



ANALYSIS

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|---|---|
| 1. Short Title and commencement | 7. Secrecy |
| 2. Application | 8. Non application of Division 2 where prospectus registered etc., in approved jurisdiction |
| 3. Registration and incorporation | 9. Application of other Acts to international companies |
| 4. Capital maintenance, dividends and other distributions | |
| 5. Inspection and closing of Register | |
| 6. Power of exemption | |

2004, No. 14

An Act to amend the International Companies Act 1981-82

(14 June 2004)

BE IT ENACTED by the Parliament of the Cook Islands in Session assembled and by the authority of the same as follows:

1. Short Title and commencement – (1) This Act may be cited as the International Companies Amendment Act 2004 and shall be read together with and deemed part of the International Companies Act 1981-82 ("the principal Act").

(2) This Act shall come into force on the 14th June 2004.

2. Application - Nothing in section 7 of this Act shall apply to or affect any proceedings commenced in the Court before the coming into force of this Act.

3. Registration and incorporation – Section 14(2) of the principal Act is amended by inserting after the words "of this Act", the words "and the customer identification and verification requirements of the Financial Transactions Reporting Act 2004".

4. Capital maintenance, dividends and other distributions - Section 54A of the principal Act is deleted and the following new section substituted –

"54A. Capital Maintenance - (1) Except insofar as this section otherwise provides, a capital return may be effected by any international company (whether or not the company may elect to alter its memorandum by reducing the amount of

its share capital and its shares accordingly) and any capital return shall be a valid act of that company and shall be binding and enforceable against it if at the time of effecting the capital return, its directors have a reasonable belief that neither the effecting of that capital return nor (in the case of any capital return the performance of which is deferred) its performance will result in the company being incapable of meeting its existing obligations to its existing creditors as they fall due.

(2) Any capital return, if it has the effect of returning assets to some but not all of the shareholders of the company (or to some but not all of the holders of any class of shares in the company) shall except insofar as it is effected in accordance with the rights of the members as stated or provided for in the Articles of the company, be deemed to be a variation of those rights to which the shareholders may object and the provisions of section 55 shall apply *mutatis mutandis* to such deemed variation. In the case of any variation or deemed variation not effected in accordance with the rights of the members as stated or provided for in the Articles, the company shall serve a copy of the return notice on every shareholder and any application under section 55 shall be lodged within 28 days after the date on which that notice was served or within such further time as the Registrar may allow.

(3) Where any capital return is effected otherwise than in accordance with the provisions of subsection (1) that capital return shall be void against a liquidator and any creditor of the company.

(4) Where an international company effects a capital return there shall be lodged with the Registrar for filing within 42 days of its having effected the capital return, or within such further time as the Registrar may allow, a return notice and if this section is not complied with in relation to the lodging of the return notice the capital return insofar as it effects a return of the capital of the company to any shareholder shall be void against any creditor of the company where -

- (a) that creditor can demonstrate that it has searched the register of the company and acted to its detriment in reliance on the particulars of the paid up capital of the company; and
- (b) the register contains no other document which might reasonably be supposed to have given notice of the fact that the assets of the company had been returned to or committed for return to any shareholder,

and such capital shall be paid by that shareholder (and if more than one by each pro rata) to the Registrar to such extent as shall be required to settle the liability of the company to that creditor and the Registrar shall forthwith pay that creditor notwithstanding the liquidation or insolvency of that company.

(5) Any capital return effected by an international company unable to pay its debts as they become due from its own money, if the company is wound up on a petition presented or of a notice lodged under section 169(1) within 3 months after its effecting the capital return shall be deemed fraudulent and void as against the liquidator of the company.

(6) Nothing in this section shall invalidate any transaction, arrangement or dealing entered into and performed in accordance with the provisions of sections 40, 50 or 51 nor any redemption of redeemable shares where the provisions of section 44 have been complied with nor any arrangement whereby at the time of

subscription or purchase of shares assets are set aside in order to defease a future capital liability.

(7) Nothing in this section shall invalidate any transaction, arrangement or dealing entered into or performed by a company for the purposes or in connection with the purchase or subscription of its shares notwithstanding that the transaction, arrangement or dealing has or may have the consequence directly or otherwise of returning to its shareholders (or to any of them) a portion of its assets.

(8) Nothing in this section shall restrict the payment of dividends to any shareholder of an international company out of profits (including capital profits).

(9) In this section -

“capital return” means -

- (a) any transaction dealing or arrangement which has or may have the consequence directly or otherwise of returning to the shareholders of an international company (or to any of them) a portion of its assets or of reducing any liability in respect of any share without effecting a reduction of its share capital in accordance with section 54;
- (b) any dividend paid by an international company otherwise than out of profits (including capital profits);
- (c) any sum of money, bonus issue, asset or property in specie of an international company paid distributed or allocated, otherwise than out of profits (including capital profits) to a shareholder in respect of that shareholder’s shares;
- (d) any gift donation or wager made by an international company to or with its shareholders (or to or with any of them),

and a capital return shall be deemed to be effected upon the passing of the directors’ resolution to effect that capital return notwithstanding that performance thereof may be deferred;

“assets” includes all the assets of a company except its profits (including capital profits);

“existing creditor” means -

- (a) any person in favour of whom at the time the capital return was effected a charge was registered against the international company under Part IV of the Act;
- (b) any person engaged in trade or commercial activity to whom the international company in the ordinary course of its business owes any debt or similar obligation but does not include any person who may become a creditor after the effecting of the capital return;

“return notice” means a statutory declaration made by a director of the company and stating with reasonable accuracy the amounts by which the issued capital of the company has been or may be reduced as a result of the capital return.”

5. Inspection and closing of register – Section 107(2) of the principal Act is amended by inserting at the commencement of that subsection, the words “Unless the Articles provide that a member’s interest and particulars on the register shall be available for inspection by all members,”

6. Power of exemption – (1) The principal Act is amended by repealing section 224.

7. Secrecy – The principal Act is amended by repealing section 227 and substituting the following -

“227. Privacy - (1) Except where the provisions of this Act require, and subject to this section, it shall be an offence for a person to disclose to any other person information relating to the establishment, constitution, business undertaking or affairs of an international company or a foreign company.

(2) Subsection (1) shall not apply to a disclosure if -

- (a) the disclosure is required or authorised by the Court; or
- (b) the disclosure is made for the purpose of discharging any duty, performing any function or exercising any power under any Act; or
- (c) the disclosure is made as required by or under a search warrant.

(3) All judicial proceedings other than criminal proceedings relating to an international company or a foreign company shall, unless ordered otherwise by the Court, be heard in camera. The decision of the Court in any proceeding may unless ordered otherwise by the Court as to the whole or any part of the decision, be published: Provided that a copy of every decision shall be forwarded by the Registrar of the Court to the Financial Supervisory Commission.

(4) A trustee company or an officer or employee of a trustee company, or an officer or employee of an international company or foreign company may divulge or make available information relating to the establishment, constitution business undertakings or affairs of an international company or a foreign company to any person or class of persons as that trustee company, officer or employee considers necessary from time to time for carrying out the management and administration of the international company or foreign company in the ordinary course of business; or to a legal practitioner for the purpose of obtaining legal advice relating to establishment, constitution, business undertakings or affairs of an international company or a foreign company; or for the purpose of prosecuting or defending any litigation relating to the establishment, constitution, business undertakings or affairs of an international company or foreign company.”

8. Non application of Division 2 where prospectus registered etc., in approved jurisdiction - The principal Act is amended by repealing section 229A and substituting the following -

“229A. Non-application of Division 2 where prospectus registered etc., in approved jurisdiction - Division 2 of this Part of the Act shall have no application to any invitation, prospectus or advertisement where a prospectus in connection with the issue of shares or debentures in or the depositing or lending of money with or to an international company as the case may be has been registered, lodged, filed, deposited or otherwise issued in accordance with the laws of a jurisdiction in which is located an Approved Stock Exchange as defined in section 126A of this Act:

Provided that within 28 days or such extended time as the Registrar in his discretion may allow, of registering, lodging, filing, depositing or otherwise issuing in the relevant jurisdiction, a copy of such prospectus has been delivered to the registered office of the international company and a duplicate copy signed by two directors of the international company has been delivered to the Registrar who shall forthwith file such duplicate prospectus on the international company's file at his office.”

9. Application of other Acts to international companies - Section 249 of the principal Act is amended, by -

- (a) deleting the words “other than this Act, the Cook Islands Monetary Board Act 1981, the Offshore Banking Act 1981, the Offshore Insurance Act 1981-82 or the Trustee Companies Act 1981-82”; and
- (b) adding at the end of subsection (2), the words “other than this Act, the Crimes Act 1969, the Criminal Procedure Act 1980-81, the Proceeds of Crime Act 2003, the Financial Supervisory Commission Act 2003, the Banking Act 2003, the Mutual Assistance in Criminal Matters Act 2003, the Extradition Act 2003, the Financial Transactions Reporting Act 2004, the Trustee Companies Act 1981-82, the Offshore Insurance Act 1981-82 and the Terrorism Suppression Act 2004.”

This Act is administered by the Financial Supervisory Commission