



Tuvalu

COMPANIES (WINDING UP) ACT

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Tuvalu

COMPANIES (WINDING UP) ACT

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Tuvalu

COMPANIES (WINDING UP) ACT

AN ACT TO PROVIDE FOR THE WINDING UP OF COMPANIES¹

Commencement [2nd April 1992]²

PART I - PRELIMINARY

1 Short title

This Act may be cited as the Companies (Winding Up) Act.

2 Interpretation

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

“**creditors’ voluntary winding up**” means a winding up under Part 3, other than a members' voluntary winding up;

“**members’ voluntary winding up**” means a winding up under Part 3 where a declaration has been made and lodged in pursuance of section 64;

“**Official Receiver**” has the meaning assigned by section 20.

(2) Expressions defined in the First Schedule to the Companies Act, have, unless the context otherwise requires, the same meaning when used in this Act.

3 Modes of Winding Up

(1) The winding up of a company may be either —

(a) by the Court; or

(b) voluntary.

- (2) The provisions of this Act with respect to winding up apply, unless the contrary appears, to the winding up of a company in either of those modes.

4 Liability as contributories of present and past members

- (1) In the event of a company being wound up, every present and past member is liable to contribute to the assets of the company as provided in section 35 of the Companies Act.
- (2) Nothing in this Act shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members on the policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of the policy or contract.

5 Definition

The term “**contributory**” means every person liable to contribute to assets of a company in the event of it being wound up, and for the purposes of all proceedings for determining, and all proceedings prior to the final determination of, the persons who are to be deemed contributories, includes any person, alleged to be a contributory.

6 Nature of liability of contributory

The liability of a contributory creates a debt in the nature of a specialty accruing due from the contributory at the time when his liability commenced, but payable at the times when calls are made for enforcing the liability.

7 Contributories in the case of death of member

- (1) If a contributory dies either before or after he has been placed on the list of contributories, his personal representative is liable in due course of administration to contribute to the assets of the company in discharge of his liability and shall be a contributory accordingly.
- (2) If the personal representatives make default in paying any money ordered to be paid by them, proceedings may be taken for administering the estate of the deceased contributory, and for compelling payment thereof of the money due.

8 Contributories in case of bankruptcy of member

If a contributory becomes bankrupt, either before or after he has been placed on the list of contributories —

- (a) his trustee in bankruptcy shall represent him for all the purposes of the winding up, and shall be a contributory accordingly, and may be called on to admit proof against the estate of the bankrupt, or otherwise to allow to be paid out of his assets in due course of law, any money due from the bankrupt in respect of his liability to contribute to the assets of the company; and
- (b) there may be proved against the estate of the bankrupt the estimated value of his liability to future calls as well as calls already made.

PART II - WINDING UP BY THE COURT

DIVISION 1 - PRELIMINARY

9 Circumstances in which company may be wound up by Court

A company may be wound up by the Court if —

- (a) the company has by special resolution resolved that the company be wound up by the Court;
- (b) the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;
- (c) the company is unable to pay its debts;
- (d) an inspector appointed under Part VII of the Companies Act has reported that he is of the opinion —
 - (i) that the company cannot pay its debts and should be wound up; or
 - (ii) that it is in the interests of the public or of the shareholders or of the creditors that the company should be wound up; or
- (e) the Court is of the opinion that it is just and equitable that the company should be wound up.

10 Definition of inability to pay debts

A company is deemed to be unable to pay its debts if —

- (a) a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred dollars then due, has served on the company, by leaving it at the registered office of the company, a demand under his hand or under the hand of his agent lawfully authorised requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it the reasonable satisfaction of the creditor;

- (b) execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
- (c) it is proved to the satisfaction of the Court that the company is unable to pay its debts and, in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company.

11 Petition for winding up

- (1) An application to the Court for the winding up of a company shall be by petition presented, subject to the provisions of this section, either by —
 - (a) the company;
 - (b) a creditor, including a contingent or prospective creditor, of the company;
 - (c) a contributory;
 - (d) the trustee in bankruptcy to, or personal representative of, a creditor or contributory; or
 - (e) the Minister pursuant to section 204 of the Companies Act³,or any two or more of those parties.
- (2) Notwithstanding anything in subsection (1) —
 - (a) a contributory is not entitled to present a winding-up petition unless the shares in respect of which he is a contributory, or some of them, either were originally allotted to him or have been held by him, and registered in his name, for at least six months during the eighteen months before the commencement of the winding up, or have devolved on him through the death of a former holder; and
 - (b) the Court shall not hear a winding-up petition presented by a contingent or prospective creditor until such security for costs has been given as the Court thinks reasonable and until a prima facie case for winding up has been established to the satisfaction of the Court.
- (3) Where a company is being wound up voluntarily, a winding-up petition may be presented by the Official Receiver as well as by any other person authorised in that behalf under the other provisions of this section, but the Court shall not make a winding-up order on the petition unless it is satisfied that the voluntary winding up cannot be continued with due regard to the interests of the creditors or contributories.
- (4) A contributory is entitled to present a winding-up petition notwithstanding that there may not be assets available on the winding-up for distribution to contributories.

12 Powers of Court on hearing petition

- (1) On hearing a winding-up petition the Court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it thinks fit, but the Court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.
- (2) Where the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the Court, if it is of the opinion —
 - (a) that the petitioners are entitled to relief either by winding up the company or by some other means; and
 - (b) that in the absence of any other remedy it would be just and equitable that the company should be wound up,

shall make a winding-up order, unless it is also of the opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

13 Power to stay or restrain proceedings against company

At any time after the presentation of a winding-up petition, and before a winding-up order has been made, the company, or any creditor or contributory, may, where any action or proceeding is pending against the company, apply to the Court to stay or restrain further proceedings, and the Court may stay or restrain the proceedings accordingly on such terms as it thinks fit.

14 Avoidance of disposition of property, etc., after commencement of winding up

In a winding up by the Court, any disposition of the property of the company, including things in action, and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding up, is, unless the Court otherwise orders, void.

15 Avoidance of attachments, etc.

Where any company is being wound up by the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding up is void.

16 Commencement of winding up by the Court

- (1) Where before the presentation of a petition for the winding up of a company by the Court a resolution has been passed by the company for voluntary winding up, the winding up of the company is deemed to have commenced at the time of the passing of the resolution, and unless the Court, on proof of fraud or mistake, thinks fit otherwise to direct, all proceedings taken in the voluntary winding up are deemed to have been validly taken.
- (2) In any other case, the winding up of a company by the Court is deemed to commence at the time of the presentation of the petition for the winding up.

17 Copy of order to be forwarded to Registrar

- (1) On the making of a winding up order, a copy of the order shall forthwith be lodged by the company, or otherwise as may be prescribed, with the Registrar, who shall make an entry thereof in his records relating to the company.
- (2) If default is made in lodging a copy of a winding-up order with the Registrar as required by subsection (1), every officer of the company or other person who knowingly authorises or permits the default is guilty of an offence.

18 Actions stayed on winding-up order

When a winding-up order has been made, or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court, and subject to such terms as the Court may impose.

19 Effect of winding-up order

An order for winding up a company shall operate in favour of all the creditors and of all the contributories of the company, as if made on the joint petition of a creditor and of a contributory.

DIVISION 2 - OFFICIAL RECEIVER

20 Meaning of Official Receiver

For the purposes of this Act, “**Official Receiver**” means the Official Receiver attached to the Court for bankruptcy purposes, and includes any Assistant Official Receiver.

21 Statement of company's affairs

- (1) Where the Court has made a winding-up order or appointed a provisional liquidator, there shall, unless the Court otherwise orders, be made out and

submitted to the Official Receiver a statement as to the affairs of the company in the prescribed form, verified by affidavit, and showing the particulars of its assets, debts and liabilities, the names, residences, and occupation of its creditors, the securities held by them respectively, the dates when the securities were respectively given, and such further or other information as may be prescribed or as the Official Receiver may require.

- (2) The statement shall be submitted and verified by one or more of the persons who are at the relevant date the directors and by the person who is, or the persons who are, at the date the secretary or joint secretaries of the company, or by such of the persons hereinafter in this subsection mentioned as the Official Receiver, subject to the direction of the Court, may require to submit and verify the statement, that is to say, persons —
 - (a) who are or have been officers, other than employees, of the company;
 - (b) who have taken part in the formation of the company at any time within one year before the relevant date;
 - (c) who are in the employment of the company, or have been in the employment of the company within that year, and are in the opinion of the Official Receiver capable of giving the information required; and
 - (d) who are or have been within that year officers of or in the employment of a company, which is, or within that year was, an officer of the company to which the statement relates.
- (3) The statement shall be submitted within fourteen days from the relevant date, or within such extended time as the Official Receiver or the Court may for special reasons allow.
- (4) Any person making or concurring in making the statement and affidavit required by this section shall be allowed, and shall be paid by the Official Receiver or provisional liquidator, as the case may be, out of the assets of the company, such costs and expenses incurred in and about the preparation and making of the statement and affidavit as the Official Receiver considers reasonable, subject to an appeal to the Court.
- (5) Any person who, without reasonable excuse, makes default in complying with the requirements of this section is guilty of an offence.
- (6) Any person stating himself in writing to be a creditor or contributory of the company is entitled by himself or by his agent at all reasonable times, on payment of the prescribed fee, to inspect the statement submitted in pursuance of this section, and to a copy thereof or extract therefrom.
- (7) Any person untruthfully so stating himself to be a creditor or contributory is guilty of a contempt of court and shall, on the application of the liquidator or of the Official Receiver, be punishable accordingly.
- (8) In this section, “the relevant date” means in a case where a provisional liquidator is appointed, the date of his appointment and, in a case where no such appointment is made, the date of the winding up order.

22 Report by Official Receiver

- (1) In a case where a winding-up order is made the Official Receiver shall, as soon as practicable after receipt of the statement to be submitted under section 21 or, in a case where the Court orders that no statement shall be submitted, as soon as practicable after the date of the order, submit a preliminary report to the Court —
 - (a) as to the amount of capital issued, and subscribed, and the estimated amount of assets and liabilities;
 - (b) if the company has failed, as to the causes of the failure; and
 - (c) whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation or failure of the company, or the conduct of the business thereof.
- (2) The Official Receiver may also, if he thinks fit, make a further report, or further reports, stating the manner in which the company was formed and whether, in his opinion any fraud has been committed by any person in its promotion or formation, or by any officer of the company in relation to the company since the formation thereof, and any other matters which in his opinion it is desirable to bring to the notice of the Court.

DIVISION 3 - LIQUIDATORS**23 Power of court to appoint liquidators**

For the purposes of conducting the proceedings in winding up a company and performing such duties in reference thereto as the Court may impose, the Court may appoint a liquidator or liquidators.

24 Appointment and powers of provisional liquidator

- (1) Subject to the provisions of this section, the Court may appoint a liquidator provisionally at any time after the presentation of a winding-up petition, and either the Official Receiver or any other fit person may be appointed.
- (2) Where a liquidator is previously appointed by the Court, the Court may limit and restrict his powers by the order appointing him.

25 Appointment style etc., of liquidators

Subject to section 24(2), the following provisions with respect to liquidators have effect on a winding-up order being made, namely —

- (a) the Official Receiver shall by virtue of his office become the provisional liquidator and shall continue to act as such until he or another person becomes liquidator and is capable of acting as such;

- (b) the Official Receiver shall summon separate meetings of the creditors and contributories of the company for the purposes of determining whether or not an application is to be made to the Court for appointing a liquidator in the place of the Official Receiver;
- (c) the Court may make any appointment and order required to give effect to any such determination, and, if there is a difference between the determinations of the meetings of the creditors and contributories in respect of any such matter, the Court shall decide the difference and make such order thereon as the Court may think fit;
- (d) in a case where a liquidator is not appointed by the Court, the Official Receiver shall be the liquidator of the company;
- (e) the Official Receiver shall by virtue of his office be the liquidator during any vacancy; and
- (f) a liquidator shall be described, where a person other than the Official Receiver is liquidator, by the style of “the liquidator” and, where the Official Receiver is liquidator, by the style of “the Official Receiver and liquidator”, of the particular company in respect of which he is appointed, and not by his individual name.

26 Provisions where person other than Official Receiver is appointed liquidator

- (1) Where in the winding-up of a company by the Court a person other than the Official Receiver is appointed liquidator, that person —
 - (a) shall not be capable of acting as liquidator until he has notified his appointment to the Registrar and given security in such manner as the Court may direct; and
 - (b) shall give the Official Receiver such information and such access to and facilities for inspecting the books and documents of the company and generally such aid as may be requisite for enabling the Official Receiver to perform his duties under this Act.
- (2) If a liquidator contravenes subsection (1)(b) he is guilty of an offence.

27 General provisions as to liquidators

- (1) A liquidator appointed by the Court may resign or, on cause shown be removed by the Court.
- (2) Where a person other than the Official Receiver is appointed liquidator, he shall receive such a salary or remuneration by way of percentage or otherwise as the Court may direct and, if more than one such persons are appointed liquidators, their remuneration shall be distributed among them in such proportions as the Court directs.

- (3) A vacancy in the office of a liquidator appointed by the Court shall be filled by the Court.
- (4) If more than one liquidator is appointed by the Court, the Court shall declare whether any act by this Act required or authorised to be done by the liquidator is to be done by all or any one or more of the persons appointed.
- (5) Subject to this Act, the acts of a liquidator are valid notwithstanding any defects whether that may afterwards be discovered in his appointment or qualification.

28 Custody of company's property

Where a winding-up order has been made or a provisional liquidator has been appointed, the liquidator, or the provisional liquidator, as the case may be, shall take into his custody, or under his control, all the property and things in action to which the company is or appears to be entitled.

29 Vesting of property of company in liquidator

Where a company is being wound up by the Court, the Court may on the application of the liquidator by order direct that all or any part of the property of whatsoever description belonging to the company or held by trustees on its behalf shall vest in the liquidator by his official name, and thereupon the property to which the order relates shall vest accordingly, and the liquidator may, after giving such indemnity, if any, as the Court may direct, bring or defend in his official name any action or other legal proceeding which relates to that property of which it is necessary to bring or defend for the purpose of effectually winding up the company and recovering its assets.

30 Powers of liquidator

- (1) The liquidator in a winding up by the Court may with the sanction either of the Court or of the committee of inspection —
 - (a) bring or defend any action or other legal proceeding in the name and on behalf of the company;
 - (b) carry on the business of the company, so far as may be necessary, for the beneficial winding up thereof;
 - (c) appoint an attorney-at-law or other agent to assist him in the performance of his duties;
 - (d) pay any classes of creditors in full if the assets of the company remaining in his hands will suffice to pay in full the debts and liabilities of the company which rank for payment before, or equally with, the debts or claims of the first mentioned creditors;

- (e) make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable;
 - (f) compromise any calls and liabilities to calls, debts, and liabilities capable or resulting in debts, and all claims, present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and a contributory, or alleged contributory, or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as are agreed, and take any security for the discharge of any such call, debt, liability or claim, and give a complete discharge in respect thereof.
- (2) The liquidator in a winding up by the Court may —
- (a) sell the real and personal property and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or to sell the same in parcels;
 - (b) do all acts and execute, in the name and on behalf of the company, all deeds, receipts, and other documents, and for that purpose to use, when necessary, the company's seal;
 - (c) prove, rank, and claim in the bankruptcy, insolvency, or sequestration of any contributory, for any balance against his estate, and receive dividends in the bankruptcy, insolvency, or sequestration in respect of that balance as a separate debt due from the bankrupt or insolvent, and rateably with the other separate creditors;
 - (d) draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if, the bill or note had been drawn, accepted, made, or endorsed by or on behalf of the company in the course of its business;
 - (e) raise on the security of the assets of the company any money requisite;
 - (f) take out in his official name letters of administration to any deceased contributory, and do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company, and in all such cases the money due is, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, deemed to be done to the liquidator himself;
 - (g) appoint an agent to do any business which the liquidator is unable to do himself; and
 - (h) do all such other things as may be necessary for winding-up the affairs of the company and distributing its assets.

- (3) The exercise by the liquidator in a winding up by the Court of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

31 Exercise and control of liquidator's powers

- (1) Subject to this Part, the liquidator of a company which is being wound up by the Court shall, in the administration of the assets of the company and in the distribution thereof among its creditors, have regard to any directions that may be given by resolution of the creditors or contributories at any general meeting, or by the committee of inspection, and any directions so given by the creditors or contributories shall in case of conflict be deemed to override any directions given by the committee of inspection.
- (2) The liquidator may summon general meetings of the creditors or contributories for the purpose of ascertaining their wishes, and he shall summon meetings at such times as the creditors or contributories, by resolution, either at the meeting appointing the liquidator or otherwise, direct, or whenever requested in writing to do so by not less than one-tenth in value of the creditors or contributories.
- (3) The liquidator may apply to the Court in the prescribed manner for directions in relation to any particular matter arising under the winding up.
- (4) Subject to this Part, the liquidator shall use his own discretion in the management of the estate and its distribution among the creditors.
- (5) If any person is aggrieved by any act or decision of the liquidator, that person may apply to the Court, and the Court may confirm, reverse, or modify the act or decision complained of, and make such order as it thinks fit.

32 Books to be kept by liquidator

- (1) Every liquidator of a company which is being wound up by the Court shall keep, in the prescribed manner, proper books in which he shall cause to be made entries or minutes of proceedings at meetings, and of such other matters as may be prescribed, and any creditor or contributory may, subject to the control of the Court, personally or by his agent inspect any such books and make copies thereof or extracts therefrom.
- (2) If a liquidator fails to keep proper books as required by subsection (1) or refuses to allow any inspection permitted thereby, he is guilty of an offence.

33 Payments of liquidator into bank

- (1) Every liquidator of a company which is being wound up by the Court shall pay the money received by him into such bank as the Court may direct.

- (2) If any such liquidator at any time retains for more than ten days a sum exceeding two hundred dollars, or such other amount as the Court in any particular case authorises him to retain, then, unless he explains the retention to the satisfaction of the Court, he shall pay interest on the amount so retained in excess at the rate of twenty per centum per annum, and shall be liable to disallowance of all or such part of his remuneration as the Court may think just, and to be removed from his office by the Court, and shall be liable to pay any expenses occasioned by reason of his default.
- (3) A liquidator of a company which is being wound up by the Court shall not pay any sums received by him as liquidator into his private banking account.
- (4) A liquidator who contravenes the provisions of subsection (3) is guilty of an offence.

34 Audit of liquidator's accounts

- (1) Every liquidator of a company which is being wound up by the Court shall, at such times as may be prescribed but not less than twice in each year during his tenure of office, send to the Registrar an account of his receipts and payments as liquidator.
- (2) The account shall be in a prescribed form, shall be made in duplicate, and shall be verified by an affidavit or a statutory declaration in the prescribed form.
- (3) The Registrar shall cause the account to be audited and for the purpose of the audit the liquidator shall furnish the registrar with such vouchers and information as the Registrar may require, and the Registrar may at anytime require the production of and inspect any books or accounts kept by the liquidator.
- (4) When the account has been audited, one copy thereof shall be filed and kept by the Registrar, and the other copy shall be delivered to the Court for filing, and each copy shall be open to the inspection of any creditor or of any person interested.
- (5) The Registrar shall cause the account when audited or a summary thereof to be printed and shall send a printed copy of the account or summary by post to every creditor and contributory.
- (6) If a liquidator fails to comply with any of the duties imposed on him by this section, he is guilty of an offence.

35 Control of Registrar over liquidators

- (1) The Registrar shall take cognizance of the conduct of liquidators of companies which are being wound up by the Court, and, if a liquidator does not faithfully perform his duties and duly observe all the requirements

imposed on him by statute, rules, or otherwise with respect to the performance of his duties, or if any complaint is made to the Registrar by any creditor or contributory in regard thereto, the Registrar shall inquire into the matter, and take such action thereon as he may think expedient.

- (2) The Registrar may at any time require any liquidator of a company which is being wound up by the Court to answer any inquiry in relation to any winding up in which he is engaged and may, if the Registrar thinks fit, apply to the Court to examine him or any other person on oath concerning the winding up.
- (3) The Registrar may also direct an investigation to be made of the books and vouchers of the liquidator.

36 Release of liquidator

- (1) When the liquidator of a company which is being wound up by the Court has realised all the assets of the company, or so much thereof as can, in his opinion be realised without needlessly protracting the liquidation, and has distributed a final dividend, if any, to the creditors, and adjusted the rights of the contributories among themselves, and made a final return, if any, to the contributories, or has resigned, or has been removed from his office, the Registrar shall, on his application, cause a report on his accounts to be prepared, and, on his complying with all the requirements of the Registrar, shall take into consideration the report, and any objection which may be urged by any creditor or contributory or person interested against the release of the liquidator, and shall either grant or withhold the release accordingly, subject nevertheless to an appeal to the Court.
- (2) Where the release of a liquidator is withheld, the Court may, on application of any creditor or contributory, or person interested, make such order as it thinks just, charging the liquidator with the consequences of any act or default which he may have done or made contrary to his duty.
- (3) An order of the Registrar releasing the liquidator shall discharge him from all liability in respect of any act done or default made by him in the administration of the affairs of the company, or otherwise in relation to his conduct as liquidator, but any such order may be revoked on proof that it was obtained by fraud or by suppression or concealment of any material fact.

DIVISION 4 - COMMITTEES OF INSPECTION

37 Meetings of creditors and contributories to determine whether committee of inspection shall be appointed

- (1) When a winding-up order has been made by the Court, it shall be the business of the separate meetings of creditors and contributories summoned for the purpose of determining whether or not an application should be made to the Court for appointing a liquidator other than the Official Receiver, to

determine further whether or not an application is to be made to the Court for the appointment of a committee of inspection to act with the liquidator and who are to be members of the committee if appointed.

- (2) The Court may make any appointment and order required to give effect to any such determination, and if there is a difference between the determination of the meetings of the creditors and contributories the Court shall decide the difference and make such order as the Court thinks fit.

38 Constitution and proceedings of committee of inspection

- (1) A committee of inspection appointed in pursuance of this Act shall consist of creditors and contributories of the company or persons holding general powers of attorney from creditors or contributories in such proportions as is agreed on by the meetings of the creditors and contributories, or as, in the case of a difference, may be determined by the Court.
- (2) The committee shall meet at such time as they from time to time appoint, and, failing such appointment, at least once a month and the liquidator or any member of the committee may also call a meeting of the committee as and when he thinks necessary.
- (3) The committee may act by a majority of their members present at a meeting, but shall not act unless a majority of the committee is present.
- (4) A member of the committee may resign by notice in writing signed by him and delivered to the liquidator.
- (5) If a member of the committee becomes bankrupt, or compounds or arranges with his creditors, or is absent from five consecutive meetings of the committee without leave of those members who together with himself represent the creditors or contributories, as the case may be, his office shall thereupon become vacant.
- (6) A member of the committee may be removed by an ordinary resolution at a meeting of creditors, if he represents creditors, or of contributories, if he represents contributories, of which seven days' notice has been given, stating the object of the meeting.
- (7) On a vacancy occurring in the committee the liquidator shall forthwith summon a meeting of creditors or of contributories, as the case may require, to fill the vacancy, and the meeting may, by resolution, re-appoint the same or appoint another creditor or contributory to fill the vacancy; but if the liquidator, having regard to the position in the winding up, is of the opinion that it is unnecessary for the vacancy to be filled he may apply to the Court and the Court may make an order that the vacancy shall not be filled, or shall not be filled except in such circumstances as may be specified in the order.
- (8) The continuing members of the committee, if not less than two, may act notwithstanding any vacancy in the committee.

39 Powers of Minister where no committee of inspection

Where in the case of a winding up there is no committee of inspection, the Minister, may on the application of the liquidator, do any act or thing or give any direction or permission which is by this Act authorised or required to be done or given by the committee.

DIVISION 5 - GENERAL POWERS OF COURT**40 Power to stay winding-up etc.**

- (1) The Court may at any time after an order for winding up, on the application either of the liquidator, or the Official Receiver, or any creditor or contributory, and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the Court think fit.
- (2) The Court may, at any time after an order for winding up, on application either of the liquidator or a creditor, and after having regard to the wishes of the creditors and contributories, make an order directing that the winding up, ordered by the Court, shall be conducted as a creditors' voluntary winding up; and if the Court does so the winding up shall be so conducted.
- (3) On any application under subsection (1) the Court may, before making an order, require the Official Receiver to furnish to the Court a report with respect to any facts or matters which are in his opinion relevant to the application.
- (4) A copy of every order made under this section shall forthwith be lodged by the company, or otherwise as may be prescribed, with the Registrar, who shall make an entry of the order in his records relating to the company.
- (5) If default is made in lodging a copy of an order made under this section with the Registrar as required by subsection (4), every officer of the company or other person who knowingly authorises or permits the default is guilty of an offence.

41 Settlement of list of contributories and application of assets

- (1) As soon as may be after making a winding-up order, the Court shall settle a list of contributories, and may rectify the register of members in all cases where rectification is required in pursuance of this Act, and shall cause the assets of the company to be collected and applied in discharge of its liabilities.
- (2) Notwithstanding subsection (1), where it appears to the Court that it will not be necessary to make calls on or adjust the rights of contributories, the Court may dispense with the settlement of a list.

- (3) In settling the list of contributories, the Court shall distinguish between persons who are contributories in their own right and persons who are contributories as being representatives of or liable for the debts of others.
- (4) The list of contributories when settled shall be prima facie evidence of the liabilities of the persons named therein as contributories.

42 Delivery of property to liquidator

The Court may, at any time after making a winding-up order, require any contributory for the time being on the list of contributors, and any trustee, receiver, banker, agent or officer of the company to pay, deliver, convey, surrender or transfer forthwith, or within such time as the Court directs, to the liquidator any assets or books and papers in his hands to which the company is prima facie entitled.

43 Payment of debts due by contributory to company and extent to which set-off allowed

- (1) The Court may, at any time after making a winding-up order, make an order directing any contributory for the time being on the list of contributories to pay, in the manner directed by the order, any money due from him or from the estate of the person whom he represents to the company, exclusive of any money payable by him or the estate by virtue of any call in pursuance of this Act.
- (2) In the case of any company, when all the creditors are paid in full, any money due on account whatever to a contributory from the company may be all owed to him by way of set-off against any subsequent call.

44 Power of Court to make calls

- (1) The Court may, at any time after making a winding-up order, and either before or after it has ascertained the sufficiency of the assets of the company, make calls on all or any of the contributories for the time being settled on the list of the contributories to the extent of their liability, for payment of any money which the Court considers necessary to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding up, and for the adjustment of the rights of the contributories, among themselves, and make an order for payment of any calls so made.
- (2) In making a call the Court may take into consideration the probability that some of the contributories may partly or wholly fail to pay the call.

45 Payment into bank of moneys due to company

- (1) The Court may order any contributory, purchaser or other person from whom money is due to the company to pay the amount due into a bank to the account of the liquidator instead of to the liquidator, and any such order may be enforced in the same manner as if it had directed payment to the liquidator.
- (2) All moneys and securities paid or delivered into such bank in the event of a winding up by the Court shall be subject, in all respects to the orders of the Court.

46 Order on contributor is conclusive evidence

An order made by the Court on a contributory is, subject to any right of appeal, conclusive evidence that the money, if any, thereby appearing to be due or ordered to be paid is due, and all other pertinent matters stated in the order shall be taken to be truly stated as against all persons and in all proceedings.

47 Appointment of special manager

- (1) Where in any proceedings the Official Receiver becomes the liquidator of a company, whether provisionally or otherwise, he may, if satisfied that the nature of the estate or business of the company, or the interests of the creditors or contributories generally, require the appointment of a special manager of the estate or business of the company other than himself, apply to the Court, and the Court may on the application appoint a special manager of the estate or business to act during such time as the Court directs, with such powers, including any of the powers of a receiver or manager, as are entrusted to him by the Court.
- (2) The special manager shall give such security and account in such manner as the Court directs.
- (3) The special manager shall receive such remuneration as may be fixed by the Court.

48 Power to exclude creditors not proving in time

The Court may fix a time or times within which creditors are to prove their debts or claims or after which they will be excluded from the benefit of any distribution made before those debts are proved.

49 Adjustment of rights of contributories

The Court shall adjust the rights of the contributories among themselves, and distribute any surplus among the persons entitled thereto.

50 Inspection of books by creditors or contributories

- (1) The Court may, at any time after making a winding-up order, make such order for inspection of the books and papers of the company by creditors and contributories as the Court thinks just, and any books and papers in the possession of the company may be inspected by creditor and contributories accordingly, but not further or otherwise.
- (2) Nothing in this section shall be taken as excluding or restricting any statutory rights of a Government Department, or, a person under the authority of a Government Department or the Minister.

51 Power to order costs of winding-up to be paid out

The Court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the costs, charges, and expenses incurred in the winding-up in such order of priority as the Court thinks fit.

52 Power to summon persons suspected of having property of company

- (1) The Court may, at any time after the appointment of a provisional liquidator or the making of a winding-up order, summon before it any officer of the company or person known or suspected to have in his possession any property of the company, or supposed to be indebted to the company, or any person whom the Court deems capable of giving information concerning the promotion, formation, trade, dealings, affairs, or property of the company.
- (2) The Court may examine him on oath concerning the matters mentioned in subsection (1), either by word of mouth or on written interrogatories, and may reduce his answers to writing and require him to sign them, and any writing so signed may be used in evidence in any legal proceedings against him.
- (3) The Court may require him to produce any books and papers in his custody or power relating to the company, but where he claims any lien on books or papers produced by him, the production shall be without prejudice to that lien, and the Court shall have jurisdiction in the winding up to determine all questions relating to that lien.
- (4) If any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed, not having a lawful impediment (made known to the Court at the time of its sitting, and allowed by it), the Court may cause him to be apprehended and brought before the Court for examination.

53 Power to order public examination of promoters, directors, etc.

- (1) Where an order has been made for winding up a company by the Court, and the Official Receiver has made a further report under this Act stating that in

his opinion a fraud or improper conduct has been committed, or engaged in, by any person in the promotion or formation of the company, or by any officer of the company in relation to the company since its formation, the Court may, after consideration of the report, direct that the person or officer or any other person who was previously an officer of the company, including any banker, attorney-at-law or auditor, or who is known or suspected to have in his possession any property of the company or is supposed to be indebted to the company or any person who the Court deems capable of giving information concerning the promotion, formation, trade dealings, affairs or property of the company, shall attend before the Court on a day appointed by the Court for that purpose, and be publicly examined as to the promotion or formation or the conduct of the business of the company, or in the case of an officer or former officer as to his conduct and dealings as officer thereof.

- (2) The Official Receiver shall take part in the examination, and for that purpose may, if specially authorised by the Court in that behalf, employ an attorney-at-law.
- (3) The liquidator, where the Official Receiver is not the liquidator, and any creditor or contributory, may also take part in the examination either personally or by attorney-at-law.
- (4) The Court may put such questions to the person examined as the Court thinks fit.
- (5) The person examined shall be examined on oath and is not excused from answering any questions put to him on the ground that the answer might tend to incriminate him but, where he claims before answering the question, that the answer might tend to incriminate him, neither the question nor the answer is admissible in evidence against him in criminal proceedings other than proceedings under subsection (2) or in relation to a charge of perjury in respect of the answer.
- (6) A person ordered to be examined shall at his own cost, before his examination, be furnished with a copy of the Official Receiver's report, and may at his own cost employ an attorney-at-law who shall be at liberty to put to him such questions as the Court may deem just for the purpose of enabling him to explain or qualify any answers given by him.
- (7) When a person directed to attend before the Court under subsection (1) applies to the Court to be exculpated from any charges made or suggested against him, the Official Receiver shall appear on the hearing of the application and call the attention of the Court to any matters which appear to the Official Receiver to be relevant, and if the Court, after hearing any evidence given or witnesses called by the Official Receiver, grants the application, the Court may allow the applicant such costs as in its discretion it may think fit.
- (8) Notices of the examination shall be taken down in writing and shall be read over to or by, and signed by, the person examined, and may thereafter be used

in evidence against him, and shall be open to the inspection of any creditor or contributory at all reasonable times.

- (9) The Court may, if it thinks fit, adjourn the examination from time to time.
- (10) Any person being examined under this section who makes a statement that is false or misleading in a material particular is guilty of an offence.
- (11) For the purposes of this section, conduct is improper if it is of such a nature as to render a person unfit to be concerned in the management of a company.

54 Power to arrest absconding contributory

The Court, at any time either before or after making a winding-up order, on proof of probable cause for believing that a contributory is about to quit Tuvalu or otherwise to abscond or to remove or conceal any of his property for the purpose of evading payment of calls, or of avoiding examination respecting the affairs of the company, may cause the contributory to be arrested, and his books and papers and movable personal property to be seized, and him and them to be safely kept until such time as the Court may order.

55 Powers of Court cumulative

Any powers by this Act conferred on the Court shall be in addition to and not in restriction of any existing powers of instituting proceedings against any contributory or debtor of the company, or the estate of any contributory or debtor, for the recovery of any call or other sums.

56 Delegation liquidator of certain powers of court

Provision may be made by rules made under section 123 for enabling or requiring all or any of the powers and duties conferred and imposed on the Court by this Act in respect of the following matters —

- (a) the holding and conducting of meetings to ascertain the wishes of creditors and contributories;
- (b) the settling of lists of contributories and the rectifying of the register of members where required, and the collecting and applying of the assets;
- (c) the paying, delivering, conveyance, surrender or transfer of any money, property, books or papers to the liquidator;
- (d) the making of calls and the adjusting of the rights of contributors; and
- (e) the fixing of a time within which debts and claims must be proved,

to be exercised or performed by the liquidator as an officer of the Court, and subject to the control of the Court but the liquidator shall not, without the special leave of the Court, rectify the register of members, and shall not make any call without either the special leave of the Court or the sanction of the committee of inspection.

57 Dissolution of company

- (1) When the affairs of a company have been completely wound up, the Court, if the liquidator makes an application in that behalf, shall make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly.
- (2) A copy of the order shall within fourteen days from the date thereof be lodged by the liquidator with the Registrar who shall enter in his records a minute of the dissolution of the company.
- (3) If the liquidator makes default in complying with the requirements of this-section, he is guilty of an offence.

58 Power to enforce orders and appeals from orders

- (1) Orders made by the Court under this Act may be enforced in the same manner as orders made in any action pending therein.
- (2) Subject to rules of court, an appeal from any order or decision made or given in the winding up of a company by the Court under this Act shall lie in the same manner and subject to the same conditions as an appeal from any order or decision of the Court.

PART III - VOLUNTARY WINDING UP

DIVISION 1 - INTRODUCTORY

59 Winding-up resolutions

- (1) A company shall be wound up voluntarily if —
 - (a) a general meeting so resolves by special resolution; or
 - (b) a general meeting so resolves by an ordinary resolution which states that the company is unable to pay its debts.
- (2) In this Act, “**a resolution for voluntary winding up**” means a resolution passed under subsection (1).

60 Notice of resolution to wind-up voluntarily

- (1) When a company has passed a resolution for voluntary winding up, it shall, within fourteen days after the passing of the resolution, give notice of the resolution by advertisement in the Gazette and in writing to the Registrar.
- (2) If default is made in complying with this section, the company and every officer of the company in default is guilty of an offence.

61 Commencement of voluntary winding up

A voluntary winding up is deemed to commence at the time of the passing of the resolution for voluntary winding up.

62 Effect of voluntary winding up on business and status of company

In case of a voluntary winding up, the company shall, from the commencement of the winding up, cease to carry on its business, except so far as is in the opinion of the liquidator required for the beneficial winding up thereof but the corporate state and corporate powers of the company shall, notwithstanding anything to the contrary in its articles of incorporation, continue until it is dissolved.

63 Avoidance of transfers, etc. after commencement of voluntary winding up

Any transfer of shares not being a transfer made with the sanction of the liquidator, and any alteration in the status of the members of the made after the commencement of a voluntary winding up, is void.

64 Statutory declaration of solvency in case of proposal of winding up voluntarily

- (1) Where it is proposed to wind up a company voluntarily, the director or, in the case of a company having more than two directors, the majority of the directors, may, at a meeting of the directors make a statutory declaration to the effect that they have made a full inquiry into the affairs of the company, and that, having so done, they have formed the opinion that the company will be able to pay its debts in full within such period not exceeding twelve months from the commencement of the winding up as may be specified in the declaration.
- (2) A declaration made under subsection (1) shall have no effect for the purposes of this Act unless —
 - (a) it is made within five weeks immediately preceding the date of the passing of the resolution for winding up the company and is lodged with the Registrar for registration before that date; and
 - (b) it embodies a statement of the company's assets and liabilities as at the latest practicable date before the making of the declaration.
- (3) Any director of a company who makes a declaration under this section without having reasonable grounds for the opinion that the company will be able to pay its debts in full within the period specified in the declaration is guilty of an offence.
- (4) If the company is wound up in pursuance of a resolution passed within the period of five weeks after the making of the declaration, but its debts are not

paid or provided for in full within the period stated in the declaration, it shall be presumed until the contrary is shown that the director did not have reasonable grounds for his opinion.

- (5) A winding up in the case of which a declaration has been made and delivered in accordance with this section is in this Act referred to as “a member’s voluntary winding up”, and winding up in the case of which a declaration has not been so made and delivered is in this Act referred to “a creditors’ voluntary winding up”.

DIVISION 2 - PROVISIONS APPLICABLE ONLY MEMBERS’ VOLUNTARY WINDING UP

65 Power of company to appoint and fix remuneration of liquidators

- (1) The company in general meeting shall appoint one, or more than one, liquidator for the purpose of winding up the affairs and distributing the assets of the company, and may fix the remuneration to be paid to him or them.
- (2) Subject to subsections (3) and (4), the company may by special resolution remove a liquidator, and appoint another liquidator, but the removal or appointment does not have effect —
- (a) until after the expiration of the period of fourteen days after the date on which the resolution is passed; or
- (b) if, within that period an application is made to the court under subsection (3), unless the Court dismisses the application or the application is withdrawn.
- (3) In addition to the other requirements of this Act with respect to the giving of notice of meetings, the company shall give to all creditors and contributories of the company notice of any meeting at which a resolution under subsection (2) will be proposed, giving in the notice particulars of the proposals.
- (4) A creditor or contributory of the company may, within the period of fourteen days after the date on which a resolution under subsection (2) is passed, apply to the Court for an order cancelling the resolution and the Court may, if it is satisfied that it is fair and reasonable to do so, allow the application, but if not so satisfied shall dismiss the application.
- (5) On the appointment of a liquidator all the powers of the directors shall, cease, except so far as the company in general meeting or the liquidator, sanctions the continuance thereof.

66 Power to fill vacancy in office of liquidator

- (1) If a vacancy occurs by death, resignation or otherwise in the office of liquidator appointed by the company, the company in general meeting may, subject to any arrangement with its creditors, fill the vacancy.

- (2) For that purpose a general meeting may be convened by any contributory or, if there were more liquidators than one, by the continuing liquidators.
- (3) The meeting shall be held in manner provided by this Act or by the Articles or in such manner as may, on application by any contributory or by the continuing liquidators, be determined by the Court.

67 Power of liquidator to accept shares etc., as consideration for sale of property of company

- (1) Where a company is proposed to be, or is in the course of being, wound up altogether voluntarily, and the whole or part of its business or property is proposed to be transferred or sold to a corporation, (in this section called “the transferee company”) the liquidator of the first-mentioned company (in this section called “the transferor company”) may, with the sanction of a special resolution of that company, conferring either a general authority on the liquidator or an authority in respect of any particular arrangement, receive in compensation for the transfer or sale, shares, policies, or other like interests in the transferee company, for distribution among the members of the transferor company, or may enter into any other arrangement whereby the members of the transferor company may, in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the transferee company.
- (2) Any sale or arrangement in pursuance of this section shall be binding on the members of the transferor company, and where the whole or part of the compensation or benefit accruing to the members of the transferor company in respect of any such sale or arrangement consists of fully paid shares in the transferee company each such member is deemed to have agreed with the transferee company for the acceptance of the fully paid shares to which he is entitled under the distribution referred to in subsection (1).
- (3) If any member of the transferor company who did not vote in favour of the special resolution expresses his dissent therefrom in writing addressed to the liquidator and left at the registered office of the company within seven days after the passing of the resolution, he may require the liquidator either to abstain from carrying the resolution into effect or to purchase his interest at a price to be determined by agreement or by arbitration in manner provided by the Arbitration Act.⁴
- (4) If the liquidator elects to purchase the member's interest, the purchase money must be paid before the company is dissolved, and be raised by the liquidator in such manner as may be determined by special resolution.
- (5) A special resolution shall not be invalid for the purposes of this section by reason that it is passed before or concurrently with a resolution for voluntary winding up or for appointing liquidators but, if an order is made within a year for winding up the Company by the Court, the special resolution is not valid unless sanctioned by the Court.

68 Duty of liquidator to call creditors meeting in case of solvency

- (1) If, in the case of a winding up commenced after the commencement of this Act, the liquidator is at any time of the opinion that the company will not be able to pay its debts in full within the period stated in the declaration under section 64, he shall forthwith summon a meeting of the creditors, and shall lay before the meeting a statement of the assets and liabilities of the company.
- (2) Unless the meeting of creditors resolve that the winding up shall continue as a members' voluntary winding up, the winding up shall as from the date when the liquidator calls the meeting of creditors become a creditors' voluntary winding up, and the meeting of creditors shall have the same powers as a meeting of creditors held under section 74.
- (3) If the liquidator fails to comply with subsection (1) he is guilty of an offence.

69 Duty of liquidator to call general meeting at end of each year

- (1) Subject to section 71, in the event of the winding up continuing for more than one year, the liquidator shall summon a general meeting of the company at the end of the first year from the commencement of the winding up and of each succeeding year, or at the first convenient date within three months (or such longer period as the Minister may allow) from the end of the year, and shall lay before the meeting an account of his acts and dealings and of the conduct of the winding up during the preceding year.
- (2) If the liquidator fails to comply with subsection (1) he is guilty of an offence.

70 General meeting and dissolution

- (1) Subject to section 71, as soon as the affairs of the company are fully wound up, the liquidator shall make up an account of the winding up, showing how the winding up has been conducted and the property of the company has been disposed of, and shall cause the account to be audited and when that has been done shall call a general meeting of the company for the purpose of laying before it the audited account and giving any necessary explanation thereof.
- (2) The meeting shall be called by notice and advertisement in the Gazette specifying the time, place and object thereof, and published one month at least before the meeting.
- (3) Within one week after the meeting, the liquidator shall lodge with the Registrar a copy of the audited account, and shall make a return to him of the holding of the meeting and of its date, and if the copy is not sent or the return is not made in accordance with this subsection the liquidator is guilty of an offence.
- (4) Notwithstanding anything in subsection (3), if a quorum is not present at the meeting, the liquidator shall, in lieu of the return referred to in subsection (3),

make a return that the meeting was duly summoned and that no quorum was present at the meeting, and upon such a return being made the provisions of this subsection as to the making of the return are deemed to have been complied with.

- (5) The Registrar on receiving the account and either of the returns mentioned in subsection (3) or (4), shall forthwith register them, and on the expiration of three months from the registration of the return of the company shall be deemed to be dissolved but the Court may, on application of the liquidator or of any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the company is to take effect for such time as the Court thinks fit.
- (6) The person on whose application an order of the Court under this section is made shall, within seven days after the making of the order, lodge with the Registrar a copy of the order for registration, and if that person fails to do so he is guilty of an offence.
- (7) If the liquidator fails to call a general meeting of the company as required by this section, he is guilty of an offence.

71 Alternative provisions as to annual and final meetings in case of insolvency

Where section 68 has effect, sections 78 and 79 shall apply to the winding up to the exclusion of sections 69 and 70, as if the winding up were a creditors' voluntary winding up and not a members' voluntary winding up, but the liquidator shall not be required to summon a meeting of creditors under section 78 at the end of the first year from the commencement of the winding up, unless the meeting held under section 68 is held more than three months before the end of that year.

DIVISION 3 - PROVISIONS APPLICABLE TO A CREDITORS' VOLUNTARY WINDING UP

72 Meeting of creditors

- (1) The company shall cause a meeting of the creditors of the company to be summoned for the day, or the day next following the day, on which there is to be held the meeting at which the resolution for voluntary winding up is to be proposed, and shall cause the notices of the meeting of creditors to be sent by post to the creditors simultaneously with the sending of the notices of the meeting of the company.
- (2) The company shall cause notice of the meeting of the creditors to be advertised once in the Gazette and in writing to the Registrar.
- (3) The directors of the company shall —

- (a) cause a full statement of the position of the company's affairs together with a list of the creditors of the company and the estimated amount of their claims to be laid before the meeting of creditors; and
 - (b) appoint one of their number to preside at the meeting.
- (4) The director appointed to preside at the meeting of creditors shall attend and preside at the meeting.
- (5) If the meeting of the company at which the resolution for voluntary winding up is to be proposed is adjourned and the resolution is passed at an adjourned meeting, any resolution passed at the meeting of the creditors held in pursuance of subsection (1) has effect as if it had been passed immediately after the passing of the resolution for winding up the company.
- (6) If default is made —
- (a) by the company in complying with subsections (1) and (2);
 - (b) by the directors of the company in complying with subsection (3); or
 - (c) by any director of the company in complying with subsection (4),
- the company or, as the case may be, each of the directors is guilty of an offence, and, in the case of default by the company, every officer of the company who is in default is guilty of an offence.

73 Appointment of liquidator

- (1) The creditors and the company at their respective meetings mentioned in section 22 may nominate a person to be liquidator for the purpose of winding up the affairs and distributing the assets of the company, and if the creditors and the company nominate different persons, the person nominated by the creditors shall be liquidator, and if no person is nominated by the creditors the person, if any, nominated by the company shall be liquidator.
- (2) Notwithstanding the provisions of subsection (1), when different persons are nominated any director, member, or creditor of the company may, within seven days after the date on which the nomination was made by the creditors, apply to the Court for an order either directing that the person nominated as liquidator by the company shall be liquidator instead of or jointly with the person nominated by the creditors, or appointing some other person to be liquidator instead of the person appointed by the creditors.

74 Appointment of committee of inspection

- (1) The creditors at the meeting to be held in pursuance of section 71 or at any subsequent meeting, may, if they think fit, appoint a committee of inspection consisting of not more than five persons, and if such a committee is appointed the company may, either at the meeting at which the resolution for voluntary winding up is passed or at any time subsequently in general meeting, appoint

such number of persons as they think fit to act as members of the committee not exceeding five in number.

- (2) Notwithstanding the provisions of subsection (1), the creditors may, if they think fit, resolve that all or any of the persons so appointed by the company ought not to be members of the committee of inspection, and, if the creditors so resolve, the persons mentioned in the resolution shall not, unless the Court otherwise directs, be qualified to act as members of the committee, and on any application to the Court under this provision the Court may, if it thinks fit, appoint other persons to act as such members in place of the persons mentioned in the resolution.
- (3) Subject to the provisions of this section and to rules made under section 123, the provisions of section 36 (except subsection (1)) apply with respect to a committee of inspection appointed under this section as they apply with respect to a committee of inspection appointed in a winding up by the Court.

75 Fixing of liquidators remuneration and cesser of director's powers

- (1) The committee of inspection, or if there is no such committee, the creditors, may fix the remuneration to be paid to the liquidator or liquidators.
- (2) On the appointment of a liquidator, all the powers of the directors shall cease, except so far as the committee of inspection, or if there is no such committee, the creditors, sanction the continuance thereof.

76 Power to fill vacancy in office of liquidator

If a vacancy occurs, by death, resignation or otherwise, in the office of a liquidator, other than a liquidator appointed by, or by the direction of, the Court, the creditors may fill the vacancy.

77 Application of section 67 to a creditors' winding up

The provisions of section 67 apply in the case of a creditors' voluntary winding up as in the case of a members' voluntary winding up, with the modification that the powers of the liquidator under that section shall not be exercised except with the sanction either of the Court or of the committee of inspection.

78 Duty of liquidator to call meetings of company and of creditors at end of each year

- (1) In the event of the winding up continuing for more than one year, the liquidator shall summon a general meeting of the company and a meeting of creditors at the end of the first year from the commencement of the winding up, and of each succeeding year, or at the first convenient date within three

months (or such longer period as the Minister may allow) from the end of the year, and shall lay before the meeting an account of his acts and dealings and of the conduct of the winding up during the preceding year.

- (2) If the liquidator fails to comply with subsection (1) he is guilty of an offence.

79 Final meeting and dissolution

- (1) As soon as the affairs of the company are fully wound up, the liquidator shall make up an account of the winding up, showing how the winding up has been conducted and the property of the company has been disposed of, and thereupon shall call a general meeting of the company and a meeting of the creditors, for the purpose of laying the account before the meetings, and giving any explanation thereof.
- (2) Each such meeting shall be called by notice and advertisement in the Gazette specifying the time, place and object thereof, and published one month at least before the meeting.
- (3) Within one week after the date of the meetings, or, if the meetings are not held on the same date, after the date of the later meeting, the liquidator shall send to the Registrar a copy of the account, and shall make a return to him of the holding of the meetings and of their dates, and if the copy is not sent or the return is not made in accordance with this subsection the liquidator is guilty of an offence.
- (4) Notwithstanding anything in subsection (2), if a quorum is not present at either meeting, the liquidator shall, in lieu of the return referred to in subsection (3), make a return that the meeting was duly summoned and that no quorum was present at the meeting, and upon such a return being made the provisions of this subsection as to the making of the return are, in respect of that meeting, deemed to have been complied with.
- (5) The Registrar on receiving the account and in respect of each such meeting either of the returns mentioned in subsection (3) or (4) shall forthwith register them, and on the expiration of three months from the registration thereof the company is deemed to be dissolved, but the Court may, on the application of the liquidator or of any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the company is to take effect from such time as the Court thinks fit.
- (6) The person on whose application an order of the Court under this section is made, shall, within seven days after the making of the order, lodge with the Registrar a copy of the order for registration, and if that person fails to do so he is guilty of an offence
- (7) If the liquidator fails to call a general meeting of the company or a meeting of the creditors as required by this section, he is guilty of an offence.

DIVISION 4 - PROVISIONS APPLICABLE TO EVERY VOLUNTARY WINDING UP**80 Distribution of property of company**

- (1) Subject to the provisions of this Act as to preferential payments, the property of a company shall, on its winding up, be applied in satisfaction of its liabilities equally, and subject to that application, shall, unless the articles of incorporation of the company otherwise provide, be distributed among the members according to their rights and interests in the company.

81 Powers and duties of liquidator in voluntary winding up

- (1) The liquidator may —
 - (a) in the case of a member's voluntary winding up, with the sanction of a special resolution of the company and, in the case of a creditor's voluntary winding up, with the sanction of either the Court or the committee of inspection, exercise any of the powers given by paragraphs (d), (e) and (f) of section 30(1) to a liquidator in a winding up by the Court;
 - (b) exercise any of the other powers by this Act given to the liquidator in the winding up by the Court;
 - (c) exercise the power of the Court under this Act of settling a list of contributories, and the list of contributories shall be prima facie evidence of the liability of the persons named therein to be contributories;
 - (d) exercise the power of the Court of making calls; and
 - (e) summon general meetings of the company for the purpose of obtaining the sanction of the company by special resolution or for any other purpose he may think fit.
- (2) The liquidator shall pay the debts of the company and shall adjust the right of the contributories among themselves.
- (3) When several liquidators are appointed, any power given by this Act may be exercised by such one or more of them as may be determined at the time of their appointment, or, in default of such determination, by a number not less than two.
- (4) Unless the committee of inspection or, as the case may be, the members determines or determine, section 34 applies in the case of a liquidator in a voluntary , winding up as it applies in the case of a liquidator of a company being wound up by the Court.

82 Power of Court to appoint and remove liquidator in voluntary winding up

- (1) If from any cause whatever there is no liquidator acting, the Court may appoint a liquidator.
- (2) The Court may, on cause shown, remove a liquidator and appoint another liquidator.

83 Notice by liquidator of his appointment

- (1) The liquidator shall, within twenty-one days after his appointment, publish by notice and in the Gazette, and deliver to the Registrar for registration a notice of his appointment in the prescribed form.
- (2) If the liquidator fails to comply with the requirements of subsection (1) he is guilty of an offence.

84 Arrangement when binding on creditors

- (1) Any arrangement entered into between a company about to be, or in the course of being, wound up and its creditors shall, subject to the right of appeal under this section, be binding on the company if sanctioned by a special resolution, and on the creditors if acceded to by three-fourths in number and value of the creditors.
- (2) Any creditor or contributory may, within three weeks from the completion of the arrangement appeal to the Court against it and the Court may thereupon, as it thinks just, amend, vary, or confirm the arrangement.

85 Power to apply to Court to have questions determined of powers exercised

- (1) The liquidator or any contributory or creditor may apply to the Court to determine any question arising in the winding up of a company, or the exercise as respects the enforcing of calls, or any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court.
- (2) The Court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit, or may make such other order on the application as it thinks just.
- (3) A copy of the order made by virtue of this section staying the proceedings in the winding up shall forthwith be lodged by the company, or otherwise as may be prescribed, with the Registrar, who shall enter a minute of the order in his records relating to the company.

86 Costs of voluntary winding up

All costs, charges and expenses properly incurred in the winding up, including the remuneration of the liquidator, shall be payable out of the assets of the company in priority to all other claims.

87 Saving for rights of creditors and contributories

The winding up of a company shall not bar the right of any creditor or contributory to have it wound up by the Court, but in the case of an application by a contributory the Court must be satisfied that the rights of the contributories will be prejudiced by a voluntary winding up.

PART IV - PROVISIONS APPLICABLE TO EVERY MODE OF WINDING UP

DIVISION 1 - PROOF AND RANKING OF CLAIMS

88 Debts of all descriptions to be proved

- (1) In every winding up, subject in the case of all insolvent companies to the application in accordance with the provisions of this Act of the law of bankruptcy, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as possible of the value of such debts or claims as are subject to any contingency or sound only in damages or for some other reason do not bear a certain value.
- (2) Subject to section 89, in the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt, and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up, and make such claims against the company as they respectively are entitled to by virtue of this section.

89 Preferential payments

- (1) In a winding up of a company there shall be paid in priority to all other debts —

- (a) all local government rates and all public taxes of every description due from the company within the period of twelve months before the relevant date and not exceeding in the whole one year's rates and taxes;
 - (b) all wages and salary of any employee in respect of services rendered to the company during the period of four months before the relevant date; or
 - (c) all wages of any employee, whether payable for time or piece work, in respect of services rendered to the company during the period of four months before the relevant date.
- (2) The debts and claims to which priority is given by subsection (1) shall —
- (a) rank equally among themselves and be paid in full, unless the assets are insufficient, to meet them, in which case they shall abate in equal proportions; and
 - (b) as far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and paid accordingly out of any property comprised in or subject to that charge.
- (3) Subject to the retention of such sums as are necessary for the costs and expenses of the winding up, the debts and claims to which priority is given by subsection (1) shall be discharged forthwith so far as assets are sufficient to meet them.
- (4) In the event of a landlord or other person distraining or having distrained on any goods or effects of the company within three months next before the date of the winding up order, the debts to which priority is given by subsection (1) shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof, but in respect of any money paid under such charge, the landlord or other person shall have the same rights of priority as the person to whom payments are made.
- (5) In this section, “the relevant date” means —
- (a) in the case of a company ordered to be wound up compulsorily which had not previously commenced to be wound up voluntarily, the date of the winding up order; and
 - (b) in any other case, the date of the commencement of the winding up.

DIVISION 2 - EFFECT OF WINDING UP ON ANTECEDENT AND OTHER TRANSACTIONS

90 Fraudulent preference

- (1) Any conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property which would, if made or done by or against an individual, be deemed in his bankruptcy a fraudulent preference, or a

fraudulent conveyance, assignment, transfer, sale or disposition, shall, if made or done by or against a company, be deemed in the event of its being wound up, a fraudulent preference of its creditors, or a fraudulent conveyance, assignment, transfer, sale or disposition, as the case may be, and be invalid accordingly.

- (2) For the purposes of this section, the commencement of the winding up is deemed to correspond with the presentation of the bankruptcy petition in the case of an individual.
- (3) Any conveyance or assignment by a company of all its property to trustees for the benefit of all of its creditors is void.

91 Liabilities and rights of certain fraudulently preferred persons

- (1) Where, in the case of a company wound up in Tuvalu, anything made or done after the commencement rights of this Act is void under section 90 as a fraudulent preference of a person interested in property mortgaged or charged to secure the company's debt, then (without prejudice to any rights or liabilities arising apart from this provision) the person preferred is subject to the same liabilities, and has the same rights, as if he had undertaken to be personally liable as surety for the debt to the extent of the charge on the property or the value of his interest, whichever is the less.
- (2) The value of the interest of a person referred to in subsection (1) shall be determined as at the date of the transaction constituting the fraudulent preference, and shall be determined as if the interest were free of all incumbrances other than those to which the charge for the company's debt was then subject.
- (3) On any application made to the Court with respect to any payment on the ground that the payment was a fraudulent preference of a surety or guarantor, the Court shall have jurisdiction to determine any questions with respect to whom the payment was made and the surety or guarantor and to grant relief in respect thereof, notwithstanding that it is not necessary so to do for the purposes of the winding up, and for that purpose may give leave to bring in the surety or guarantor as a third party as in the case of an action for the recovery of the sum paid.
- (4) This subsection applies, with the necessary modifications, in relation to transactions other than the payment of money as it applies in relation to payments.

92 Effect of floating charge

Where a company is being wound up, a floating charge on the undertaking or property of the company created within twelve months of the commencement of the winding up is, unless it is proved that the company immediately after the creation of

the charge was solvent, invalid, except to the amount of any cash paid to the company at the time of or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount at the rate of six per centum per annum or such other rate as may for the time being be prescribed by order of the Minister.

93 Disclaimer of onerous property

- (1) Where any part of the property of a company which is being wound up consists of land of any tenure burdened with onerous covenants, of shares or stock in corporations, or unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the liquidator of the company, notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, may, with the leave of the Court and subject to the provisions of this section, by writing signed by him, at any time within twelve months after the commencement of the winding up or such extended period as may be allowed by the Court, disclaim the property; but where any such property has not come to the knowledge of the liquidator within one month after the commencement of the winding up, the power under this section of disclaiming the property may be exercised at any time within twelve months after he has become aware thereof or such extended period as may be allowed by the Court.
- (2) The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interest, and liabilities of the company, and the property of the company, in or in respect of the property disclaimed, but shall not, except so far as is necessary for the purpose of releasing the company and the property of the company from liability, affect the rights or liabilities of any other person.
- (3) The liquidator shall not be entitled to disclaim any property under this section in any case where an application in writing has been made to him by any person interested in the property requiring him to decide whether he will or will not disclaim, and the liquidator has not, within a period of twenty-eight days after the receipt of the application or such further period as may be allowed by the Court, given notice to the applicant that he intends to apply to the Court for leave to disclaim, and, in the case of a contract, if the liquidator, after such an application, does not within the said period or further period disclaim the contract, the company shall be deemed to have adopted it.
- (4) The Court may, on the application of any person who is, as against the liquidator, entitled to the benefit or subject to the burden of a contract made with a company, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise as the Court thinks just, and any damages payable

under the order to any such person may be proved by him as a debt in the winding up.

- (5) The Court may, on an application by any person who either claims any interest in any disclaimed property or is under any liability not discharged by this Act in respect of any disclaimed property and on hearing any such persons as it thinks fit, make an order for the vesting of the property in or the delivery of the property to any persons entitled thereto, or to whom it may seem just that the property should be delivered by way of compensation for such liability, or a trustee for him, and on such terms as the Court thinks just, and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose.
- (6) Notwithstanding anything in subsection (6), where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the company, whether as under-lessee or as mortgagee by demise, except upon terms of making that person —
- (a) subject to the same liabilities and obligations as those to which the company was subject under the lease in respect of the property at the commencement of the winding up; or
 - (b) if the Court thinks fit, subject only to the same liabilities and obligations as if the lease had been assigned to that person at that date,
- and in either event, if the case so requires, as if the lease had comprised only the property comprised in the vesting order, and any mortgagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and, if there is no person claiming under the company who is willing to accept an order upon such terms, the Court may vest the estate and interest of the company in the property in any person liable personally or in a representative character, and either alone or jointly with the company to perform the lessee's covenants in the lease, freed and discharged from all estates, incumbrances and interests created therein by the company.
- (7) Any person injured by the operation of a disclaimer under this section is deemed to be a creditor of the company to the amount of the injury, and may accordingly prove the amount as a debt in the winding up.

94 Interpretation

In sections 95 and 96 —

“**bailiff**” includes any officer charged with the execution of a writ or other process;

“**goods**” includes all chattels personal.

95 Restriction of rights of creditor as to execution or attachment

- (1) Where a creditor has issued execution against the goods or lands of a company or has attached any debt due to the company, and the company is subsequently wound up, he shall not be entitled to retain the benefit of the execution or attachment against the liquidator in the winding up of the company unless he has completed the execution or attachment before the commencement of the winding up but —
 - (a) where any creditor has had notice of a meeting having been called at which a resolution for voluntary winding up is to be proposed, the date on which the creditor so had notice shall for the purposes of the foregoing provision be substituted for the date of the commencement of the winding up;
 - (b) a person who purchases in good faith under a sale by a bailiff any goods of a company on which an execution has been levied shall in all cases acquire a good title to them against the liquidator; and
 - (c) the rights conferred by this subsection on the liquidator may be set aside by the Court in favour of the creditor to such extent and subject to such terms as the Court may think fit.
- (2) For the purposes of this section —
 - (a) an execution against goods shall be taken to be completed by seizure and sale;
 - (b) an attachment of a debt is deemed to be completed by receipt of the debt; and
 - (c) an execution against land is deemed to be completed from the date of the order for sale or by seizure as the case may be, and, in the case of an equitable interest, by the appointment of a receiver.

96 Duties of bailiff as to goods taken in execution

- (1) Subject to subsection (3), where any goods of a company are taken in execution and, before the sale thereof or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the bailiff that a provisional liquidator has been appointed or that a winding-up order has been made or that a resolution for voluntary winding up has been passed, the bailiff shall, on being so required, deliver the goods and any money seized or received in part satisfaction of the execution to the liquidator, but the costs of the execution shall be a first charge on the goods or money so delivered and the liquidator may sell the goods, or a sufficient part thereof for the purpose of satisfying that charge.
- (2) Subject to subsection (3), where under an execution in respect of a judgment for a sum exceeding one hundred dollars the goods of a company are sold or money is paid in order to avoid sale, the bailiff shall deduct the costs of the execution from the proceeds of the sale or the money paid and retain the

balance for fourteen days, and if within that time notice is served on him of a petition for the winding up of the company having been presented or of a meeting having been called at which there is to be proposed a resolution for the voluntary winding up of the company and an order is made or a resolution passed, as the case may be, for the winding up of the company, the bailiff shall pay the balance to the liquidator, who shall be entitled to retain it as against the execution creditor.

- (3) The rights conferred by this section on the liquidator may be set aside by the Court in favour of the creditor to such extent and subject to such terms as the Court thinks fit.

DIVISION 3 - OFFENCE

97 Offences by officers of companies in liquidation

- (1) Any person (being a past or present officer of a company which at the time of the commission of the alleged offence is being wound up, whether by the Court or voluntarily, or is subsequently ordered to be wound up by the Court or subsequently passes a resolution for voluntary winding up), who —
 - (a) does not to the best of his knowledge and belief fully and truly disclose to the liquidator all the property, real and personal, of the company, and how and whom and for what consideration and when the company disposed of any part thereof, except such part as has been disposed of in the ordinary way of the business of the company;
 - (b) does not deliver up to the liquidator, or as he directs, all such part of the real and personal property of the company as is in his custody or under his control, and which he is required by law to deliver up;
 - (c) does not deliver up to the liquidator, or as he directs, all books and papers in his custody or under his control belonging to the company and which he is required by law to deliver up;
 - (d) within twelve months next before the commencement of the winding up or at any time thereafter conceals any part of the property of the company to the value of one hundred dollars or upwards, or conceals any debt due to or from the company;
 - (e) within twelve months next before the commencement of the winding up or at any time thereafter fraudulently removes any part of the property of the company to the value of one hundred dollars or upwards;
 - (f) makes any material omission in any statement relating to the affairs of the company;
 - (g) knowing or believing that a false debt has been proved by any person under the winding up, fails for the period of one month to inform the liquidator thereof;

- (h) after the commencement of the winding up prevents the production of any book or paper affecting or relating to the property or affairs of the company;
- (i) within twelve months next before the commencement of the winding up or at any time thereafter, conceals, destroys, mutilates or falsifies, or is privy to the concealment, destruction, mutilation, or falsification of, any book or paper affecting or relating to the property or affairs of the company;
- (j) within twelve months next before the commencement of the winding up or at any time thereafter makes or is privy to the making of any false entry in any book or paper affecting or relating to the property or affairs of the company;
- (k) within twelve months next before the commencement of the winding up or at any time thereafter fraudulently parts with, alters or makes any omission in, or is privy to the fraudulent parting with, altering or making any omission in, any document affecting or relating to the property or affairs of the company;
- (l) after the commencement of the winding up or at any meeting of the creditors of the company within twelve months next before the commencement of the winding up attempts to account for any part of the property of the company by fictitious losses or expenses;
- (m) has within twelve months next before the commencement of the winding up or at any time thereafter, by any false representation or other fraud, obtained any property for or on behalf of the company on credit which the company does not subsequently pay for;
- (n) within twelve months next before the commencement of the winding up or at any time thereafter, under the false pretence that the company is carrying on its business, obtains on credit, for or on behalf of the company, any property which the company does not subsequently pay for;
- (o) within twelve months next before the commencement of the winding up or at any time thereafter pawns, pledges or disposes of any property of the company which has been obtained on credit and has not been paid for, unless such pawning, pledging or disposing is in the ordinary way of the business of the company; or
- (p) is guilty of any false representation or other fraud for the purpose of obtaining the consent of the creditors of the company or any of them to an agreement with reference to the affairs of the company or to the winding up,

is guilty of an offence.

- (2) It is a sufficient defence in proceedings for an offence under paragraph, (a), (b), (c), (d), (f), (n), or (o) of subsection (1) if the accused proves that he had no intent to defraud, and in proceedings for an offence under paragraph (h), (i)

or (j) of subsection (1) if he proves that he had no intent to conceal the state of affairs of the company or to defeat the law.

- (3) Where any person pawns, pledges or disposes of any property in circumstances which amount to an offence under subsection (1)(o), every person who takes in pawn or pledge or otherwise receives the property knowing it to be pawned, pledged or disposed of in those circumstances is guilty of an offence.
- (4) For the purposes of this section, “officer” includes any person in accordance with whose directions or instructions the directors of a company have been accustomed to act.

98 Penalty for falsification of books

Any officer or contributory of a company being wound up who destroys, mutilates, alters or falsifies any books, papers, or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book of account or document belonging to the company with intent to defraud or deceive any person, is guilty of an offence.

99 Frauds by officers of companies which have gone into liquidation

Any person who, being at the time of commission of the alleged offence an officer of a company which is subsequently ordered to be wound up by the Court or subsequently passes a resolution for voluntary winding up, —

- (a) has by false pretences or by means of any other fraud induced any person to give credit to the company;
- (b) with intent to defraud creditors of the company, has made or caused to be made any gift or transfer of or charge on, or has caused or connived at the levying of any execution against the property of the company; or
- (c) with intent to defraud creditors of the company, has concealed or removed any part of the property of the company since, or within two months before, the date of any unsatisfied judgment or order for payment of money obtained against the company,

is guilty of an offence.

100 Liability where proper accounts not kept

- (1) If where a company is wound up it is shown that proper books of account were not kept by the company throughout the period of two years immediately preceding the commencement of the winding up, or the period between the incorporation of the company and the commencement of the winding up, whichever is the shorter, every officer of the company who was knowingly a party to the default of the company, unless he shows that he

acted honestly and that in the circumstances in which the business of the company was carried on the fault was excusable, is guilty of an offence.

- (2) For the purposes of this section, proper books of account are deemed not to have been kept in the case of any company if there have not been kept such books or accounts as are necessary to exhibit and explain the transactions and financial position of the trade or business of the company, including books containing entries from day to day in sufficient detail of all cash received and cash paid, and, where the trade or business has involved dealings in goods, statements of the annual stock takings and (except in the case of goods sold by way of ordinary retail trade) of all goods sold and purchased, showing the goods and the buyers and sellers thereof in sufficient detail to enable those goods and those buyers and sellers to be identified.

101 Fraudulent Trading

- (1) If in the course of the winding up of a company it appears that any business of the company has been carried on —
 - (a) with intent to defraud creditors of the company or the creditors of any other person or for any fraudulent purpose;
 - (b) with reckless disregard of the company's obligation to pay its debts and liabilities; or
 - (c) with reckless disregard of the insufficiency of the company's assets to satisfy its debts and liabilities,

the Court, on the application of the Official Receiver or the liquidator or any creditor or contributory of the company may, if it thinks proper so to do, declare that any of the officers whether past or present, of the company or any other persons who were knowingly parties to the carrying on of the business in that manner are personally responsible, without any limitation of liability, for all or any debts or other liabilities of the company, as far as the Court may direct.

- (2) Where the Court makes any declaration referred to in subsection (1) it may give such further directions as it thinks proper for the purpose of giving effect to that declaration, and in particular may make any provision for making the liability of a person under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in any mortgage or charge, on any assets of the company held by or vested in him, or any company or person on his behalf or any person claiming as assignee from or through the person liable to any person acting on his behalf, and may from time to time make such further order as may be necessary for the purpose of enforcing any charge imposed under this subsection.
- (3) For the purposes of subsection (2), “assignee” includes any person to whom or in whose favour, by the directions of the person liable, the debt, obligation, mortgage or charge was created, issued or transferred or in the interest

created, but does not include an assignee for valuable consideration (not including consideration by way of marriage) given in good faith and without notice of any of the matters on the ground of which the declaration is made.

- (4) Where any business of a company is carried on with such intent or for such purpose as is mentioned in subsection (1), every person who was knowingly a party to the carrying on of the business in that manner is guilty of an offence.
- (5) The provisions of this section have effect notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the declaration is to be made, and where the declaration under subsection (1) is made in the case of a winding up, the declaration is deemed to be a final judgment obtained in an action by which a previously existing liability of the defendant is ascertained or established.

102 Power of Court to assess damages against delinquent directors, etc.

- (1) If in the course of winding up a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present officer or liquidator of the company, has misapplied or retained or become liable or accountable for any money or property of the company or been guilty of a misfeasance or breach of trust in relation to the company, the Court may, on the application of the Official Receiver or of the liquidator, or of any creditor or contributory, examine into the conduct of the promoter, liquidator or officer, and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the Court thinks just, or to contribute such sum to the asset's of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the Court thinks just.
- (2) The provisions of this section have effect notwithstanding that the offence is one for which the offender may be criminally liable.
- (3) Where in the case of a winding up an order for payment of money is made under this section, the order is deemed to be a final judgment as in section 101(5).

103 Prosecution of delinquent officers and members of company

- (1) If it appears to the Court in the course of a winding up by the Court, that any past or present officer, or any member, of the company has been guilty of an offence in relation to the company for which he is criminally liable the Court may, either on the application of any person interested in the winding up members of or on its own motion, direct the liquidator to refer the company matter to the Attorney General.
- (2) If it appears to the liquidator in the course of a voluntary winding up that any past or present officer, or any member, of a company has been guilty of any offence in relation to the company for which he is criminally liable, he shall

forthwith report the matter to the Attorney General and shall furnish to him such access to and facilities for inspecting and taking copies of any documents, being information or documents in the possession or under the control of the liquidator and relating to the matter in question, as the Director may require.

- (3) Where any report is made under subsection (2) to the Attorney General, he may, if he thinks fit, refer the matter to the Minister for further enquiry, and the Minister may appoint an inspector under Part VII of the Companies Act to investigate the matter.
- (4) If it appears to the Court in the course of a voluntary winding up that any past or present officer, or any member, of the company has been guilty of any offence in relation to the company for which he is criminally liable, and that no report with respect to the matter has been made by the liquidator to the Attorney General under subsection (2), the Court may, on the application of any person interested in the winding up or of its own motion, direct the liquidator to make such a report, and on a report being made accordingly the provisions of this section have effect as though the report had been made in pursuance of subsection (2).
- (5) If, where any matter is reported or referred to the Attorney General under this section, he considers that the case is one in which a prosecution ought to be instituted, the liquidator and every officer and agent of the company past and present (other than the defendant in the proceedings) shall give him all assistance in connection with the prosecution which he is reasonably able to give.
- (6) For the purposes of subsection (5), “agent”, in relation to a company, is deemed to include any banker or attorney-at-law of the company and any person employed by the company as auditor, whether that person is or is not an officer of the company.
- (7) If any person fails or neglects to give assistance in the manner required by subsection (5), the Court may, on the application of the Attorney General, direct that person to comply with the requirements of that subsection, and where any such application is made with respect to a liquidator the Court may, unless it appears that the failure or neglect to comply was due to the liquidator not having in his hands sufficient assets of the company to enable him so to do, direct that the costs of the application shall be borne by the liquidator personally.

DIVISION 4 - SUPPLEMENTARY PROVISIONS AS TO WINDING UP

104 Disqualification from appointment as liquidator

A corporation or an undischarged bankrupt is not qualified for appointment as liquidator of a company, whether in a winding up by the Court or in a voluntary winding up, and —

- (a) any appointment made in contravention of this provision is void; and
- (b) any corporation which or an undischarged bankrupt who, acts as liquidator of a company is guilty of an offence.

105 Notification that a company is in liquidation

Where a company is being wound up, whether by the Court or voluntarily, every invoice, order for goods or business letter issued by or on behalf of the company or a liquidator of the company, or a receiver or manager of the property of the company, being a document on or in which the name of the company appears, shall contain a statement that the company is being wound up.

106 Failure to comply with section 105

If the default is made in complying with section 105, the company and every officer of the company, and every liquidator of the company and every receiver or manager, who knowingly authorises or permits the default, is guilty of an offence.

107 Exemption of certain documents from stamp duty on winding up of companies

- (1) In the case of a winding up by the Court, or certain of a creditors' voluntary winding up, of a company —
 - (a) every assurance relating solely to freehold or leasehold property, or to any mortgage, charge or other incumbrance on, or any estate, right or interest in, any real or personal property, which forms part of the assets of the company and which, after the execution of the assurance, either at law or in equity, is or remains part of the assets of the company; and
 - (b) every power of attorney, proxy, writ, order, certificate, affidavit, bond or other instrument or writing relating solely to the property of any company which is being so wound up or to any proceeding under any such winding up,

is exempt from duties chargeable under the enactment relating to stamp duties.

- (2) In subsection (1), “assurance” includes deed, conveyance, assignment, transfer and surrender.

108 Books of company to be evidence

Where a company is being wound up, all books and papers of the company and of the liquidators shall, as between the contributories of the company, be prima facie evidence of the truth of all matters purporting to be recorded therein.

109 Disposal of books and papers of company

- (1) When a company has been wound up and is about to be dissolved, the books and papers of the company and of the liquidators may be disposed of as follows, namely —
 - (a) in the case of a winding up by the Court in such manner as the Court directs;
 - (b) in the case of a members' voluntary winding up, in such way as a general meeting of the company by ordinary resolution directs, and, in the case of a creditors' voluntary winding up, in such manner as the committee of inspection or, if there is no such committee, as a meeting of the creditors of the company, by resolution directs.
- (2) After five years from the dissolution of the company no responsibility rests on the company, the liquidators or any person to whom the custody of the books and papers has been committed, by reason of any book or paper not being forthcoming to any person claiming to be interested therein.
- (3) Provision may be made by rules made under section 118 for enabling the Court to prevent, for such period (not exceeding five years from the dissolution of the company) as the Court thinks proper, the destruction of the books and papers of a company which has been wound up, and for enabling any creditor or contributory of the company to make representations to the Court.
- (4) If any person acts in contravention of any rules made under section 118 for the purposes of this section or of any direction of the Court thereunder, he is guilty of an offence.

110 Information as to pending liquidators

- (1) If where a company is being wound up the winding up is not concluded within one year after its commencement, the liquidator shall, at such intervals as may be prescribed, until the winding up is concluded, send to the Registrar a statement in the prescribed form and containing the prescribed particulars with respect to the proceedings in and position of the liquidator.
- (2) Any person stating himself in writing to be a creditor or contributory of the company shall be entitled, by himself or by his agent, at all reasonable times, on payment of the prescribed fee, to inspect the statement, and to receive a copy thereof or extract therefrom.
- (3) If a liquidator fails to comply with this section, he is guilty of an offence and any person untruthfully stating himself as provided in subsection (2) to be a creditor or contributory is guilty of a contempt of Court, and is, on the application of the liquidator or of the Official Receiver, punishable accordingly.

111 Unclaimed assets

- (1) If it appears either from any statement sent to the Registrar under section 110 or otherwise that a liquidator has in his hands or under his control any money representing unclaimed or undistributed assets of the company which have remained unclaimed or undistributed for six months after the date of their receipt or any money held by the company in trust in respect of dividends or other sums due to any person as a member of the company, the liquidator shall forthwith pay that money into Court, and shall be entitled to the prescribed certificate of receipt for the money so paid, and that certificate shall be an effectual discharge to him in respect thereof.
- (2) Any person claiming to be entitled to any money paid into Court in pursuance of this section may apply to the Court for payment thereof, and the Court may, on a certificate by the liquidator that the person claiming is entitled, make an order for the payment to that person of the sum due.

DIVISION 5 - SUPPLEMENTARY POWERS OF COURT**112 Meetings to ascertain wishes of creditors or contributories**

The Court may, as to all matters relating to the winding up of a company, have regard to the wishes of the creditors or contributories of the company, as proved to it by any sufficient evidence, and may, if it thinks fit, for the purpose of ascertaining those wishes, direct meetings of the creditors or contributories to be called, held and conducted in such manner as the Court directs, and may appoint a person to act as Chairman of any such meeting and to report the result thereof to the Court.

113 Affidavits, etc.

- (1) Any affidavit required to be sworn under the provisions or for the purposes of this Part may be sworn in Tuvalu or elsewhere before any Court, judge, or person lawfully authorised to take and receive affidavits.
- (2) All Courts, judges, justices, commissioners and persons acting judicially shall take judicial notice of the seal or stamp or signature, as the case may be, of any such Court, judge or person attached, appended, or subscribed to any such affidavit, or to any other document to be used for the purpose of this Part.

DIVISION 6 - PROVISIONS AS TO DISSOLUTION**114 Power of Court to declare dissolution of company void**

- (1) Where a company has been dissolved (otherwise than pursuant to section 115) the Court may at any time within two years of the date of the dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to the court to be interested, make an order upon such terms as the Court thinks fit, declaring the dissolution to have been

void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved.

- (2) The person on whose application the order was made shall, within seven days after the making of the order, or such further time as the Court allows, lodge with the Registrar a copy of the order, and if that person fails so to do he is guilty of an offence.

115 Registrar may strike defunct company of register

- (1) Where the Registrar has reasonable cause to believe that a company is not carrying on business or in operation, he may send to the company by post a letter inquiring whether the company is carrying on business or in operation.
- (2) If the Registrar does not within one month of sending the letter receive any answer thereto, he shall within fourteen days after the expiration of the month send to the company by post a registered letter referring to the first letter, and stating that no answer thereto has been received, and that if an answer is not received to the second letter within one month from the date thereof, a notice will be published in the Gazette with a view to striking the name of the company off the register.
- (3) If the Registrar either receives an answer to the effect that the company is not carrying on business or in operation, or does not within one month after sending the second letter receive any answer, he may publish in the Gazette, and send to the company by post, a notice that at the expiration of three months from the date of that notice the name of the company mentioned therein will unless cause is shown to the contrary, be struck off the register and the company will be dissolved.
- (4) If, in any case where a company is being wound up, the Registrar has reasonable cause to believe either that no liquidator is acting, or that the affairs of the company are fully wound up, and the returns required to be made by the liquidator have not been made for a period of six consecutive months, the Registrar shall publish in the Gazette and send to the company or the liquidator, if any, a like notice as is provided in subsection (3).
- (5) At the expiration of the time mentioned in the notice the Registrar may, unless cause to the contrary is previously shown by the company, strike its name off the register, and shall publish notice thereof in the Gazette, and on the publication in the Gazette of this notice the company shall be dissolved, but —
 - (a) the liability, if any, of every director, managing officer, and member of the company continues and may be enforced as if the company had not been dissolved; and
 - (b) nothing in this subsection affects the power of the Court to wind up a company the name of which has been struck off the register.

- (6) If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register, the Court on an application made by the company or member or creditor before the expiration of twenty years from the publication in the Gazette of the notice may, if satisfied that the company was at the time of the striking off carrying on business or in operation or otherwise that it is just that the company may be restored to the register, and upon a copy of the order being delivered to the Registrar for registration the company is deemed to have continued in existence as if its name had not been struck off; and the Court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.
- (7) A notice to be sent under this section to a liquidator may be addressed to the liquidator at his last known place of business, and a letter or notice to be sent under this section to a company may be addressed to the company at its registered office, or, if no office has been registered, to the care of some director or other officer of the company or if there is no director or other officer of the company whose name and address are known to the Registrar, may be sent to each of the persons who subscribed the Articles of incorporation, addressed to him at the address mentioned in the Articles of incorporation.

116 Outstanding assets of defunct company to vest in Registrar

- (1) Where, after a company has been dissolved, there remains any outstanding property, real or personal, including things in action and whether within or outside Tuvalu which was vested in the company or to which it was entitled, but which has not been realised or otherwise disposed of or dealt with by the company or Registrar its liquidator, such property shall, for the purposes of this section be and become vested in the Registrar for all the estate and interest therein legal or equitable of the company or its liquidator at the date the company was dissolved, together with all claims, rights and remedies which the company or its liquidator then had in respect thereof.
- (2) Where any claim, right or remedy of the liquidator may under this Act be made, exercised or availed of only with the approval or concurrence of the Court or some other person, the Registrar may for the purposes of this section make, exercise or avail itself of that claim, right or remedy without such approval or concurrence.
- (3) Property vested in the registrar by operation of this section is liable and subject to all charges, claims and liabilities imposed thereon or affecting such property by reason of any statutory provision as to rates, taxes, charges or any other matter or thing to which such property would have been liable or subject had such property continued in the possession, ownership or occupation of the company; but there shall not be imposed on the Registrar or the Crown any duty, obligation or liability whatsoever to do or suffer any act or thing

required by any such statutory provision to be done or suffered by the owner or occupier other than the satisfaction or payment of any such charges, claims, or liabilities out of the assets of the company so far as they are in the opinion of the Registrar properly available for and applicable to such payment.

117 Disposal of moneys

- (1) Upon proof to the satisfaction of the Registrar that there is vested in the Registrar by operation of section 116 or of an enactment of a proclaimed State containing provisions similar to provisions of section 123, any estate or interest in property, whether solely or together with any other person, of a beneficial nature and not merely held in trust, the Registrar may get in, sell or otherwise dispose of or deal with the estate or interest or any part thereof as the Registrar sees fit.
- (2) The Registrar may sell or otherwise dispose of or deal with any such property either solely or in concurrence with any other person in such manner for such consideration, by public auction, public tender or private contract upon such terms and conditions as the Registrar thinks fit, with power to rescind any contract and resell or otherwise dispose of or deal with any such property as the Registrar thinks expedient, and may make, execute and give such contracts, instruments and documents as the Registrar thinks necessary.
- (3) The Registrar shall be remunerated by such commission, whether by way of percentage or otherwise as is prescribed in respect of the exercise of powers conferred by subsection (1).
- (4) The moneys received by the Registrar in the exercise of any of the powers conferred on the Registrar by this section shall be applied in defraying all costs, expenses, commission and fees incidental thereto and thereafter to any payment authorised by section () or this section and the surplus, if any, shall be paid into such account as is prescribed, and the same shall, subject to the rules made under section 118, be dealt with according to orders of the Court.
- (5) Any claim, suit, or action for or in respect of any moneys paid into the prescribed account shall be presented, made, or instituted within twenty years next after the dissolution of the company, after the expiration of which period of time all moneys then or at any time thereafter standing to the credit of the prescribed account shall, if there be no such claim, suit, or action pending, or any order of the Court to the contrary, be paid into the Consolidated Fund.

PART V - WINDING UP OF UNREGISTERED COMPANIES

118 “Unregistered company”

- (1) For the purposes of this Division, “unregistered company” includes —
 - (a) an external company;
 - (b) any partnership, whether limited or not, or association consisting of not less than eight members; or

- (c) any company not registered under this Act or any corresponding previous enactment,
but does not include —
 - (d) a company incorporated under this Act or any corresponding previous enactment; or
 - (e) any society or association established under any enactment designated by the Minister by order published in the Gazette.
- (2) The provisions of this Division are in addition to and not in restriction of any provisions contained in this or any other Act with respect to winding up companies by the Court and the Court or liquidator may exercise any powers or do any act in the case of unregistered companies which might be exercised or done by it or him in winding up companies.
- (3) The Minister may, from time to time, make an order for the purposes of subsection (1)(e).

119 Winding up of unregistered companies

- (1) Subject to this Part, any unregistered company may be wound up under this Part, which Part shall apply to an unregistered company with the following adaptations —
- (a) the principal place of business of the company in Tuvalu is for all the purposes of the winding up the registered office of the company;
 - (b) no such company shall be wound up voluntarily;
 - (c) the circumstances in which the company may be wound up are —
 - (i) if the company is dissolved or has ceased to have a place of business in Tuvalu or has a place of business in Tuvalu only for the purpose of winding up its affairs or has ceased to carry on business in Tuvalu;
 - (ii) if the company is unable to pay its debts;
 - (iii) if the Court is of the opinion that it is just and equitable that the company should be wound up; or
 - (iv) in the case of an external company, in such a case as is referred to in section 9(d).
- (2) An unregistered company is deemed to be unable to pay its debts if —
- (a) a creditor to whom the company is indebted in a sum exceeding one hundred dollars then due has served on the company, by leaving at its principal place of business in Tuvalu or by delivering to the secretary or some director, manager or principal officer of the company, or on a person authorised by an external company to accept service of process, or by otherwise serving in such manner as the Court approves or directs, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks after the service of the demand neglected to pay the sum or to secure or compound for it to the satisfaction of the creditor;

- (b) any action or other proceeding has been instituted against any member for any debt or demand due or claimed to be due from the company or from him in his character of member, and, notice in writing of the institution of the action or proceeding having been served on the company by leaving it at its principal place of business in Tuvalu or by delivering it to the secretary or some director, manager or principal officer of the company, or on a person authorised by an external company to accept service of process, or by otherwise serving it in such manner as the Court approves or directs, the company has not within ten days after service of the notice paid, secured or compounded for the debt or demand or procured the action or proceeding to be stayed or indemnified the defendant to his reasonable satisfaction against the action or proceeding and against all costs, damages and expenses to be incurred by him by reason thereof;
 - (c) execution or other process issued on a judgment, decree or order obtained in any court in favour of a creditor against a company or any member thereof as such or any person authorised to be sued as nominal defendant on behalf of the company is returned unsatisfied;
 - (d) it is otherwise proved to the satisfaction of the Court that the company is unable to pay its debts.
- (3) A company incorporated outside Tuvalu may be wound up as an unregistered company under this Part notwithstanding that it is being wound up or has been dissolved or has otherwise ceased to exist as a company under or by virtue of the laws of the place under which it was incorporated.
- (4) In this section “to carry on business” has the same meaning as it has in section 251(2) of the Companies Act.

120 Contributories in winding up of unregistered company

- (1) On an unregistered company being wound up every person is a contributory —
- (a) who is liable to pay or contribute to the payment of —
 - (i) any debt or liability of the company;
 - (ii) any sum for the adjustment of the rights of the members among themselves; or
 - (iii) the costs and expenses of winding up; or
 - (b) where the company has been dissolved in the place in which it is formed or incorporated, who immediately before the dissolution was so liable,
- and every contributory is liable to contribute to the assets of the company all sums due from him in respect of any such liability.
- (2) On the death or bankruptcy of any contributory the provisions of this Act with respect to the personal representatives of deceased contributories and the trustees of bankrupt contributories respectively apply.

121 Power of Court to stay or restrain proceedings

- (1) The provisions of this Act with respect to staying and restraining actions and proceedings against a company at any time after the presentation of a petition for winding up and before the making of a winding up order shall, in the case of an unregistered company where the application to stay or restrain is by a creditor, extend to actions and proceedings, against any contributory of the company.
- (2) Where an order has been made for winding up an unregistered company no action or proceedings shall be proceeded with or commenced against any contributory of the company in respect of any debt of the company except by leave of the Court and subject to such terms as the Court imposes.

122 Outstanding assets of defunct unregistered company

- (1) Where an unregistered company, the place of incorporation or origin of which is in a proclaimed State, has been dissolved and there remains in Tuvalu any outstanding property which was vested in the company or to which it was entitled or over which it had a disposing power at the time it was dissolved, but which was not got in, realised, or otherwise disposed of or dealt with, by the company or its liquidator before the dissolution, the property shall, by the operation of this section be and become vested for all the estate and interest therein legal or equitable of the company or its liquidator at the date the company was dissolved, in such person as is entitled thereto according to the law of the place of incorporation or origin of the company.
- (2) Where the place of origin of an unregistered company is Tuvalu, the provisions of sections 115 and 116 apply with such adaptations as may be necessary in respect of that company.

PART VI - RULES AND PENALTIES**123 Rules**

The Minister may make rules for any purposes for which rules may be made under this Act, for carrying this Act into effect and for making provision for or with respect to the winding up and dissolution of companies and costs and fees in connection therewith.

124 Penalties

A person is liable, on conviction for an offence under this Act, to a fine up to \$3000.

ENDNOTES

¹ Act 14 of 1991

² LN 5/1992

³ Cap 40.08

⁴ Cap. 7.04