the board of directors

7.8.1 These Articles do not limit, restrict or qualify the authority of the Board to appoint any number of committees of directors, or to delegate to any such committee any of the authority of the Board.[Section 191(1)]

7.8.2 Except to the extent that a Board resolution establishing a committee provides otherwise, the members of the committee:

7.8.2.1 may include persons who are not directors of the Company but any such person must not be ineligible or disqualified to be a director in terms of section 188 of the Act. Any such persons shall not have a vote on any matter to be decided by the committee;

7.8.2.2 may consult with or receive advice from any person;

7.8.2.3 may be remunerated for their services as such; and

7.8.2.4 provided that the committee is duly constituted, have the full authority of the Board in respect of any matter referred to it.[Section 191(2)]

7.8.3 The Board may from time to time, where it has appointed a committee in terms of 7.8.1 and 7.8.2, include in any such delegation the power to sub delegate the powers referred to in 7.8.1 and 7.8.2 to such person or persons as the Committee thinks fit, subject to such terms and conditions as the Committee for the time being may think fit, and may from time to time revoke, withdraw, alter or vary all or any such powers.

7.9 Termination of office

7.9.1 Without prejudice to any provisions for retirement contained in these Articles or the Act, the office of a director is vacated if:

7.9.1.1 he becomes prohibited or disqualified by the Act from acting as a director, ceases to be a director by virtue of any provision of the Act or is removed from office pursuant to these Articles or the Act,

7.9.1.2 he gives notice to the Company of his resignation as a director with effect from the date of, or such later date as provided for in, such notice;

7.9.1.3 he is absent from meetings of the directors for 6 (six) consecutive months without permission of the Board and the directors have resolved that his office be vacated, provided that this provision shall not apply to a director who is represented by an alternate director who does not so absent himself; or

7.9.1.4 he is removed by an ordinary resolution of the shareholders in accordance with section 190 of the Act.

7.9.2 If a director holds an appointment to executive office which terminates on termination of his office as director, his removal from office pursuant to this 7.9 shall be deemed an act of the Company and shall take effect without prejudice to any claim for damages for breach of any contract of service between him and the Company.

7.9.3 If the office of a director is vacated for any reason he shall cease to be a member of any committee of the Board.

7.9.4 A resolution of the Board declaring a director to have vacated office under the terms of this 7.9 shall be conclusive as to the facts and grounds of vacation stated in the resolution.

8. GENERAL PROVISIONS

8.1 Amendment of class, preferences, rights, limitations or other terms

8.1.1 If any amendments proposed to any preferences, rights, limitations or other terms of any class of shares, such amendment would be subject to the prior sanction of a resolution passed at a separate class meeting of the holders of that class of shares in the same manner as a special resolution:

8.1.1.1 where the amendment relates to any preferences, rights, limitations or other terms associated with any class of Shares already in issue, such amendment requires a Special Resolution adopted at a separate meeting of the Holders of shares in that class; and

8.1.1.2 the holder of the shares referred to in 8.1.1.1 shall, in addition be entitled to vote at any other meeting of shareholders which such amendment is to be approved.

8.1.2 At every meeting of the holders of that class of shares, the provisions of these Articles relating to general meetings of ordinary shareholders shall apply, except that a quorum at any such general meeting shall be the quorum specified for that class of shares, provided that if at any adjournment of such meeting a quorum is not present, the provisions of these Articles relating to adjourned meetings shall apply.

8.2 Fractions of securities

If, on any capitalisation issue, consolidation, subdivision, re-designation of securities, or for any other reason, any shareholder would, but for the provisions of this 8.2, become entitled to fractions of securities, the directors shall be entitled to sell the securities resulting from the aggregation of such fractions on such terms and conditions as they deem fit for the benefit of the relevant shareholders, and any director shall be empowered to sign any instrument of transfer or other instrument necessary to give effect to such sale provided that all allocations of securities will be rounded up or down based on standard rounding convention (i.e. allocations will be rounded down to the nearest whole number if they are less than 0,5 and will be rounded up to the nearest whole number if they are equal to or greater than 0,5) resulting in allocations of whole securities and no fractional entitlements.

8.3 Dividends

8.3.1 A general meeting or the Board may declare cash or scrip dividends, in accordance with the Act, to any one or more classes of shareholders from time to time:

8.3.1.1 registered as such at a date which shall be not less than 14 (fourteen) days after the date of publication of the announcement of the declaration of the dividend on the basis that the securities register may not be closed between the date of publication of such announcement and the record date for the payment of the dividend; and

8.3.1.2 with the sanction of a general meeting, any dividend declared may be paid either wholly or in part by the distribution of such specific assets in such manner as the directors may determine, provided that no greater dividend shall be declared by a general meeting than is recommended by the Board.

8.3.2 The Company may transmit any dividend or other amount payable in respect of a security by the ordinary post to the address of the holder thereof recorded in the securities register or such other address as the holder thereof may previously have given to the Company in writing, and the Company shall not be responsible for any loss in transmission.

8.3.3 All distributions, including dividends and other monies, that are due to any shareholder/s and which are unclaimed:

8.3.3.1 shall be subject to the laws of prescription;

8.3.3.2 will be held in trust by the Company in favour of such shareholder/s until claimed by the shareholder concerned [LR 10.17(c)];

8.3.3.3 for a period of 3 (three) years from the date on which dividends are declared, only such dividends may be declared forfeited by the Board

for the benefit of the Company. The Board may at any time annul such forfeiture upon such conditions (if any) as they think fit [10.17(c)]; and

8.3.3.4 subject to clause 8.3.3.1, shall not bear any interest against the Company, and the Company shall, for the purpose of facilitating its winding-up or deregistration, or the reduction of its share capital, be entitled by special resolution to delegate to any bank, registered as such in accordance with the laws of the Republic, the liability for payment of any such distribution, payment of which has not been forfeited in terms of the foregoing.

8.4 Rights attaching to securities

8.4.1 Subject to any restriction as to voting to which any shareholder or security may be subject, a shareholder who is present in person or by proxy shall:

8.4.1.1 have 1 (one) vote on a show of hands; and

8.4.1.2 on a poll have 1(one) vote for each ordinary share held.

8.4.2 Voting shall be conducted by means of a polled vote in respect of any matter to be voted on at a meeting of shareholders if a demand is made for such a vote by:

8.4.2.1 at least 5 (five) persons having the right to vote on that matter, either

as shareholders or as proxies representing shareholders; or

8.4.2.2 a shareholder who is, or shareholders who together are, entitled, as shareholders or proxies representing shareholders, to exercise at least 10% (ten percent) of the voting rights entitled to be voted on that matter; or

8.4.2.3 the chairperson of the meeting.

8.4.3 In all other respects, and in particular, but without limiting the generality of the

foregoing, in respect of the redeemable preference shares set out Annexure 1, the rights, privileges and obligations attaching to such shares are set out in

Annexure 2 attached hereto.

8.5 Winding-up

If the Company is wound-up, whether voluntarily or by court order, the assets remaining after payment of the liabilities of the Company and the costs of winding-up shall be distributed amongst the shareholders in proportion to the number of securities respectively held by them, subject to the rights of any shareholders to whom securities have been issued on special conditions and subject to the Company’s right to apply set-off against the liability, if any, of any shareholders for unpaid capital.

ANNEXURE 1 – AUTHORISED SHARES

A. Classified shares

1. 1,000,000,000 (one billion)ordinary shares, each of which shall entitle the holder, subject to any preferences, rights or other share terms of any class of shares in the Company ranking prior to the ordinary shares:

(i) to receive any distribution in accordance with the holder’s voting power;

(ii) on a liquidation of the Company, to receive the net assets of the Company in accordance with the holder’s voting power;

(iii) to all of the preferences, rights or other terms set out in the Act or these Articles;

and

(iv) to any other rights at common law insofar as such rights are not inconsistent with these Articles or the Act.

2. 60,000,000 (sixty million) redeemable participating preference shares, each of which shall entitle the holder, subject to any preferences, rights or other share terms of any class of shares in the Company ranking prior to the redeemable participating preference shares:

(i) to receive any distribution in accordance with the holder’s voting power;

(ii) on a liquidation of the Company, to receive the net assets of the Company in accordance with the holder’s voting power;

(iii) to all of the preferences, rights or other terms set out in the Act or these Articles;

and

(iv) to any other rights at common law insofar as such rights are not inconsistent with these Articles or the Act.

B. Unclassified shares

None.

ANNEXURE 2 – RIGHTS, PRIVILEGES AND OBLIGATIONS OF THE REDEEMABLE

PREFERENCE SHARES

1 For the purposes of this Annexure:

1.1 "business day" means any day other than a Saturday, Sunday or public holiday in the

Republic;

1.2 "CSDP" means a central securities depository participant;

1.3 "preference dividend" means a preferential cash dividend per preference share

determined pursuant to the formula contained in 2 below;

1.4 "the redeemable preference shares" means 60,000,000 (sixty million) redeemable

participating preference shares in the issued share capital of the Company, each which have the rights set out in this Annexure;

1.5 “the rights offer” means the rights offer to be implemented by the Company commencing

on or about 01 March 2024.

2. If the Company declares dividends or makes any payment to the holders of the ordinary

shares in respect of any financial year, then the holders of the redeemable preference shares

shall be entitled to a preferential dividend or payment calculated in accordance with the

following formula:

Pref Div / Payment = P x 0.15 x R / S

Where Pref Div / Payment = the total dividend or payment to be declared by board in respect of the redeemable preference shares as a class.

P = the total dividend or payment to be declared by board in respect of ordinary shares and redeemable preference shares.

R = the redeemable preference shares in issue at record date of the relevant dividend or payment.

S = the total number of redeemable preference shares issued in terms of the rights offer.

To calculate the preference dividend payable per redeemable preference share, the Dollar

value derived from applying the above formula is divided by “R”.

1. The redeemable preference shares will rank as regards arrear dividends and return of capital on a winding-up in priority to the ordinary shares and in priority to the holders of any other shares in the capital of the Company to repayment of an amount equal to the greater of: (a) the sum of the subscription price of the redeemable preference shares and any arrears in the preference dividends or (b) the amount the holders of the redeemable preference shares would otherwise be entitled to receive had the holders thereof elected to exercise their options to purchase ordinary shares immediately prior to the date it is determined to wind-up the\ affairs of the Company (whether or not such date is an option exercise date detailed in 8.1 below).
2. The Company in general meeting or the directors of the Company shall be entitled to declare dividends in respect of the redeemable preference shares on the basis that the preference dividend payable in respect of any financial year shall be payable at the same time as the payment of the dividend in respect of ordinary shares to the holders of the redeemable preference shares registered as such at a reasonable date chosen by the Company in general meeting or by the directors, as the case may be, which date shall be subsequent to the date of the declaration of such dividends or the date of the confirmation of such dividends, whichever is the later. Any arrear preference dividends shall rank for payment in priority to the declaration or payment of any dividends in respect of the ordinary shares.
3. With respect to voting rights in the Company, the holders of the redeemable preference shares shall not be entitled to receive notice of and to attend and vote at any general meeting of the Company unless any one or more of the following circumstances prevail at the date of the meeting –

5.1 the preference dividend or any part thereof whether declared or not or redemption payment thereon remains unpaid after 60 (sixty) days from the due date thereof[LR S10.5(h)(i) and (iii)];

5.2 a resolution of the Company is proposed which directly affects the rights attached to the redeemable preference shares or the interests of the holders thereof, limited to a resolution for the winding-up of the Company or for the reduction of its share capital [LR S10.5(h)(ii)];

5.3 a resolution of the Company is proposed for the disposal of the whole or substantially the whole of the undertaking of the Company, or the whole or the greater part of the assets of the Company which shall include a resolution of the Company for the disposal of the undertaking or assets of a subsidiary of the Company, if such undertaking or assets constitute the whole or substantially the whole of the undertaking or assets of the Company and all its subsidiaries considered as one entity for this purpose.

6. Subject to the Act, holders of any redeemable preference share shall, when such holders are entitled to vote at any general meeting or annual general meeting of the Company in terms of

clause 5 above, shall:

6.1 not have any special rights and/or privileges attached to their vote/s; and

6.2 be entitled to 1 (one) vote for each share that they hold, provided that their total voting right at such a general meeting or annual general meeting, may never be more than 24.99% less one vote of the total voting rights of all shareholders at such meeting.[LR S10.5(c)]

7. Payment in respect of preference dividends and any other payments shall be made in the currency of Namibian Dollar at the risk of the relevant holder of redeemable preference shares either by cheque sent by ordinary post to the address of each holder of redeemable preference shares as recorded in the register of the Company's shareholders or by electronic transfer to such bank account nominated in writing by any holder of redeemable preference shares for such purpose. Payment in respect of shareholders whose redeemable preference shares have been dematerialised will be made to the relevant CSDP or broker.

8. All or any of the rights attaching to the issued redeemable preference shares may not be

modified, altered, varied, added to or abrogated, without the prior written consent of the holders of at least three-quarters of the issued redeemable preference shares or the sanction of a resolution of the holders of the issued redeemable preference shares passed at a separate general meeting of such holders and at which redeemable preference shareholders holding in the aggregate not less than one quarter of the total votes of all the redeemable preference shareholders holding securities entitled to vote at that meeting are present in person or by proxy and the resolution has been passed by not less than three quarters of the total votes to which the redeemable preference shareholders are present in person or by proxy are entitled.

9. The holder of each redeemable preference share is granted the right and option ("the call option") to subscribe for such number of ordinary shares at the prices set out below. The call option may be exercised by the holder of each redeemable preference share upon the following terms and conditions:

9.1 the call option may be exercised by the relevant shareholder giving written notice to that effect to the Company in accordance with the procedure set out in paragraph 11 below, in respect of each of the periods ending on 30 November 2024, 2025, 2026 and 2027 (“the option exercise dates”);

9.2 the number of ordinary shares that will be issued to the holder of each redeemable preference share if the call option is exercised in respect of that redeemable preference share at the relevant time shall be calculated in accordance with the following formula:

{(A – B)/0.85 – (A – B)} x C/D

Where:

A = the total ordinary shares in issue at time of exercise of the call option.

B = the total ordinary shares issued in terms of previously exercised call options.

C = the number of redeemable preference shares in respect of which the call option is exercised.

D = the total number of redeemable preference shares originally issued in terms of the rights offer.

9.3 the subscription price per ordinary share payable by the shareholder to the Company shall be calculated in accordance with the following formula:

A = B ÷ C

Where

A = the subscription price per ordinary share at which the call option may be

exercised.

B = the aggregate subscription price at which the preference shares associated

with the options that were exercised were subscribed for by the relevant

shareholder;

C = the number of ordinary shares that will be issued by the Company upon the

exercise of the call option;

9.4 the call option may be exercised in whole or in part;

9.5 any call option that is not exercised by 31 December 2013 shall lapse.

10. From the date upon which ordinary shares are issued pursuant to the exercise of the relevant call options, the preference shares to which the exercised call options relate shall cease to be entitled to any dividend or other distribution. The only monies to which holders of those redeemable preference shares shall be entitled are the redemption monies provided for in 10 below.

11. The redeemable preference shares to which that call option relate shall be redeemed out of the proceeds of the issue of the ordinary shares that will be subscribed for by the holders of the redeemable preference shares on the exercise of the option on the following basis –

11.1 the price payable for each redeemable preference share on redemption of same will be at a redemption price equal to the subscription price paid per redeemable preference share;

11.2 the Company shall be deemed to have given notice of such redemption simultaneously with the exercise of the call option;

11.3 the redemption shall take place in accordance with the procedures set out in paragraph 11 below.

12. The procedures for enabling redeemable preference shareholders to exercise their options and enable the Company to redeem the redeemable preference shares are as follows –

12.1 not less than 30 (thirty) days before the occurrence of any option exercise date, the Company shall post a notice to redeemable preference shareholders;

12.2 the notice shall advise redeemable preference shareholders of the salient features of the call option attaching to the redeemable preference shares, shall set out a timetable and the specific procedures approved by the NSE for the exercise of the call option, for the issue and allotment of the ordinary shares that will result should a call option be\ exercised and the redemption of the preference shares;

12.3 the call option may be exercised on behalf of a redeemable preference shareholder whose redeemable preference shares have been dematerialised by the CSDP of such redeemable preference shareholder;

12.4 the notice shall contain a form for completion by any certificated redeemable preference shareholder wishing to exercise the call option in respect of the relevant option exercise date and for return to the Company or its authorised representative by a time and date which shall be not later than 14 (fourteen) days prior to the close of business on the relevant option exercise date; and

12.5 certificated redeemable preference shareholders shall be required to deliver their share certificates together with the completed form referred to above.

13. On the lapsing of the call option the Company shall redeem the redeemable preference shares out of monies which may be lawfully applied for that purpose on the basis that the price payable for each redeemable preference share on redemption of same will be at a redemption price equal to the subscription price paid per redeemable preference share, provided that should the Company not have sufficient reserves to redeem the redeemable preference share at a redemption price equal to the subscription price of the redeemable preference share then the price at which each redeemable preference share shall be redeemed shall be calculated by taking the reserves available for the redemption of the redeemable preference shares and dividing that amount by the number of redeemable preference shares to be redeemed.

14. Upon the date of redemption of any redeemable preference shares there shall be paid all preference dividends (including any which are in arrear) outstanding in respect of the same, up to the date fixed for redemption thereof.

15. In respect of redeemable preference shares where the call option has lapsed, the preference dividends thereon shall cease to accrue from that date unless, upon surrender of the share certificate in respect of the preference shares, payment of the redemption monies is not effected by the Company.

16. The Company shall not be liable to a redeemable preference shareholder for interest on any unclaimed redemption monies and arrear dividends.

17. Any preference dividends (including any which are in arrear) that remain unclaimed for 3 (three) years may become the property of the Company.

18. The redeemable preference shares will, subject to the approval of the NSE, be listed on the NSE.

19. Any redeemable preference shares in the authorised capital of the Company that are not issued in the rights offer will be automatically cancelled on completion of the rights offer.

TABLE B – ARTICLES OF ASSOCIATION FOR A PRIVATE COMPANY

1. INTRODUCTION

1.1 The Articles of Association set out herein apply automatically to any private company incorporated in the Republic of Namibia unless the Company adopts a company-specific set of Articles of Association.

1.2 These Articles do not:

1.2.1 contain any restrictive conditions contemplated in section 59(1) of the Act;

1.2.2 contain any requirement for the amendment of any particular provision of these Articles in addition to the requirements of the Act; and

1.2.3 prohibit the amendment of any particular provision of these Articles.

1.3 The Company is incorporated as a private company in terms of the Act and,

accordingly:

1.3.1 the Company is prohibited from offering its securities to the public; and

1.3.2 the transfer of the Company’s securities is unrestricted as follows:[Section 35(2)(b)]

1.3.2.1 Any new issue of shares is subject to pre-emptive rights in favour of existing shareholders

1.3.2.2 Directors of the company should approve any transfer of securities in the Company.

2. INTERPRETATION

In these Articles, including the introduction above, and unless the context requires

otherwise:

2.1 words importing any one gender shall include the other two genders;

2.2 the singular shall include the plural and vice versa;

2.3 any word which is defined in the Act and is not defined in 2.5, shall bear that statutory

meaning in these Articles;

2.4 the headings have been inserted for convenience only and shall not be used for or

assist or affect their interpretation;

2.5 each of the following words and expressions shall have the meaning stated opposite it

and cognate expressions shall have a corresponding meaning, namely:

2.5.1 “the Act” means the Corporate Laws Act, 2023, together

with the Corporate Laws Regulations, 2023, as amended or substituted from time to time;

2.5.2 “Board” means the board of directors of the Company from time to time;

2.5.3 “Chairman” means the chairman of the directors appointed in accordance with 7.6;

2.5.4 “Deputy Chairman” means the deputy chairman of the directors appointed in accordance with 7.6;

2.5.5 “Group” means the Company and its subsidiaries from time to time and “a member of the Group” means any one of them;

2.5.7 “legal representative” means any person who has submitted the necessary proof of his appointment as –

2.5.7.1 an executor of the estate of a deceased member or trustee, curator or guardian of a member whose estate has been sequestrated or who is otherwise under disability;

2.5.7.2 the liquidator of any member which is a body corporate in the course of being wound-up; or

2.5.7.3 the business rescue practitioner of any member which is a company under business rescue;

2.5.8 “these Articles” means these Articles of Association and include their Annexures, which form part thereof; and

2.5.9 “the Republic” means the Republic of Namibia.

3. GENERAL

3.1 Liability of incorporators, shareholders or directors

These Articles do not impose any liability on any person for the liabilities or obligations of the Company, solely by reason of such person being an incorporator, shareholder or director of the Company as contemplated by section 57(1) of the Act.

3.2 Powers of the Company

These Articles do not restrict, limit or qualify the legal powers or capacity of the Company in section 59(1) of the Act.[Section 59(1)]

3.3 Articles of Association and Governance Rules

3.3.1 The Board shall not have the power to make, amend or repeal any necessary

or incidental rules relating to the governance of the Company in respect of matters that are not addressed in the Act or these Articles.

3.3.2 These Articles do not contain any restrictive conditions applicable to the Company as contemplated in section 74(2)(b).

3.3.3 These Articles may only be altered or amended by a special resolution of the ordinary shareholders of the Company.

3.3.4 An amendment of these Articles shall include, but not be restricted to, the

following:

3.3.4.1 the creation of any class of shares;

3.3.4.2 the variation of any preferences, rights, limitation and other share

terms attaching to any class of shares;

3.3.4.3 the conversion of one class of shares into one or more other classes

of shares;

3.3.4.4 any increase in the number of shares;

3.3.4.5 the consolidation of shares;

3.3.4.6 the subdivision of shares; and/or

3.3.4.7 the change of name of the company;

3.3.5 If the Board, or any individual authorised by the Board, alters these Articles in any manner necessary to correct a patent error in spelling, punctuation, reference, grammar or similar defect on the face of the document, it must publish a notice of such alteration by publishing the alterations on the Company’s website, and must file a notice of alteration in

the manner prescribed by the Act.[Section 81(1)]

3.4 Financial assistance to related persons

These Articles do not limit, restrict or qualify the authority of the Board to authorise the Company to provide direct or indirect financial assistance to any person contemplated in section 105 of the Act. [Section 105(2)]

3.5 Solvency and liquidity test

These Articles do not alter the application of the solvency and liquidity test provided in section 1 of the Act, except in so far as the application of equity solvency test in relation to the requirements for distributions in terms of section 118. [Section 118(2)]

3.6 Annual Financial Statements

A copy of the annual financial statements (if required) must be distributed to shareholders at least 15 business days before the date of the annual general meeting (if applicable) at which they will be considered.

3.7 Ratification of Ultra Vires Acts

The proposal of any resolution to shareholders in terms of sections 59(1) of the Act which would lead to the ratification of an act that is contrary to the stated purposes and powers of the Company, shall be permissible, unless the action to be ratified is in contravention of the Act.

4. SECURITIES OF THE COMPANY

4.1 Authorisation for shares

4.1.1 The Company is authorised to issue the shares specified in the Annexure 1 to these Articles of Association, which may include:

4.1.1.1 ordinary shares, each of which carries voting rights in respect of any matter to be decided in shareholder meetings; and

4.1.1.2 Redeemable shares of any class;

4.1.2 Any amendment to these Articles must be approved by a special resolution of ordinary shareholders [section 184(11)(a)], save where an amendment is ordered by a court in terms of sections 202(3) and may, inter alia, effect

4.1.3 Authority to issue shares include:

4.1.3.1 the creation of any class of shares;

4.1.3.2 the variation of any preferences, rights, limitations and other terms attaching to any class of shares;

4.13.3 an increase in the number of securities of a class;

4.1.2.4 a consolidation of securities;

4.1.3.5 a sub-division of securities; and/or

4.1.3.6 the change of the name of the company.

4.1.4 The preferences, rights, limitations or other terms of any class of shares in the Company may not be varied and no resolution may be proposed to shareholders for rights to include such variation in response to an objectively ascertainable external fact or facts, as provided for in section 1.

4.2 Capitalisation shares

These Articles do not limit, restrict or qualify the authority of the Board, in terms

of section 108 of the Act, to:

4.2.1 approve the issue of any authorised shares of the Company as capitalisation shares, on a pro rata basis to the shareholders of one or more classes of shares;

4.2.2 approve the issue of shares of one class as capitalisation shares in respect of

shares of another class; or

4.2.3 permit shareholders to elect to receive a cash payment in lieu of a capitalisation share, at a value determined by the Board.[Sections 108(1)(c)] provided that the requirements of section 108 are met. [Section 108(2)(a) and (b)]

4.3 Payments to securities holders

4.3.1 Without derogating from any of the other provision in these Articles, all payments made to holders of securities must be for adequate consideration determined by the Board.

4.3.2 Any acquisition by the Company or a subsidiary company of the Company’s shares and any distribution to shareholders will be subject to the provisions of the Act.

4.4 Debt instruments

These Articles do not limit, restrict or qualify the authority of the Board to authorise the Company to issue secured or unsecured debt instruments, provided that the Board may not grant special privileges regarding the attending and voting at general meetings of the Company or the appointment of directors in respect of such debt instruments.[Sections 138]

4.5 Registration of beneficial interests

These Articles do not limit or restrict the holding of the Company’s issued securities by, or the registration of the Company’s issued securities in the name of, one person for the beneficial interest of another.[Section 117(1)]

4.6 Joint holders of securities

Where two or more persons are registered as the holders of any security, they shall

be deemed to hold that security jointly, and:

4.6.1 notwithstanding anything to the contrary in these Articles, on the death, sequestration, liquidation or legal disability of any one of such joint holders, the remaining joint holders may be recognised, at the discretion of the Board, as the only persons having title to such security;

4.6.2 any one of such joint holders may give effectual receipts for any dividends, bonuses or returns of capital or other accruals payable to such joint holders;

4.6.3 only the joint holder whose name stands first in the securities register of the Company shall be entitled to delivery of the certificate relating to that security, or to receive notices from the Company (and any notice given to such joint holder shall be deemed to be notice to all of the joint holders); and

4.6.4 any one of the joint holders of any security conferring a right to vote may vote either personally or by proxy at any shareholders’ meeting in respect of such security as if he were solely entitled thereto, and if more than one of such joint holders is present at any shareholders’ meeting, either personally or by proxy, the joint holder who tenders a vote and whose name stands in the securities register of the Company before the other joint holders who are present in person or by proxy shall be entitled to vote in respect of that security.

4.7 Legal Representatives

A legal representative (not being one of several joint holders) shall be the only person recognised by the Company as a shareholder or having any title to a security registered in the name of the shareholder whom he represents. The legal representative shall provide proof of his capacity as such in a form reasonably satisfactory to the Company or the Chairman, as the case may be.

4.8 Commission

4.8.1 The Company may not pay commission of more than 10% (ten per centum) of the subscription price at which securities are issued to any person in consideration for such person subscribing or agreeing to subscribe, absolutely or conditionally, or for procuring or agreeing to procure subscriptions, absolute or conditional, for such securities.

4.8.2 Such commission may be paid in whole or in part by fully paid up securities, provided that the prior approval of Shareholders by means of an ordinary resolution shall be required before any commission or portion thereof is paid in shares.

4.9 Authority to sign transfer deeds

All authorities to sign transfer deeds granted by holders of securities for the purpose of transferring securities that may be lodged, produced or exhibited with or to the Company at any of its transfer offices shall, as between the Company and the grantor of such authorities, be taken and deemed to continue and remain in full force and effect, and the Company may allow the same to be acted upon until such time as express notice in writing of the revocation of the same shall have been given and lodged at the Company’s transfer offices at which the authority was lodged, produced or exhibited. Even after the giving and lodging of such notices, the Company shall be

entitled to give effect to any instruments signed under the authority to sign, and certified by any officer of the Company, as being in order before the giving and lodging of such notice.

4.10 Securities may be subject to lien

Securities may be subject to any lien in favour of the Company and shall be subject to restrictions on transferability of shares as set out in these Articles.

4.11 Transmission

These Articles may not contain a provision to the effect that securities registered

in the name of a deceased or insolvent holder shall be forfeited if the executor fails to

register them in his own name or in the name of the heir(s) or legatees, when called

upon by the directors of the Company to do so.

5. SHAREHOLDER RIGHTS AND PROXY FORMS

5.1 Shareholders’ right to information

These Articles do not establish any information rights of any person in addition

to the information rights provided in sections 242(1) - (6) of the Act.[Section 244]

5.2 Representation by concurrent proxies

These Articles do not limit or restrict the right of a shareholder to appoint two or

more persons concurrently as proxies, or to appoint more than one proxy to exercise

voting rights attached to different securities held by that shareholder.[Section

177]

5.3 Authority of proxy to delegate

These Articles do not limit or restrict the right of a proxy to delegate the proxy’s authority to act on behalf of the shareholder appointing him to anoth]er person, subject to such restrictions as may be set out in the instrument appointing the proxy. [Section 177(3)(b)]

5.4 Requirement to deliver proxy instrument to the Company

A copy of the instrument appointing a proxy must be delivered to the registered office of the Company, or to any other person specified by the Company, not less than 48 (forty eight) hours (or such lesser period as the directors may determine in relation to a particular meeting)before the time appointed for the holding of the meeting (including an adjourned meeting) at which the person(s) named in the proxy form proposes to vote and if the instrument of proxy is not so delivered, the form of proxy shall not be treated as valid.[Section 177(3)(c)]

5.5 Record date for exercise of shareholder rights

A record date for any action or event shall be determined in accordance with the Act.[Section 178(1)]

6. SHAREHOLDERS MEETINGS

6.1 Convening of shareholders’ meetings

These Articles do not specify any person other than the Board who may call a shareholders’ meeting.[Sections 180(1) and 180(3)]

6.2 Shareholders’ right to requisition a meeting

These Articles do not specify a lower percentage of voting rights than the

percentage specified in section 184(7) and (9) of the Act required for the requisition by

shareholders of a shareholder’s meeting.[Section 180]

6.3 Location of shareholders meetings

These Articles do not limit, restrict or qualify the authority of the Board to determine the location of any shareholders meeting, which may be in Namibia or in any foreign country.[Section 180(10)]

6.4 Notice of shareholders meetings

6.4.1 These Articles do not provide a different period of notice of shareholders meetings to the period prescribed by the Act..[Sections 181(1)and (2)]

6.4.2 Notice of shareholder meetings shall be sent to each shareholder entitled to

vote at such meeting and who has elected to receive such notice.

6.5 Shareholders meetings conducted by electronic communication

These Articles do not authorise the Company to provide for any shareholders meeting generally to be conducted by electronic communication, or for one or more shareholders, or proxies for shareholders, to participate in any shareholders meeting by electronic communication, unless the Board authorises it in respect of any particular meeting.[Section 182(2)]

6.6 Quorum for shareholders meetings

6.6.1 These Articles do not specify a different percentage of voting rights in

terms of section 183(1) of the Act and accordingly at least 25% (twenty five per centum) of all the voting rights that are entitled to be exercised in respect of:

6.6.1.1 at least one matter to be decided at any shareholders’ meeting must be present for that meeting to begin; and

6.6.1.2 for the consideration of any matter to be decided at any shareholders’ meeting. provided that 3 (three) shareholders entitled to attend and vote are present at the meeting referred to in 6.6.1.1 and 6.6.1.2.[Sections 183(3)]

6.6.2 These Articles specify30 (thirty) minutes as a different time to the 1 (one) hour provided in sections 183(4) and (5) of the Act for a quorum to be established before a shareholders’ meeting may be adjourned.[Sections 183(4), (5) and 6)].

6.6.3 These Articles do not specify a different period than the period of 1 (one) week provided in section 183(4) for the adjournment of a shareholders meeting.[Sections 183(4)(a) and 183(6)(b)]

6.6.4 These Articles prohibit the continuation of any shareholders’ meeting or the consideration of any matter to be considered at any shareholders’ meeting after a quorum has been established for commencement of such meeting if such quorum is not present for that matter to be considered. [Section 183(9)]

6.7 Adjournment of shareholders meetings

These Articles not provide different maximum periods for adjournment of shareholders’ meetings than those specified in section 183(12) of the Act. [Sections 183(12) and 13)]

6.8 Shareholders’ resolutions

6.8.1 These Articles do not require a higher percentage of voting rights to approve an ordinary resolution than the percentage voting rights specified in the Act.[Sections 184(7) and (8)]

6.8.2 These Articles do not require a different percentage of voting rights to approve a special resolution than the percentage voting rights specified in the Act.[Section 184(9) and (10)]

6.8.3 These Articles do not require a special resolution for any other matter not contemplated in section 184(11) of the Act.[Section 184(12)].

7. DIRECTORS AND OFFICERS

7.1 Composition of the board of directors

7.1.1 These Articles specify 2 (four) as the minimum number of directors of the Company, being a minimum number of directors required in terms of section 185(2) of the Act. [Sections 185(2) and (3)].

7.1.2 The shareholders shall elect the directors, and shall be entitled to elect one or more alternate directors, in accordance with the provisions of section 187(1) of the Act.[Sections 187(1)]

7.1.3 These Articles do not provide for:

7.1.3.1 the direct appointment or removal of any director or alternate director by any particular person; or[Section 185(4)(a)(i) and (iii)]

7.1.3.2 the appointment of any person as an ex officio director of the Company.[Section 185(4)(a)(ii)]

7.1.4 These Articles do not stipulate any additional qualifications or eligibility requirements than those set out in the Act for a person to become or remain a director or a prescribed officer of the Company, provided that, the Board, through the nomination committee, could recommend eligibility of directors, taking into account past performance and contributions.[Section 188(6)]

7.1.5 Subject to the Act and these Articles, at every annual general meeting one third of the non-executive directors for the time being or, if their number is not a multiple of 3 (three), then the number nearest to, but not less than one third, or if there are less than three, then all of the non-executive directors, shall retire from office. The non-executive directors so to retire at every annual general meeting shall be those who have been longest in office since their last election, but as between persons who become or were last elected directors on the same day, those to retire shall (unless they otherwise agree among themselves) be determined by lot, provided that notwithstanding anything in these Articles:

7.1.5.1 if at the date of any annual general meeting any director shall have held office for a period of 3 (three) years since his last election or appointment (or such other period determined in terms of the Corporate Governance principles), he shall retire at such meeting either as one of the directors to retire in pursuance of the foregoing or additionally thereto;

7.1.5.2 a director who intends to retire voluntarily at the meeting may be

taken into account in determining the number of directors to retire at such meeting in terms of the Listings Requirements;

7.1.5.3 the identity of the directors to retire at such annual general meeting shall be determined as at the date of the notice convening such meeting; and

7.1.5.4 the length of time a director has been in office shall be computed from his last election, appointment or date upon which he was deemed re-elected. A director retiring at a meeting shall retain office until the close or adjournment of the meeting.[Section 187(1)]

7.1.6 Retiring directors shall be eligible for re-election but no person, other than a director retiring at the meeting, shall, unless recommended by the directors, be eligible for election to the office of a director at any shareholders meeting.

7.1.7 The Board may appoint any person who satisfies the requirements for election as a director or alternate director to fill any vacancy and serve as a director or alternate director on a temporary basis until the vacancy is filled by election in accordance with section 187(1) of the Act.[Section 187(3)]

7.1.8 Life directorships and directorships for an indefinite period are not permissible.

7.2 Vacancies

If the number of directors falls below the minimum provided for in these Articles or those required in terms of the Listings Requirements, the remaining directors must as soon as possible and in any event not later than 3 (three) months from the date that the number of directors falls below the minimum, fill the vacancies or call a general meeting for the purpose of filling the vacancies. If required by the Corporate Governance principles:

7.2.1 the appointment of a director to fill a vacancy or as an addition to the Board must be confirmed by shareholders at the next annual general meeting; and

7.2.2 after the expiry of the 3 (three) month period referred to above, the remaining directors shall only be permitted to act for the purpose of filling vacancies or calling general meetings of shareholders.

7.3 Authority of the board of directors

The authority of the Board to manage and direct the business and affairs of the Company, as contemplated in section 185(1) of the Act, is not limited, restricted or qualified by these Articles.[Section 185(1)]

7.4 Directors compensation and financial assistance to directors

7.4.1 These Articles do not limit, restrict or qualify the power of the Company to pay remuneration to its directors for their service as directors in accordance with section 185(9) of the Act.[Section 185(8)]

7.4.2 The appointment and remuneration of directors employed in any other capacity in the Company or as a director or employee of a company controlled by, or itself a major subsidiary of, the Company must be determined by a disinterested quorum of directors.

7.4.3 The directors may be paid all their travelling and other expenses, properly and necessarily incurred by them in and about the business of the Company, and in attending meetings of the Board or of committees thereof; and, if any director is required to perform extra services, to reside abroad or be specifically occupied about the Company’s business, he may be entitled to receive such remuneration as is determined by a disinterested quorum of directors, which may be either in addition to or in substitution for any other remuneration payable.

7.5 Indemnification of directors

7.5.1 These Articles do not limit, restrict or qualify the ability of the Company to advance expenses to a director to defend any legal proceedings arising from his service to the Company, or to indemnify a director against such expenses if the proceedings are abandoned or exculpate the director or arise in respect of any liability for which the Company may indemnify the director in terms of sections 197(5)(a) of the Act. [Section 197(5)(a)]

7.5.2 These Articles do not limit, restrict or qualify the power of the Company to indemnify a director in respect of any liability arising out of the director’s service to the Company to the fullest extent permitted by the Act.[Section 78(5)(b)]

7.5.3 These Articles do not limit, restrict or qualify the power of the Company to purchase insurance to protect a director against any liability or expenses for which the Company is permitted to indemnify a director in terms of the Act and these Articles, or the Company against any contingency.[Section 197(8)]

7.5.4 Every director, alternate director, manager, secretary and other officer of the Company and any person employed by the Company as its auditor shall be indemnified out of the Company’s funds against all liability incurred by him in defending any proceedings (whether civil or criminal) arising out of any actual or alleged negligence, default, breach of duty or breach of trust on his part in relation to the Company in which judgment is given in his favour or in which he is acquitted or in connection with any matter in which relief is granted to him by the court in terms of the Act.

7.6 Chairman

7.6.1 The directors may elect from their number a Chairman and a Deputy Chairman, or two or more Deputy Chairmen, and decide the period for which each is to hold office. The directors may also remove any of them from such office at any time. If neither a Chairman nor a Deputy Chairman has been appointed or if at any meeting of the directors, neither the Chairman nor a Deputy Chairman is present within five minutes after the time appointed for holding the meeting, the directors present may choose one of their number to be chairman of the meeting.

7.6.2 If at any time there is more than one Deputy Chairman, the right in the

absence of the Chairman to preside at a meeting of the directors or of the Company shall be determined as between the Deputy Chairmen present, if more than one, by seniority in length of appointment or otherwise as resolved by the Directors.

7.7 Directors’ meetings

7.7.1 These Articles do not restrict the directors from acting otherwise than at a meeting, as contemplated in section 193(1) of the Act. [Section 193(1)]

7.7.2 These Articles do not specify a different percentage or number of directors upon whose request a meeting of the Board must be called in terms of section 192(1) of the Act. [Sections 192(1) and (2)]

7.7.3 These Articles do not restrict the Board from conducting meetings, or

directors from participating in meetings, by electronic communication, as contemplated in section 192(3) of the Act. [Section 192(3)]

7.7.4 These Articles do not limit, restrict or qualify the authority of the Board to determine the manner and form of giving notice of its meetings. [Section 192(4)]

7.7.5 These Articles do not limit, restrict or qualify the authority of the Board to proceed with a Board meeting in accordance with the requirements of section 192(5)(a) of the Act, despite a failure or defect in giving notice of the meeting. [Section 192(5)(a)]

7.7.6 The quorum requirement for a directors’ meeting to begin, the voting rights at such a meeting, and the requirements for approval of a resolution at such a meeting, as set out in section 192(5) of the Act, are not varied by these Articles. [Sections 192(5)(b),(c), (d) and (e)]

7.7.7 Subject to the Listings Requirements, in the case of an equality of votes at any meeting of the directors, the Chairman shall have a second or casting vote, except where the necessary quorum for a directors’ meeting is 2 (two), in which event the Chairman shall not be permitted to have a casting vote if only two directors are present at a directors’ meeting.

7.7.8 A decision that could be voted on at a meeting of the board of directors of the Company may instead be adopted by written consent of a majority of the directors, given in person, or by electronic communication, provided that each director has received notice of the matter to be decided. Such resolution, inserted in the minute book, shall be as valid and effective as if it has been passed at a meeting of directors. Any such resolution may consist of several documents and shall be deemed to have been passed on the date on which it was signed by the last director who signed it (unless a statement to the contrary is made in that resolution).

7.8 Committees of the board of directors

7.8.1 These Articles do not limit, restrict or qualify the authority of the Board to appoint any number of committees of directors, or to delegate to any such committee any of the authority of the Board.[Section 191(1)]

7.8.2 Except to the extent that a Board resolution establishing a committee provides otherwise, the members of the committee:

7.8.2.1 may include persons who are not directors of the Company but any such person must not be ineligible or disqualified to be a director in terms of section 188 of the Act. Any such persons shall not have a vote on any matter to be decided by the committee;

7.8.2.2 may consult with or receive advice from any person;

7.8.2.3 may be remunerated for their services as such; and

7.8.2.4 provided that the committee is duly constituted, have the full authority of the Board in respect of any matter referred to it.[Section 191(2)]

7.8.3 The Board may from time to time, where it has appointed a committee in terms of 7.8.1 and 7.8.2, include in any such delegation the power to sub delegate the powers referred to in 7.8.1 and 7.8.2 to such person or persons as the Committee thinks fit, subject to such terms and conditions as the Committee for the time being may think fit, and may from time to time revoke, withdraw, alter or vary all or any such powers.

7.9 Termination of office

7.9.1 Without prejudice to any provisions for retirement contained in these Articles or the Act, the office of a director is vacated if:

7.9.1.1 he becomes prohibited or disqualified by the Act from acting as a director, ceases to be a director by virtue of any provision of the Act or is removed from office pursuant to these Articles or the Act,

7.9.1.2 he gives notice to the Company of his resignation as a director with effect from the date of, or such later date as provided for in, such notice;

7.9.1.3 he is absent from meetings of the directors for 6 (six) consecutive months without permission of the Board and the directors have resolved that his office be vacated, provided that this provision shall not apply to a director who is represented by an alternate director who does not so absent himself; or

7.9.1.4 he is removed by an ordinary resolution of the shareholders in accordance with section 190 of the Act.

7.9.2 If a director holds an appointment to executive office which terminates on termination of his office as director, his removal from office pursuant to this 7.9 shall be deemed an act of the Company and shall take effect without prejudice to any claim for damages for breach of any contract of service between him and the Company.

7.9.3 If the office of a director is vacated for any reason he shall cease to be a member of any committee of the Board.

7.9.4 A resolution of the Board declaring a director to have vacated office under the terms of this 7.9 shall be conclusive as to the facts and grounds of vacation stated in the resolution.

8. GENERAL PROVISIONS

8.1 Amendment of class, preferences, rights, limitations or other terms

8.1.1 If any amendments proposed to any preferences, rights, limitations or other terms of any class of shares, such amendment would be subject to the prior sanction of a resolution passed at a separate class meeting of the holders of that class of shares in the same manner as a special resolution:

8.1.1.1 where the amendment relates to any preferences, rights, limitations or other terms associated with any class of Shares already in issue, such amendment requires a Special Resolution adopted at a separate meeting of the Holders of shares in that class; and

8.1.1.2 the holder of the shares referred to in 8.1.1.1 shall, in addition be entitled to vote at any other meeting of shareholders which such amendment is to be approved.

8.1.2 At every meeting of the holders of that class of shares, the provisions of these Articles relating to general meetings of ordinary shareholders shall apply, except that a quorum at any such general meeting shall be the quorum specified for that class of shares, provided that if at any adjournment of such meeting a quorum is not present, the provisions of these Articles relating to adjourned meetings shall apply.

8.2 Fractions of securities

If, on any capitalisation issue, consolidation, subdivision, re-designation of securities, or for any other reason, any shareholder would, but for the provisions of this 8.2, become entitled to fractions of securities, the directors shall be entitled to sell the securities resulting from the aggregation of such fractions on such terms and conditions as they deem fit for the benefit of the relevant shareholders, and any director shall be empowered to sign any instrument of transfer or other instrument necessary to give effect to such sale provided that all allocations of securities will be rounded up or down based on standard rounding convention (i.e. allocations will be rounded down to the nearest whole number if they are less than 0,5 and will be rounded up to the nearest whole number if they are equal to or greater than 0,5) resulting in allocations of whole securities and no fractional entitlements.

8.3 Dividends

8.3.1 A general meeting or the Board may declare cash or scrip dividends, in accordance with the Act, to any one or more classes of shareholders from time to time:

8.3.1.1 registered as such at a date which shall be not less than 14 (fourteen) days after the date of publication of the announcement of the declaration of the dividend on the basis that the securities register may not be closed between the date of publication of such announcement and the record date for the payment of the dividend; and

8.3.1.2 with the sanction of a general meeting, any dividend declared may be paid either wholly or in part by the distribution of such specific assets in such manner as the directors may determine, provided that no greater dividend shall be declared by a general meeting than is recommended by the Board.

8.3.2 The Company may transmit any dividend or other amount payable in respect of a security by the ordinary post to the address of the holder thereof recorded in the securities register or such other address as the holder thereof may previously have given to the Company in writing, and the Company shall not be responsible for any loss in transmission.

8.3.3 All distributions, including dividends and other monies, that are due to any shareholder/s and which are unclaimed:

8.3.3.1 shall be subject to the laws of prescription;

8.3.3.2 will be held in trust by the Company in favour of such shareholder/s until claimed by the bshareholder concerned;

8.3.3.3 for a period of 3 (three) years from the date on which dividends are declared, only such dividends may be declared forfeited by the Board

for the benefit of the Company. The Board may at any time annul such forfeiture upon such conditions (if any) as they think fit; and

8.3.3.4 subject to clause 8.3.3.1, shall not bear any interest against the Company, and the Company shall, for the purpose of facilitating its winding-up or deregistration, or the reduction of its share capital, be entitled by special resolution to delegate to any bank, registered as such in accordance with the laws of the Republic, the liability for payment of any such distribution, payment of which has not been forfeited in terms of the foregoing.

8.4 Rights attaching to securities

8.4.1 Subject to any restriction as to voting to which any shareholder or security may be subject, a shareholder who is present in person or by proxy shall:

8.4.1.1 have 1 (one) vote on a show of hands; and

8.4.1.2 on a poll have 1(one) vote for each ordinary share held.

8.4.2 Voting shall be conducted by means of a polled vote in respect of any matter to be voted on at a meeting of shareholders if a demand is made for such a vote by:

8.4.2.1 at least 5 (five) persons having the right to vote on that matter, either

as shareholders or as proxies representing shareholders; or

8.4.2.2 a shareholder who is, or shareholders who together are, entitled, as shareholders or proxies representing shareholders, to exercise at least 10% (ten percent) of the voting rights entitled to be voted on that matter; or

8.4.2.3 the chairperson of the meeting.

8.4.3 In all other respects, and in particular, but without limiting the generality of the

foregoing, in respect of the redeemable preference shares set out Annexure 1, the rights, privileges and obligations attaching to such shares are set out in

Annexure 2 attached hereto.

8.5 Winding-up

If the Company is wound-up, whether voluntarily or by court order, the assets remaining after payment of the liabilities of the Company and the costs of winding-up shall be distributed amongst the shareholders in proportion to the number of securities respectively held by them, subject to the rights of any shareholders to whom securities have been issued on special conditions and subject to the Company’s right to apply set-off against the liability, if any, of any shareholders for unpaid capital.

ANNEXURE 1 – AUTHORISED SHARES

A. Classified shares

1. 100 (one hundred)ordinary shares, each of which shall entitle the holder, subject to any preferences, rights or other share terms of any class of shares in the Company ranking prior to the ordinary shares:

(i) to receive any distribution in accordance with the holder’s voting power;

(ii) on a liquidation of the Company, to receive the net assets of the Company in accordance with the holder’s voting power;

(iii) to all of the preferences, rights or other terms set out in the Act or these Articles;

and

(iv) to any other rights at common law insofar as such rights are not inconsistent with these Articles or the Act.

2. 600 (six hundred) redeemable participating preference shares, each of which shall entitle the holder, subject to any preferences, rights or other share terms of any class of shares in the Company ranking prior to the redeemable participating preference shares:

(i) to receive any distribution in accordance with the holder’s voting power;

(ii) on a liquidation of the Company, to receive the net assets of the Company in accordance with the holder’s voting power;

(iii) to all of the preferences, rights or other terms set out in the Act or these Articles;

and

(iv) to any other rights at common law insofar as such rights are not inconsistent with these Articles or the Act.

B. Unclassified shares

None.

TABLE C – ARTICLES FOR A NOT FOR PROFIT COMPANY

**Interpretation**

In these Articles of Association ––

(a) a reference to a section by number refers to the corresponding section of the Corporate Laws Act, 2023;

(b) words that are defined in the Corporate Laws Act, 2023 bear the same meaning in these Articles as in that Act; and

(c) words appearing to the right of an optional check line are void unless that line contains a mark to indicate that it has been chosen as the applicable option.

The Schedules attached to these Articles are part of the Articles of Association

Article 1 - Incorporation and Nature of the Company

1.1 Incorporation

1.1.1 The Company is incorporated as a Non Profit company, as defined in the Corporate Laws Act, 2023.

1.1.2 The Company is incorporated in accordance with, and governed by–

(a) the unalterable provisions of the Corporate Laws Act, 2023 that are applicable to Non Profit companies;

(b) the alterable provisions of the Corporate Laws Act, 2023 that are applicable to Non Profit companies, subject to any limitation, extension, variation or substitution set out in these Articles of Association; and

(c) the provisions of the Memorandum of Association of the Company.

1.2 Objects and Powers of the Company

1.2.1 The Objects of the Company are as set out on the cover sheet and, except to the extent necessarily implied by the stated objects, the purposes and powers of the Company–

(a) are not subject to any restriction, limitation or qualification, as contemplated in section 59 (1).

1.2.2 The Company is not subject to any provision contemplated in section 74(2)(b) or (c) restricting or prohibiting the amendment of any particular provision of the Memorandum or Articles.

1.2.3 Each of the object of the Company set out in Annexure 1 hereto is either –

(a) a public benefit object; or

(b) an object relating to 1 or more cultural or social activities, or communal or group interests; and

1.2.4 The Company -

(a) must apply all of its assets and income, however derived, to advance its stated objects, as set out in its Memorandum and Articles of Association; and

(b) subject to paragraph (a), may -

(i) acquire and hold securities issued by a profit company; or

(ii) directly or indirectly, alone or with any other person, carry on any business, trade or undertaking consistent with or ancillary to its stated objects.

1.2.4 Upon dissolution of the Company, its net assets must distributed –

(a) to 1 or more non-profit companies, external non-profit companies carrying on activities within the Republic, voluntary associations or non-profit trusts –

(i) having objects similar to the Company’s main object; and

(ii) as determined –

(aa) by or in terms of the company’s Articles of Association; or

(bb) by its members, if any, or its directors, at or immediately before the time of its dissolution; or

(cc) by the court, if the Articles of Association, or the members or directors fail to make such a determination.

1.2.5 These Articles of Association may be altered or amended only in the manner set out in section 85(1) and (2).

1.2.6 The authority of the Company’s Board of Directors to manage or direct the business and affairs of the Company, as contemplated in section 185(1), is not limited or restricted in any manner by these Articles of Association.

1.2.7 The Company must publish a notice of any alteration of the Articles and Memorandum of Association, made in terms of sections 82 (1), by lodging, within 14 days after the date of the request, a copy of the Articles or Memorandum as so altered.

1.2.8 The Company does not elect, in terms of section 274 (1)(c)(ii), to comply voluntarily with the provisions of Part 8 of Chapter 8 of the Corporate Laws Act, 2023.

1.2.9 Members of the Company

1.2.10 As contemplated in section 37(3)(a) of the Act, the Company has members, who are all in a single class, being voting members, each of whom has an equal vote in any matter to be decided by the members of the Company.

1.2.11 The terms and conditions of membership in the company are as set out in Annexure 1 to these Articles.

Article 2 - Rights of Members

2.1 Members’ authority to act

If, at any time, every member of the Company is also a director of the Company, the authority of the members to act without notice or compliance with any other internal formalities is not limited or restricted by these Articles of Association.

2.2 Members’ right to Information

In addition to the rights to access information set out in section 244 (1), a member of the Company has the further rights to information, if any, set out in Annexure 1 of these Articles of Association.

2.3 Representation by concurrent proxies

The right of a member of the Company to appoint persons concurrently as proxies, as set out in section 177 (3) is not limited, restricted or varied by these Articles of Association.

2.4 Authority of proxy to delegate

The authority of a member’s proxy to delegate the proxy’s powers to another person, as set out in section 177 (3)(b) is not limited or restricted by these Articles of Association.

2.5 Requirement to deliver proxy instrument to the Company

The requirement that a member must deliver to the Company a copy of the instrument appointing a proxy before that proxy may exercise the member’s rights at a members meeting, as set out in section 177 (3)(c) is not varied by these Articles of Association.

2.6 Deliberative authority of proxy

The authority of a member’s proxy to decide without direction from the member whether to exercise, or abstain from exercising

any voting right of the member, as set out in section 177 (7) is not limited or restricted by these Articles of Association.

2.7 Record date for exercise of member rights

If, at any time, the Company’s Board of Directors fails to determine a record date, as contemplated in section 178, the record date for the relevant matter is as determined in accordance with section 178 (3).

Article 3 - Members Meetings

3.1 Requirement to hold meetings

The Company is not limited to holding members’ meetings as specifically required by the Corporate Laws Act, 2023.

3.2 Members’ right to requisition a meeting

The right of members to requisition a meeting, as set out in section 180 (3), may be exercised by at least 10% of the voting members, as provided for in that section.

3.3 Location of members meetings

The authority of the Company’s Board of Directors to determine the location of any members meeting, and the authority of the Company to hold any such meeting in the Republic or in any foreign country, as set out in section 180 (9) is not limited or restricted by these Articles of Association.

3.4 Notice of members meetings

The minimum number of days for the Company to deliver a notice of a members meeting to the members, as required by section 181 is as provided for in section 181 (1).

3.5 Electronic participation in members meetings

The authority of the Company to conduct a meeting entirely by electronic communication, or to provide for participation in a meeting by electronic communication, as set out in section 182(2) is not limited or restricted by these Articles of association.

3.6 Quorum for members meetings

3.6.1 The quorum requirement for a members meeting to begin, or for a matter to be considered are as set out in section 183 (1) without variation.

3.6.2 The time periods allowed in section 183 (4) and (5) apply to the Company without variation

3.6.3 The authority of a meeting to continue to consider a matter, as set out in section 183 (9) is not limited or restricted by these Articles of Association.

3.7 Adjournment of members meetings

The maximum period allowable for an adjournment of a members meeting is as set out in section 183 (12), without variation.

3.8 Members resolutions

3.8.1 For an ordinary resolution to be adopted at a members meeting, it must be supported by more than 50% of the members who voted on the resolution, as provided in section 184 (7).

3.8.2 For a special resolution to be adopted at a members meeting, it must be supported by at least 75 % of the members who voted on the resolution, as provided in section 184 (9).

3.8.3 A special resolution adopted at a members meeting is not required for a matter to be determined by the Company, except those matters set out in section 184 (11).

Article 4 -‐ Directors and Officers

4.1 Composition of the Board of Directors

4.1.1 The Board of Directors of the Company comprises of at least \_\_\_\_\_\_ directors, and \_\_\_\_\_\_alternate directors each of whom -

(a) is to be elected in the manner set out in Annexure 1; and

(b) serves for a term of \_\_\_\_\_\_ years.

4.1.2 In addition to the elected directors there are no appointed or ex officio directors of the company, as contemplated in section 185 (4).

4.1.3 In addition to satisfying the qualification and eligibility requirements set out in section 188, to become or remain a director of the Company, a person need not satisfy any further eligibility requirements or qualifications.

4.1.4 Each appointed director of the Company serves for an indefinite term, until substituted by the person or entity that made the appointment.

4.2 Authority of the Board of Directors

The authority of the Company’s Board of Directors to manage and direct the business and affairs of the Company, as set out in section 185 (1) is not limited or restricted by these Articles of Association.

4.3 Board of Directors meetings

4.3.1 The authority of the Company’s Board of Directors to consider a matter other than at a meeting, as set out in section 193 is not limited or restricted by these Articles of Association.

4.3.2 The right of the Company’s Directors to requisition a meeting of the Board, as set out in section 180 (1), may be exercised by at least 25% of the directors, if the board has 12 or more members, or by 2 (two) directors, in any other case, as provided in that section.

4.3.3 The authority of the Company’s Board of Directors to conduct a meeting entirely by electronic communication, or to provide for participation in a meeting by electronic communication, as set out in section 192 (3), is not limited or restricted by these Articles of Association.

4.3.4 The authority of the Company’s Board of Directors to determine the manner and form of providing notice of its meetings, as set out in section 192 (4) is not limited or restricted by these Articles of Association.

4.3.5 The authority of the Company’s Board of Directors to proceed with a meeting despite a failure or defect in giving notice of the meeting, as set out in section 192 (5) is not limited or restricted by these Articles of Association.

4.3.6 The quorum requirement for a directors meeting to begin, the voting rights at such a meeting, and the requirements for approval of a resolution at such a meeting, are as set out in section 192 (5).

4.4 Indemnification of Directors

4.4.1 The authority of the Company’s Board of Directors to advance expenses to a director, or indemnify a director, in respect of the defence of legal proceedings, as set out in section 197 (5), is not limited or restricted by these Articles of Association

4.4.2 The authority of the Company’s Board of Directors to indemnify a director in respect of liability, as set out in section 197 (5) is not limited or restricted by these Articles of Association.

(3) The authority of the Company’s Board of Directors to purchase insurance to protect the Company, or a director, as set out in section 197 (8) is not limited or restricted by these Articles of Association.

4.5 Officers and Committees

4.5.1 The Board of Directors may appoint any officers it considers necessary to better achieve the objects of the Company.

4.5.2 The authority of the Company’s Board of Directors to appoint committees of directors, and to delegate to any such committee any of the authority of the Board as set out in section 191 (1), or to include in any such committee persons who are not directors, as set out in section 191 (2)(a), is not limited or restricted by these Articles of Association.

4.5.3 The authority of a committee appointed by the Company’s Board, as set out in section 191 (2)(b) and (c), is not limited or restricted by these Articles of Association.

Article 5 - General Provisions

Insert any further provisions desired in this or additional Articles.

Annexure 1 – Supplement to Articles of Association

Incorporation and nature of the Company

Part A

Insert any provisions limiting the purposes or powers of the Company, as contemplated in section Art. 1.2 above.

Part B

Insert any ‘Ring fencing’ provisions as contemplated in section 74 (2) of the Act.

Part C

Insert provisions establishing, or providing for the establishment of a scheme of distribution of the net assets of the Company upon its dissolution, as required by Art. 1.4(a)(ii)(aa) of these Articles of Association.

Part D

Insert––

(a) any provisions relating to the amendment of the Articles of Association, as contemplated in section 85(1) and (2) of the Act;

(b) any provisions relating to the publication of the notice of alteration as contemplated in section 85 (2) of the Act.

Part E

Insert provisions setting out the terms and conditions of membership.

Rights of Members

Part A

Insert any provisions limiting or restricting the right of members to act without meeting formal requirements, as contemplated in section 176 (4) of the Act.

Part B

Insert any provisions creating addition information rights of members, as contemplated in section 244.

Part C

Insert any provisions relating to the powers of members to appoint proxies, the appointment of proxies, and the powers of any such proxy, as contemplated in section 177 of the Act.

Part D

Insert any provisions respecting the fixing of a record date, as contemplated in section 178 of the Act.

Members Meetings

Part A

Insert any provisions imposing a requirement to hold a members meeting.

Part B

Insert any provision limiting or restricting the authority of the Board to determine the location of members meetings, or the authority of the Company to meet outside the Republic.

Part C

Insert any provision prohibiting, limiting or restricting the authority of the Board with respect to the use of electronic communication for members meetings, as contemplated in section 178 of the Act.

Part D

Insert any provision respecting the quorum requirements for members meetings, or varying the provisions of section 183 of the Act.

Part E

Insert any provision varying section 183 (13) of the Act with respect to the maximum period for adjournment of a members meeting.

Part F

Insert––

(a) any provision establishing different requirements for adoption of an ordinary resolution for different matters;

(b) any provision establishing different requirements for adoption of an special resolution for different matters; or

(c) Any provision imposing the requirement of a special resolution to approve any matter, as contemplated in section 184 (11) of the Act.

Directors of the Company

Part A

Insert provisions setting out the process for the election of Directors by the voting members.

Part B

Insert any provisions establishing the rights of any person to appoint a director, or establishing the right of any person to be an ex officio director of the Company or providing for the appointment or election of alternate directors.

Part C

Insert any provision imposing additional eligibility or qualification requirements for directors and prescribed officers of the Company.

Part D

Insert any provision limiting or restricting the authority of the Board to manage and direct the business and affairs of the Company, as contemplated in section 185 (1) of the Act.

Part E

Insert any provision limiting or restricting the authority of the Board to consider a matter other than at a meeting, as contemplated in section 193 of the Act.

Part F

Insert any provision limiting, restricting or varying the authority of the Board with respect to the conduct of its meetings, as contemplated in section 192 of the Act.

Part G

Insert any provision limiting, restricting or extending the authority of the Company to advance expenses to a director, indemnify a director, or purchase insurance to protect the Company or a director, as contemplated in section 78 of the Act.

Part H

Insert any provision limiting or restricting the authority of the Board with respect to the establishment of committees, as contemplated in section 191 of the Act.

**SCHEDULE 2: Provisions Concerning Closely Held Companies**

1. Definitions

PART I: FORMATION AND JURISTIC PERSONALITY OF CLOSELY HELD COMPANIES

2. Formation and juristic personality of closely held companies

PART II: ADMINISTRATION OF THE SCHEDULE

3. Registration Office and register

4. Registrar

5. Inspection and copies of documents in Registration Office

6. Payment of fees

7. Tribunal and Courts having jurisdiction in respect of closely held companies

8. Security for costs in legal proceedings by closely held companies

9. Transmission of copies of Court orders to Registrar and Master

10. Regulations

PART III: REGISTRATION, DEREGISTRATION AND CONVERSION

11. Memorandum of Incorporation

12. Registration of Memorandum of Incorporation

13. Certificate of incorporation

14. Registration of amended Memorandum of Incorporation

15. Keeping of copies of Memoranda of Incorporation by closely held companies

16. No constructive notice of particulars in Memorandum of Incorporation and other documents

17. Meaning of “name” in items 19, 20 and 21

18. Undesirable names

19. Order to change name

20. Effect of change of name

21. Formal requirements as to names and registration numbers

22. 22A. Improper references to incorporation in terms of Schedule

23. Use and publication of names

24. Contributions by shareholders

25. Postal address and registered office

26. Deregistration

27. Conversion of companies and close corporations into closely held companies

PART IV: MEMBERSHIP

28. Number of shareholders

29. Requirements for shareholding

30. Nature of shares

31. Certificate of shares

32. Representation of shareholders

33. Acquisition of shares by new shareholder

34. Disposal of interest of insolvent shareholder

35. Disposal or interest of deceased shareholder

36. Cessation of shareholding by order of Court

37. Other dispositions of shareholders’ shares

38. Maintenance of aggregate shareholding in the company

39. Payment by closely held company for shareholders’ shares acquired

40. Financial assistance by closely held companies in respect of acquisition of shares

41. Publication of names of shareholders

PART V: INTERNAL RELATIONS

42. Fiduciary position of shareholders as a governing body

43. Liability of shareholders for negligence when acting as a governing body

44. Association agreements

45. No access to or constructive notice of association agreement

46. Variable rules regarding internal relations

47. Disqualified shareholders regarding management of business of closely held company

48. Meetings of shareholders

49. Unfairly prejudicial conduct

50. Proceedings against fellow-shareholders on behalf of closely held company (derivative litigation proceedings)

51. Payments by closely held company to shareholders

52. Prohibition of loans and furnishing of security to shareholders and others by closely held company

PART VI EXTERNAL RELATIONS

53. Pre-incorporation contracts

54. Power of shareholders to bind closely held company

55. Application of sections 43 and 253 of Corporate Laws Act, 2023

PART VII: ACCOUNTING AND DISCLOSURE

56. Accounting records

57. Financial year of closely held company

58. Annual financial statements

59. Appointment of accountants

60. Qualifications of accountants

61. Right of access and remuneration of accountants

62. Duties of accountants

PART VIII: LIABILITY OF MEMBERS AND OTHERS FOR DEBTS OF CLOSELY HELD COMPANY

63. Limited liability for debts of closely held company

64. Liability for reckless or fraudulent carrying on of business of closely held company

65. Powers of Court in case of abuse of separate juristic personality of closely held company

PART IX: WINDING-UP

66. Application of Corporate Laws Act, 2023

67. Voluntary winding-up

68. Liquidation by Court

69. Circumstances under which closely held company deemed unable to pay debts

70. Repayments by shareholders

71. Repayment of salary or remuneration by shareholders

72. Composition

73. Repayments, payments of damages and restoration of property by shareholders and others

74. Appointment of liquidator

75. Vacancies in office of liquidators

76. Refusal by Master to appoint nominated person as liquidator

77. Resignation and absence of liquidator

78. First meeting of creditors and members

79. Report to creditors and members

80. Repayments by shareholders or former shareholders

81. Duties of liquidator regarding liability of shareholders to creditors or closely held company

PART X: PENALTIES AND GENERAL

82. Penalties

83. Commencement of Schedule

PART 1

FORMATION AND JURISTIC PERSONALITY OF

CLOSELY HELD COMPANIES

Definitions for this Chapter

1. In this Chapter, unless the context otherwise indicates -

“accountant” in relation to a closely held company, means an accounting professional who is authorised to provide accounting services as defined in terms of the Accountants and Auditors Act, 2022

“accounting records” in relation to a closely held company, includes accounts, deeds, writings and such other documents as may be prescribed;

“association agreement” in relation to any closely held company or the members thereof, means an addendum to the company’s Memorandum of Incorporation entered into in terms of item 67 by the members of the closely held company, including –

(a) any agreement which has been altered or added to as contemplated in sub3-itemn (3) of that section; and

(b) any agreement which has replaced it as contemplated in that sub-item;

“court” includes a tribunal established in terms of section 25 of the Act;

“deregistration”, in relation to a closely held company, means the cancellation of the registration of the Memorandum of Incorporation of the closely held company;

“Memorandum of Incorporation,” in relation to a closely held company, means -

(a) the founding statement of the closely held company, including the association agreement, referred to in item 34 which has been registered in terms of item 35; and

(b) any amended founding statement in respect of the closely held company registered in terms of item 37(1) or (2);

“member”, in relation to a closely held company, means a person qualified for membership of a closely held company in terms of Item 52 and designated as a member in a founding statement of the closely held company -

(a) and includes, subject to this Schedule, a trustee, administrator, executor, curator and other legal representative, referred to in Item 52(2)(c), in respect of any such person who is insolvent, deceased, mentally disordered or otherwise incapable or incompetent to manage his affairs;

(b) but excludes such person who has in terms of this Act ceased to be a member;

“member’s shareholding” or “interest”, in relation to a member of a closely held company, means the interest of the member in the closely held company expressed in accordance with Item 34(1)(f) as a percentage in the Memorandum of Incorporation of the closely held company;

“registration” in relation to -

(a) a closely held company, means the registration of the Memorandum of Incorporation of the closely held company referred to in Item 34;

(b) the founding statement or any amended founding statement of a closely held company, means the registration thereof as Memorandum of Incorporation in terms of Item 35 or Item 37(1) or (2);

(c) any matter in connection with a closely held company, or any member thereof, particulars of which are specified in terms of this Schedule or in a Memorandum of Incorporation of the closely held company, means the specifying of particulars thereof in any such memorandum; and

(d) any other matter in connection with which any duty or power in relation to the registration thereof is in terms of this Schedule imposed on or conferred to the Registrar, means the registration thereof by him or her in accordance with any applicable provision of this Schedule.

Application of the Act to closely held companies

2. In addition to this Schedule this Schedule, this Act applies to closely held companies to the extent expressly stated therein.

Formation and juristic personality of closely held companies

3.

(1) A person or more persons, not exceeding 10, who qualify for membership of a closely held company in terms of this Schedule, may form a closely held company and secure its incorporation by complying with the requirements of this Schedule in respect of the registration of its Memorandum of Incorporation referred to in Item 34.

(2) A closely held company formed in accordance with this Schedule is on registration in terms of this Schedule a juristic person and continues, subject to this Act, to exist as a juristic person despite changes in its membership until it is in terms of this Schedule deregistered or dissolved.

(3) Subject to this Schedule, the members of a closely held company may not merely by reason of their membership be liable for the liabilities or obligations of the closely held company.

(4) A closely held company has the capacity and powers of a natural person of full capacity in so far as a juristic person is capable of having such capacity or of exercising such powers.

PART 2

REGISTRATION, DEREGISTRATION AND CONVERSION OF

COMPANIES INTO CLOSELY HELD COMPANIES

Memorandum of Incorporation

4.

(1) A person qualified for membership in terms of Item 52 or, subject to Item 51, any number of such persons who intend to form a closely held company, must complete a Memorandum of Incorporation in the prescribed form in the official language of Namibia, which must, subject to this Schedule, contain -

(a) the full name of the closely held company, but a literal translation of that name into any language other than the official language of Namibia, or a shortened form of such name or such translation thereof, may in addition be given;

(b) the principal business, if any, to be carried on by the closely held company;

(c) a postal address for the closely held company;

(d) the address, not being the number of a post office box, of the office of the closely held company referred to in Item 48(1);

(e) the full name, residential address and identity number of each member or, if he or she has no such number, the date of his or her birth;

(f) the size, expressed as a percentage, of each member’s shareholding in the closely held company;

(g) particulars of the contribution of each member to the closely held company in accordance with Item 47(1), including -

(i) any amounts of money; and

(ii) a description, and statement of the fair value, of any property (whether corporeal or incorporeal) or any service referred to in Item 47(1);

(h) the name and postal address of the person appointed as its accountant; and

(i) the date of the end of the financial year of the closely held company.

(2) Every person who is to become a member of the closely held company upon its registration must -

(a) sign the Memorandum of Incorporation of a closely held company; and

(b) sign the Memorandum of Incorporation in the presence of at least one witness who must attest the signature and state his or her residential, business and postal address.

Registration of Memorandum of Incorporation

5.

(1) If -

(a) the Memorandum of Incorporation referred to in Item 34 complying with the requirements of this Schedule is lodged with the Registrar in triplicate in the manner prescribed;

(b) the business to be carried on by the closely held company is lawful; and

(c) the name of the closely held company that has been provided has been approved,

the Registrar must upon payment of the prescribed fee register such memorandum in his or her registers and must give notice of the registration in the Gazette.

(2) Every closely held company must, for the benefit of the State Revenue Fund -

(a) annually, after the commencement of its financial year and in the manner as prescribed, pay the prescribed annual duty; and

(b) in the event of late payment of the annual duty, pay, in addition to such duty, such prescribed penalty.

Certificate of incorporation

6.

(1) Upon the registration of a Memorandum of Incorporation the Registrar must assign a registration number to the closely held company concerned and endorse under his or her hand on the statement a certificate that the closely held company is incorporated.

(2) A certificate of incorporation given by the Registrar in terms of sub-item (1) or Item 50(4)(c), or a copy thereof, must upon its mere production, in the absence of proof of fraud or error, be conclusive evidence -

(a) that all the requirements of this Schedule in respect of -

(i) registration of the closely held company; and

(ii) matters precedent and incidental to the registration of the closely held company,

have been complied with; and

(b) that the closely held company concerned is duly incorporated under this Act.

Registration of amended founding statement as amended Memorandum of Incorporation

7.

(1) If, immediately prior to the conversion of a close corporation into a closely held company, any change has been made or occurred in respect of any matter of which particulars are to be stated in a Memorandum of Incorporation of a closely held company in accordance with paragraph (b), (d) (other than in relation to a member’s residential address), (e) or (f) of Item 34, the closely held company must, subject to sub-item 52(5) and (6), within 28 days after such change –

(a) lodge with the Registrar for registration in his or her registers an amended Memorandum of Incorporation in triplicate, in the prescribed form, signed by every member of the closely held company and by any person who is to become a member on such registration, and which contains particulars and the date of the change; and

(b) pay the fee prescribed for the registration of an amended Memorandum of Incorporation.

(2) If any change is made or occurs in respect of -

(a) any matter of which particulars are stated in a Memorandum of Incorporation in accordance with paragraph (a) or (g)(ii) of Item 34, an amended Memorandum of Incorporation is, in accordance with the requirements of sub-item (1), lodged with the Registrar for registration as a Memorandum of Incorporation;

(b) a member’s residential address or any matter of which particulars are stated in a Memorandum of Incorporation -

(i) in accordance with sub-item 34(1)(c), and the closely held company has approved of such change and the accountant so certifies in writing; or

(ii) in accordance with sub-item 34(1)(g)(i),

the closely held company must lodge with the Registrar for registration in his or her registers a Memorandum of Incorporation in the prescribed form, which may be signed by the accountant on behalf of the members, and upon registration thereof, forms part of the Memorandum of Incorporation or amended Memorandum of Incorporation.

(3) A change contemplated in -

(a) sub-item (2)(a) or (b)(i) must take effect upon registration of the memorandum in question in the relevant registers, or upon a later date mentioned in such memorandum; and

(b) sub-item (2)(b)(ii) must take effect upon the date mentioned in the memorandum in question.

(4) If by an order of court in terms of Item 51, an alteration or addition is made to a Memorandum of Incorporation, the provisions of sub-item (1) in relation to the lodging of an amended M, must with the necessary changes apply in respect of such Memorandum of Incorporation.

(5) If a closely held company fails to lodge an amended Memorandum of incorporation in accordance with sub-items (1), (2) or (4), the Registrar on -

(a) his or her own initiative; or

(b) application made by any member or creditor of the closely held company,

may serve on the members of the closely held company, in accordance with Item 52(1)(a), a reminder to make good the default within 28 days of the date of the reminder;

(6) If the members concerned -

(a) fail to comply with any such reminder, the Registrar may, by written notice so served, direct those members so served, to make good the default within 28 days of the date of the notice; or

(b) fail to comply with any such direction, the Registrar may by further written notice, so served on the members by registered post, impose on the members, or any of them, a penalty not exceeding N$100 per day from the date upon which the reminder referred to in sub-item (5) was sent.

(7) When the Registrar has served a notice referred to in sub-item (6) on the members, he or she may, after expiry of a period of 21 days from the date of the notice, forward a certified copy thereof to the registrar of the Tribunal or the clerk of the magistrate’s court in whose area of jurisdiction the registered office of the closely held company is situated, who must record it, and thereupon such notice has the effect of a civil judgment of that magistrate’s court against every such member for the amount of the penalty in question.

(8) On application by one or more of the members concerned, the court in question may reduce or rescind the penalty, or exempt any such member or members from the effect of the notice.

(9) An amended Memorandum of Incorporation referred to in sub-item (1)(a), (2)(a) or (4) and a statement referred to in sub-item (2)(b) is signed in the presence of at least one witness who must attest the signature and state his or her residential, business and postal address.

Keeping of copies of Memorandum of Incorporation by closely held companies

8.

(1) A closely held company must keep a copy of its Memorandum of Incorporation and any proof of its registration at the registered office of the closely held company.

(2) A document referred to in sub-item (1) is, during the business hours of the closely held company, open to inspection by any person upon payment to the closely held company, in the case of a person who is not a member of the closely held company, of N$3 or such lesser amount as the closely held company may determine.

(3) A member or officer of a closely held company who refuses access for the purposes of an inspection in terms of sub-item (2) to a person entitled thereto, is liable to a compliance notice and payment of a prescribed penalty or both.

No constructive notice of particulars in Memorandum of Incorporation and other documents

9. A person is not deemed to have knowledge of any particulars merely because such particulars are stated or referred to in any -

(a) Memorandum of Incorporation; or

(b) other document regarding a closely held company registered by or lodged with the Registrar,

which is kept at the registered office of a closely held company in accordance with this Schedule.

Meaning of “name” in Items 44, 45 and 46

10. For the purpose of Items 44, 45 and 46 “name”, in relation to a closely held company, unless the context otherwise indicates, means -

(a) the full name of the closely held company;

(b) a literal translation of the full name into any language other than the official language in Namibia; or

(c) a shortened form of the full name or any such translation thereof referred to in Item 34(1)(a).

Undesirable names

11. (1) Any -

(a) Memorandum of Incorporation of a closely held company referred to in Item 34; or

(b) amended Memorandum of Incorporation which relates to a change of name referred to in Item 37(2),

may not be registered if the name or changed name of the closely held company is in the opinion of the Registrar undesirable.

(2) The Registrar, on written application on the prescribed form and on payment of the prescribed fee, may reserve a -

(a) name approved by him or her;

(b) literal translation of a name into any language other than official language in Namibia; or

(c) shortened form of the name of a closely held company or the name so translated under paragraph (b),

for a period of 60 days pending the registration of a Memorandum of Incorporation.

(3) Where at the conversion of a company into a closely held company in terms of Item 50 the name of the company is retained, no reservation of such name is necessary.

Order to change name

12.

(1) If within a period of 12 months after the registration of -

(a) Memorandum of Incorporation; or

(b) an amended Memorandum of Incorporation,

of a closely held company it appears to the Registrar that a name mentioned in the Memorandum of Incorporation or amended Memorandum of Incorporation is undesirable, the Registrar must order the closely held company to change such name.

(2) An interested person may -

(a) within a period of 12 months referred to in sub-item (1) and on payment of the prescribed fee apply in writing to the Registrar for an order directing the closely held company to change its name on the ground –

(i) of undesirability; or

(ii) that such name is calculated to cause damage to the applicant; or

(b) within a period of two years after the registration of a Memorandum of Incorporation or an amended Memorandum of Incorporation apply to a Court for an order directing the closely held company to change its name on the ground –

(i) of undesirability; or

(ii) that such name is calculated to cause damage to the applicant,

and the Court may make such order as it considers fit.

(3) The Registrar may, after application has been made in terms of sub-item (2)(a), in writing order the closely held company concerned to change its name if, in the opinion of the Registrar, it is or has become undesirable.

(4) A closely held company that fails to comply with an order made under sub-item (1) or (3) within a period mentioned in such order commits an offence.

(5) No provision of this Chapter is construed as affecting the rights of any person at common law to bring an action against any closely held company for passing off any business goods or services as those of another person.

(6) A person feeling aggrieved by any decision or order of the Registrar under this Item may, within 30 days after the date of such decision or order, apply to the High Court of Namibia for relief, and the Court may -

(a) consider the merits of any such matter;

(b) receive further evidence;

(c) make any order it considers fit.

(7) No prescribed fee mentioned in Item 37(1) is payable in respect of the registration of an amended Memorandum of Incorporation by virtue of an order under sub-item (3).

Effect of change of name

13.

(1) A change of a name of a closely held company in terms of this Schedule does not affect any –

(a) right or obligation of the closely held company;

(b) any legal proceedings instituted by or against the closely held company; or

(c) legal proceedings that could have been continued or commenced by or against the closely held company prior to the change of name, therefore such legal proceedings may be continued or commenced, despite such change of name.

(2) Upon -

(a) the production by a closely held company of a certified copy of a Memorandum of Incorporation reflecting a change of name of the closely held company to any registrar or other officer charged with the maintenance of a register under any law; and

(b) compliance with all the requirements pursuant to any such law as to the form of application, and the payment of any required fee,

such registrar or other officer must make in his or her register all such alterations as are necessary by reason of the change of name in respect of the closely held company.

Formal requirements as to names and registration numbers

14. (1) The abbreviation “CHC Ltd”, in capital letters, is subjoined to the name used by a closely held company.

(2) A closely held company must refer to the registration number of the closely held company on all prescribed documents and correspondence sent by the closely held company to the Registration Office.

(3) If a closely held company is being wound up, the statement “In Liquidation” is subjoined to the name of the closely held company for the duration of the winding-up.

Improper references to incorporation in terms of Act

15. A person carrying on a business under a name or title -

(a) to which the abbreviation “CHC Ltd” is subjoined; or

(b) of which the words “closely held company” or any abbreviation thereof forms part,

in any way which indicates incorporation as a closely held company in terms of this Schedule, while not being so incorporated, commits an offence.

Use and publication of names

16.

(1) A closely held company must -

(a) display its registered full name or a registered literal translation thereof and registration number -

(i) in a conspicuous position; and

(ii) in characters easily legible,

(b) on the outside of its registered office and every office or place in which its business is carried on;

(c) have its name or such translation thereof and registration number mentioned in legible characters in -

(i) all notices and other official publications of the closely held company; and

(ii) all letters, delivery notes, invoices, receipts and letters of credit of the closely held company; and

(d) use a registered shortened form of its name only in conjunction with that name or such literal translation thereof.

(2) If any member of, or any other person on behalf of, a closely held company issues or authorises the issuing of -

(a) any notice or official publication of the closely held company; or

(b) any letter, advertisement, delivery note, invoice, receipt or letter of credit of the closely held company,

without -

(i) the name of the closely held company or such registered literal translation thereof; and

(ii) its registration number,

being mentioned therein in accordance with sub-item (1)(b), such member or person is liable for a compliance notice or prescribed penalty or both.

(3) A closely held company which fails to comply with any provision of sub-item (1) is also subject to a compliance notice and a prescribed penalty.

Capital contributions by members

17.

(1) Every person who is to become a member of a closely held company upon its registration must make an initial capital contribution of -

(a) money;

(b) property, whether corporeal or incorporeal; or

(c) services rendered in connection with and for the purposes of the formation and incorporation of the closely held company,

to the closely held company and particulars of such capital contribution are to be stated in the Memorandum of Incorporation of the closely held company as referred to in Item 34 and as required by paragraph (f) of that Item.

(2) The amount or value of the members’ capital contributions, or of the contribution of any one or more members, may from time to time by agreement among all the members -

(a) be increased by additional contributions of money or property (whether corporeal or incorporeal) to the to the closely held company by existing members or, in terms of Item 47(1)(b), by a person becoming a member of a registered to the closely held company; or

(b) be reduced, but a reduction by way of a repayment to any member must comply with section 118(1) of the Act.

(3) Particulars of any increase or reduction of a member’s contribution in terms of sub-item (2) are furnished in an amended Memorandum of Incorporation referred to in Item 37(1).

(4) Money or property referred to in sub-item (1) or (2)(a) must, in order to vest ownership thereof in the closely held company, be paid, delivered or transferred to the closely held company within a period of 90 days -

(a) after the date of registration of the closely held company in the case of an initial contribution referred to in sub-item (1); or

(b) after the date of the registration of an amended Memorandum of Incorporation in connection with any additional contribution referred to in sub-item (2)(a).

(5) An undertaking by a member to make an initial or an additional contribution to a closely held company is enforceable by the closely held company in legal proceedings.

Postal address and registered office

18.

(1) A closely held company must have in Namibia a postal address and an office to which, subject to sub-item (2), all communications and notices to the closely held company may be addressed.

(2) Any -

(a) notice, order, communication or other document which is in terms of this Act is required or permitted to be served upon any closely held company or member thereof, is deemed to have been served if it has been delivered at the registered office, or has been sent by certified or registered post to the registered office or postal address, of the closely held company; and

(b) process which is required to be served upon a closely held company or member thereof is, subject to applicable provisions in respect of such service in any law, served by so delivering or sending it.

Deregistration

19.

(1) If the Registrar has reasonable cause to believe that -

(a) a closely held company is not carrying on business; or

(a) is not in operation,

the Registrar must serve on the closely held company at its postal address a letter by certified post in which the closely held company is notified thereof and informed that if the Registrar is not within 60 days from the date of receipt of the notice informed in writing that the closely held company -

(i) is carrying on business; or

(ii) is in operation,

the closely held company is to be deregistered, unless good cause is shown to the contrary.

(2) The Registrar -

(a) after the expiry of 60 days mentioned in a letter referred to in sub-item (1); or

(b) upon receipt from the closely held company of a written statement signed by or on behalf of every member to the effect that the closely held company -

(i) has ceased to carry on business; and

(ii) has no assets or liabilities,

may deregister the closely held company, unless good cause to the contrary has been shown by the closely held company.

(3) Where a closely held company has been deregistered, the Registrar must give notice to that effect in the Gazette, and the date of the publication of such notice is deemed to be the date of deregistration.

(4) The deregistration of a closely held company does not affect any liability of a member of the closely held company to the closely held company or to any other person, and such liability may be enforced as if the closely held company were not deregistered.

(5) If the Registrar is satisfied, on application by any interested person, that -

(a) a closely held company was at time of its deregistration carrying on business or was in operation; or

(b) it is otherwise just that the registration of the closely held company be restored,

and has complied with Item 49(2), must restore such registration.

(6) The Registrar must give notice of the restoration of the registration of a closely held company in the Gazette, and as from the date of such notice the closely held company continues to exist and is deemed to have continued in existence as from the date of deregistration as if it were not deregistered.

Conversion of companies into closely held companies

20.

(1) A company having 10 or fewer members all of whom qualify for membership of a closely held company in terms of Item 51 may be converted into a closely held company, on condition that every member of the company becomes a member of the closely held company.

(2) In respect of a conversion, there is lodged with the Registrar -

(a) an application for conversion -

(i) in the prescribed form;

(ii) signed by all the members of the company; and

(iii) containing a statement that upon conversion the assets of the closely held company, fairly valued, will exceed its liabilities, and that after conversion the closely held company will be able to pay its debts as they become due in the ordinary course of its business;

(b) a statement in writing by the auditor of the company that -

(i) he or she has no reason to believe that a material irregularity contemplated in section 64 of the Accountants’ and Auditors’ Act, 2022, has taken place or is taking place in relation to the company; or

(ii) where steps have been taken in terms of that Item mentioned in subparagraph (i), that such steps and other proceedings in terms of that sub-item have been completed; and

(c) a Memorandum of Incorporation referred to in Item 34 lodged in accordance with Item 35, subject to Item 59(3).

(3) For the purposes of the Memorandum of Incorporation referred to in sub-item (2)(c) -

(a) there must, in regard to the requirements of Item 34(1)(f), be a statement of the aggregate of the contributions of the members, which is for an amount not greater than the excess of the fair value of the assets to be acquired by the closely held company over the liabilities to be assumed by the closely held company by reason of the conversion, but the closely held company may treat any portion of such excess not reflected as members’ contributions as amounts which may be distributed to its members;

(b) the members’ shareholding stated in terms of Item 34(1)(g) need not necessarily be in proportion to the number of shares in the company held by the respective members at the time of the conversion.

(4) If sub-item (2) has been complied with and the Registrar is satisfied that the company concerned has complied materially with the requirements of this Schedule, the Registrar must -

(a) register the Memorandum of Incorporation in accordance with Item 35;

(b) simultaneously with registration of the Memorandum of Incorporation, cancel the registration of the constitution of the company concerned in accordance with this Act;

(c) endorse on the Memorandum of Incorporation a certificate of incorporation as provided by Item 36(1), but such certificate must state -

(i) the fact that the closely held company has been converted from a company; and

(ii) the name and registration number of the former company; and

(d) give notice of conversion in the Gazette.

(5) On the registration of a closely held company converted from a company -

(a) the assets, rights, liabilities and obligations of the company must vest in the closely held company;

(b) any legal proceedings instituted by or against the company before the conversion may be continued by or against the closely held company;

(c) any other thing done by or in respect of the company is deemed to have been done by or in respect of the closely held company; and

(d) the juristic personality that existed prior to the conversion of a company into a closely held company continues to exist but in the form of a closely held company.

(6) The conversion of a company into a closely held company does not in particular affect -

(a) any liability of a director or officer of the company to the company on the ground of breach of trust or negligence, or to any other person pursuant to any provision of this Act; or

(b) any liability of the company or any other person as surety.

(7) The closely held company, after its conversion from a company, must forthwith give notice in writing of the conversion to -

(a) all creditors of the company at the time of conversion; and

(b) all other parties to contracts or legal proceedings in which the company was involved at the time of the conversion.

(8) Upon -

(a) the production by a closely held company which has been converted from a company of a certified copy of its Memorandum of Incorporation referred to in sub-item (4)(a), to any registrar or other officer charged with the maintenance of a register under any law;

(b) compliance with all the requirements pursuant to any such law as to the form of application (if any); and

(c) the payment of any required fee,

such registrar or officer must make in his or her register all such alterations as are necessary by reason of the conversion of the company into a closely held company, but no transfer or stamp duties is payable in respect of such alterations in registers.

(9) If the accountant mentioned in the Memorandum of Incorporation of a converted closely held company is not the person who or firm which has acted as auditor for the company, the appointment of that person or firm lapses upon the conversion into a closely held company.

(10) If a closely held company is converted into a company in accordance with this Act, the registration of the Memorandum of Incorporation of the closely held company is cancelled simultaneously with the registration of the memorandum and articles of association of the company in terms of this Act.

PART 3

MEMBERSHIP OF CLOSELY HELD COMPANIES

Number of members

21. A closely held company may at its incorporation have one or more members, but at no time may the number of members exceed 10.

Requirements for membership

22.

(1) Subject to sub-item (2)(b) and (c) -

(a) a natural person qualifies for membership of a closely held company;

(b) a juristic person or trustee of a trust inter vivos in that capacity may not directly or indirectly (whether through the instrumentality of a nominee or otherwise) hold a member’s shareholding in a closely held company.

(2) The following persons qualify for membership of a closely held company -

(a) a natural person entitled to a member’s shareholding;

(b) a natural or juristic person, *nomine officii*, who is a trustee of a testamentary trust entitled to a member’s shareholding, but on condition that -

(i) no juristic person is a beneficiary of such trust; and

(ii) if the trustee is a juristic person, such juristic person is not directly or indirectly controlled by any beneficiary of the trust; and

(c) a natural or juristic person, nomine officii, who, in the case of a member -

(i) is insolvent, deceased, mentally disordered or otherwise incapable or incompetent to manage his or her affairs;

(ii) is a trustee of his or her insolvent estate or an administrator, executor or curator in respect of such member; or

(iii) is otherwise a person who is his or her duly appointed or authorised legal representative.

(3) The membership of any person qualified therefor in terms of sub-item (2) commences on the date of the registration of a Memorandum of Incorporation of a closely held company containing the particulars required by Item 34 in regard to such person and his or her member’s shareholding.

(4) Where a person is to become a member of a registered closely held company, the existing member or members of the closely held company must ensure that the requirements of Item 37(1) regarding the lodging of an amended Memorandum of Incorporation with the Registrar are complied with.

(5) A trustee of an insolvent estate, administrator, executor or curator or other legal representative referred to in sub-item (2)(c), in respect of any member of a closely held company, who -

(a) is not obliged; or

(b) does not intend,

to transfer to any other person the shareholding of the member in the closely held company in accordance with this Schedule and within 20 days of his or her assuming office, must -

(i) within that period or any extended period allowed by the Registrar; and

(ii) on application by him or her,

request the existing member or members of the closely held company to lodge with the Registrar in accordance with Item 37(1) an amended Memorandum of Incorporation designating him or her, nomine officii, as representative of the member of the closely held company in question.

(6) Where the closely held company has no other member, any such representative himself or herself must, in the circumstances contemplated in sub-item (5), act on behalf of the closely held company in accordance with Item 37(1), read with sub-item (5).

(7) Sub-items (5) and (6) do not affect the power of such representative, as from the date of his or her assumption of office, and whether or not any such amended Memorandum of Incorporation has been lodged, to represent the member concerned in all matters in which he or she himself or herself as a member could have acted, until the shareholding of that member in the closely held company has been transferred to any other qualified person in accordance with this Schedule.

(8) A closely held company is not concerned with the execution of any trust in respect of any member’s shareholding in the closely held company.

Nature of shareholding of members

23.

(1) The shareholding of any member in a closely held company is a single equity expressed as a percentage.

(2) Two or more persons may not be joint holders of the same member’s shareholding in a closely held company.

Certificate of shareholding of members

24. Each member of a closely held company is issued with a certificate, signed by or on behalf of every member of the closely held company, and stating the current percentage of such member’s shareholding in the closely held company.

Representation of members

25.

(1) A minor who is a member of a closely held company, other than a minor whose guardian has lodged a written consent referred to in Item 70(1)(a) is represented in the closely held company by his or her guardian.

(2) A member subject to any other legal disability is represented in the closely held company by his or her duly appointed or authorised legal representative referred to in Item 52(2)(c).

Acquisition of shareholding of member by new members

26.

(1) A person becoming a member of a registered closely held company must acquire his or her member’s shareholding required for membership -

(a) from one or more of the existing members or his or their deceased or insolvent estates; or

(b) pursuant to a contribution made by such person to the closely held company, in which case the percentage of his or her member’s shareholding is determined by agreement between him or her and the existing members, and the percentages of the interest of the existing members in the closely held company is reduced in accordance with Item 61(b).

(2) The contribution referred to in sub-item (1)(b) may consist of an amount of money, or of any property, whether corporeal or incorporeal, of a value agreed upon by the person concerned and the existing members.

Disposal of interest of insolvent members

27.

(1) Despite any provision to the contrary in any association agreement or other agreement between members, a trustee of the insolvent estate of a member of a closely held company may, in the discharge of his or her functions, sell that member’s shareholding -

(a) to the closely held company, if there are one or more members other than the insolvent member;

(b) to the members of the closely held company, other than the insolvent member, in closely held company to their member’s shareholding or as they may otherwise agree upon; or

(c) subject to sub-item (2), to any other person who qualifies for membership of a closely held company in terms of Item 52.

(2) If the closely held company concerned has one or more members, other than the insolvent member, the following provisions apply to a sale in terms of sub-item (1)(c) of the insolvent member’s shareholding -

(a) the trustee must deliver to the closely held company a written statement giving particulars of the name and address of the proposed purchaser, the purchase price and the time and manner of payment thereof;

(b) for a period of 28 days after the receipt by the closely held company of the written statement the closely held company or the members, in such closely held company as they may agree upon, must have the right, exercisable by written notice to the trustee, to be substituted as purchasers of the whole, and not a part only, of the insolvent member’s shareholding at the price and on the terms set out in the trustee’s written statement; and

(c) if the insolvent member’s shareholding is not purchased in terms of paragraph (b), the sale referred to in the trustee’s written statement must become effective and be implemented.

Disposal of shareholding of deceased members

28. Subject to any other arrangement in the Memorandum of incorporation, an executor of the estate of a member of a closely held company who is deceased must, in the performance of his or her functions -

(a) cause the deceased member’s shareholding in the closely held company to be transferred to a person who -

(i) qualifies for membership of a closely held company in terms of Item 44; and

(ii) is entitled thereto as legatee or heir or under a redistribution agreement,

if the remaining member or members of the closely held company, if any, consent to the transfer of the member’s shareholding to such person; or

(b) If any consent referred to in paragraph (a) is not given within 28 days after it was requested by the executor, sell the deceased member’s shareholding -

(i) to the closely held company, if there is any other member or members than the deceased member;

(ii) to any other remaining member or members of the closely held company in proportion to the shareholding of those members in the closely held company or as they may otherwise agree upon; or

(iii) to any other person who qualifies for membership of a closely held company in terms of Item 52, in which case Item 57(2) applies with the necessary changes to the context in respect of any such sale.

Cessation of membership by order of Court

29.

(1) On application by any member of a closely held company a Court may order any member of the closely held company to cease to be a member, if -

(a) subject to the provisions of the Memorandum of Incorporation, that the member is permanently incapable, because of unsound mind or any other reason, of performing his or her part in the carrying on of the business of the closely held company;

(b) the member has been guilty of such conduct as taking into account the nature of the closely held company’s business, is likely to have a prejudicial effect on the carrying on of the business;

(c) that the member so conducts himself or herself in matters relating to the closely held company’s business that it is not reasonably practicable for the other member or members to carry on the business of the closely held company with him or her; or

(d) circumstances have arisen which render it just and equitable that such member should cease to be a member of the closely held company,

but such application to a court on any ground mentioned in paragraph (a) or (d) may also be made by a member in respect of whom the order applies.

(2) A court granting an order in terms of sub-item (1) may make such further orders as it considers fit in regard to -

(a) the acquisition of the member’s shareholding concerned by the closely held company or by members other than the member concerned; or

(b) the amounts, if any, to be paid in respect of the member’s shareholding concerned or the claims against the closely held company of that member, the manner and times of such payments and the persons to whom they are made; or

(c) any other matter regarding the cessation of membership which the Court considers fit.

Other dispositions of shareholding of members

30. Subject to Items 57, 58 and 59, a member of a closely held company may not dispose of his or her shareholding in the closely held company or a portion of such shareholding, unless such shareholding or portion is disposed of -

(a) in accordance with the Memorandum of Incorporation or Item 67; or

(b) with the consent of every other member of the closely held company,

but a member may not dispose of his or her shareholding to the closely held company unless it has one or more other members.

Maintenance of aggregate of members’ shareholding

31. The aggregate of the shareholding of the members in a closely held company expressed as a percentage is 100 per cent at all times, and for that purpose -

(a) any transfer of the whole, or a portion, of a member’s shareholding is effected by the cancellation or the reduction of the shareholding of the member concerned and the allocation in the name of the transferee, if not already a member, of a member’s shareholding of the percentage concerned, or the addition to the shareholding of an existing member of the percentage concerned;

(b) when a person becomes a member of a registered closely held company pursuant to a contribution made by him or her to the closely held company, the percentage of his or her member’s shareholding is agreed upon by him or her and the existing members, and the percentages of the shareholding of the existing members are reduced proportionally or as they may otherwise agree; and

(c) any shareholding of the member acquired by the closely held company is added to the respective shareholding of the other members in proportion to their existing shareholding or as they may otherwise agree.

Payment by closely held company for shareholding acquired by members

32.

(1) Payment by a closely held company in respect of its acquisition of the shareholding in the closely held company is made only -

(a) with the prior written consent of every member of the closely held company, other than the member whose shareholding is acquired, for the specific payment;

(b) if, at a particular time if, considering all reasonably foreseeable financial circumstances of the closely held company at that time, it appears that the closely held company will be able to pay its debts as they become due in the ordinary course of business for the foreseeable future;

(d) if such payment will in the particular circumstances not in fact render the closely held company unable to pay its debts as they become due in the ordinary course of its business for the foreseeable future.

(2) For the purposes of sub-item (1) “payment” includes the delivery or transfer of any property.

Financial assistance by closely held company in respect of acquisition of interests by members

33. A closely held company may give financial assistance, whether directly or indirectly and whether by means of a loan, guarantee, the provision of security or otherwise, for the purpose of, or in connection with, any acquisition of a member’s shareholding in the closely held company by any person, only -

(a) with the prior written consent of every member of the closely held company for the specific assistance;

(b) if, after such assistance is given, the closely held company’s assets, fairly valued, exceed all its liabilities;

(c) if, considering all reasonably foreseeable financial circumstances of the closely held company at that time, it appears that the closely held company will be able to pay its debts as they become due in the ordinary course of business for the foreseeable future.; and

(d) if such assistance will in the particular circumstances not in fact render the closely held company unable to pay its debts as they become due in the ordinary course of its business for the foreseeable future.

Publication of names of members

34.

(1) A closely held company may not send to any person any business letter bearing a registered name of the closely held company, unless the forenames or the initials thereof and surname of every member is stated thereon.

(2) A closely held company that contravenes any provision of sub-item (1) commits an offence.

PART 4

INTERNAL RELATIONS FOR CLOSELY HELD COMPANIES

Fiduciary position of members

35.

(1) Each member of a closely held company stands in a fiduciary relationship to the closely held company.

(2) Without prejudice to the generality of the expression “fiduciary relationship”, sub-item (1) implies that a member -

(a) must, in relation to the closely held company, act honestly and in good faith, and in particular -

(i) must exercise such powers as he or she may have to manage or represent the closely held company in the interest and for the benefit of the closely held company; and

(ii) may not act without or exceed his or her powers; and

(b) must avoid any material conflict between his or her own interests and those of the closely held company, and in particular -

(i) may not derive any personal economic benefit to which he or she is not entitled by reason of his or her membership of or service to the closely held company, from the closely held company or from any other person in circumstances where that benefit is obtained in conflict with the interests of the closely held company;

(ii) may notify every other member, at the earliest opportunity practicable in the circumstances, of the nature and extent of any direct or indirect material interest which he or she may have in any contract of the closely held company; and

(iii) may not compete in any way with the closely held company in its business activities.

(3) A member of a closely held company whose act or omission has breached any duty arising from his or her fiduciary relationship is liable to the closely held company for -

(a) any loss suffered as a result thereof by the closely held company; or

(b) any economic benefit derived by the member by reason thereof.

(4) Where -

(a) a member fails to comply with sub-item (2)(b)(ii); and

(b) it becomes known to the closely held company that the member has an interest referred to in that sub-item in any contract of the closely held company,

the contract in question is, at the option of the closely held company, voidable.

(5) Where a closely held company chooses not to be bound by a contract contemplated in sub-item (4), a Court, on application by any interested person, if the Court is of the opinion that in the circumstances it is fair to order that such contract is nevertheless binding on the parties, may -

(a) give an order to that effect; and

(b) make any further order in respect thereof which it may consider fit.

(6) Except as regards his or her duty referred to in sub-item 2(a)(i), a particular conduct of a member does not constitute a breach of a duty arising from his or her fiduciary relationship to the closely held company, if such conduct was preceded or followed by the written approval of all the members where such members were or are cognisant of all the material facts.

Liability of members for negligence

36.

(1) A member of a closely held company is liable to the closely held company for loss caused by his or her failure in the carrying on of the business of the closely held company to act with the degree of care and diligence that may reasonably be expected of a person carrying out the same functions in relation to the closely held company as those carried out by that member and with the degree of skill that may be expected of a person having the general knowledge, skill and experience of that member.

(2) Liability referred to in sub-item (1) is not incurred if the relevant conduct was preceded or followed by the written approval of all the members where such members were or are cognisant of all the material facts.

Association agreements

37.

(1) The members of a closely held company having two or more members should enter into, and are bound by, a written association agreement appended to the Memorandum of Incorporation, signed by or on behalf of each member, which regulates -

(a) any matter which in terms of this Schedule may be set out or agreed upon in an association agreement; and

(b) any other matter relating to the internal relationship between the members, or the members and the closely held company, in a manner not inconsistent with this Schedule.

(2) A closely held company must keep any association agreement at the registered office of the closely held company where any member may inspect it and may make extracts therefrom or copies thereof.

(3) Whether or not an association agreement has been entered into by the members, every closely held company is subject to the default association agreement appended to the prescribed standard Memorandum of Incorporation of a closely held company.

(4) Any other agreement, express or implied, between all the members of a closely held company on any matter that may be regulated by an association agreement is valid, subject to that such express or implied agreement -

(a) is not inconsistent with any provision of an association agreement;

(b) does not affect any person other than the closely held company or a member who is a party to it; and

(c) ceases to have any effect when any party to it ceases to be a member of the closely held company.

(5) Subject to this Schedule, an association agreement or an agreement referred to in sub-item (4) binds the closely held company to every member in his or her capacity as member of that closely held company and, in such capacity, every member to the closely held company and to every other member.

(5) A new member of a closely held company is bound by an existing association agreement between the other members as if he or she has signed it as a party thereto.

(6) Any amendment to, or the dissolution of, an association agreement should be in writing and signed by or on behalf of each member, including a new member referred to in sub-item (5).

No access to and constructive notice of association agreements

38. A person -

(a) who is not a member of a closely held company, except by virtue of a provision of this Schedule, is not entitled to inspect any association agreement in respect of the closely held company; and

(b) dealing with the closely held company is not deemed to have knowledge of particulars of any association agreement merely because it is stated or referred to therein, whether or not the agreement is in accordance with Item 67(2) kept at the registered office of the closely held company.

Variable rules regarding internal relations

39. The following rules in respect of internal relations in an association agreement apply in so far as this Schedule or an association agreement in respect of the closely held company does not provide otherwise -

(a) every member is entitled to participate in the carrying on of the business of the closely held company;

(b) subject to Item 77, members have equal rights in regard to the management of the business of the closely held company and in regard to the power to represent the closely held company in the carrying on of its business, subject there to that the consent in writing of a member holding a member’s shareholding of at least 75 per cent, or of members holding together at least that percentage of the members’ shareholding, in the closely held company, is required for -

(i) a change in the principal business carried on by the closely held company;

(ii) a disposal of the whole, or substantially the whole, undertaking of the closely held company;

(iii) a disposal of all, or the greater portion of, the assets of the closely held company; and

(iv) any acquisition or disposal of immovable property by the closely held company;

(v) any merger or amalgamation between any two or more closely held companies;

(c) differences between members as to matters connected with the business of a closely held company decided by majority vote at a meeting of members of the closely held company;

(d) at any meeting of members of a closely held company each member has the number of votes that corresponds with the percentage of his or her interest in the closely held company;

(e) a closely held company must indemnify every member in respect of expenditure incurred or to be incurred by him or her -

(i) in the ordinary and proper conduct of the business of the closely held company; and

(ii) in regard to anything done or to be done for the preservation of the business or property of the closely held company; and

(f) payments by a closely held company to its members by reason only of their membership in terms of Item 74(1) are -

(i) of such amounts and effected at such times as the members may from time to time agree upon; and

(ii) made to members in proportion to their respective interests in the closely held company.

(g) Subject to Item 60, if a member of a closely held company desires to sell his or her shareholding in the closely held company, or a portion of such shareholding, he or she must give a written notice of his or her intention to sell to other members of the closely held company, and state the price at which he or she desires to sell such interest or portion, and –

(i) the members concerned, or the closely held company, have an option to purchase such shareholding or portion within a period of two months of the date of receipt of the notice;

(ii) if more than one offer for such interest or portion is made, such interest or portion is sold to the persons concerned in equal percentages;

(iii) if the members of the closely held company cannot agree on the selling price of such shareholding or portion, the selling price should be the true and fair value determined by -

(aa) the accountant of the closely held company, if so agreed thereto by all members interested in the sale; or

(bb) failing such an agreement, a person registered as an auditor in terms of the Accountants’ and Auditors’ Act and designated by the President of the Accountants’ and Auditors’ Regulatory Authority of Namibia ( “AARA”); and

(iv) if -

(aa) none of the members of the closely held company, or the closely held company offers to purchase such shareholding or portion within the period referred to in subparagraph (i); or

(bb) members of the closely held company or the closely held company offers to purchase only a portion of such shareholding or portion,

the member making the offer may sell the shareholding or the unsold portion thereof to any other person qualifying for membership under Item 52.

Disqualified members regarding management of business of closely held companies

40.

(1) Despite any other provision of this Schedule or in the Memorandum of Incorporation or any other agreement between members to the contrary -

(a) a person under legal disability, except a minor who has attained the age of 17 years and whose guardian has lodged with the closely held company a written consent to the minor’s participation in the management of the business of the closely held company;

(b) save under authority of a Court -

(i) an unrehabilitated insolvent;

(ii) a person removed from an office of trust on account of misconduct;

(iii) a person who has at any time been convicted in Namibia or elsewhere of theft, fraud, forgery or uttering a forged document, perjury, any offence under any act preventing corruption, or any offence involving dishonesty or in connection with the formation or management of a company or a closely held company, and has been sentenced therefor to imprisonment for at least six months without the option of a fine; and

(c) any person who is subject to any order of a Court under this Act disqualifying him from being a director of a company,

is disqualified from taking part in the management of a closely held company.

(2) A person disqualified under sub-item (1)(b) or (c) who directly or indirectly takes part in or is concerned with the management of the business of any closely held company, commits an offence.

Meetings of members

41.

(1) A member of a closely held company, by notice to every other member and every other person entitled to attend a meeting of members, may call a meeting of members for any purpose disclosed in the notice.

(2) Unless the Memorandum of Incorporation provides otherwise –

(a) a notice referred to in sub-item (1) must, as regards the date, time and venue of the meeting, fix a reasonable date and time, and a venue which is reasonably suitable for all persons entitled to attend the particular meeting;

(b) three-fourths of the members present in person at the meeting constitutes a quorum; and

(c) only members present in person or by proxy at a meeting may vote at the meeting.

(3) A closely held company must record a report of the proceedings at a meeting of its members within 14 days after the date on which the meeting was held in a minute book which is kept at the registered office of the closely held company.

(4) A resolution in writing, signed by all the members and entered into the minute book, is as valid and effective as if it were passed at a meeting of the members duly convened and held.

Unfairly prejudicial conduct

42.

(1) A member of a closely held company who alleges that -

(a) any particular act or omission of the closely held company or of one or more other members is unfairly prejudicial, unjust or inequitable to him or her, or to some members including him or her; or

(b) the affairs of the closely held company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or her, or to some members including him or her,

may make an application to a Court for an order under this Item.

(2) If on any application under sub-item (1) it appears to the Court that -

(a) the particular act or omission is unfairly prejudicial, unjust or inequitable as contemplated in that sub-item; or

(b) that the closely held company’s affairs are being conducted as contemplated in that sub-item,

and if the Court considers it just and equitable, the Court may with a view to settling the dispute make such order as it thinks fit, whether for -

(i) regulating the future conduct of the affairs of the closely held company; or

(ii) the purchase of the shareholding of any member of the closely held company by other members thereof or by the closely held company.

(3) When an order under this Item makes any alteration or addition to the relevant Memorandum of Incorporation, or replaces any association agreement, the alteration or addition or replacement has effect as if it were duly made by agreement of the members concerned.

(4) A copy of an order made under this Item which -

(a) alters or adds to a Memorandum of Incorporation is, within 28 days of the making thereof, lodged by the closely held company with the Registrar for registration;

(b) alters or adds to or replaces any association agreement, is kept by the closely held company at its registered office where any member of the closely held company may inspect it.

(5) A closely held company which fails to comply with sub-item (4) commits an offence.

Proceedings against fellow members on behalf of closely held companies

43.

(1) Where a member or a former member of a closely held company is liable to the closely held company -

(a) to make an initial contribution or any additional contribution contemplated in Item 47(1) or (2)(a), respectively; or

(b) on account of -

(i) the breach of a duty arising from his or her fiduciary relationship to the closely held company in terms of Item 65; or

(ii) negligence in terms of Item 66,

any other member of the closely held company may institute proceedings in respect of such liability on behalf of the closely held company against such member or former member after notifying all other members of the closely held company of his or her intention to do so.

(2) After the institution of such proceedings by a member the leave of the Court concerned is required -

(a) for a withdrawal of the proceedings; or

(b) for any settlement of the claim,

and the Court may in connection with such withdrawal or settlement make such orders as it may think fit.

(3) If a Court in any particular case finds that the proceedings, if unsuccessful, have been instituted without prima facie grounds, it may order the member himself or herself who has instituted them on behalf of the closely held company to pay the costs of -

(a) the closely held company; and

(b) the defendant in question,

in such manner as the Court may determine.

Payments by closely held companies to members

44.

(1) Any payment by a closely held company to any member by reason only of his or her membership, may be made only -

(a) if at a particular time, considering all reasonably foreseeable financial circumstances of the company at that time, it appears that the closely held company will not be able to pay its debts as they become due in the ordinary course of business for the foreseeable future.; and

(b) if such payment will in the particular circumstances not in fact render the closely held company unable to pay its debts as they become due in the ordinary course of its business for the foreseeable future.

(2) A member is liable to a closely held company for any payment received contrary to any provision of sub-item (1).

(3) For the purposes of this Item -

(a) without prejudice to the generality of the expression “payment by a closely held company to any member by reason only of his or her membership”, that expression -

(i) includes a distribution, or a repayment of any contribution, or part thereof, to a member;

(ii) excludes any payment to a member in his or her capacity as a creditor of the relevant closely held company and, in particular, a payment as remuneration for services rendered as an employee or officer of the closely held company, a repayment of a loan or of interest thereon or a payment of rental; and

(b) “payment” includes the delivery or transfer of any property.

Prohibition of loans and furnishing of security to members and others by closely held companies

45.

(1) A closely held company may not, directly or indirectly -

(a) make a loan -

(i) to any of its members;

(ii) to any other closely held company in which one or more of its members together hold more than a 50 per cent shareholding; or

(iii) to any company or other juristic person, except a closely held company, controlled by one or more members of the closely held company; or

(b) provide any security to any person in connection with any obligation of -

(i) any of its members;

(ii) other closely held company; or

(iii) any company or other juristic person.

(2) Sub-item (1) does not apply in respect of the making of any particular loan or the provision of any particular security with the prior express consent in writing of all the members of a closely held company.

(3) A member of a closely held company who authorises or permits or is a party to the making of any loan or the provision of any security contrary to any provision of this Item -

(a) is liable to indemnify the closely held company and any other person who had no actual knowledge of the contravention against any loss directly resulting from the invalidity of such loan or security; and

(b) commits an offence.

(4) For the purposes of this Item -

(a) “loan” includes -

(i) a loan of any property; and

(ii) any credit extended by a closely held company where the debt concerned is not payable or is not being paid in accordance with normal business practice in respect of the payment of debts of the same kind;

(b) one or more members of a closely held company is only deemed to control a company or other juristic person as contemplated in sub-item (1)(a)(iii), if the circumstances envisaged in Item 165(2)(b) in relation to -

(i) a director or manager or his or her nominee, or directors or managers or their nominees, referred to in that Item; and

(ii) a company or body corporate,

are present in respect of any such member or his or her nominee, or such members or their nominees, and any such company or other juristic person; and

(c) “security”, includes a guarantee.

PART 5

EXTERNAL RELATIONS FOR CLOSELY HELD COMPANIES

Pre-incorporation contracts

46. (1) A contract in writing entered into by a person professing to act as an agent or a trustee for a closely held company not yet formed, may after its incorporation be ratified or adopted by such closely held company as if the closely held company had been duly incorporated at the time when the contract was entered into.

(2) The ratification or adoption by a closely held company referred to in sub-item (1) is to be in the form of a consent in writing of all the members of the closely held company, given within a time specified in the contract or, if no time is specified, within a reasonable time after incorporation.

Power of members to bind closely held companies

47. (1) Subject to this Item, any member of a closely held company must, in relation to a person who is not a member and is dealing with the closely held company, be an agent of the closely held company for the purposes of the business of the closely held company stated in its Memorandum of Incorporation or actually being carried on by it.

(2) An act of the member of a closely held company binds the closely held company, if -

(a) such act is expressly or impliedly authorised by the closely held company, or is subsequently ratified by it; or

(b) such act is performed for the carrying on, in the usual way, of business of the kind stated in a Memorandum of Incorporation of the closely held company or actually being carried on by the closely held company at the time of the performance of the act, unless -

(i) the member so acting has in fact no power to act for the closely held company in the particular matter; and

(ii) the person with whom he or she deals has, or ought reasonably to have, knowledge of the fact that the member has no such power.

(3) Where an act of a member of a closely held company is -

(a) performed for a purpose apparently not connected with the ordinary course of the business of the closely held company stated in its Memorandum of Incorporation; or

(b) actually being carried on by the closely held company at the time of the performance of the act,

the closely held company is not bound by such act, unless it has in fact been authorised or is ratified as contemplated in sub-item (2)(a) by the closely held company.

(4) Where -

(a) an association agreement restricts the power of any member to represent a closely held company; or

(b) a member is disqualified under Item 70 from participating in the management of the business of the closely held company,

no act in contravention of the restriction or performed by such disqualified person is binding on the closely held company with respect to any person who has, or ought reasonably to have, knowledge of such restriction or disqualification.

(5) Where the consent in writing of a member or members of a closely held company is in any particular case required in terms Item 76(2), no act in contravention of such requirement is binding on the closely held company with respect to any person who has, or ought reasonably to have, knowledge of the fact that the particular act is performed in contravention of such requirement.

Application of Items 43 and 234 of Companies Act, 2004

48. (1) If the relationship between a company and a closely held company is such that the closely held company, if it were a company, would be a holding company of such company, the provisions of Item 141 regarding the -

(a) employment of funds of a company in a loan to; or

(b) provision of any security by a company to another person in connection with an obligation of,

its holding company, or a company which is a subsidiary of that holding company but is not a subsidiary of itself, apply with the necessary changes to the context in relation to -

(i) any such employment of funds; or

(ii) any such provision of security,

by any such company in respect of -

(aa) any such closely held company; and

(bb) any company which would be a subsidiary of the closely held company if it were a company, but which is not a subsidiary of the first-mentioned company.

(2) In the application of Item 141(2) as contemplated in sub-item (1) a reference therein to -

(a) a director or officer; or

(b) a former director or officer,

of a holding company, is construed as a reference to any member or officer, or former member or officer, of a closely held company envisaged in that sub-item.

(3) If the relationship between a company and a closely held company is as envisaged in sub-item (1), the provisions of Item 141 regarding the making by a company of any loan to, or the provision of security by a company to another person in connection with any obligation of -

(a) any director or manager of the holding company of the company or of another company which is a subsidiary of its holding company; or

(b) another company or another juristic person controlled by one or more directors or managers of the holding company of the company or of a company which is a subsidiary of its holding company,

apply, with the necessary changes, in relation to any such loan or provision of security by any such company in respect of -

(i) any member or officer of any such closely held company, or any director or officer of another company which would be a subsidiary of any such closely held company were the closely held company is a company; and

(ii) another company or another juristic person controlled by one or more members of any such closely held company, or by one or more directors or managers of a company which would be a subsidiary of the closely held company were is a company.

(4) In the application of Item 163(1) in terms of sub-item (3) any reference therein to any director or officer of a holding company is construed as a reference to any member or officer of a closely held company envisaged in sub-item (1).

PART 6

ACCOUNTING AND DISCLOSURE

Accounting records

49. (1) A closely held company must keep in the official language of Namibia such accounting records as are necessary to fairly represent the state of affairs and business of the closely held company, and to explain the transaction and financial position of the business of the closely held company, including -

(a) records showing its assets and liabilities, members’ contributions, undrawn profits, revaluations of fixed assets and amounts of loans to and from members;

(b) a register of fixed assets showing in respect thereof -

(i) the respective dates of any acquisition and the cost thereof, depreciation, if any, and where any asset has been revalued, the date of the revaluation and the revalued amount thereof;

(ii) the respective dates of any disposals and the consideration received in respect thereof,

but in the case of a closely held company which has been converted from a company in terms of Item 50 the existing fixed asset register of the company is deemed to be such a register in respect of the closely held company, and such particulars therein is deemed to apply in respect of it;

(c) records containing entries from day to day of all cash received and paid out, in sufficient details to enable the nature of the transactions and, except in the case of cash sales, the names of the parties to the transactions to be identified;

(d) records of all goods purchased and sold on credit, and services received and rendered on credit, in sufficient detail to enable the nature of those goods or services and the parties to the transactions to be identified;

(e) statements of the annual stocktaking, and records to enable the value of stock at the end of the financial year to be determined; and

(f) vouchers supporting entries in the accounting records.

(2) The accounting records relating to -

(a) contributions by members;

(b) loans to and from members; and

(c) payments to members,

containing sufficient detail of individual transactions to enable the nature and purpose thereof to be clearly identified.

(3) The accounting records referred to in sub-item (1) are kept in such a manner as to provide adequate precautions against falsification and to facilitate the discovery of any falsification.

(4) The accounting records are kept at the place or places of business or at the registered office of the closely held company and, wherever kept, are open at all reasonable times for inspection by any member.

(5) A closely held company which fails to comply with any provision of any of the preceding sub-items, and every member thereof who -

(a) is a party to such failure; or

(b) fails to take all reasonable steps to secure compliance by the closely held company with any such provision,

commits an offence.

(6) In any proceedings against any member of a closely held company in respect of an offence consisting of a failure to take reasonable steps to secure compliance by a closely held company with any provision referred to in sub-item (5), it is a defence if it is proved that the accused had reasonable grounds for believing and did believe that -

(a) a competent and reliable person was charged with the duty of seeing that any such provision was complied with and that such person was in a position to discharge that duty; and

(b) the accused had no reason to believe that such person had in any way failed to discharge that duty.

Financial year of closely held companies

50. (1) The financial year of a closely held company is its annual accounting period, which is, subject to sub-items (2), (3) and (4), not less than 12 months and ends on the date stated in its Memorandum of Incorporation in accordance with Item 34(1)(g)(ii)

(2) A closely held company, subject to Item 37(2), may change the date referred to in sub-item (1) -

(a) to a date being not more than six months earlier; or

(b) to a date being not more than six months later,

but any such change is not made more than once in a financial year, and, in the case of a change contemplated in paragraph (b), the prescribed additional amount in respect of the annual duty is payable for any period by which the financial year is extended.

(3) The first financial year of a closely held company -

(a) commences on the date of its registration; and

(b) ends on the date referred to in sub-item (1) occurring not less than four or more than 15 months after the date of registration, but the first financial year of a closely held company converted from a company in terms of Item 50, ends on the date on which the financial year of the company would have ended had it not been so converted.

(4) The financial year of a closely held company, which has in terms of sub-item (2) changed the date referred to in sub-item (1) -

(a) commences at the end of the previous financial year; and

(b) ends on the date, as changed, occurring not less than three nor more than 18 months after the end of that previous financial year.

Annual financial statements and return of closely held companies

51. (1) The members of a closely held company must within nine months after the end of every financial year of the closely held company cause financial statements in respect of that financial year to be prepared in the official language of Namibia.

(2) The financial statements of a closely held company -

(a) must consist of -

(i) a balance sheet and any notes thereon; and

(ii) an income statement or any similar financial statement where such form is appropriate, and any notes thereon;

(b) must in conformity with generally accepted accounting practice, appropriate to the business of the closely held company fairly present the state of affairs of the closely held company as at the end of the financial year concerned, and the results of its operations for that year;

(c) must disclose separately the aggregate amounts, as at the end of the financial year, of contributions by members, undrawn profits, revaluations of fixed assets and amounts of loans to or from members, and the movements in these amounts during the year;

(d) must be in agreement with the accounting records, which must be summarised in such a form that -

(i) compliance with the provisions of this sub-item is made possible; and

(ii) an accountant is enabled to report to the closely held company in terms of Item 85(1)(c) without it being necessary to refer to any subsidiary accounting records and vouchers supporting the entries in the accounting records, but nothing in this paragraph is construed as preventing an accountant, if he or she thinks it necessary, from inspecting such subsidiary accounting records and vouchers; and

(e) must contain the report of the accountant referred to in Item 85(1)(c).

(3) The annual financial statements are approved and signed by a member holding a member’s shareholding of at least 51 per cent, or members together holding members’ interests of at least 51 per cent, in the closely held company.

(4) A member of a closely held company who fails to take all reasonable steps to comply or to secure compliance with any provision of this Item commits an offence.

(5) In any proceedings against any member of a closely held company under sub-item (4) the defence referred to in Item 79(6)(b) is available to such member.

(6) In order to assist the Registrar to determine whether the information required to be disclosed in terms of this Act by a closely held company has been disclosed and is still valid, every corporation must not later than the end of the month following upon the month within which the anniversary of the date of its incorporation occurs, on payment of the prescribed fee, lodge with the Registrar a return in the prescribed form.

(7) A copy of the annual return is kept at the registered office of the closely held company, and Item 38 relating to the inspection of the Memorandum of Incorporation and proof of its registration applies with the necessary changes to the annual return by a closely held company.

(8) A closely held company which has failed to lodge a return within the prescribed period, may thereafter lodge such return, subject to the payment to the Registrar of the prescribed additional fee in respect of each such failure, but the Registrar may, upon good cause shown, waive payment of the fee concerned.

(9) The information required to be disclosed in terms of this Chapter as disclosed in the latest annual return of a closely held company is, in the absence of any subsequent compliance with any relevant disclosure requirement of this Act, regarded as the latest disclosed information in respect of the closely held company concerned.

Appointment of accountants

52. (1) Subject to Item 83, every closely held company must appoint an accountant who has consented to the appointment in writing.

(2) The appointment of the first accountant of a closely held company referred to in Item 34(1)(h) takes effect on the date of the registration of the closely held company.

(3) If a vacancy occurs in the office of an accountant, whether as a result of removal, resignation or otherwise, the closely held company must -

(a) within 14 days, appoint another accounting office; and

(b) comply with sub-item (2) of Item 37,

but sub-item (5) of that Item applies where sub-item (2) of that Item has not so been complied with, whether or not an appointment of such other accountant has been made.

(4) A closely held company must inform its accountant in writing of his or her removal from office.

(5) An accountant must -

(a) on resignation or removal from office forthwith inform every member of the closely held company within 14 days thereof in writing;

(b) send a copy of the letter to the last known address of the registered office of the closely held company; and

(c) in addition forthwith by certified post inform the Registrar -

(i) that he or she has resigned or been removed from office;

(ii) of the date of his or her resignation or removal from office;

(iii) of the date up to which he or she performed his or her duties;

(iv) of any matters with respect to the financial affairs of the closely held company of which he or she was aware, at the time of his or her resignation or removal, which were in contravention of the provisions of this Chapter.

(6) If an accountant who has been removed from office is of the opinion that he or she was removed for improper reasons, he or she must forthwith by certified post inform the Registrar thereof, and must send a copy of the letter to every member.

Qualifications of accountants

53. (1) A person is not qualified for appointment as an accountant of a closely held company, unless he or she is a member of a recognized profession which -

(a) as a condition for membership, requires its members to have passed examinations in accounting and related fields of study which in the opinion of the Minister would qualify such members to perform the duties of an accountant under this Act;

(b) has the power to exclude from membership those persons found guilty of negligence in the performance of their duties or of conduct which is discreditable to their profession; and

(c) has been named in a notice referred to in sub-item (2).

(2) The Minister may from time to time publish by notice in the Gazette the names of those professions whose members are qualified to perform the duties of an accountant in terms of this Act.

(3) A member or employee of a closely held company, and a firm whose partner or employee is a member or employee of a closely held company, does not qualify for appointment as an accountant of such closely held company unless all the members consent in writing to such appointment.

(4) A firm may be appointed as an accountant of a closely held company, subject there to that each partner in the firm is qualified to be so appointed.

Right of access and remuneration of accountants

54. (1) An accountant of a closely held company has at all times -

(a) a right of access to the accounting records and all the books and documents of the closely held company; and

(b) a right to require from members such information and explanations as he or she considers necessary for the performance of his or her duties as an accountant.

(2) The remuneration of an accountant is determined by agreement with the closely held company.

Duties of accountants

55. (1) The accountant of a closely held company, not later than three months after completion of the annual financial statements, must -

(a) subject to the provisions of Item 81(2)(d), determine whether the annual financial statements are in agreement with the accounting records of the closely held company;

(b) review the appropriateness of the accounting policies represented to the accountant as having been applied in the preparation of the annual financial statements; and

(c) report in respect of paragraphs (a) and (b) to the closely held company.

(2) If during the performance of his or her duties an accountant becomes aware of any contravention of a provision of this Chapter, he or she must describe the nature of such contravention in his or her report.

(3) Where an accountant is a member or employee of a closely held company, or is a firm of which a partner or employee is a member or employee of the closely held company, his or her report must state that fact.

(4) If an accountant of a closely held company -

(a) at any time knows, or has reason to believe, that the closely held company is not carrying on business or is not in operation and has no intention of resuming operations in the foreseeable future; or

(b) during the performance of his or her duties finds -

(i) that any change, during a relevant financial year, in respect of any particulars mentioned in the relevant Memorandum of Incorporation has not been registered;

(ii) that the annual financial statements indicate that as at the end of the financial year concerned the closely held company’s liabilities exceed its assets; or

(iii) that the annual financial statements incorrectly indicate that as at the end of the financial year concerned the assets of the closely held company exceed its liabilities, or has reason to believe that such an incorrect indication is given,

he or she must forthwith by certified post report accordingly to the Registrar.

(5) If an accountant of a closely held company has in accordance with sub-item (4)(b)(ii) or (iii) reported to the Registrar that -

(a) the annual financial statements of the closely held company concerned indicate that as at the end of the financial year the closely held company’s liabilities exceed its assets;

(b) the annual financial statements incorrectly indicate that as at the end of the financial year concerned the assets of the closely held company exceed its liabilities; or

(c) he or she has reason to believe that such an incorrect indication is given,

and he or she finds that any subsequent financial statements of the closely held company concerned indicate that -

(i) the situation has changed or has been rectified and that the assets concerned then exceed the liabilities;

(ii) they no longer incorrectly indicate that the assets exceed the liabilities; or

(iii) he or she no longer has reason to believe that such an incorrect indication is given,

he or she must report to the Registrar accordingly.

PART 7

LIABILITY OF MEMBERS AND OTHERS FOR

DEBTS OF CLOSELY HELD COMPANIES

Joint liability for debts of closely held companies

56. Despite anything to the contrary in any provision of this Chapter, the following persons are in the following circumstances together with a closely held company jointly and severally liable for the specified debts of the closely held company -

(a) where a juristic person or a trustee of a trust inter vivos in that capacity purports to hold, whether directly or indirectly, a member’s shareholding in the closely held company in contravention of any provision of Item 53 -

(i) such juristic person or trustee of a trust inter vivos; and

(ii) any nominee referred to in that Item,

is, despite the invalidity of the holding of such shareholding, so liable for every debt of the closely held company incurred during the time the contravention continues;

(b) where the closely held company makes a payment in respect of the acquisition of a member’s shareholding in contravention of any provision of Item 62, every person who -

(i) is a member at the time of such payment and is aware of the making of such payment; or

(ii) is a member or a former member who receives or who received such payment,

is so liable for every debt of the closely held company incurred prior to the making of such payment unless, in the case of a member who is so aware, he or she proves that he or she took all reasonable steps to prevent the payment;

(c) where the closely held company gives financial assistance for the purpose of or in connection with any acquisition of a member’s shareholding in contravention of any provision of Item 63 -

(i) every person who is a member at the time of the giving of such assistance and is aware of the giving of such assistance; or

(ii) the person who receives such assistance,

is so liable for every debt of the closely held company incurred prior to the giving of such assistance unless, in the case of a member who is so aware, he or she proves that he or she took all reasonable steps to prevent the payment;

(d) where a person takes part in the management of the business of the closely held company while disqualified from doing so in terms of Item 70(1)(b) or (c), that person is so liable for every debt of the closely held company which it incurs as a result of his or her participation in the management of the closely held company; and

(e) where the office of accountant of the closely held company is vacant for a period of six months, any person who -

(i) at any time during that period was a member and aware of the vacancy; and

(ii) at the expiration of that period is still a member,

is so liable for every debt of the closely held company incurred during such existence of the vacancy and for every such debt thereafter incurred while the vacancy continues and he or she still is the member.

Liability for reckless or fraudulent carrying on of business of closely held companies

57.

(1) If it at any time appears that any business of a closely held company was or is being carried on -

(a) recklessly;

(b) with gross negligence; or

(c) with intent to defraud any person or for any fraudulent purpose,

a Court may on the application of -

(i) the Master; or

(ii) any creditor, member or liquidator of the closely held company,

declare that any person who was knowingly a party to the carrying on of the business in any such manner to be personally liable for all or any of such debts or other liabilities of the closely held company as the Court may direct, and the Court may give such further orders as it thinks proper for the purpose of giving effect to the declaration and enforcing that liability.

(2) Without prejudice to any other criminal liability incurred where any business of a closely held company is carried on in any manner contemplated in sub-item (1), every person who is knowingly a party to the carrying on of the business in any such manner commits an offence.

Powers of Court in case of abuse of separate juristic personality of closely held companies

58. Whenever a Court -

(a) on application by an interested person; or

(b) in any proceedings in which a closely held company is involved,

finds that the incorporation of, or any use of, the closely held company, constitutes a gross abuse of the juristic personality of the closely held company as a separate entity, the Court may -

(i) declare that the closely held company is to be deemed not to be a juristic person in respect of such -

(aa) rights, obligations or liabilities of the closely held company; or

(bb) member or members thereof, or such other person or persons,

as are specified in the declaration; and

(ii) give such further order or orders as it may thinks fit in order to give effect to such declaration.

PART 8

WINDING-UP OF CLOSELY HELD COMPANIES

Application of other provisions of this Act other than provisions of this Chapter

59. (1) The other provisions, other than the provisions of this Chapter, which relate to the winding-up of a company, including the regulations made thereunder, apply with the necessary changes and in so far as they can be applied to the liquidation of a closely held company in respect of any matter not specifically provided for in this Part or in any other provision of this Chapter.

(2) For the purposes of sub-item (1) -

(a) any reference in a relevant provision, other than a provision of this Chapter, and in any provision of the Insolvency Act, made applicable by any such provision -

(i) to a company, is construed as a reference to a closely held company;

(ii) to a share in a company, is construed as a reference to the interest of the member in a closely held company;

(iii) to a member, director, shareholder or contributory of a company, is construed as a reference to a member of a closely held company;

(iv) to an auditor of a company, is construed as a reference to an accountant of a closely held company;

(v) to an officer or a secretary of a company, is construed as a reference to a manager or a secretary who is an officer of a closely held company;

(vi) to a registered office of a company, is construed as a reference to a registered office of a closely held company;

(vii) to a memorandum or articles of association of a company, is construed as a reference to a Memorandum of Incorporation and an association agreement of a closely held company, respectively;

(viii) to the Companies Act or the regulations made thereunder, or to any provision thereof, is construed as including a reference to this Act or the regulations made thereunder, or to any corresponding provision thereof, as the case may be;

(ix) to an insolvent estate, is construed as a reference to a closely held company;

(x) to a provisional liquidator of a company, or to a liquidator of a company or a trustee of an insolvent estate, is construed as a reference to a provisional liquidator and to a liquidator of a closely held company, respectively;

(xi) to the sheriff, is construed as including a reference to a messenger of a magistrate’s court;

(xii) to the Registrar of the Court, is construed as including a reference to a clerk of a magistrate’s court; and

(xiii) to the Court, is construed as a reference to a Court having jurisdiction under this Chapter;

(b) a reference to a special resolution -

(i) referred to in 164, is construed as a reference to a written resolution for the voluntary winding-up of a closely held company in terms of Item 90; and

(ii) referred to in Item , is construed as a reference to a written resolution signed by or on behalf of all the members of a closely held company.

Voluntary winding-up

60.

(1) A closely held company may be wound up voluntarily by members or creditors, if all its members -

(a) so resolve at a meeting of members called for the purpose of considering the winding-up of the closely held company; and

(b) sign a written resolution that the closely held company be wound up voluntarily.

(2) A copy of the written resolution, in duplicate in the prescribed form, is lodged within 28 days after the date of the passing of the resolution, together with the prescribed fee, with the Registrar, who must register such resolution if it complies with sub-item (1).

(3) If such copy of the written resolution is not so registered by the Registrar within 90 days from the date of the passing of the resolution, the resolution lapses and becomes void.

(4) A resolution in terms of this Item does not take effect until it has been registered by the Registrar.

Liquidation by Court

61. A closely held company may be wound up by a Court, if -

(a) members having more than one half of the total number of votes of members, have so resolved at a meeting of members called for the purpose of considering the winding-up of the closely held company, and have signed a written resolution that the closely held company be wound up by a Court;

(b) the closely held company is unable to pay its debts; or

(c) it appears on application to the Court that it is just and equitable that the closely held company be wound up.

Circumstances under which closely held companies deemed unable to pay debts

62. (1) For the purposes of Item 91(c) a closely held company is deemed to be unable to pay its debts, if -

(a) a creditor, by cession or otherwise, to whom the closely held company is indebted in a sum of not less than N$200 then due has served on the closely held company, by delivering it at its registered office, a demand requiring the closely held company to pay the sum so due, and the closely held company has for 21 days thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or

(b) any process issued on a judgement, decree or order of any court in favour of a creditor of the closely held company is returned by a sheriff, or a messenger of a magistrate’s court, with an endorsement that he or she has not found sufficient disposable property to satisfy the judgement, decree or order, or that any disposable property found did not upon sale satisfy such process; or

(c) it is proved to the satisfaction of the Court that the closely held company is unable to pay its debts.

(2) In determining for the purposes of sub-item (1) whether a closely held company is unable to pay its debts, the Court must also take into account the contingent and prospective liabilities of the closely held company.

Repayments by members

63. (1) Subject to this Item, a member of a closely held company is not in the winding-up of the closely held company liable for the repayment of any payment made by the closely held company to him or her by reason only of his or her membership, if such payment complies with the requirements of Item 65(1).

(2) In the winding-up of a closely held company unable to pay its debts, any such payment made to a member by reason only of his or her membership within a period of two years before the commencement of the winding-up of the closely held company, is repaid to the closely held company by the member, unless such member can prove that -

(a) after such payment was made, the closely held company’s assets, fairly valued, exceeded all its liabilities; and

(b) such payment was made while the closely held company was able to pay its debts as they become due in the ordinary course of its business; and

(c) such payment, in the particular circumstances, did not in fact render the closely held company unable to pay its debts as they became due in the ordinary course of its business.

(3) A person who has ceased to be a member of the closely held company concerned within two years, is also liable for any repayment provided for in sub-item (2) if, and to the extent that, repayments by present members, together with all other available assets, are insufficient for paying all the debts of the closely held company.

(4) A certificate given by the Master as to the amount payable by any member or former member in terms of sub-item (2) or (3) to the closely held company may be forwarded by the liquidator to the clerk of the magistrate’s court in whose area of jurisdiction the registered office of the closely held company is situated who must record it, and thereupon such notice has the effect of a civil judgement of that magistrate’s court against the member or former member concerned.

(5) The court in question may, on application by a member or former member referred to in sub-item (3), make any order that it thinks fit in regard to any certificate referred to in sub-item (4).

Repayment of salary and remuneration by members

64. (1) lf a closely held company being wound up is unable to pay its debts, and -

(a) any direct or indirect payment of a salary or other remuneration was made by the closely held company within a period of two years before the commencement of its winding-up to a member in his or her capacity as an officer or employee of the closely held company; and

(b) such payment was, in the opinion of the Master, not bona fide or reasonable in the circumstances,

the Master must direct that such payment, or such part thereof as he or she may determine, be repaid by such member to the closely held company.

(2) A person who has within a period of two years referred to in sub-item (1)(a) ceased to be a member of a closely held company referred to in that sub-item may, under the circumstances referred to therein, be directed by the Master to make a repayment provided for in sub-item (1), if, and to the extent that, any such repayments by present members are, together with all other available assets, insufficient for paying all the debts of the closely held company.

(3) Sub-items (4) and (5) of Item 93 apply with the necessary changes in respect of any repayment to a closely held company in terms of sub-item (1) or (2).

Written offers of composition

65. (1) In the winding-up of a closely held company unable to pay its debts, the members of the closely held company may at any time after the first meeting of creditors submit to the Liquidator a written offer of composition, signed by the members holding more than 50 per cent of members’ interests in the closely held company.

(2) Items 119, 120, 123 and 124(1) and (5) of the Insolvency Act apply with the necessary changes in respect of the procedure and effect of any such composition, and the liquidator’s functions thereunder.

(3) For the purposes of sub-item (2), any reference therein -

(a) to an insolvent or insolvent estate, is construed as a reference to the closely held company concerned;

(b) to a trustee is construed as a reference to the liquidator of the closely held company concerned; and

(c) to the rehabilitation of an insolvent, is construed as a reference to the setting aside of the winding-up of the closely held company concerned.

Repayments, payments of damages and restoration of property by members and others

66. (1) Where in the course of the winding-up of a closely held company it appears that any person who has taken part in the formation of the closely held company, or any former or present member, officer or accountant of the closely held company -

(a) has misapplied or retained or become liable or accountable for any money or property of the closely held company; or

(b) has been guilty of any breach of trust in relation to the closely held company,

a Court may, on the application of the Master or of the liquidator or of any creditor or member of the closely held company, inquire into the conduct of such person, member, officer or accountant and may order him or her -

(i) to repay or restore the money or property, or any part thereof, with interest at such rate as the Court considers just; or

(ii) to contribute such sum to the assets of the closely held company by way of compensation or damages in respect of the misapplication, retention or breach of trust,

as the Court thinks just.

(2) Sub-item (1) applies in respect of any person, member, officer or accountant referred to therein, despite the fact that such person may also be criminally responsible in respect of any conduct contemplated therein.

Appointment of liquidators

67. (1) For the purposes of conducting the proceedings in a winding-up of a closely held company, the Master must appoint a suitable natural person as liquidator.

(2) The Master must make an appointment as soon as is practicable after a provisional winding-up order has been made, or a copy of a resolution for the voluntary winding-up has been registered in terms of Item 90(2).

(3) When the Master in the case of a voluntary winding-up by members makes an appointment, he or she must take into consideration any further resolution at a meeting of members nominating a person as liquidator.

(4) In the case of -

(a) a creditors’ voluntary winding-up; or

(b) a winding-up by the Court,

if a person is nominated as co-liquidator at the first meeting of creditors, the Master, subject to Item 91, must appoint such person as co-liquidator as soon as he or she has given security to the satisfaction of the Master for the proper performance of his or her duties.

Vacancies in office of liquidators

68. (1) When a vacancy occurs in the office of a liquidator of a closely held company, the Master may -

(a) where the vacancy occurs in the office of a liquidator nominated by members or creditors, direct any remaining liquidator to convene a meeting of creditors or members to nominate a liquidator to fill the vacancy;

(b) in a case other than a case contemplated in paragraph (a), if he or she is of opinion that any remaining liquidator will be able to complete the winding-up, dispense with the appointment of a liquidator to fill the vacancy, and direct the remaining liquidator to complete the winding-up; or

(c) in any other case, appoint a liquidator to fill the vacancy.

(2) The provisions of Item 97 relating to the nomination or appointment of a liquidator apply to the nomination or appointment of a liquidator to fill a vacancy in the office of liquidator.

Refusal by Master to appoint nominated persons as liquidators

69. (1) If -

(a) a person who has been nominated as liquidator by any meeting of creditors or of members of a closely held company -

(i) was not properly nominated, or is disqualified from being nominated or appointed as liquidator pursuant to Item 179 as applied by Item 97; or

(ii) has failed to give within a period of 21 days as from the date upon which he or she was notified that the Master had accepted his or her nomination or within such further period as the Master may allow, the security mentioned in Item 179(3), as so applied; or

(b) in the opinion of the Master the person nominated as liquidator should not be appointed as liquidator of the closely held company concerned,

the Master must -

(i) give notice in writing to the person so nominated that he or she declines to accept his or her nomination or to appoint him or her as liquidator; and

(ii) in such notice state his or her reasons for declining to accept his or her nomination or to appoint him or her,

but if the Master declines to accept the nomination for appointment as liquidator because he or she is of the opinion that the person nominated should not be appointed as liquidator, it is sufficient if the Master states in that notice, as such reason, that he or she is of the opinion that the person nominated should not be appointed as liquidator of the closely held company concerned.

(2) When the Master -

(a) has so declined to accept the nomination of any person or to appoint him or her as liquidator; or

(b) has set aside the appointment of a liquidator, as applied by Item 97 of this Chapter,

the Master must convene a meeting of creditors or members of the closely held company concerned for the purpose of nominating another person for appointment as liquidator.

(3) In the notice convening any meeting under sub-item (2) the Master must state that he or she has declined -

(a) to accept the nomination for appointment as liquidator of the person previously nominated; or

(b) to appoint the person so nominated;

and, subject to sub-item (2), the reasons therefor, or that the appointment of the person previously appointed as liquidator has so been set aside by the Master and that the meetings are convened for the purpose of nominating another person for appointment as liquidator.

(4) The Master must post a copy of such notice to every creditor whose claim against the closely held company was previously proved and admitted.

(5) A meeting referred to in sub-item (2) is deemed to be a continuation of the relevant first meeting of creditors or of members, or of any such meeting referred to in Item 84.

(6) If the Master again so declines for any reason mentioned in sub-item (1) to accept the nomination for appointment as liquidator by any meeting referred to in sub-item (2), or to appoint a person so nominated -

(a) he or she must act in accordance with sub-item (1); and

(b) if the person so nominated as sole liquidator has not or if all the persons so nominated have not been appointed by him or her, he or she must appoint as liquidator or liquidators of the closely held company concerned any other person or persons not disqualified from being liquidator of that closely held company.

Resignation and absence of liquidators

70. (1) At the request of a liquidator the Master may relieve him or her of his or her office upon such conditions as the Master may think fit.

(2) A liquidator may not be absent from Namibia for a period exceeding 60 days, unless -

(a) the Master has before his or her departure from Namibia granted him or her permission in writing to be absent; and

(b) he or she complies with such conditions as the Master may think fit to impose.

(3) Every liquidator who is relieved of his or her office by the Master, or who is permitted to absent himself or her for a period exceeding 60 days from Namibia, must give notice thereof in the Gazette.

First meeting of creditors and members

71. (1) A liquidator must, as soon as may be and, except with the consent of the Master, not later than 30 days after a final winding-up order has been made by a Court or a resolution of the creditors’ voluntary winding-up has been registered -

(a) summon a meeting of the creditors of the closely held company for the purpose of -

(i) considering the statement as to the affairs of the closely held company lodged with the Master;

(ii) the proving of claims against the closely held company;

(iii) deciding whether a co-liquidator should be appointed and, if so, nominating a person for appointment; and

(iv) receiving or obtaining, in a winding-up by the Court or a creditors’ voluntary winding-up, directions or authorisation in respect of any matter regarding the liquidation; and

(b) summon a meeting of members of the closely held company for the purpose of -

(i) considering the statement mentioned in pragraph (a) as to the affairs of the closely held company, unless the meeting of members when passing a resolution for the voluntary winding-up of the closely held company has already considered the statement; and

(ii) receiving or obtaining directions or authorisation in respect of any matter regarding the liquidation.

(2) The law relating to insolvency in respect of voting, the manner of voting and voting by an agent at meetings of creditors apply with the necessary changes in respect of any meeting referred to in this Item.

(3) In a winding-up by the Court a member or former member of a closely held company has no voting right in respect of -

(a) the nomination of a liquidator based on his or her loan account with the closely held company; or

(b) claims for arrear salary, travelling expenses or allowances due by the closely held company, or claims paid by such member or former member on behalf of the closely held company.

(4) The provisions of sub-item (2) apply with the necessary changes in respect of a person to whom a right contemplated in that sub-item has been ceded.

Report to creditors and members

72. Except in the case of a members’ voluntary winding-up, a liquidator must, as soon as practicable and, except with the consent of the Master, not later than 90 days after the date of his or her appointment, submit to a general meeting of creditors and members of the closely held company a report as to -

(a) the estimated amounts of the closely held company’s assets and liabilities;

(b) if the closely held company has failed, the causes of the failure;

(c) whether or not he or she has submitted or intends to submit to the Master a report under Item 256(7)(b)(ii) as applied by Item 92;

(d) whether or not any member or former member appears to be liable -

(i) to the closely held company on the ground of breach of trust or negligence;

(ii) to make repayments to the closely held company in terms of Item 93(2) or (3) or Item 96(1) or (2);

(iii) to either a creditor of the closely held company or the closely held company itself by virtue of any provision of this Part;

(e) any legal proceedings by or against the closely held company which may have been pending at the date of the commencement of the winding-up, or which may have been or may be instituted;

(f) whether or not further enquiry is in his or her opinion desirable in regard to any matter relating to the formation or failure of the closely held company or the conduct of its business;

(g) whether or not the closely held company has kept the accounting records required by Item 79 and, if not, in what respects the requirements of that Item have not been complied with;

(h) the progress and prospects in respect of the winding-up; and

(i) any other matter which he or she may consider fit, or in connection with which he or she may require the directions of the creditors.

Repayments by members and former members

73. The liquidator of the closely held company unable to pay its debts -

(a) must ascertain whether members or former members of the closely held company are liable in terms of Item 93(2) or (3) to make repayments;

(b) must ascertain whether circumstances justify and approach to the Master for a direction that members or former members of the closely held company make repayments in terms of Item 94(1) or (2);

(c) may, if necessary, enforce such repayments; and

(d) may, in the event of the death of such member or former member liable for or directed to make a repayment, or of the insolvency of his or her estate, claim the amount due from the estate concerned.

Duties of liquidator regarding liability of members to creditors or closely held companies

74. (1) The liquidator of a closely held company unable to pay its debts must ascertain whether, on the facts reasonably available to him or her, there is reason to believe that -

(a) any member or former member of the closely held company; or

(b) any other person,

has by virtue of any provision of this Part incurred any liability to a creditor of the closely held company or to the closely held company itself.

(2) If -

(a) the liquidator finds that there is such reason in respect of any creditor who has proved a claim, he or she must in writing inform such creditor accordingly; and

(b) the creditor recovers the amount of his or her claim or part thereof from such member or former member, or from such other person,

the liquidator must take such recovery into account in determining the dividend payable to the creditor.

(3) In particular the liquidator must determine whether an application to the Court in terms of Item 92 is justified and advisable.

PART 9

GENERAL PROVISIONS FOR THIS SCHEDULE

Penalties

75. (1) Any closely held company or a member or officer of a closely held company or any other person convicted of any offence in terms of this Chapter, is liable, in the case of an offence referred to -

(a) in Item 79 or 87, to a fine not exceeding N$8 000 or imprisonment for a period not exceeding two years, or to both such fine and such imprisonment;

(b) in Item 70 or 81, to a fine not exceeding N$4 000 or imprisonment for a period not exceeding 12 months, or to both such fine and such imprisonment;

(c) in Item 38, 42, 46 or 72, to a fine not exceeding N$2 000 or imprisonment for a period not exceeding six months, or to both such fine and such imprisonment; and

(d) in Item 45, 64 or 75, to a fine not exceeding N$1 000 or imprisonment for a period not exceeding three months, or to both such fine and such imprisonment.

(2) The Court convicting any such closely held company, member, officer or person for failure to perform any act required to be performed by it or him or her under this Act, may, in addition to any penalty which the Court imposes, order such closely held company, member, officer or person to perform such act within such period as the Court may determine.

(3) A person who, in respect of any offence under any provision of this Act or the Insolvency Act, which is made applicable by any provision of this Chapter, is convicted of any such offence under any such provision as so applied is liable to be sentenced to the penalties which are imposed in respect of -

(a) any such offence by any applicable provision of this Act; or

(b) the Insolvency Act.

Savings and transitional provisions

76. (1) A close corporation incorporated under the Close Corporations Act is deemed to have been incorporated under the corresponding provision of this Chapter and must -

(a) at the commencement of this Act, asume a new name as “closely held company”; and

(b) not later than a date determined by the Minister by notice in the Gazette, change all its official documentation, signs, logos, insignias, date stamps and any other thing depicting the word “close corporation” to “closely held company”.

(2) Anything done under the Close Corporations Act and which could have been done under a corresponding provision of this Chapter is deemed to have been done under that corresponding provision.

(3) A matter pending before the Registrar under the Close Corporations Act before the date of commencement and not fully addressed at that time must be concluded by the Registrar in terms of that Act, despite its repeal

(4) The Close Corporations Act continues to apply to any winding-up or liquidation of a closely held company proceedings commenced before the date of commencement of this Chapter, as if that Act had not been repealed.

(5) Any proceedings in any court in terms of the Close Corporations Act immediately before the commencement date are continued in terms of that Act as if it had not been repealed.

(6) Any order of a court in terms of the Close Corporations Act and in force immediately before the commencement date continues to have the same force and effect as if that Act had not been repealed, subject to any further order of the court.

**SCHEDULE 3: Requirements Concerning Offering of Securities**

1. Interpretation

For the purposes of this Schedule, unless the context indicates otherwise –

(a) in respect of any property hired or proposed to be hired by a company –

(i) “vendor” includes the lessor; and

(ii) “purchase money” include the consideration for the lease;

(b) “property” includes movable and immovable property, and securities, but does not include any property if its purchase price is not material; and

(c) “vendor” includes any person who, directly or indirectly, sells or otherwise disposes of any property to a company.

2. Application of Schedule

(1) A report by an auditor required by Part B or C of this Schedule must not be made by any auditor who is -

(a) a director, officer or employee, or a partner of or in the employment of a director, officer or employee of the company or of any other company in the group of companies; or

(b) related to a person contemplated in paragraph (a).

(2) If a company has been carrying on business for less than 5 years, or if a business undertaking has been carried on for less than 5 years, the annual financial statements of the company or business undertaking required by this Schedule must be provided only for the number of financial years that the company has existed, or the business has been carried on.

(3) To the extent that a person making a report required by Part B or C considers it necessary to adjust the amount of profits or losses or assets and liabilities dealt with by the report, that person may either –

(a) make those adjustments and indicate that they have been made; or

(b) include a note setting out the adjustments the person considers ought to be made.

3. Rights offers

(1) A company desiring to issue a letter of allocation must file -

(a) a copy of -

(i) the letter of allocation for registration;

(ii) any document required in the circumstances by section 99 (4);

each certified by not less than 2 directors of the company, as a true copy of the original approved by the relevant exchange;

(b) any agreement referred to in a document contemplated in paragraph (a), with a translation in an official language, if the agreement is not in an official language; and

(c) the prescribed fee.

(2) Upon registering the documents referred to in sub item (1), the Commission must give notice of the registration to the company concerned or the person who submitted them on behalf of the company.

(3) Every letter of allocation that is issued must-

(a) state on the face of it that a copy of it, together with copies of all other documents referred to in sub item (1), have been registered as required by this Item; and

(b) be accompanied by a copy of every document referred to in sub item (1).

(4) Sub item (3)(b) does not apply to any letter of allocation issued in connection with a renunciation of part of the rights to subscribe in terms of the rights offer.

(5) The provisions of sections 95 (5) and (6), 100, 102, 104, 105 and 106 and of Item 5, each read with the changes required by the context, apply to a rights offer and all documents issued in connection with it.

4. General requirements for a prospectus

(1) As far as possible the general matter of a prospectus must be presented in narrative form and statistical matter in tabular form.

(2) The information required by this Act to be stated in a prospectus must -

(a) be set out in print or type;

(b) be not less conspicuous than that in which any additional matter is printed or typed; and

(c) be set out in separate paragraphs under the headings -

(i) included in Part B of this Schedule, unless sub-paragraph (ii) applies to the prospectus; or

(ii) contemplated in Part C of this Schedule, if the intended offer -

(aa) relates to unlisted securities that are in all respects uniform with previously issued securities of the same company; and

(bb) is made only to existing holders of that company securities, with a right to renounce in favour of other persons.

(3) A prospectus must deal with each of the applicable Items of Part B or C of this Schedule under its Item number and heading.

(4) The last paragraph of the prospectus, under the heading - 'Paragraphs of Schedule 3 which are not applicable' – must be a list setting out the numbers of any Items of Part B or C of this Schedule that are not applicable.

(5) Every prospectus issued must -

(a) state on its face that it is a copy of a registered prospectus; and

(b) specify or refer to statements included in it specifying any documents required by this Act to be endorsed on or attached to or to accompany a prospectus when it is filed.

5. Signing, date and date of issue, of prospectus

(1) A prospectus in respect of an offer for the subscription of shares of a company must be signed by every person named in it as a director of the company or by an agent authorised in writing by a director to sign on behalf of that director.

(2) A prospectus in respect of any other offer must be signed by -

(a) every person making the offer, or by an agent authorised by that person in writing to sign on their behalf;

(b) if the person making the offer is a company or firm –

(i) by 2 directors of the company, or if it has only 1 director , by that director;

(ii) by not less than one-half of the partners in the firm; or

(iii) by an agent authorised by any director or partner in writing to sign on their behalf.

(3) If a prospectus has been signed by or on behalf of directors of a company or partners in a firm as provided in subsection (2), every director of that company or partner in that firm is deemed to have authorised the issue of the prospectus irrespective whether that director or partner signed it, unless it is proven that it was issued without the director or partner’s knowledge, authority or consent.

(4) Every signature to a prospectus must be dated, and the latest of those dates is deemed to be the date of the prospectus.

PART B – ITEMS REQUIRED TO BE INCLUDED IN A PROSPECTUS

In terms of Item 4 (c)(i)

I – Information about the company whose securities are being offered

6. Name, address and incorporation

(1) The name of the company.

(2) The address of the company’s registered office and the office of its transfer agent, if any.

(3) The date of incorporation of the company.

(4) If the company is a foreign company –

(a) the name of the country in which it was incorporated; and

(b) the date and registration number of the company’s registration –

(i) as an external company in terms of section 23, if it carries on business within the Republic; or

(ii) as a foreign company, in terms of section 99 (1)(b).

(5) If the company is a subsidiary –

(a) the name of its holding company; and

(b) the address of the registered office of its holding company.

7. Directors and other office holders

(1) The names, occupations and addresses of the directors and proposed directors of the company (specifying any who hold, or are proposed to hold, a prescribed office in the company), and their nationalities, if not South African.

(2) The term of office for which any director has been or is to be appointed, the manner in and terms on which any proposed director will be appointed and particulars of any right held by any person relating to the appointment of any director.

(3) Particulars of any remuneration or proposed remuneration of the directors or proposed directors in their capacity as directors, managing directors or in any other capacity, whether determined by the Memorandum of Incorporation or not, by the company and any subsidiary.

(4) If the business of the company or its subsidiary or any part thereof is managed or is proposed to be managed by a third party under a contract, the name and address (or the address of its registered office, if a company) of the third party and a description of the business so managed or to be managed.

(5) The borrowing powers of the company and its subsidiary exercisable by the directors and the manner in which that borrowing powers may be varied.

(6) The name and address of the company’s -

(a) auditor;

(b) attorney, banker, stockbroker, trustee, if any, and underwriter, if any; and

(c) secretary, if any, together with the secretary’s professional qualifications.

8. History, state of affairs and prospects of company

(1) The general history of the company and its subsidiary stating, among other things -

(a) the length of time during which the business of the company and of any subsidiary has been carried on; and

(b) the date on which the company became a public company.

(2) A general description of the business carried on or to be carried on by the company and its subsidiary and, if the company or its subsidiary carries on or proposes to carry on, 2 or more businesses that are material having regard to the profits or losses, assets employed or to be employed or any other factor, information as to the relative importance of each such business.

(3) Details of any change in the business of the company, if material, during the past 5 years.

(4) A general description giving a fair presentation of the state of affairs of the company and its subsidiary, including-

(a) the name, date and place of incorporation and the issued or stated capital of its subsidiary, together with details of the shares held by the holding company, and the main business of its subsidiary and the date on which it became a subsidiary; and

(b) if material, a statement as to the estimated commitments of the company and its subsidiary for the purchase, construction or installation of buildings, plant or machinery, the estimated date of completion and the commencement of the operational use thereof.

(5) Brief particulars of any alteration of capital during the preceding 3 years.

(6) A summary of any offers of securities of the company to the public for subscription or sale during the preceding 3 years, the prices at which those securities were offered, the number of securities allotted in pursuance thereof and whether issued to all shareholders in proportion to their shareholdings and, if not, to whom issued, the reasons why the shares were not so issued and the basis of allotment.

(7) The situation, area and tenure of the principal immovable property held or occupied by the company and its subsidiary including, in the case of leasehold property, the rental and unexpired term of the lease.

(8) For the company and each subsidiary, in respect of each of the preceding 5 years, particulars of-

(a) the profits or losses before and after tax;

(b) the dividends paid;

(c) the dividends paid in cents per share; and

(d) the dividend cover for each year;

or, if the company is a holding company, the same information, with any changes required by the context, for the company in consolidated form.

(9) The opinion of the directors, stating the grounds therefor, as to the prospects of the business of the company and of its subsidiary and of any subsidiary or business undertaking to be acquired.

9. Share capital of the company

(1) Particulars of the share capital -

(a) the stated capital, the number of shares authorised, and issued, and the classes of shares;

(b) a description of the respective preferential conversion and exchange rights, rights to dividends, profits or capital of each class, including redemption rights and rights on liquidation or distribution of capital assets; and

(c) the number of founders' and management or deferred shares, if any, and the special rights attaching to those shares.

10. Loans

(1) Details of material loans, including debentures, to the company and to its subsidiary at the date of the prospectus, stating-

(a) whether each such loans is secured or unsecured;

(b) the names of the lenders if not debenture-holders;

(c) the amount, terms and conditions of repayment;

(d) the rates of interest on each loan; and

(e) details of the security, if any.

(2) Details of material loans by the company or by its subsidiary, other than in the ordinary course of business, at the date of the prospectus, stating-

(a) the date of the loan;

(b) the person to whom made;

(c) the rate of interest;

(d) if the interest is in arrear, the last date on which it was paid and the extent of the arrears;

(e) the period of the loan;

(f) the security held;

(g) the value of that security and the method of valuation;

(h) if the loan is unsecured, the reasons therefor; and

(i) if the loan was made to another company, the names and addresses of the directors of that company.

11. Options or preferential rights in respect of shares

(1) The substance of any agreement or proposed agreement whereby any option or preferential right of any kind was or is proposed to be given to any person to subscribe for any shares of the company or its subsidiary, giving the number and description of any such shares, including, in regard to the option or right, particulars of-

(a) the period during which it is exercisable;

(b) the price to be paid for shares subscribed for under it;

(c) the consideration given or to be given for it;

(d) the names and addresses of the persons to whom it was given, other than to existing shareholders as such or to employees under a bona fide staff option scheme;

(e) if given to existing shareholders as such, material particulars thereof; and

(f) any other material fact or circumstance concerning the granting of such option or right.

(2) For the purpose of this Item, “subscribing for shares” includes acquiring them from a person to whom they were allotted, or were agreed to be allotted, with a view to that person offering them for sale.

12. Shares issued or to be issued otherwise than for cash

The number of shares that, within the preceding 2 years, were issued or were agreed to be issued by the company or its subsidiary to any person, otherwise than for cash, and the consideration for which those shares were issued or were agreed to be issued, and the value of the property, if any, acquired or to be acquired.

13. Property acquired or to be acquired

(1) Particulars of any immovable property or other property of the nature of fixed assets purchased or acquired by the company or its subsidiary or proposed to be purchased or acquired, the purchase price of which is to be defrayed in whole or in part out of the proceeds of the issue, or is to be or was within the preceding 2 years paid in whole or in part in securities of the company or its subsidiary, or out of the funds of the company or its subsidiary, whether in cash or shares, or the purchase or acquisition of which has not been completed at the date of the prospectus, and the nature of the title or interest therein acquired or to be acquired by the company or its subsidiary.

(2) Details of the consideration given, or to be given, for the acquisition of any such property, specifying the value payable for goodwill, if any.

(3) The names and addresses of the vendors and the consideration received or to be received by each.

(4) Brief particulars of any transaction relating to the property completed within the preceding 2 years in which any vendor of the property to the company or its subsidiary or any person who is or was at the time of the transaction a promoter or a director or proposed director of the company had any interest, direct or indirect: Provided that where the vendors or any of them are a partnership, the members of the partnership shall not be treated as separate vendors.

(5) Particulars of the price at which any such property which is immovable property or an option over immovable property was purchased or sold within 3 years immediately before the date of the prospectus where any promoter or director had any interest, directly or indirectly, in such transaction or where any promoter or director was a member of a partnership, syndicate or other association of persons which had such an interest, with the dates of any such purchases and sales and the names of any such promoter or director, and the nature and extent of his interest; for the purposes of this subparagraph, shares of a company, the major asset of which is immovable property, shall be deemed to be immovable property.

14. Amounts paid or payable to promoters

The amount paid within the preceding 2 years or proposed to be paid to any promoter, or to any partnership, syndicate or other association of which that promoter is or was a member, and the consideration for that payment, and any other benefit given to the promoter, partnership, syndicate or other association within the same period or proposed to be given, and the consideration for the giving of that benefit, and the promoter’s name and address.

15. Commissions paid or payable in respect of underwriting

The amount, if any, or the nature and extent of any consideration, paid within the preceding 2 years, or payable as commission to any person (including commission so paid or payable to any sub-underwriter who is a promoter or director or officer of the company) for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions for any shares of the company, the name, occupation and address of each such person, particulars of the amounts underwritten or sub-underwritten by each and the rate of the commission payable for such underwriting or sub-underwriting agreement with such person; and if such person is a company, the names of the directors of such company and the nature and extent of any interest, direct or indirect, in such company of any promoter, director or officer of the company in respect of which the prospectus is issued.

16. Preliminary expenses and issue expenses

The amount or estimated amount of preliminary expenses, if incurred within 2 years of the date of the prospectus, and the persons by whom any of those expenses were paid or are payable, and the amount or estimated amount of the expenses of the issue and the persons by whom any of those expenses were paid or are payable.

17. Material contracts

(1) The dates and the nature of, and the parties to, every material agreement entered into by the company or its subsidiary, not being an agreement entered into in the ordinary course of the business carried on or proposed to be carried on by the company or its subsidiary or an agreement entered into more than 2 years before the date of the prospectus, and a reasonable time and place at which any such agreement or a copy thereof may be inspected.

(2) A brief summary of existing contracts or proposed contracts, either written or oral, relating to the directors' and managerial remuneration, royalties, and secretarial and technical fees payable by the company and its subsidiary.

18. Interest of directors and promoters

(1) Full particulars of the nature and extent of any material interest, direct or indirect, of every director or promoter in the promotion of the company and in any property proposed to be acquired by the company out of the proceeds of the issue, and where the interest of such director or promoter consists in being a member of a partnership, company, syndicate or other association of persons, the nature and extent of the interest of such partnership, company, syndicate or other association, and the nature and extent of such director's or promoter's interest in the partnership, company, syndicate or other association.

(2) Full particulars of the nature and extent of any material interest, direct or indirect, of every director or promoter in the property acquired or proposed to be acquired by the company or its subsidiary during the 3 years preceding the date of the prospectus.

(3) A statement of all sums paid or agreed to be paid within the 3 years preceding the date of the prospectus to any director or to any company in which he is beneficially interested or of which he is a director, or to any partnership, syndicate or other association of which he is a member, in cash or shares or otherwise, by any person either to induce him to become or to qualify him as a director, or otherwise for services rendered by him or by the company, partnership, syndicate or other association in connection with the promotion or formation of the company.

II – Information about the offered securities

19. Purpose of the offer

A statement of the purpose of the offer giving reasons why it is considered necessary for the company to raise the capital offered, and if the capital offered is more than the amount of the minimum subscription referred to in Item 28, the reasons for the difference between the capital offered and that minimum subscription.

20. Time and date of the opening and of the closing of the offer

The time and date of the opening and of the closing of the subscription lists or of the offer.

21. Particulars of the offer

(1) Particulars of the securities offered, including-

(a) the class of securities;

(b) the number of securities offered;

(c) the issue price;

(d) if any securities are secured, particulars of the security, specifying the property comprising the security and the nature of the title to the property; and

(e) other conditions of the offer.

(2) If, during the 5 years immediately preceding the date of the prospectus, the company issued any securities, the prospectus must include a statement setting out -

(a) the dates of issue of those securities;

(b) the price at which they were issued; and

(c) and the reasons for any differentiation between those prices and the issue price of the securities being offered by the prospectus.

(3) If, during the 5 years immediately preceding the effective date, the company issued any securities for a premium, the prosepectus must include a statement setting out -

(a) the dates of issue of those securities;

(b) the reasons for any such premium;

(c) the reasons for any differentiation between the amounts of any such premium; and

(d) how any such premium was be dealt with.

22. Minimum subscription

(1) The minimum amount which, in the opinion of the directors, must be raised by the issue of the shares in order to provide the sums, or, if any part thereof is to be defrayed in any other manner, the balance of the sums required to be provided, in respect of each of the following matters:

(a) The purchase price of any property purchased or to be purchased, if any part of the purchase price is to be defrayed out of the proceeds of the issue;

(b) any preliminary expenses payable by the company, and any commission payable to any person in consideration of his agreeing to subscribe for, or of his procuring or agreeing to procure subscriptions for, any shares of the company;

(c) the repayment of any moneys borrowed by the company and its subsidiary in respect of any of the foregoing matters;

(d) working capital, stating the specific purposes for which it is to be used and the estimated amount required for each such purpose;

(e) any other expenditure, stating the nature and purposes thereof and the estimated amount in each case; and

(f) the amounts to be provided in respect of the matters aforesaid otherwise than out of the proceeds of the issue, and the sources from which those amounts are to be provided.

III – Statements and Reports relating to the offer

23. Statement as to adequacy of capital

A statement by the directors of the company either –

(a) that, in their opinion, the issued capital of the company (including the amount to be raised in pursuance of this offer) is adequate for the purposes of the business of the company and of its subsidiary, if any; or

(b) if they are of the opinion that the capital of the company as contemplated in paragraph (a) is inadequate, setting out the extent of the inadequacy and the manner in which, and the sources from which, the company and its subsidiary are financed, or are proposed to be financed.

24. Report by directors as to material changes

A report by the directors of the company setting out any material change in the assets or liabilities of the company or any subsidiary which may have taken place between the last date to which the annual financial statements of the company or any subsidiary, as the case may be, were made out, and the date of the prospectus.

25. Statement as to listing on stock exchange

A statement as to whether or not an application has been made for a listing of the shares offered and, if so, the name of the relevant exchange.

26. Report by auditor of company

(1) A report by the auditor of the company with respect to-

(a) profits or losses and assets and liabilities, in accordance with sub-Items (2) or (3), as applicable; and

(b) the rates of the dividends, if any, paid by the company in respect of each class of securities of the company in respect of each of the 5 financial years immediately preceding the issue of the prospectus, giving particulars of –

(i) each class of shares on which dividends were paid; and

(ii) the cases in which no dividends were paid in respect of a particular class of shares in respect of any of those years; and

(c) if no annual financial statements were made out by or for the company in respect of any part of the 5 years ending on a date 3 months before the issue of the prospectus, a statement of that fact.

(2) If the company has no subsidiary, the report -

(a) in regard to profits or losses, must deal with the profits or losses of the company in respect of each of the 5 financial years immediately preceding the issue of the prospectus; and

(b) in regard to assets and liabilities, must deal with the assets and liabilities of the company at the last date to which the annual financial statements of the company were made out.

(3) If the company has a subsidiary, the report -

(a) in regard to profits or losses, must deal separately with the company's profits or losses as provided by sub-Item (2), and in addition, must deal-

(i) as a whole with the combined profits or losses of all subsidiaries, as far as they concern holders of the company’s securities; or

(ii) individually with the profits or losses of each subsidiary, so far as they concern holders of the company’s securities; or

(iii) as a whole with the consolidated profits or losses of the group of companies so far as concerns holders of the company’s securities; and

(b) in regard to assets and liabilities, must deal separately with the company's assets and liabilities as provided by sub-Item (2) and, in addition, must deal-

(i) as a whole with the combined assets and liabilities of all subsidiaries, indicating the interest therein of holders of the company’s securities, other than the company; or

(ii) individually with the assets and liabilities of each subsidiary, indicating the interests therein of shareholders other than the company; or

(iii) as a whole with the consolidated assets and liabilities of the company and all subsidiaries, indicating the interests therein of shareholders other than the company;

(c) if a subsidiary incurred losses, must state the amounts of those losses and the manner in which provision was made for them.

(4) The auditor must be satisfied, as far as reasonably practicable, that, except as stated in the report-

(a) the debtors and creditors do not include any accounts other than trade accounts;

(b) the provisions for doubtful debts are adequate;

(c) adequate provision has been made for obsolete, damaged or defective goods, and for supplies purchased at prices in excess of current market prices;

(d) intercompany profits in the group have been eliminated;

(e) there have been no material changes in the assets and liabilities of the company and of any subsidiary since the date of the last annual financial statements.

27. Report by auditor where business undertaking to be acquired

If the proceeds, or any part of the proceeds, of the issue of the shares or any other funds are to be applied directly or indirectly in the purchase of any business undertaking, a report made by an auditor named in the prospectus on-

(a) the profits or losses of the business undertaking in respect of each of the 3 financial years preceding the date of the prospectus; and

(b) the assets and liabilities of the business undertaking at the last date to which the financial statements of the business undertaking were made out.

28. Report by auditor where company will acquire a subsidiary

(1) If the proceeds or any part of the proceeds of the issue of the shares are to be applied, directly or indirectly, in any manner resulting in the acquisition by the company or its subsidiary of securities of any other juristic person by reason of which or of anything to be done in consequence thereof or in connection therewith, that juristic person will become a subsidiary of the company, a report made by an auditor named in the prospectus on-

(a) the profits or losses of the other juristic person in respect of each of the 3 financial years preceding the date of the prospectus; and

(b) the assets and liabilities of the other juristic person at the last date to which the annual financial statements of the juristic person were made out.

(2) The report must-

(a) indicate how the profits or losses of the other juristic person dealt with by the report would, in respect of the shares to be acquired, have concerned shareholders of the company and what allowance would have fallen to be made, in respect of assets and liabilities so dealt with, for holders of other shares, if the company had at all material times held the shares to be acquired; and

(b) where the other juristic person has a subsidiary, or, had it been a company in terms of the Act, would have had a subsidiary, deal with the profits or losses and the assets and liabilities of the juristic person and its subsidiary and such other juristic person as would have been its subsidiary if it had been a company in terms of the Act, in the manner provided by paragraph 25 (3) in relation to the company and its subsidiary.

29. Requirements for prospectus of mining company

(1) In this Item, “mining company” includes a company that carries on or proposes to carry on mining, development or prospecting for or exploitation of any mineral resources, or that acquires or proposes to acquire any mineral rights thereto or options thereon.

(2) A report by an expert containing information appropriate to the subject matter of the prospectus and including, if applicable-

(a) a statement describing briefly the geological characteristics of the occurrence;

(b) details of previous operations and production relevant to the workability and pay ability of the proposed mining operations;

(c) survey, drilling and borehole results;

(d) ore reserves;

(e) an interpretation of the information available with reference to the viability of the project.

(3) Material information not otherwise required by this Schedule relating to the mineral rights, or any other right to mine, mining title, including any Government mining lease, and immovable property available for the mine, including, if applicable-

(a) whether the aforesaid is owned by the company, or in process of transfer or is under option or lease;

(b) the name of the farm on and district in which each is situated;

(c) the area of each;

(d) the aggregate price or other consideration for which they were or are to be acquired;

(e) relevant details of any option as aforesaid.

(4) A statement by the directors of the plans for reaching the production stage or for increasing output, including information regarding-

(a) shaft sinking and development;

(b) capital expenditure for each material stage of development.

PART C – ITEMS REQUIRED TO BE INCLUDED IN A PROSPECTUS

In terms of Item 4 (c)(ii)

30. Application of Part B Items

If, as contemplated in Item 4 (c) (ii), an intended offer -

(a) relates to unlisted securities that are in all respects uniform with previously issued securities of the same company; and

(b) is made only to existing holders of that company securities, with a right to renounce in favour of other persons

the requirements for a prospectus, as set out in Part B, listed in the first column of the following table, apply to the extent and subject to the alterations listed in the second column.

Item Extent to which the Item applies, or alterations to the Item

6 Only sub-items (1), (2) and (4) apply.

7 Only sub-items (1) and (6)(c) apply.

8 Only sub item (2) applies, and it applies only if there has been a material change in the nature of the company’s activities since it last issued an annual financial statement.

9 All of the Item applies

10 None of the Item applies

11 All of the Item applies

12 None of the Item applies

13 None of the Item applies

14 None of the Item applies

15 All of the Item applies

16 None of the Item applies

17 All of the Item applies

18 All of the Item applies, but without reference to any promoter.

19 The following provision is substituted for the Item:

“A statement of the purpose of the offer, giving reasons why it is considerd necessary to raise the capital offered.”

20 All of the Item applies.

21 All of the Item applies.

22 None of the Item applies.

23 None of the Item applies.

24 All of the Item applies.

25 None of the Item applies.

26 None of the Item applies.

27 All of the Item applies.

28 All of the Item applies.

29 None of the Item applies.

31. Additional information required

(1) If it is the intention to acquire a business undertaking or property, the prospectus must include a brief history of that business undertaking or property, including –

(a) particulars of each business undertaking or property purchased or acquired, or proposed to be purchased or acquired by the company or any subsidiary of the company, if any part of the purchase price of that business undertaking or property is to be defrayed out of the proceeds of the issue;

(b) the amount, if any, paid or payable as purchase money in cash or securities for any such business undertaking or property, specifying the amount, if any, paid for goodwill;

(c) the name and address of the vendor of the business undertaking or property; and

(d) the amount payable in cash or securities to every vendor.

(2) If the offer is not being underwritten, the prospectus must include a statement by the directors setting out the manner in which, and the sources from which, any shortfall in the amount proposed to be raised by means of the offer is to be financed.

**SCHEDULE 4: Conversion of Close Corporations to Closely Held Companies**

1. Notice of conversion of close corporation

2. Effect of conversion on legal status

3. Automatic conversion of close corporations

Conversion of Close Corporations to Closely Held Companies

1. Notice of conversion of close corporation

(1) A close corporation may file a notice of conversion in the prescribed manner and form (free of charge), at any time during the first year after the promulgation of this Act.

(2) A notice of conversion must be accompanied by –

(a) a certified copy of a special resolution approving the conversion of the close corporation; and

(b) either a new Memorandum of Incorporation, or an amendment to the company’s Memorandum of Incorporation, consistent with the requirements of this Act, in either case.

(3) Section 56, read with the changes required by the context, applies with respect to the filing of a notice of conversion, as if it were a Notice of Incorporation in terms of this Act.

(4) Upon conversion of a close corporation in terms of this Schedule the Registrar must -

(a) cancel the registration of that close corporation in terms of the Close Corporations Act, 1988 (Act No. 26 of 1988); and

(b) give notice in the Gazette of the conversion of a close corporation into a closely held company.

2. Effect of conversion on legal status

(1) Every member of a close corporation converted under this Schedule is entitled to become a member or shareholder of the closely held company resulting from that conversion, but the shareholding to be held in the company by the shareholders individually need not necessarily be in proportion to the members' interests as stated in the founding statement of the close corporation concerned.

(2) On the registration of a closely held company converted from a close corporation -

(a) the juristic person that existed as a close corporation before the conversion continues to exist as a juristic person, but in the form of a closely held company;

(b) all the assets, liabilities, rights and obligations of the close corporation vest in the closely held company;

(c) any legal proceedings instituted before the registration by or against the corporation, may be continued by or against the closely held company, and any other thing done by or in respect of the close corporation, is deemed to have been done by or in respect of the closely held company;

(d) any enforcement measures that could have been commenced with respect to the close corporation in terms of the Close Corporations Act, 1988 (Act No. 26 of 1988) for conduct occurring before the date of registration, may be brought against the closely held company on the same basis, as if the conversion had not occurred; and

(e) any liability of a member of the corporation for the corporation’s debts, that had arisen in terms of the Close Corporations Act, 1988 (Act No. 26 of 1988) and existed immediately before the date of registration, survives the conversion and continues as a liability of that person, as if the conversion had not occurred.

3. Automatic conversion of close corporations

(1) On the second anniversary of the promulgation of the Corporate Laws Act, any close corporation still on the Companies Register that has not been converted into a closely held company shall automatically be converted into a closely held company and –

(a) the juristic person that existed as a close corporation before the conversion continues to exist as a juristic person, but in the form of a closely held company;

(b) all the assets, liabilities, rights and obligations of the close corporation vest in the closely held company so converted;

(c) any legal proceedings instituted before the registration by or against the corporation, may be continued by or against the closely held company, and any other thing done by or in respect of the close corporation, is deemed to have been done by or in respect of the closely held company;

(d) any enforcement measures that could have been commenced with respect to the close corporation in terms of the Close Corporations Act, 1988 (Act No. 26 of 1988) for conduct occurring before the date of registration, may be brought against the closely held company on the same basis, as if the conversion had not occurred; and

(e) any liability of a member of the corporation for the corporation’s debts, that had arisen in terms of the Close Corporations Act, 1988 (Act No. 26 of 1988) and existed immediately before the date of registration, survives the conversion and continues as a liability of that person, as if the conversion had not occurred.

**SCHEDULE 5: Consequential Amendments**

1. Interpretation

2. Repeal of the Close Corporations Act, 1988

3. Proscription of incorporation of close corporations

4. Legal status of close corporations

5. Rescue of financially distressed close corporations and closely held companies

6. Administration and enforcement of Schedule 2 concerning Closely Held Companies

1. Interpretation

In this Schedule, “this Act or “this principal Act” means the Close Corporations Act, 1988 (Act No. 26 of 1988).

2. Repeal of the Close Corporations Act, 1988

On the coming into operation of Item 3(1) of Schedule 4 to the Corporate Laws Act, 2023, this Act shall be repealed and be replaced by Schedule 2 to the Corporate Laws Act, 2023.

3. Limitation of period to incorporate close corporations or convert companies

(1) At any time before Item 3(1) of Schedule 4 of the Corporate Laws Act, 2023, comes into operation, any 1 or more persons, not exceeding ten, who qualify for membership of a close corporation in terms of this Act, may form a close corporation and secure its incorporation by complying with the requirements of this Act in respect of the registration of its founding statement referred to in section 12.

(2) Section 13 of the principal Act is replaced by the following:

“13. If a founding statement referred to in section 12 complying with the requirements of this Act is lodged with the Registrar in the manner prescribed at any time before Item 3(1) of Schedule 4 of the Corporate Laws Act comes into operation, and if the business to be carried on by the corporation is lawful, the Registrar shall upon payment of the prescribed fee register such statement in his or her registers and shall give notice of the registration in the Gazette.

(3) Section 27 of the principal Act is repealed with effect from the date on which Item 3(1) of Schedule 4 of the Corporate Laws Act came into operation.

4. Legal status of close corporations

Section 2 of the principal Act is amended by the substitution for subsection (2) of the following subsection:

“(2) A corporation formed in accordance with the provisions of this Act is on registration in terms of those provisions a juristic person and continues, subject to the provisions of this Act, to exist as a juristic person notwithstanding changes in its membership, or its conversion to a company in terms of Schedule 4 of the Corporate Laws Act, until it is [in terms of this Act] deregistered, dissolved or automatically converted in accordance with the provisions of Item 3(1) of Schedule 4 to the Corporate Laws Act.

5. Rescue of financially distressed close corporations

The principal Act is amended by the insertion immediately following subsection (1) of section 66 of the following provision:

“(1A) The provisions of Chapter 11 of the Corporate Laws Act, read with the changes required by the context, apply to a corporation, but any reference in that chapter to -–

(a) a company must be regarded as a reference to a corporation; or

(b) a shareholder of a company, or the holder of securities issued by a company, must be read as a reference to a member of a corporation.”

6. Administration and enforcement of Schedule 2 of the Corporate Laws Act concerning Closely Held Companies

(1) In accordance with the provisions of the Corporate Laws Act, BIPA –

(a) may exercise the powers and must perform the duties assigned to the Registrar by this Act; and

(b) is, in accordance with the provisions of the Business and Intellectual Property Authority Act, 2016 (Act No. 8 of 2016), responsible for the administration of the Registration Office.” ;

SCHEDULE 6: Legislation to be Enforced by Business and Intellectual Property Authority

Legislation to be Enforced by BIPA

BIPA is responsible for the administration and enforcement of the following Acts:

Corporate Laws Act, 2024 (Act No\_\_\_of 2023)

Copyright and Neighbouring Rights Protection Act, 1994 (Act No. 6 of 1994)

Industrial Property Act, 2012 (Act No. 1 of 2012)

Business and Intellectual Property Authority, 2016 (Act 8 of 2016)

**SCHEDULE 7: Transitional Arrangements**

1. Interpretation

2. Continuation of pre-existing companies and introduction of closely held companies

3. Pending filings

4. Memorandum of Incorporation for closely held companies

5. Pre-incorporation contracts

6. Par value of shares, share premiums, treasury shares, capital accounts and share certificates

7. Company finance and governance

8. Company names and name reservations

9. Adaptation of Insolvency Bill 2019 to Companies

10. Preservation and continuation of court proceedings and orders

11. General preservation of regulations, rights, duties, notices and other instruments

12. Transition of regulatory agencies

13. Continued investigation and enforcement of previous Act

14. Regulations

Transitional Arrangements

1. Interpretation

(1) In this Schedule—

(a) “general effective date” means the date on which the Corporate Laws Act came into operation;

(b) "previous Act" means the Companies Act, 2004 (Act No. 28 of 2004).

(2) A reference in this Schedule—

(a) to a section by number, is a reference to the corresponding section of—

(i) the previous Act, if the number is followed by the words “of the previous Act”; or

(ii) this Act, in any other case; or

(b) to an item or a sub-item by number is a reference to the corresponding item or sub-item of this Schedule.

(3) Despite any other provision of this Act –

(a) the Minister, by notice in the Gazette, may determine a date on which BIPA may assume the exercise of any particular function or power assigned to it in terms of the Regulations to the Corporate Laws Act; and

(b) until a date determined by the Minister in terms of paragraph (a) –

(i) BIPA may not perform that particular function or exercise that particular power; and

(ii) the Minister has the authority to, and bears the responsibility of, exercising any such function or performing any such power assigned by this Actto BIPA.

2. Continuation of pre-existing companies

(1) As of the general effective date, every pre-existing company that was, immediately before that date, –

(a) incorporated in terms of the Companies Act, 2004 (Act No. 28 of 2004); or

(b) recognised as an “existing company” in terms of the Companies Act, 1973 (Act No. 61 of 1973)

continues to exist as a company, as if it had been incorporated and registered in terms of this Act, with the same name and registration number previously assigned to it.

3. Pending filings

(1) Any matter filed with the Registrar under the Companies Act, 2004 (Act No. 28 of 2004), before the effective date and not fully addressed at that time, must be concluded by the Registrar in terms of that Act, despite its repeal.

(2) Any conversion of a company to a close corporation in terms of section 27 of the Close Corporations Act 1988 (Act No. 26 of 1988) filed with the Registrar before the effective date and not fully addressed at that time must be concluded by the Registrar in terms of that Act, despite the repeal of that section.

(3) A company that is incorporated and registered in terms of sub-item (1) is deemed to -

(a) have been registered in terms of the previous Act; and

(b) be a pre-existing company for all purposes of this Act.

4. Memorandum of Incorporation for closely held companies

(1) Every pre-existing company incorporated in terms of section 21 of the previous Act is deemed to have amended its memorandum and articles of association as of the effective date to expressly state that it is a non-profit company.

(2) At any time within 2 years immediately following the general effective date, a pre-existing close corporation or a closely held company may file, without charge -

(a) an amendment to its Memorandum of Incorporation to bring it in harmony with this Act; and

(b) if necessary, a notice of name change and copy of a special resolution contemplated in section 68, to alter its name to meet the requirements of this Act.

(3) If, before the general effective date, a pre-existing company had adopted any binding provisions, under whatever style or title, comparable in purpose and effect to the association agreement contemplated in section 44 of the Close Corporations Act or Schedule 2 to the Corporate Laws Act, those provisions continue to have the same force and effect -

(a) as of the general effective date, for a period of 2 years, or until changed by the company; and

(b) after the 2 year period, to the extent that they are consistent with this Act.

(4) During the period of 2 years immediately following the general effective date –

(a) if there is a conflict between a provision of this Act, and a provision of a pre-existing company’s Memorandum of Incorporation, the latter provision prevails, except to the extent that this Schedule provides otherwise; and

(b) despite Chapter 2, until a pre-existing company has filed an amendment contemplated in sub-item (2), neither BIPA nor the ad-hoc Panel of Experts on Takeover Regulation may issue a compliance notice to that company with respect to conduct that is -

(i) inconsistent with this Act; but

(ii) consistent with that company’s memorandum and/or articles of association of the company.

5. Pre-incorporation contracts

Section 60 does not apply with respect to a pre-existing company.

6. Par value of shares, treasury shares, capital accounts and share certificates

(1) Section 96 (2) does not apply to a banking institution, as defined in the Banking Institutions Act, 1998 (Act No. 2 of 1998 until a date declared by the Minister, after consulting the member of the Cabinet responsible for national financial matters.

(2) Despite section 96 (2) any shares of a pre-existing company that have been issued with a nominal or par value, and are held by a shareholder immediately before the effective date, continue to have the nominal or par value assigned to them when issued, subject to any regulations made in terms of sub-item (3).

(3) The Minister, in consultation with the member of the Cabinet responsible for national financial matters, must make regulations, to take effect as of the general effective date, providing for the transitional status and conversion of any nominal or par value shares, treasury shares, and capital accounts of a pre-existing company, but any such regulations must -

(a) preserve the rights of shares holders associated with such shares, as at the effective date, to the extent doing so is compatible with the purposes of this Item; or

(b) provide for the company to compensate its shareholders for the loss of any such rights.

(4) A failure of any share certificate issued by a pre-existing company to satisfy the requirements of section 110 –

(a) is not a contravention of that section; and

(b) does not invalidate that share certificate.

7. Company finance and governance

(1) A person holding office as a director, prescribed officer, secretary or auditor of a pre-existing company immediately before the effective date, continues to hold that office as of the effective date, subject to the company’s memorandum and articles of association, and this Act.

(2) A person contemplated in sub-item (1) who, in terms of this Act, is ineligible to be, or disqualified from being a director, secretary or auditor, is deemed to have resigned that office as of the effective date.

(3) As of the general effective date, a pre-existing company is deemed to have a number of vacancies on the board equal to the difference between –

(a) the minimum number of directors required by or in terms of this Act; and

(b) the actual number of directors of that pre-existing company immediately before the general effective date, if that number is less than the minimum referred to in paragraph (a).

(4) A vacancy in the office of director, secretary or auditor of a pre-existing company as of the effective date, irrespective whether arising by operation of sub-item (2) or (3), or otherwise, is to be filled in accordance with this Act.

(5) Despite anything to the contrary in a company’s memorandum and/or articles of association, the provisions of this Act respecting -

(a) the duties, conduct and liability of directors apply to every director of a pre-existing company as of the effective date;

(b) rights in terms of this Act of shareholders to receive any notice or have access to any information apply as from the effective date to every pre-existing company;

(c) meetings of shareholders or directors, and adoption of resolutions apply as from the effective date to every pre-existing company; and

(d) Chapter 9 applies as from the effective date to every pre-existing company, except to the extent it is exempted by or in terms of that Chapter.

(6) Approval of any distribution, financial assistance, insider share issues, or options, are subject to this Act, even if any such action had been approved by a company’s shareholders before the effective date, despite anything to the contrary in the company’s Articles of Association.

(7) A right of any person to seek a remedy in terms of this Act applies with respect to conduct pertaining to a pre-existing company and occurring before the effective date, unless the person had commenced proceedings in a court in respect of the same conduct before the effective date.

(8) A pre-existing company is not in contravention of this Act by reason only of a failure to -

(a) maintain any record for the duration required by section 242 (1), if -

(i) the company disposed of that record before the effective date; and

(ii) at the time the company disposed of the record it was not required, by or in terms of any public regulation, to continue to maintain that record; or

(b) include in its notice of incorporation in terms of the previous Act a prominent statement comparable to that required by section 74 (2)(b) of this Act.

(9) A provision of the memorandum or articles of association of a pre-existing company comparable to a provision contemplated in section 74 (2) has the same validity after the effective date that it had immediately before that date, despite any failure of the company to have drawn attention to that provision in the manner required by section 74 (2)(b).

8. Company names and name reservations

(1) Any reservation by the Registrar of a name in terms of section 48 of the previous Act that was in effect immediately before the effective date, is deemed to be a reservation in terms of section 67 of this Act, as of the effective date, subject to sub-item (2).

(2) If BIPA believes that a reserved name contemplated in sub-item (1) does not satisfy the requirements of section 66 –

(a) BIPA must notify the person for whose use the name was reserved, inviting the person to request the reservation of a substitute name that does satisfy the requirements of this Act; and

(b) the person concerned may file a request contemplated in paragraph (a), at no charge, any time within 120 business days after the date of BIPA’s notice.

(3) Any registration by the Registrar of –

(a) a translation or shortened form of a name, in terms of section 49 of the previous Act that was in effect immediately before the effective date, is deemed to be a registration of that name, as if it had been registered as a name of the company concerned in terms of this Act; or

(b) a defensive name, in terms of section 49 of the previous Act that was in effect immediately before the effective date must be regarded as if it had been reserved in terms of section 67 of this Act, as of the effective date, but any such deemed reservation of a name expires on the earlier of –

(i) the date the name is used by a company incorporated by the person for who the name has been reserved; or

(ii) the second anniversary of the general effective date.

9. Continued application of previous Act to winding up and liquidation

(1) Despite the repeal of the previous Act, until the date determined in terms of sub-item (2) OF Schedule 4 to this Act, Chapter 14 of that Act continues to apply with respect to the winding up and liquidation of companies under this Act, as if that Act had not been repealed subject to sub-items (2) and (3).

(2) Despite sub-item (1), sections 348, 349, 351, and 353 to 358 do not apply to the winding up of a solvent company, except to the extent necessary to give full effect to the provisions of Part 6 of Chapter 4.

(3) If there is a conflict between a provision of the previous Act that continues to apply in terms of sub-item (1), and a provision of Part 6 of Chapter 4 of this Act with respect to a solvent company, the provision of this Act prevails.

(4) The Minister, by notice in the Gazette, may –

(a) determine a date on which this Item ceases to have effect, but no such notice may be given until the Minister is satisfied that alternative legislation has been brought into force adequately providing for the winding up and liquidation of insolvent companies; and

(b) prescribe ancillary rules as may be necessary to provide for the efficient transition from the provisions of the repealed Act, to the provisions of the alternative legislation contemplated in paragraph (a).

10. Preservation and continuation of court proceedings and orders

(1) Any proceedings in any court in terms of the previous Act immediately before the effective date are continued in terms of that Act, as if it had not been repealed.

(2) Any order of a court in terms of the previous Act, and in force immediately before the effective date, continues to have the same force and effect as if that Act had not been repealed, subject to any further order of the court.

11. General preservation of regulations, rights, duties, notices and other instruments

(1) Any right or entitlement enjoyed by, or obligation imposed on, any person in terms of any provision of the previous Act, that had not been spent or fulfilled immediately before the effective date is a valid right or entitlement of, or obligation imposed on, that person in terms of any comparable provision of this Act, as from the date that the right, entitlement or obligation first arose, subject to the provisions of this Act.

(2) A notice given by any person to another person in terms of any provision of the previous Act must be considered as notice given in terms of any comparable provision of this Act, as from the date that the notice was given under the previous Act.

(3) A document that, before the effective date, had been served in accordance with the previous Act must be regarded as having been satisfactorily served for any comparable purpose of this Act.

(4) An order given by an inspector, in terms of any provision of the previous Act, and in effect immediately before the effective date, continues in effect, subject to the provisions of this Act.

12. Transition of the regulatory agency

(1) The person who occupied the post of Chief Executive Officer of the Business and Intellectual Property Authority (‘BIPA’) immediately before the general effective date, must be regarded as continuing to serve, on the general effective date, as the Chief Executive of BIPA, for a term to be determined by the Minister.

(2) A person in the employ of BIPA continues to be an employee of BIPA on the effective date.

(4) A person referred to in sub-item (2) remains subject to any decisions, proceedings, rulings and directions applicable to that person immediately before the effective date, and any proceedings against such a person, that were pending immediately before the effective date, must be disposed of as if this Act had not been enacted.

13. Continued investigation and enforcement of previous Act

(1) Despite the repeal of the previous Act -

(a) any investigation by the Minister or the Registrar in terms of the previous Act and pending immediately before the effective date, may be continued by BIPA;

(2) In exercising authority under subsection (1), BIPA must conduct the investigation or other matter in accordance with the previous Act.

14. Regulations

On the effective date, and for a period of 60 business days after the effective date, the Minister may make any regulation contemplated in this Act without meeting the procedural requirements set out in section 19 or elsewhere in this Act, provided the Minister has published those proposed regulations in the Gazette for comment for at least 30 business days.