

REPUBLIC OF VANUATU

BILL FOR THE COMPANIES (AMENDMENT) ACT NO. OF 2018

Explanatory Note

This Bill amends the Companies Act No. 25 of 2012.

A citizen and non-citizen can now apply for a formation of a company online. However, there is a high risk of money laundering, terrorist financing and financial loss compared to what local companies used to enjoy in the past. In order to deal with preventing these financial crimes, the Act needs to be amended to conform to the standards set by other legislations and the Financial Action Task Force (“FATF”) standards.

The current Act does not provide for the creation of a company limited by guarantee. However, there are companies limited by guarantee which were incorporated under the former Companies Act [CAP 191] and have been left unaccounted for after the former Act was repealed by the new Act. The re-instatement of the provisions relating to a company limited by guarantee is to regulate their existence and to have these companies report to and be supervised by the Registrar of Companies.

Furthermore, the current Act does not provide for the Registrar to request details of the beneficial owners of local companies so that the Registrar can maintain a register of beneficial owners. The current Act does not provide for penalty notices and it does not empower the Registrar to inspect company records, financial and accounting records and company documents. Also it does not provide for the conversion of an international company to a local company.

With the above mentioned deficiencies in the Act, the Vanuatu Financial Services Commission (“the VFSC”) cannot supervise companies to the standards required by FATF and to ensure that ultimate beneficial owners of local companies are strictly monitored.

The proposed amendments will require the Registrar of Companies to create a register of beneficial owners, shareholders and disqualified directors. It will also provide for penalty notices issued by the Registrar and will empower the Registrar to inspect and seek beneficial owner information, company records, financial and accounting records and company documents. Furthermore, it will reinstate provisions for companies limited by guarantee formerly set out in Companies Act [CAP 191] and will provide for the conversion of an international company to a local company.

This amendment will improve and facilitate VFSC's ongoing monitoring and supervision of a local company in Vanuatu.

Minister of Finance and Economic Management



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An Act to amend the Companies Act No. 25 of 2012.

Be it enacted by the President and Parliament as follows-

1 Amendments

The Companies Act No. 25 of 2012 is amended as set out in the Schedule.

2 Commencement

This Act commences on the day on which it is published in the Gazette.

SCHEDULE

AMENDMENTS OF COMPANIES ACT NO. 25 OF 2012

1 Section 1

Insert in its correct alphabetical positions:

““beneficial owners” means a natural person who is the ultimate owner or ultimate controller of a company;

“company limited by guarantee” means a company limited by guarantee referred to under section 4A;”

2 After section 1

(a) Before “In”, insert “(1)”.

(b) After subsection (1), insert

“(2) For the purpose of the definition of “beneficial owner”, ultimate owner and ultimate controller, includes circumstances where ownership or control is exercised:

(a) through a chain of ownership; or

(b) by means of indirect control that may not have legal or equitable force, or be based on legal or equitable rights.”

3 After section 4

Insert

“4A. Meaning of a company limited by guarantee

A company limited by guarantee may be:

(a) a company having the liability of its members limited by its memorandum of association to the amount, if any, unpaid on the shares respectively held by the members; or

(b) a company having the liability of its members limited by its memorandum of association to such amount as the members may respectively undertake to contribute to the assets of the company in the event of it being wound up.”

4 Paragraph 6(3)(b)

Delete “or a community company”, substitute “, a community company or a company limited by guarantee”

5 Paragraph 6(3)(c)

After “Schedule 4 (in the case of a community company)” insert “or the model rules prescribed under subsection 9(6C)(in the case of a company limited by guarantee)”

6 After paragraph 6(3)(ga)

Insert

“(gb) details of the beneficial owners of the company; and”

7 Section 7

Repeal the section, substitute

“7 Certificate of incorporation and register of incorporation

- (1) Subject to subsection (2), as soon as the Registrar receives an application for registration that complies with section 6, the Registrar must:
- (a) enter the company on the register; and
 - (b) issue a certificate of incorporation in respect of the company.
- (2) In addition, the Registrar must grant a certificate of incorporation if he or she is satisfied:
- (a) of the source of funds used to pay the capital for the company; and
 - (b) that the shareholder and beneficial owner is a fit and proper person.
- (3) In assessing whether or not a key person satisfies the fit and proper criteria, the Registrar must consider the following matters:
- (a) whether the person has been convicted of an offence or is subject to any criminal proceedings; and
 - (b) whether the person is listed on a United Nations Financial Sanctions list, or a financial sanctions list under the United Nations

Financial Sanctions Act No. 6 of 2017 or a financial sanctions list under a law of any jurisdiction; and

- (c) any other fit and proper criteria prescribed by the Regulations.
- (4) For the purpose of this section, “key person” means a director, a beneficial owner or a shareholder.

7A Registrar may require certain information or documents about beneficial owners or members

- (1) Subject to subsection (2), the Registrar may, by notice in writing to a company, require the company to provide the Registrar with information or documents, or both, specified in the notice within the period set out in the notice.
- (2) The information or documents must relate to:
 - (a) the beneficial owners of the company; and
 - (b) the details of the members of the company as contained in its Register of members; and
 - (c) the audited accounting records and the financial statements of the company.
- (3) If the company:
 - (a) refuses or fails to give the Registrar the information or documents required by the Registrar; or
 - (b) knowingly or recklessly gives the Registrar information or documents that are false or misleading,the company commits an offence punishable upon conviction to a fine not exceeding VT75 million.
- (4) This section does not limit section 180A.”

8 After subsection 9(6)

Insert

- “(6A) A company may be registered as a company limited by guarantee if the liability of its members is limited to the amount each members undertake to contribute to the assets of the company at the time it is being wound up.
- (6B) A company limited by guarantee must not be registered with shares and must not create or issue shares.
- (6C) The model rules for a company limited by guarantee is to be prescribed by the Minister.”

9 Paragraph 14(1)(a)

Delete “or 4”, insert “, 4 or prescribed under subsection 9(6C)”

10 Section 15

Repeal the section, substitute

“15 Model Rules

- (1) The rules set out in Schedule 1 are the model rules of a private company.
- (2) The rules set out in Schedule 1 are the model rules of a single shareholder company.
- (3) The rules set out in Schedule 1 are the model rules of a public company.
- (4) The rules set out in Schedule 1 are the model rules of a community company.
- (5) The rules prescribed under subsection 9(6C) is a company limited by guarantee.
- (6) Despite subsections (1), (2), (3), (4) and (5), a company may:
- (a) adopts the model rules set out in any schedule or as prescribed by the Minister under subsection 9(6C); or
- (b) adopts rules that exclude, or modify, or are inconsistent with, the model rules.”

11 At the end of section 83

Add

- “(5) The company must ensure that at least one director must be a natural person who ordinarily resides in Vanuatu.”

12 After section 85

Insert

“85A Registrar to maintain a register of directors

The Registrar must keep and maintain a register of directors containing up to date details of the directors of each company.

85B Registrar to maintain a register of disqualified directors

The Registrar must keep and maintain a register of disqualified directors containing up to date details of the disqualified directors of each company.”

13 After section 164

Insert

“164A. Continuation

(1) A company incorporated under:

- (a) the laws of a jurisdiction other than Vanuatu which does not prohibit the continuation of companies outside that jurisdiction; or
- (b) the International Companies Act [CAP 222],

may apply to continue as a company incorporated under this Act.

(2) A company applying to be continued under this Act is to file with the Registrar:

- (a) a constitution which complies with this Act; and
- (b) a certified copy of its existing memorandum of association and articles of association or their equivalent and certificate of incorporation; and
- (c) a certified copy of a resolution passed by a simple majority of members entitled to vote, to:
 - (i) continue the company under this Act; and
 - (ii) approve the new constitution; and
 - (iii) appoint one or more persons to sign the new constitution; and

- (iv) authorize one or more persons who may give notice to the Registrar in writing, that the new constitution be registered.
- (3) The new constitution is to contain:
 - (a) the existing name, which is to be continued; and
 - (b) the jurisdiction in which it is incorporated; and
 - (c) the date it was incorporated.
- (4) If the Registrar is satisfied that all requirements in respect of continuation and all matters precedent and incidental in this Act have been complied with, the Registrar may retain the documents filed under subsection (2) and grant a permit to continue the company under this Act.
- (5) The Registrar must not prior to receiving a notice under subparagraph (2)(c)(iv), permit any person to inspect the documents referred to in subsection (2) and must not disclose any information requested.
- (6) Prior to the registration of the new constitution, a company may rescind or amend the written authorization referred to under subparagraph (2)(c)(iv) by delivering to the Registrar a written notice of rescission or amendment.
- (7) If the Registrar does not receive a notice referred to under subparagraph (2)(c)(iv) from a person named in the written authorization, within three years immediately following the date on which the permit to continue is granted by the Registrar under subsection (4), the permit is taken to have lapsed.

164B. Certificate of continuation

- (1) Subject to subsection 164A(4), upon receipt of a notice under subparagraph 164A(2)(c)(iv), the Registrar may issue a dated certificate of continuation authenticated by its official seal certifying that the company is incorporated under this Act.
- (2) A certificate of continuation issued by the Registrar under subsection (1) is prima facie evidence of compliance with all requirements of this Act in respect of continuation.

164C. Effect of continuation

- (1) From the time of issuing of a certificate of continuation under subsection 164B(1):
- (a) the company to which the certificate relates:
 - (i) continues to be a body corporate incorporated under this Act, under the name designated in the articles of continuation; and
 - (ii) is capable of exercising all powers of a company incorporated under this Act; and
 - (iii) is no longer to be treated as a company incorporated under the International Companies Act [CAP 222] or a company incorporated under the laws of a jurisdiction outside Vanuatu; and
 - (b) the constitution of the company, or its equivalent, as amended by the articles of continuation, continues to apply as the constitution of that company; and
 - (c) property of every description, including choses in action and the business of the company, must continue to be vested in the company; and
 - (d) the company must continue to be liable for all of its claims, debts, liabilities and obligations.
- (2) If a company continues under this Act:
- (a) no conviction, judgment, ruling, order, claim, debt, liability, or obligation due or to become due and no cause existing, against the company or against any member, director, officer or agent, is released or impaired by its continuation as a company under this Act; and
 - (b) any civil or criminal proceedings pending at the time of issuance of certificate of continuation by the Registrar under subsection 164A(5) must not be discontinued.

- (3) All unpaid shares in the company that are outstanding prior to the Registrar issuing the certificate of continuation under subsection 164B(1) are deemed to have been issued in accordance with this Act.
- (4) Despite subsection (3), if a share at the time the Registrar issues the certificate of continuation is not fully paid, the member holding the share remains liable until the share is fully paid.
- (5) The company must amend its constitution within 2 years after the Registrar issues its certificate of continuation.

164D. Continuation under foreign law

- (1) Subject to any limitations in its constitution, a company may, by a resolution of directors or by a resolution of members, be continued as a company incorporated under the laws of a jurisdiction outside Vanuatu in the manner provided under those foreign laws.
- (2) A company that continues to be incorporated under the laws of a jurisdiction outside Vanuatu ceases to be a company incorporated under this Act upon the company complying with those laws, provided that the laws of the jurisdiction outside Vanuatu permit the continuation.
- (3) Where a company continues under the laws of a jurisdiction outside Vanuatu:
 - (a) the company continues to be liable for all of its claims, debts, liabilities and obligations that existed prior to this continuation as a company under the laws of the jurisdiction outside Vanuatu; and
 - (b) no conviction, judgment, ruling, order, claim, debt, liability or obligation due or to become due, and no cause existing against the company or against any member, director, officer or agent thereof, is released or impaired by its continuation as a company under the laws of the jurisdiction outside Vanuatu; and
 - (c) no proceedings, whether civil or criminal, pending by or against the company, or against any member, director, officer or agent be discontinued by its continuation as a company under the laws of the jurisdiction outside Vanuatu, but may be enforced, prosecuted, settled or compromised by or against the company or against the member, director, officer or agent thereof, as the case may be.

14 After section 188 (In Division 1)

Insert

“188A Registrar to maintain a register of beneficial owners

The Registrar is to ensure that a register of beneficial owners of a company is kept and is updated on details of the company’s beneficial owners.”

15 After section 199

Insert

“199A Penalty Notice

- (1) The Registrar may serve a penalty notice on a person if it appears to the Registrar that the person has committed an offence under any provision of this Act.
- (2) A penalty notice may be served personally or by post.
- (3) The Minister may by Order prescribe penalties which a person is required to pay under this section, which must not exceed:
 - (a) VT 200,000 for an individual; or
 - (b) VT 1 million for a body corporate,within 30 days after the date on which the notice was served.
- (4) If the amount of penalty referred to in subsection (3) offence is paid, that person is not liable to any further proceedings for the alleged offence.
- (5) Payment made under this section is not to be regarded as an admission of liability for the purpose of, nor in any way affect or prejudice, any proceeding arising out of the same occurrence.
- (6) The Registrar may publish a penalty notice issued to a person in such manner as the Registrar determines.
- (7) If a penalty notice has been served on a person, a prosecution in respect of the alleged offence may only be commenced if the penalty remains unpaid 30 days after the penalty was due, and the Court may take account of any unpaid penalty when imposing a penalty in respect of the offence.

- (8) This section does not limit the operation of any other provision of, or made under, this or any other Act relating to proceedings that may be taken in respect of offences.”

16 After section 207

Insert

“207A Amendment of Schedule

The Minister may, by Order:

- (a) add to; or
- (b) vary; or
- (c) replace,

the Schedules in the Act.”

17 Paragraph 209(9)(c)

After “Schedule 3 (in the case of a public company)” insert “or the model rules prescribed by the Minister under subsection 9(6C) (in the case of a company limited by guarantee)”