COMPANIES AND OTHER BUSINESS ENTITIES BILL, 2018

MEMORANDUM

This Bill seeks to replace and update the law relating to companies and private business corporations. The present Companies Act was passed in 1951 and needs updating. Among the most outstanding new features that will be introduced by this Bill are the following:

- Provision for the issuance of non-par-value shares rather than shares with a fixed value, together with provisions for the valuation of no-par-value shares;
- The introduction of an Electronic Registry for the incorporation and registration of domestic and foreign companies and private business corporations;
- The substitution of criminal penalties by civil penalties wherever possible;
- To establish an inspectorate to better enforce the provisions of this Bill;
- To make new provision for the merger and takeover of companies and other business entities;
- The licensing of business entity incorporation agents and business entity service providers;
- To clarify and improve the common law principle of *bona vacantia* (i.e. the vesting in the State of unclaimed properties of defunct companies and private business corporations) by instituting a fair and transparent method of declaring such properties to be *bona vacantia;*
- To make the beneficial ownership of companies more transparent;
- The introduction of a continuous system of updating the Registry;
- Further provision to combat the use of the company form for criminal purposes;
- To define in greater detail the corporate responsibilities of directors and boards of companies and to encourage good corporate governance;
- Additional measures to protect shareholders and investors, in particular minority shareholders and investors;

The individual clauses of the Bill are hereunder outlined.

Clause 1 provides for the title of the Bill and its commencement.

Clause 2 contains important, definitions of terms used throughout the Bill. Of major note are: "business entity", "civil penalty", "company", "constitutive documents", "court", "distribution", "electronic record", "financial statement", "generally accepted accounting practices", "inspector", "private business corporation", "public company", "Registrar", "internal rules" (of a company or PBC) and "share".

Clause 3 gives detailed guidance on who or what is an "associate" for the purposes of this Bill (it is particularly relevant in connection with clause 203 "Director's personal financial interests").

Clause 4 says that this Bill will not apply to banks, building societies, co-operative societies, insurers and other entities whose formation is subject to other laws. Also it does not apply to trade unions and employers organisations.

Clause 5 outlines or lists the kinds of business entities that are registrable entities under this Bill and for the first time there is provision for entities such as partnerships, syndicates and joint ventures.

Part II of Chapter I contains administrative provisions.

Clause 6 provides for establishment of the the Office for the Registration of Companies and Other Business Entities ("Companies Office") as a corporate entity, headed by the Chief Registrar of Companies and Other Business Entities, who will be assisted by other registrars and members of staff. Consistently with the Constitution's encouragement of the decentralisation of Government services, provision is made to establish registries in other centres of Zimbabwe than just Harare and Bulawayo.

Clause 7 contemplates that the Companies Office will become an accounting entity for the purposes of Public Finance Management Act [*Chapter 22:19*], responsible for collecting, receiving and accounting for its own funds. The sources of such funds are specified in this clause.

Clause 8 provides for the annual reporting of the Companies Office to Parliament through the Minister.

Clause 9 is concerned with the form and language of registers and other documents required by this Act to be kept by companies, and the manner in which they are to be kept by companies and other entities. For the first time officially recognised languages are given recognition for documents to be registered under this Bill. For the benefit of local and foreign investors, a copy of the official language document must have an authenticated translation from the company concerned, rendered by a person competent to do so in the opinion of the Registrar.

Clause 10 concerns standard forms and tables used for the purposes of this Bill, and the fees for services provided by the Companies Office, which are set forth in the First, Second, Third, Fourth and Fifth Schedules.

Clause 11 gives the general power to the Registrar to refuse registration of any record that is legally or textually defective in any way and to allow the person responsible for the defect to correct it.

Clause 12 provides for condonation for the late filing or delivery of documents by a user of the registry by the Registrar.

Under *clause 13* an affidavit by the Registrar or of any persons employed in the Companies Office as to whether or not a document has been filed with or delivered to the Registrar, shall be treated as presumptive proof of the facts stated therein for the purpose of civil and criminal proceedings.

Clause 14 permits the inspection, copying and extraction of the whole or any part of any document kept at the Companies Office by the public under prescribed conditions.

Clause 15 contemplates situations where the Registrar may demand additional documents to those otherwise required by this Bill.

Clause 16 empowers the Registrar to replace lost, defaced or destroyed documents that are filed with the Companies Office.

Clause 17 bestows statutory immunity on the Registrar and Companies Office employees in relation to any potential legal liability arising out of acts or omissions by those persons done in good faith.

Chapter II gathers together all the provisions of the Bill that are applied in common to companies and private business corporations (hereinafter referred to as PBCs).

Clause 18 provides for the first step in the incorporating of companies and PBCs, namely the lodging with the Registrar of the memorandum of association of a company or incorporation statement of a PBC, as the case may be.

Clause 19 provides for the bestowal of corporate personality and limited liability on applicant companies and PBCs that have complied with the conditions of registration under this Bill.

Clause 20 states that the constitutive documents of a company or PBC shall, when registered, bind the company or private business corporation and the members thereof (including those who did not subscribe to the memorandum and articles of the company) to the same extent as if they respectively had been signed by each member. In the case of a company, the subscribers of a memorandum of association who are entered into the register of the company shall be members of that company. In the case of a PBC, a person will not become a member until the fact of his or her membership has been recorded in a registered incorporation statement; similarly his or her membership will not cease in most cases until that fact has been recorded and registered.

The clause also limits the liability of members of a company or PBC for the debts and obligations of the Company or PBC.

Clause 21 requires every company and PBC to send to every member at his or her request a copy of the memorandum or articles of association or incorporation statement, as the case may be. It also requires companies and PBCs to keep their constitutive documents at their registered office or the physical address of the accounting officer respectively.

Clause 22 says that no notice shall be presumed to be given to third parties of the contents of the constitutive documents of a company or PBC just because those documents are registered in the registry. This provides an important measure of comfort to third parties dealing in good faith with companies or PBCs, because it prevents companies or PBCs from repudiating or not honouring their obligations on the basis of things contained in their constitutive documents.

Clause 23 puts an obligation on companies and PBCs to ensure that their members are furnished with up to date copies of constitutive documents incorporating changes up to that date.

Clause 24 presumes in favour of companies and PBCs that all their internal processes have been duly and lawfully complied with. This shifts the burden of proof to the contrary on persons who allege otherwise.

Clauses 25, 26, 28 and 29 revolve around the choice, use and abuse of names of companies and PBCs: the prohibition of undesirable names, changes of name, and the consequences of name changes, and the lawful use of assumed names by companies and PBCs.

Clause 27 confirms the abolition of what was called the *ultra vires* rule of the common law concerning companies, which was first abolished in the 1993 Companies Amendment Act. This rule said that a company could not go beyond its "stated objects" and if it did that, this would provide grounds for the company or a third party to resile or repudiate or not honour its obligations.

Clause 30 requires every company and PBC to incorporate in their business letters in legible characters the name of every director or member of a PBC.

Clause 31 requires every company and PBC to have in Zimbabwe a postal address and a registered office physical address or a physical address of an accounting officer in the case of PBC. In addition, if a company or PBC conducts its business or administration electronically, it must notify its electronic address in writing to the Registrar. Any breach of this requirement may subject the company or PBC to a civil penalty.

Clause 32 provides for ratification of incorporation contracts by putative companies or PBCs.

Clause 33 applies to juristic persons the same advantages and obligations that natural persons have when concluding contracts.

Clause 34 applies to juristic persons the same advantage and obligations natural persons have when using promissory notes and bills of exchange.

Clause 35 empowers a company or PBC to authorise a person and its agent to execute deeds in a foreign country.

It is not compulsory for companies or PBCs to have a seal, but where they have them it is important to guard against abuse. *Clause 36* provides accordingly.

Clause 37 empowers the director secretary or authorised member of a private business corporation to authenticate documents on behalf of the company or PBC.

Part II of Chapter I: concerns provisions of inspections and investigations by the Registrar.

Clause 38 sets out the purposes of the investigation and inspection of companies and other business entities, which is to promote good corporate governance and inspire investor confidence. The powers and privileges of the Registrar shall be the same with those of commissioners (with some exceptions) under the provisions of the Commissioners of Inquiry Act [*Chapter 10:07*].

Under *Clause 39* the Registrar may initiate an investigation of a company or PBC if he or she has reasonable cause to believe that this Bill is not being complied with respect to documents required to be submitted to him or her by that company or PBC.

Clause 40 enables minority shareholders of companies and minority members of PBCs to request the Registrar to initiate an investigation of the company or PBC (that is, shareholders or members of at least 5% of the total shareholding or interests).

Under *Clause 41* the Registrar may institute an inquiry through one or more inspectors as to the ownership or control of any company or PBC. If any members requests such an investigation that member will bear the cost of such investigation.

Clause 42 empowers the Registrar to undertake an investigation at the initiative of a special company resolution or by order of court requesting such an investigation.

It also empowers the Registrar to undertake any such investigation when he or she reasonably believes that the entity in question is conducting its business in such a way as to defraud its creditors.

Clause 43 says an inspector assigned to investigate a company may also investigate any subsidiary or holding company or an associated company of the first mentioned company under investigation.

Clause 44 provides for officers and agents of companies and PBCs to assist the inspector's investigation by producing records and giving evidence of the affairs of the entity to the inspector.

Under *clause 45*, after completion of an investigation a report is availed to the Registrar who must then avail it to the Minister, and in the case of an investigation prompted by shareholders or interest holders or a court, to those shareholders or interest holders or the court, as the case may be.

Under *clause 46* the Registrar may conclude on the basis of a report that a prosecution ought to be instituted or that a company or PBC ought to be wound up or that civil proceeding in the name of the company or PBC ought to be instituted to recover damages.

Clause 47 deals with the assignment of responsibility for the expenses of an investigation of the affairs of a company or PBC.

Where the Registrar deems it desirable to investigate the ownership of any shares or debentures of a company the Registrar may under *clause 48* require information to be furnished to him or her for any person he or she reasonably believes to be interested in any shares or debentures in that company.

Under *clause 49* the Registrar may impose restrictions on transactions involving shares that belong to a company or PBC subject to an investigation under this Sub-Part.

For the avoidance doubt *clause 50* saves attorney-client privilege and the banker confidentiality privilege.

Clause 51 makes it clear that the inspector's report upon an investigation is admissible in court on the issue of the inspector's opinion in relation to any matter contained therein.

Part III of Chapter I concerns defunct companies and PBCs.

Clause 52 empowers the Registrar to strike off from the register defunct companies or PBCs where it is apparent that they have ceased to operate by reason of not rendering returns. However any member of the company or PBC that has been struck off can apply to the magistrates court within whose area of jurisdiction the entity had its principal place of business for an order that the entity's name be restored to the register.

Clause 53 embodies and improves the application of the long standing common law principle of *bona vacantia*, where the property of a defunct company that is not distributed vests in the State. The clause provides for the vesting in the State of any property of a defunct company or PBC to which no one has any claim, upon an application being made to that effect by the Attorney-General at the request of the Chief Registrar. It is clear that the State will not needlessly "expropriate" unclaimed property, since the State will be obliged to publicly auction the said property.

Part IV of Chapter II concerns provisions relating to legal proceedings that apply commonly to companies and PBCs.

Clause 54 excuses director's members, officers and auditors of companies and PBCs from liability for negligence, breach of duty or breach of trust in connection with his or her duties to the company or PBC if it appears to the court hearing claims for such fault liability that the person alleged to be at fault acted in good faith, that is to say honestly and reasonably.

Clause 55 empowers the court to demand security for costs from any company or PBC in legal proceedings if the court is satisfied that the company or PBC may be unable to pay the costs of those proceedings.

Clause 56 provides for manual or electronic service of documents in connection with legal proceedings under this Bill.

Clause 57 strengthens the presumption of regularity under clause 24 by requiring that any allegation of voidness or impropriety on the part of registered business entity in connection with any of its agreements, resolutions or exercise of its powers cannot be substantiated except by a court ruling or a decision of the Registrar made pursuant the exercise of his or her civil penalty jurisdiction.

Under certain conditions specified in *clause 58* a member or members acting on their own behalf against any director for breach of good faith or want of care or diligence in that capacity may also at the same time bring action on behalf of the company. The litigants concerned must apply to the court for leave to bring or continue legal proceedings on behalf of the company where the company has failed to take the necessary steps in terms of a demand served upon it. This is a departure from

the common law position (which contemplated a wrong being ratified by the majority shareholders; it also departs from the "proper plaintiff rule", where the company itself institutes legal action when a wrong has been committed against it). The clause goes further in allowing in exceptional circumstances for an interested person other than a member to apply to court to institute proceedings without demanding action from the company first. Employees too can therefore bring a derivative action against a company. The enhanced derivative action remedy will advance good corporate responsibility and will promote stakeholder activism, thereby discouraging malfeasance by directors in relation to their company and providing a remedy through court action/application.

Part V of Chapter I deals with offences and defaults common to companies and PBCs.

Clause 59 provides criminal penalties for the making false statements by directors and other officers or responsible persons of companies and private business corporations.

Under *clause 60* the High Court will have he power to declare a director or member or former director or member of a company or PBC personally liable for the company's or the PBC's debts if he or she was responsible for carrying on its business recklessly, grossly negligently or fraudulently.

Clause 61 provides criminal penalties for fraudulent, reckless or wilful failure to comply with provisions of this Bill, to ensure proper financial accounting by companies and PBCs; also for the falsification or deliberate concealment or destruction of documents.

Clause 62 provides for the disqualification of any persons convicted of certain crimes in connection with the promotion, formation or management of a company or PBC from being managers or directors of companies or controlling members of PBCs. Any interested persons may apply for such an order from the court.

Clause 63 criminalises unlawful impersonation of any owner of a share or interest in a company or PBC, or the misuse of any share certificate or certificate of interest to misrepresent the nature of one's stake in a accompany or PBC.

Clause 64 prohibits the concealment of the beneficial ownership of shares through the use of nominees (except in certain specified circumstances). A "beneficial owner" is defined in the Bill as "a natural person who ultimately owns, controls, or benefits from a company or trust and the income it generates". The Financial Action Task Force (FATF) has issued a recommendation to address the misuse of companies as vehicles for money laundering and terrorist financing, by requiring that states establish the identity of each natural person who exercises control of a company through one or more nominees.

Clause 65 prevents companies or PBCs from releasing or indemnifying officers of the company from or against their statutory duties under this Bill. If the officer concerned is absolved or acquitted in connection with the enforcement of such statutory duty, the company or PBC may indemnify him or her. Also permissible are indemnities for personal expenses incurred by officers of companies or members of PBCs acting in pursuance of the interests of the companies or PBCs.

Chapter III gathers all provisions that are unique to companies.

Sub-Part A of Part I of Chapter III contains provisions for the incorporation of companies and matters incidental thereto.

Clause 66 prohibits any association for gain of more than 20 persons unless that association is incorporated as a company or a PBC.

Clause 67 requires that any persons wishing to form a company must subscribe their names to a memorandum of association.

Under *clause 68* a memorandum of a company may be in English or any officially recognised language, and in the latter case an authenticated translation should be furnished in English to the Registrar.

Clause 69 provides for the persons who must sign the memorandum of association and other conditions attaching to memorandum of association.

Clause 70 provides for the alteration of the memorandum of association under specified conditions.

Clause 71 provides that in certain circumstances the holders of any type or class of shares may be entitled to vote as a group on an amendment to the memorandum of association (that is to say, a majority of the votes of the group on the question whether to amend the memorandum shall be deemed to be the totality of the votes of the group).

Clause 72 provides for the articles of association of a company, that is to say, for its constitution and internal regulations. These may be in English or in any officially recognised language, and in the latter case an authenticated translation must be furnished in English. This clause also provides for alteration of the articles association of a company.

Under *clause 73* companies whose objects are not primarily for profit but rather to benefit their members may apply to the Minister for a licence to dispense with the word "Limited" in their title. Companies limited by guarantee that are licensed under this section are the preferred vehicle for charities and ecclesiastical bodies.

Sub-Part B of Part I of Chapter III contains provisions for the membership of companies in addition to that found in *clause 19* above.

Under *clause 74*, if a company has no members and carries on business for more than six months without members, any person who knowingly causes it to do so shall be liable, jointly and severally with the company, for all debts incurred by it after the six months have elapsed.

Clause 75 forbids a body corporate from being a member of a company which is its holding company, except under certain circumstances precisely defined in this clause.

Sub-Part C of Part I of Chapter III contains provisions for private companies.

Clause 76 defines what a private company is, that is a company that restricts the rights to transfer its shares, limits the number of its members to 50 and prohibits the public subscription of its shares. A public company is allowed to convert to a private company, with the sanction of a court. If a company purports to be a private company but (for instance) exceeds 50 members or invites the public subscribe its shares, then such company ceases to enjoy the benefits of a private company.

Clause 77 says that if a private company converts itself into a public company then, instead of issuing a prospectus, it may issue a statement in lieu of prospectus without complying with the formalities attaching to issuing a prospectus.

Sub-Part D of Part I of Chapter III contains provisions (*clauses 78 to 85*) for co-operative companies, which are special companies composed of members for which the company facilitates the production or marketing of agricultural produce or livestock, or the sale of goods to its members, or both. A co-operative company permits farmers to associate with limited liability for the purpose of pooling produce and selling it to best advantage without the necessity of raising capital in the same way as companies.

Sub-Part A of Part II of Chapter III contains provisions pertaining to shares, share capital and debentures, their nature and the rights and obligations attaching thereto.

Clause 86 specifies that a share in a company is transferable movable property. It does not (except in the case of companies existing on the effective date) have a nominal or par value. Only issued shares have rights attaching to them.

Clause 87 provides that a company's memorandum must and may provide with respect to the authorisation and classification of its shares, the numbers of authorised shares of each class, and the preferences, rights, limitations and other terms associated with each class of shares. The number of authorised shares of each class of shares a company, as set out in its memorandum, may be altered by means of an amendment of the memorandum of incorporation by the shareholders thereof. Thus, should a company not have any authorised but unissued shares in its portfolio, the directors will not be able to exercise the powers afforded to them in terms of *clause 88*.

Clause 88 states that all of the shares of a particular class authorised by a company have the preference rights, limitations and other terms that are identical to other shares of the same class. This is an unalterable provision and cannot be changed in the memorandum. Also where the memorandum has established more than one class of shares, then the memorandum, when setting out the preferences, rights, limitations or other terms of those classes of shares, must provide that for each particular matter that may be submitted for a decision to shareholders of the company, at least one class of the company's shares has voting rights that may be exercised on that matter; and the holders of at least one class of the company's shares, irrespective of whether it is the same as any class contemplated in class of shares mentioned earlier on, are entitled to receive the net assets of the company upon its liquidation.

Clause 89 (" Issuing shares") of the Bill empowers the directors to issue shares, and as such raise capital finance, at their discretion and does not require them to procure the prior consent thereto of the shareholders of the company, so long as and to the extent they are empowered to do so by their company's memorandum. The clause allows for the retroactive ratification by shareholders of the issuance by the board of shares in excess of those provided for in the memorandum or of a class not contemplated by the memorandum. However, if a resolution to retroactively authorise an issue of shares is not adopted when voted on, then the share issue is a nullity to the extent that it exceeds any authorisation, and the company must return to any person the fair value of the consideration received by the company in respect of that share issue to the extent that it is nullified, together with interest.

Under *clause 90*, if a private company proposes to issue any additional shares, each shareholder of that private company has a right, before any other person who is not a shareholder of that company, to be offered and, within a reasonable time to subscribe for, a percentage of the shares to be issued equal to the voting power of that shareholder's general voting rights immediately before the offer was made (but the private company's memorandum may expressly limit, negate, restrict or place conditions upon this right).

Clause 91 provides that the board of directors of a company must only issue authorised shares for adequate consideration to the company, as determined by the board. Shares may be issued for future consideration or for consideration in kind under specified conditions. In exercising their powers under this clause directors are enjoined to be mindful of their fiduciary duty to act in the best interests of the company.

Clause 92 sets out rules with respect to options for subscription of shares or debentures in a company.

Clause 93 sets forth the parameters of the solvency and liquidity test with reference to a company's financial health that must be applied by the board of directors for certain purposes of this Bill. "Solvency" refers to an company's capacity to meet its long-term

financial commitments, while liquidity refers to an company's ability to pay short-term obligations. A company (including a subsidiary company?) satisfies the solvency and liquidity test at a particular time if, considering all reasonably foreseeable financial circumstances of the company at that time, the assets of the company, as fairly valued, equal or exceed the liabilities of the company as fairly valued. This should also take into account that the company will be able to pay its debts as they become due in the ordinary course of business for a period of 12 months after the date on which the test is applied; or in the case of a distribution as defined, 12 months following that distribution. Any financial records to be considered concerning the company must be based on accounting records and financial statements as prescribed. In applying the solvency and liquidity test, a fair valuation of the company's assets and liabilities must be considered, including any reasonably foreseeable contingent assets and liabilities.

Sub-Part B of Part II of Chapter III contains provisions pertaining to the prospectus of a public company, that is to say, a printed invitation offering to the public for subscription or purchase any shares or debentures of the company.

Under *clause 94* a prospectus issued by or on behalf of a company or in relation to an intended company must be dated and that date will, unless the contrary is proved, be taken as the date of publication of the prospectus.

Clauses 95 and 103 provide for certain matters to be stated in reports set out in the prospectus; these statements must be in English or any officially recognised language. Matters to be stated and reports set out in the prospectuses are listed.

Clause 96 provides that any statement in a prospectus purporting to be a statement of an expert must not be issued unless the expert gives his or her written consent to the inclusion of that statement in the prospectus.

Clause 97 requires all prospectuses to be registered with the Registrar.

Clause 98 says that (unless the company concerned is a private company converting into a public company) a company shall not alter anything included in a formation contract which is mentioned in a prospectus or statement in *lieu* of prospectus unless that alteration is approved in a statutory meeting of the members of the company.

Clauses 99 and 100 provide for civil liability and criminal liability respectively that are to be attached to misstatements in a prospectus, and for defences to an action brought on the basis of such misstatements.

Clause 101 provides for a situations where the whole or a portion of shares or debentures being offered for public subscription is underwritten, that is to say covered by a contract of insurance to the effect that the underwriter will buy any shares or debentures that have not been taken up by public subscription. In that event the company must deliver to the Registrar, not later than the date of the public subscription, a copy of the underwriting contract and an affidavit sworn by the underwriter or two of the underwriter's directors that it is in a position to honour the underwriting contract.

Clause 102 deems any document offering any shares or debentures for public subscription to be a prospectus for the purposes of this Sub-Part.

Clause 103 construes certain references to offering shares or debentures to the public as including references to offering the same to any section of the public or to clients of the promoter of the company.

Clause 104 prohibits the door-to-door solicitation of members of the public at their homes or in offices, shops or business premises to subscribe for shares or debentures. This clause also prohibits the advertisement or soliciting for distribution of any verbal or written statement unless such statement is accompanied by a prospectus or similar document that is compliant with this Bill.

Clause 105 prohibits door-to-door solicitation of members of the public to subscribe for shares and certain other methods of advertising in connection with the offering of shares to the public.

Sub-Part C of Part II of Chapter III contains provisions pertaining to the allotment of shares or stock in a company.

Clause 106 prohibits an allotment of shares below the amount offered to the public where the prospectus stated that a certain number of minimum shares must be subscribed and that minimum has not been achieved.

In *clause 107* a public company which allots shares at any time after its formation must not allot such shares unless it lodges with the Registrar a statement in lieu of prospectus signed by the directors. Such statements must comply in certain respects with those contained in a prospectus.

Failure to comply with this clause can result in a civil penalty and (where a statement in lieu of prospectus includes any false statement) a criminal sanction as well. In *clause 108* if any allotment of share is made in contravention of *clauses 106 and 107* the allotment itself shall be void if an aggrieved person who makes an application to the court to that effect.

Under *clause 109* an allottee of shares may void the allotment of shares if the allotment of shares were made in contravention of *clause 95*.

The effect of *clause 110* is that shares or debenture issued in pursuance of a prospectus must not be allotted before the expiry of three days and any legal proceeding proceedings in connection of the prospectus are stayed until the expiry of that period.

Clause 111 holds the issuer of a prospectus to any statement therein that application to list on the stock exchange has been made. The effect of this clause is that if such application has not been applied for within three days after the first issuance of the prospectus, or if permission to list on the stock exchange has been refused 21 days after the closure of the period during which members of the public may subscribe for share in the company concerned. Any allotment made in those circumstances will be void.

Clause 112 requires companies to keep registers of allotted shares at its registered office. It must also lodge with the Registrar returns of allotments with specified particulars thereof to the Registrar whenever it makes any allotment of its shares.

Sub-Part D of Part II of Chapter III contains provisions pertaining to commissions and discounts in connection with the sale and purchase of shares.

Under *clause 113* the payment of any shares as an inducement to buy any shares is regulated.

Clause 114 prohibits a company from giving financial assistance to any person to buy its own shares or shares in a company of which it is a subsidiary.

Sub-Part E of Part II of Chapter III contains provisions pertaining to the issue of shares at premium or discount and redeemable preference shares.

Clause 115 allows a company to issue shares at a premium subject to the company transferring the value of the premiums to the share premium account. This is treated the same way as reducing a company's share capital. A company is allowed to use a share premium account to pay up unissued shares for allotment to members as full paid bonus shares.

Clause 116 allows a company to issue shares at a discount subject to the authority of a special resolution of the company, the sanction of the court and other conditions.

Clauses 117 and 118 empower a company to issue shares the company can buy back under specified conditions. It is provided that redeemable shares can only be redeemed out of profit otherwise available for distribution as dividends.

Clause 119 to 125 provide for the power of a company to purchase its own shares. A company must be authorised in advance by the general meeting to do this. The right to purchase its own shares thus authorised are not capable of being ceded, nor can they be renounced unless authority to do this is obtained in advance from general meeting of the company. If authority is given by a general meeting to purchase its own shares and the right to so purchase is subjected to any payment being made to the shareholders, then such payment can only be made out of the profits otherwise available for distribution as dividends.

Likewise, payments made by a company to obtain the right to buy its own shares or to obtain the release of any obligation to buy its own shares can only be made out of the profits otherwise available for distribution as dividends.

The diminution in the company's share capital resulting in a company purchasing its own shares is evidenced by the cancelled shares being transferred to a special reserve called the capital redemption reserve. A company is excused from civil liability for failure to pay for its redeemable shares or to purchase its own shares, if it is able to show the court that it cannot meet the costs from its profits.

Sub-Part F of Part II of Chapter III contains miscellaneous provisions as to share capital.

Under *clause 126* a company may if so authorised by its articles arrange to pay different amounts on the issuance of any batch of its shares and make other differential arrangements specified in its articles.

Under *clause 127* a company can by special resolution determine that any portion of its share capital not yet called up is not to be called up except in the case of winding up or judicial management.

Clause 128 deals with capitalisation shares. Capitalisation shares, commonly called "bonus shares", are free shares offered by a company to its existing shareholders, often as an alternative to increasing the dividend payout. The board may resolve at the same time to offer to any shareholder who so wishes a cash payment in lieu of receiving the capitalisation shares, but in so doing it must apply the solvency and liquidity tests on the assumption that every such shareholder would elect to receive cash.

Clause 129 provides that, before making any dividend payments, the board must (among other things) apply the solvency and liquidity test as set out in *clause 93*. This provision contains certain safeguards for shareholders and creditors, such as that dividend distributions must be effected within 120 days of them being declared, and if there is delay in complying with this requirement, the solvency and liquidity test must be re-applied.

Clause 130 deals with what are called "rights issues", that is to say, an issue of rights to a company's existing shareholders that entitles them to buy additional shares directly from the company in proportion to their existing holdings, within a fixed time period. Rights issues subsist by virtue of existing shareholders being given by this clause a pre-emptive right to any issuance of new shares by the company.

Under *clause 131* any consolidation, conversion, cancellation or subdivision of a company's share capital, or redemption of its preferable shares, must be notified to the Registrar.

Under *clause 132* the Registrar must be notified by a company of any increase of its registered share capital which may only be done upon a special resolution authorising such increase.

Clause 133 provides for the payment of interest on issued share capital used for capital investments that cannot be made profitable for a lengthy period under specified conditions.

In *clause 134*, if the company has authority by its memorandum of association or articles or by special resolution to vary the rights attaching to any class of its shares, minority shareholders representing not less than 5% of shares of the affected class are given the rights to apply to court to have the variation cancelled. The conditions associated with such variation are specified in the captioned clause.

Sub-Part G of Part II of Chapter III contains in *clauses 135 to 140* provisions pertaining to the reduction of the share capital of companies.

A company authorised by its articles of association to reduce its share capital may do so by special resolution and after confirmation by court. Upon confirmation by a court for an order confirming reduction, the reduction is registered by the Registrar. The liability of members in respect of reduced shares, and the penalties for effecting a reduction of capital that is prejudicial to a creditor or for wilfully concealing the name of any creditor entitled to object to the reduction, are set forth in *clauses 139 and 140*.

Sub-Part H of Part II of Chapter III contains provisions pertaining to the transfer of shares and debentures, evidence of titles, etc.

Clause 141 stipulates that each share must be assigned a distinct number unless all issued shares of a particular class have been fully paid up and rank *pari passu* (on an equal footing) with each other.

Clause 142 states that no company may register a transfer of shares except on presentation to the company of a valid instrument of transfer of value of such shares (this does not apply to shares transferred by operation of law). A company must on the application of a transferor of any share enter the transferee in its register of members. A company is entitled to refuse the registration of a transferee upon notice to both the transferor and transferee. An executor of a deceased estate may transfer shares the same way a deceased member could have done if they were alive.

Clause 143 prohibits "bearer shares" (shares whose ownership are purported to be transmitted by delivery without registration in a company share register) and the concealment of the beneficial ownership of shares through the use of nominees (except in certain specified circumstances).

Under *clause 144*, unless the conditions of issuance of debenture, share of stock otherwise provide, a company must within two months of lodgement of transfer of the same complete and have ready for delivery the certificate relating to those shares debentures and debenture stock, however, provision is made to allow for uncertificated shares to be issued by companies that are registered users of the electronic registry.

Clause 145 empowers a company to create and issue debentures to bind its movable or immovable property if so authorised by its memorandum or articles of association. A contract with a company to take up and pay for any debentures of the company may be enforced by an order for specific performance.

Clause 146 requires company to keep a register of mortgages and a register of debentures with full relevant particulars at its registered office.

Clause 147 empowers the company, if so authorised by its articles, to keep in any foreign country a branch register of debenture holders, subject to the conditions specified in the clause.

Clause 148 provides for the power to reissue redeemed debentures in certain cases. The presumption is in favour of the company being able to do so, unless there is an expression provision in its articles of association or special resolution prohibiting this.

Part III of Chapter III contains provisions pertaining to the management and administration of Companies. *Sub-Part A* provides for restrictions on commencement of business and the register and index of members.

Clause 149 imposes certain conditions that must be met before a public company can commence business.

Clauses 150 to 155 concern the keeping of a register of members by a companies. Companies must keep registers of their members at their registered offices, regularly updated with certain particulars, namely, addresses, shares held by them, when members where entered into the register as such and when they ceased to be members. Companies may, however, contract out this responsibility out to corporate service providers, in which event such providers will be liable to fulfil to the statutory requirements. Companies must avail their registers for inspection by their members, but may temporarily by resolution of the directors close their registers to scrutiny for a period or periods not exceeding 60 days. An aggrieved person may apply to the High Court to rectify the register if any name is omitted or any delay is made in registering that a person has ceased to be a member. Companies have a discretion whether to record in their register whether any shares are held in trust. But in that event the must verify the legal status of the trust or the trustee. Registers of members are presumptive proof to a court of any entries therein. Companies may also, if authorised by their articles, keep a register in foreign countries.

Sub-Part B of Part III of Chapter III contains provisions pertaining to the rendering of annual returns to the Registrar by companies, and the conduct of their meetings and proceedings.

Clause 156 requires every company to a file with the Registrar an annual return which includes a summary of shareholders, list of directors and secretaries and date statutory meeting.

Under *clause 157* every public company must not earlier than one month or later than three months from when it commences business hold a statutory meeting. At least 14 days before such meeting the directors must transmit to every member what is called a statutory report. This is a kind of an agenda, the items of which include confirmation of directors, shareholding and confirmation of secretary and auditors. Such statutory report must be certified as correct by the auditors and directors, and must be filed with the Registrar within one month of the date of certification.

Under *clause 158* an obligation is put on companies to hold annual general meetings for the purposes of dealing with and disposing of matters required in terms of this Bill to be dealt with and disposed of at an annual general meeting (together with the consideration of any other matters the company may provide for in its articles).

Clause 159 compels a company to hold an extraordinary general meeting on the requisition of members holding at least 5% of the paid up shares of the company.

Clause 160 stipulates minimum notice periods for calling meetings of members of a company.

Clause 161 contains default provisions (that is, provisions to be complied with in the absence of similar provisions in the articles) on such issues as the manner of serving notice, the requisition of meetings, the quorum at meetings and the voting weight to be attached to each share or value of stock. Virtual meetings are also now provided for.

Clause 162 entitles a member of a company to appoint a proxy to vote on his or her behalf at membership meetings.

Clause 163 entitles members of a public company to cause the adjournment of a members meeting if a resolution to that effect is a carried by a majority to that meeting. The conditions for such adjournment are specified in this clause.

Clause 164 permits bodies corporate to be represented at meetings of members of companies under specified conditions.

Clause 165 entitles a certain number of members to place on the agenda of an annual general meeting of members notice of a resolution, and to have such resolution circulated to members at the expense of the requisitionists.

Clause 166 provides for special resolutions, that is to say, resolutions that require a supermajority of 75% of members entitled to vote and a notice of 21 days.

Clause 167 provides for resolutions to be passed without a meeting of members of a private company if the resolution is circulated among member entitled to vote. However such manner of voting is not permitted for resolutions seeking the removal of a director or auditor of the company.

Clause 168 provides that where by the articles anything is required to be done on special notice, such notice must be given 28 days before the meeting at which it is to be moved (rather than on 21 days' notice). This clause provides how such notice must be given.

Under *clause 169*, provision is made for the transmission to the Registrar of copies of special resolutions.

Clause 170 says that if a resolution of a company or of the directors of a company is passed at a meeting that resulted from the adjournment of an earlier meeting, then the date of the resolution is the date on which it was actually passed and not the date of the earlier meeting.

Clauses 171 and 172 require minutes to be kept of every general meeting of a company and of its directors, and provide for the inspection or obtaining of the minutes of general meetings by any member of a company.

Sub-Part C of Part III of Chapter III contains provisions pertaining to a company's accounts and audit.

Clauses 173, 174, 175 and 176 provide that every company is required to keep at its registered office financial records that reflect a true and fair view of the companies state of affairs, and that the company may destroy such records 8 years after the completion of the transactions to which they relate. It also provides that every company is required to prepare a a statement of financial position and a statement of comprehensive income for each financial year, which is supposed to be laid before the company at each annual general meeting. In addition, the directors of a public company must cause to be presented at each annual general shareholders' meeting the report of the board's audit committee, disclosing among other things the total amount of remuneration paid to and the value of any benefits received by each director or former director during the financial year last ended.

Clause 176 clarifies the meaning of what a company is in relation to subsidiary companies and their holding companies or the meaning of a holding company in relation to its subsidiaries.

Clauses 177 and 178 make provision for "group accounts", that is to say consolidated or individually segregated accounts in the case of a company with subsidiaries. These must be likewise laid before a general meeting of the company.

Clause 179 requires the statement of comprehensive income to be annexed to every statement of financial position and laid before a general meeting of the company.

Under *clause 180* there must be attached to every statement of financial position laid before a company in general meeting a report by the directors with respect to the state of the company's affairs, providing for things as what dividend have been paid or should be paid or what profit should be retained and carried to the company reserves.

Clause 181 says that members of a company must before every general meeting receive copies of every statement of financial position and associated documents associated thereto. It does not, however, apply to private companies unless one of its members is a public company or another private company that is a subsidiary of a public company. This clause further entitles member and debenture holders to demand copies of the auditors report thereon that where laid before the last general meeting of the company.

Clause 182 provides for the appointment, remuneration, duties, powers and removal of auditors. In particular, this clause requires special notice of any resolution at an annual general meeting to appoint or remove the auditor of a company.

Clause 183 provides for the disqualifications for appointment as an auditor of a company.

Clause 184 provides for the contents of an auditor's report.

Clause 185 says that a reference in this Bill to a document annexed or required to be annexed or required to be annexed to a company account does not include the director's or auditor's report.

Sub-Part D of Part III of Chapter III contains provisions pertaining to a company's directors and other officers.

Clause 186 requires that a company must have at least two directors responsible for managing and directing operations; and that at least one of them must ordinarily be resident in Zimbabwe. For public companies there is an upper limit of 15 directors that they can appoint, and a limit has also been set on directors of unassociated companies to sit on no more than six boards. This clause sets out the responsibilities of directors. Important in this respect is the obligation on directors to exercise independent judgment and to act in a way that they consider, in good faith, to be within the powers of the company, to promote the success of the company for the benefit of its shareholders as a whole. In doing so they must have regard to, among other things the long-term consequences of any decision, the interests of the company's employees, the need to foster the company's relationships with suppliers, customers and others, the impact of the company's operations on the community and the environment, the desirability of the company maintaining a reputation for high standards of business conduct, and the need to act fairly as between shareholders of the company. No director may delegate his or her core management function and the accountability that goes with it to any other person. Subclause (9) contains provisions against the misuse of a director's position for personal advantage or to harm the company of which he or she is a director, and against misuse by a director of information that is material to the company of which he or she is a director. By subclause (10) directors of public companies are prohibited from sitting on more than 6 boards of other public companies that are unassociated with the public company of which he or she is a director. Acts of directors and mangers are valid despite defects that may afterwards be discovered after their appointment.

Clause 187 will enable decisions to be made otherwise than at meetings of boards of companies requiring the physical presence of directors, such as at virtual meetings (teleconferences) and by circular, unless the memorandum of the company concerned prohibits this.

In terms of *clause 188*, a director of a company (but also n alternate director, a prescribed officer, a person who is a member of a committee of a board of a company, or a member of the audit committee of a company irrespective of whether or not the person is also a member of the company's board) may be held personally liable by the aggrieved company of which he or she is the director in accordance with the principles of the common law relating to the breach of a fiduciary duty and relating to delict, for any loss, damages or costs sustained by the company as a consequence of any breach by the director of duties contemplated, *inter alia*, in *clause 186* above. However, subclause

(9) states that in any proceedings against a director, other than for wilful misconduct or wilful breach of trust, the court may relieve the director, either wholly or in part, from any liability set out in this section, or on any terms the court considers just, if it appears to the court that the director has acted honestly and reasonably, or having regard to all the circumstances of the case, including those connected with the appointment of the director, it would be fair to excuse the director.

Clause 189 sets out the appointment by the board of a public company an officer known as the "company secretary" whose functions, qualifications and disqualifications are there itemized. Stricter provisions apply to appointment, qualification and disqualification of secretaries of public companies.

Clause 190 imposes restrictions on the appointment or advertisement of directors of public companies.

The persons disqualified from being appointed as directors of public companies are set out in *clause 191*; although private companies are not bound by this provision when appointing directors, the must file a statement with the Registrar that they have appointed a director who would be disqualified from appointment as a director of a public company (a private company that fails to file this statement runs the risk of this matter becoming an issue in litigation at the instance of aggrieved investors who are unaware of the appointment).

Clause 192 requires the appointment of directors of public companies to be voted on individually at a general meeting of a public company.

Clause 193 enables public companies, despite anything in its articles of association or any agreement between it and the director concerned, to remove by resolution any of its directors before the expiry of his or her term of office. The right of the affected director to make representations for compensation to unlawful dismissal is saved.

Clause 194 provides for the remuneration of directors ("emoluments"). The emoluments of a director of a public company must be approved by shareholders at the annual general meeting of the company.

Clause 195 prohibits loans or guarantees from the funds of the company to be made to directors, except within the conditions stated therein.

Clause 196 provides that the nature and extent of any terminal benefits to any director of a public company must be disclosed by a public company and approved by members at a general meeting. In relation to private companies, there is no such restriction, but the company secretary must file with the Registrar a statement of the terminal benefits on loss of office paid to a director (a private company that fails to file this statement runs the risk of this matter becoming an issue in litigation at the instance of aggrieved investors who are unaware of the appointment).

Clause 197 requires the prior approval for members of public company for any transfer of its property to an existing director as compensation for his or her loss of office or retirement. As with the previous clause there is no such statutory requirement on the part of a private company, apart from the obligation to file a statement with the Registrar that it has made a transfer of its property to a departing director.

Clause 198 says that where a public company is taken over, merged, amalgamated or subjected to the control of another person or company, and the directors thereof are to be compensated for any loss of office resulting therefrom, the affected directors must disclose the contemplated compensation in the notice of offer made for their shares that is furnished to the shareholders.

Clause 199 creates certain presumptions in connection the foregoing clauses 195,196 and 197 with a view to avoiding any evasion of them by affected directors.

Clause 200 compels the keeping of a register of directors' shareholdings in a company or companies that are not private companies, and imposes civil penalty sanctions for failure to do this. Such register will be kept at the company's registered office and must be open to inspection during business hours. The Registrar may require a copy or part of it to be availed to him or her.

Clause 201 prohibits (notwithstanding anything in the articles of association of the company concerned) the allotment of shares to directors, save on the same terms as those offered to members; directors are also prevented, without the approval of the company at a general meeting, to dispose of any undertaking of the company or the whole or greater part of the assets of the company. It also makes clear that any differential allotment of shares or disposals of any such undertakings or assets must be identified specifically.

Clause 202 requires disclosures of directors' salaries and pensions in the accounts of a company are laid before it in a general meeting or in a statement annexed thereto.

Clause 203 requires certain disclosures to be made in accounts laid before members of a public company of particulars of loans made to officers of that company.

Clause 204 sets out rules for insulating the personal financial interests of a director from the interests of the company of which he or she is a director. If the director is a sole director but does not hold all the beneficial interests of all the shares of the company, the director may not enter into any agreement in which he or she (or an associate- see *clause 3*) is financially interested, or make any decision in which he or she or an associate is personally interested, except with the prior approval of the shareholders by ordinary resolution, passed by them with full knowledge of the nature and extent of the director's (or associate's) interest. If the director is not a sole director, and does not hold all the beneficial interests of all the shares of the company, then, if he or she is personally interested in a matter or be considered by the board (or knows that an associate has a personal interest in the matter), the director must make full disclosure of that interest in accordance with subclause (5), and must absent himself or herself from the meeting at which the matter is to be determined by the board.

Clause 205 requires the keeping of a register of its directors and secretaries together with a register of its members at its registered office for public scrutiny.

Sub-Part E of Part III of Chapter III contains provisions pertaining to the responsibilities of boards of directors, audit committees of public company and corporate governance guidelines for public companies.

Clauses 206 set forth what the role of the board of directors is, which must exercise collectively the responsibilities that directors must exercise individually under *clause 186*.

Provision is made for public companies to appoint audit committees under *clause 207*.

Under *clause 208*, the board of every public company shall establish and or adopt written corporate governance guidelines that must be consistent with the then current National Code on Corporate Governance.

Sub-Part F of Part III of Chapter II contains provisions pertaining to the protection of minority shareholders from oppression.

Clause 210 entitles oppressed shareholders to make an application to the High Court, on the ground that the company's affairs are being or have been conducted in a manner which is oppressive or unfairly prejudicial to the interests of some part of the members, including himself or herself, or that any actual or proposed act or omission of the company, including an act or omission on its behalf, is or would be so oppressive or prejudicial.

Under *clause 211* the Registrar is also empowered to make a similar application if he or she receives a report after an investigation into the company's affairs which discloses that the company affairs are being done oppressively and unfairly to minority shareholders. Among other things a court may require the impugned company to refrain from doing or continuing an act complained of by the applicant or to do an act which the applicant has complained it has omitted to do.

Sub-Part G of Part III of Chapter III contains provisions pertaining to mergers and related issues.

Clause 213 contains definitions of "merger" and "major asset transaction".

Clause 214 empowers private, public company and cooperative companies to undertake mergers and describes the types of mergers that may be undertaken.

Clause 215 provides comprehensively for the procedure from the beginning of a merger of companies to its end, with the documents concerning the merger being filed with the Registrar.

Clause 216 provides the minimum requirements for the contents of a merger contract. Under *clause 217* a private company may, and public company must, if either is a party to a merger, engage an independent, professional financial advisor to explain for the benefit of members and shareholders what the merger is about and whether in his or her opinion its terms are fair.

Clause 218 spells out in detail the legal effect of the merger of two or more companies.

In *clause 219* major asset transactions not amounting to mergers must be subjected to shareholder approval. If the transaction in question is of certain magnitude and is not related to the usual course of the company's business, shareholders and dissenting directors are given the right to challenge the board if they dispute whether or not the transaction in question is a major asset transaction. They also have this right if the transaction in question is also in fact a disguised merger.

Clause 220 provides for dissenting shareholders appraisal rights. Such rights enable minority shareholders in a company who dissent from a corporate decision of a company in certain cases (in particular those referred to in *clauses 134 and 214*) to leave the company by having the company pay them for the fair value of their shares. Appraisal rights ensure against any minority dissenting shareholder standing in the way of a transaction approved by the majority shareholders, without, however, creating a great burden for the company. The fair value of the shares paid to the dissenters must compensate shareholders for their investments, expectations, and results in a company. An aggrieved or dissenting shareholder is given an opportunity to inform the company of his or her intention to express their views on objecting to a major asset transaction or merger resolution. Where the company proceeds against the wishes of the dissenting shareholders, the dissenting shareholder are entitled, within a prescribed time, to require that the company pay them the fair value for all the shares they hold in the company. A court may ultimately determine "fair value" in the absence of mutual agreement. In doing so it is not limited to looking at the interests of the dissenting shareholders, but also of the company itself.

Sub-Part H of Part III of Chapter III contains provisions pertaining to takeovers.

Clause 221 defines the words "associates" and "control block" for the purposes of this Sub-Part. Persons are deemed to be associated if, being natural persons, they are related to each other or, in any other case, such as associations of natural or juristic persons, they exercise control over each other in the form of controlling shareholdings and so on.

Clause 222 says that a person who (alone or together with any associate) acquires more than 20% of the ordinary shares of a public company must, within a specified date of the acquisition, notify the company of that fact.

Clause 223 says that a person who wants (whether alone or together with one or more associates) to acquire a control block of shares (that is, to say a block of at least 35% of the ordinary voting shares of a public company) must give at least 30 days notice of his or her intention to do so. During that notice period a shareholders' meeting of each merging company is held at which all shareholders may vote except the potential acquirer and his or her associates. A shareholder may on good cause shown apply for an interdict to a court to stop the acquisition of the control block.

Clause 224 sets out the steps to be followed when notice of an intention to acquire a controlling block of shares in a public company is made. Firstly notice must be given to shareholders on the date that a control block is acquired. Secondly within 60 days of such notice acquisition, the acquirer of the block must give notice to shareholders offering to acquire the companies ordinary shares belonging to them at a price approximating the market price of the shares in the last six months prior of the acquisition of the controlling block. Thirdly shareholders must be given up to at least 30 days to take up the offer. The whole process must be completed in less than 120 days from the acquisition of the controlling block.

Clauses 225 and 226 provide for what are known as "drag-along" and "tag-along" options. Drag- along is the power of the acquirer in a takeover to compel 10 % or less of dissenting shareholders to sell them their shares to the acquirer. On the tag-along is the opposite right in favour of the dissenting shareholders: the acquirer in a takeover may be compelled to buy 10% or less of the shareholding of dissenting shareholders on the same terms as those applicable to non-dissenting shareholders.

Part IV of Chapter III contains provisions pertaining to foreign companies.

Clause 227 contains definitions used in Sub-Part A of this Part.

Clause 228 says that every foreign company wanting to establish a place of business in Zimbabwe must lodge with the Minister a copy of its constitutive documents, a list of directors resident or to be resident in Zimbabwe and, if it is a subsidiary, the name of its holding company. The Minister is involved because of the concerns over security in connection with money-laundering and terrorism within the framework of our country's obligations to the Financial Action Taskforce.

Unless the Minister is of the opinion the registration of a foreign company is not in the public interest the Minister will issue a certificate with or without conditions authorising the foreign country to establish a place of business in Zimbabwe: whereupon it must lodge with the documents with the Registrar in order for it be registered. The document must additionally identify a principal officer responsible for the management of a foreign company in Zimbabwe. Changes to the documents and particulars lodged with the Registrar, must be notified to the Registrar within one month of the change. The Registrar may at any time within a one month notice require a foreign country to disclose the particulars of any director of a company not resident in Zimbabwe. Every year a foreign company must make a return to the Registrar of its financial position (this does not apply to banks and insurers who account to the appropriate statutory regulations), a return on particulars of its nominal and issued share capital.

The Registrar may also be notified that a foreign country has ceased to have a place of business in Zimbabwe, in which event he will remove it from the register. Likewise the Registrar may strike a foreign company off the register if he or she is satisfied that a foreign country has ceased to operate a place of business in Zimbabwe, additionally the Minister is given powers to revoke and impose conditions on foreign companies in the public interest. However, such power is subject to judicial review. It should be noted that foreign companies are entirely exempted from this section if they

have obtained an investment licence or operating in a special economic zone or are licensed as a foreign bank or insurer registered under the appropriate Act.

Clause 229 imposes on foreign companies conditions similar to those in *clauses 28, 30, 31 and 173*.

Clause 230 says that where a foreign company redomiciles in Zimbabwe or is merged or taken over or changes its character it may be exempted from duty for the transfer of immoveable property from the original foreign company to the new company.

Sub-Part B of Part IV of Chapter III contains, in *clauses 231 to 234*, provisions pertaining to prospectuses of foreign companies that are issued out, circulated or distributed in Zimbabwe.

Chapter IV gathers all provisions that are unique to PBCs and other business entities.

PBCs where a business and investment vehicle introduced in 1993 by the Private Business Corporations Act. PBCs give small business people an option to form bodies to be known as private business corporations, which will afford members the same protection from unlimited liability as companies but which will be simpler to establish and operate.

Under *clause 234*, any number of people not exceeding 20 people will be entitled to form a PBC by signing an incorporation statement and delivering it to the Registrar for registration.

In *clause 235* the creators of a PBC will have to specify the PBC's name and address, the names of all its members and the extent of their contributions and interests in the PBC, and the name of a person (to be known as an "accounting officer") who will be responsible for ensuring that the PBC's accounts are properly kept in terms of

Sub-Part E. Upon registration of an incorporation statement the PBC concerned will be incorporated – that is, will be established as a corporate body with legal personality and full capacity independent of its members.

Under *clause 236* PBCs will be obliged to register any changes in their membership or in any other particulars to be required to be specified in their incorporation statements. Failure to do so will render the PBC members liable for their PBC's debts.

Under *clause 237* a PBC will be able to convert itself to a company after applying to the Registrar in a prescribed form signed by all its members and delivering to the Registrar all the documents necessary for the formation of a company. If the Registrar is satisfied he or she shall register the PBC as a new company which will be regarded as a continuation of the same body corporate that was formed when the PBC was first incorporated. On the other hand a company may convert itself to a PBC, provided that the company has less than twenty members and otherwise complies with all the provisions set out in *clause 238*. Provided that if the Registrar or the High court have received no objections to the conversion of the company into a PBC, the Registrar shall cancel the company's registration in the companies register and register it as a PBC. Upon registration as a PBC, the PBC must give notice of its conversion to all creditors of the former company and all other parties to contracts or legal proceedings in which it was involved before its conversion.

Sub-Part B of Part I of Chapter IV contains provisions pertaining to membership of PBCs.

Under *clause 239* a PBC will be limited to between one and twenty members. A PBC will continue to exist even if it has no members, but anyone who causes it to carry on business without members will be personally liable for its debts. If a PBC purports to have more than twenty members all the members and purported members will incur personal liability for the PBC's debts.

Under *clause 240* only natural persons (that is human beings) acting in their personal capacity will be entitled to membership of a PBC, though representative members will be allowed in the event of insolvency, minority or other legal disability of a member.

A person will not become a member of a PBC until the fact of his or her membership has been recorded in a registered incorporation statement; similarly his or her membership will not cease in most cases until that fact has been recorded and registered, though under *clause 243* a court will have power to make an order terminating a person's membership if he or she has become incapable of carrying out his or her duties, as a member or has misconducted himself or herself or, generally, if it is equitable to terminate his or her membership.

Under *clause 241* every member will be obliged to contribute towards the PBC's assets in cash or with property or services; the value of his or her contribution will be regarded as his or her "interest" in the PBC, and will be recorded in the PBC incorporation statement.

Under *clause 242* members will obliged to exercise the utmost good faith towards their PBC and their fellow-members; and their duties are spelt out in this clause.

Sub-Part C of Part I of Chapter IV contains provisions pertaining to members' interests in PBCs.

In *clause 244* a member's interest (unlike a company; member's of a PBC hold an "interest" rather than a "share") in a PBC shall be expressed as percentage (the total sum of the members, interests being 100%), which is not capable of being jointly owned, but in the case of winding up the member shall be entitled to equivalent percentage of the free residue of the PBC that are then distributable to members.

Under *clause 245* each member will be entitled to a certificate showing a percentage of his or her interest in the PBC. Any changes in a member's interest shall be adjusted accordingly in the certificate issued by the PBC. New members may acquire existing members' interests or make contributions to the assets of the PBC, in which latter case the percentage of their interests will be agreed between them and the existing members (*clause 246*).

Clauses 247 and 248 deal with the disposal of interests of members who are insolvent and deceased members respectively. The trustee of an insolvent member will have unrestricted right to sell or dispose of the insolvent member's interest in the PBC. However, in the case of a deceased member, the executor will have will have to comply with the PBC's by-laws, if they address such a situation.

Unless there is some other provision in the PBC's by-laws, all voluntary disposal of members' interests will (under *clause 249*) require the consent of every member.

Clause 250 requires the adjustment of members' interests whenever the membership of PBCs is increased or diminished, so that the totality of members' interests is maintained at 100%.

Under *clause 251* a PBC will be allowed to accept the surrender of a member's interest or to acquire their interest, so long as the PBC remains solvent after the acquisition. Similarly, a PBC will also be allowed to give financial assistance for the acquisition of its members' interests, so long as all the members consent and provided the PBC is solvent after the assistance has been given (*clause 252*).

Sub-Part D of Part I of Chapter IV contains provisions pertaining to the management and administration of PBCs.

Under *clause 253* acts done by members will bind a PBC if the acts were authorised or were done in the course of the PBC's business, unless the member concerned had no

authority and the person with whom he or she was dealing with ought to have known it.

Under clause *254* PBCs will have power in this clause to adopt by-laws regulating the management of their affairs; the by-laws will have to be signed and approved by every member on their adoption but will be capable of being amended by members holding at least 75 % of the total interests in the PBC. Model by-laws set out in Table D of the Sixth Schedule may be adopted by the members on registration of the PBC's incorporation statement or at any time thereafter.

Clauses 255 and 256 set out the minimum requirements for the management of PBCs, which will apply to any PBC unless varied by agreement between the members or by the PBC's by-laws. The requirements set out in the two clauses relate to the payment of members for taking part in the management of the PBC concerned and the holding of meetings of members.

Clause 257 of the Bill provides members with a remedy if they are unfairly prejudiced by the conduct of other members; on an application being made to it under this clause a court will have very wide powers to remedy the situation and protect the interests of prejudiced members.

Clause 258 is designed to protect creditors of PBCs. Dividends will not be paid out to members if their payment would render the PBC insolvent.

Sub-Part E of Part I of Chapter IV contains provisions pertaining to accounting by PBCs.

By *clause 259* every PBC will be required to keep financial records that are sufficiently detailed to allow the nature of all transactions and the PB'Cs true financial position to be ascertained. Such financial records will have to be kept for six years.

At the end of every financial year a PBC will have to prepare financial statements consisting of a statement of financial position and an income statement and showing the state of the PBC's affairs at the end of the financial year, its members' contributions and the value of its assets (*clause 261*). The annual financial statement will have to be submitted to a person with recognised accounting qualifications approved by the Minister (known as an "accounting officer" in the Bill). The accounting officer will be responsible for reviewing and reporting on the PBC's accounts and financial statements. In the exercise of his or her functions, an accounting officer will have a right to access all the PBC's financial records and will be empowered to summon meetings of members, even if he or she is not a member (*clause 262*). If an accounting officer is dismissed and he or she has reason to believe that his or her dismissal was effected to prevent him or her discovering malpractice in the PBC's affairs, he or she will be obliged to report the dismissal and his or her suspicions to the Registrar (*clause 264*).

Clause 266 permits the voluntary registration by partnerships, syndicates, consortiums, joint ventures or unregistered associations of their constitutive documents by the Registrar. The copy of the constitutive document of any such entity that is so registered will be deemed to be the authentic copy for all purposes.

Chapter V concerns the electronic registry, which is defined as the electronic counterpart to paper-based Office for the Registration of Companies and Other Business Entities.

This Chapter will permit the digitisation of the companies registry and the eventual establishment of an electronic companies registry which will supplement the paper-based one, thereby greatly expediting and facilitating company registry administration. Access to the electronic registry for the purpose of information-gathering will be subject to certain safeguards against fraud, violations of privacy and other abuses. In particular users of the electronic registry must subscribe to a "user agreement" with the Registrar in substantially the form set forth in the ---- Schedule.

Chapter VI deals with the licensing of business entity incorporation agents and business entity service providers, shell companies and shelf companies, and the undertaking of by the Registrar of periodic company status verification exercises.

In general, no person other than a legal practitioner, chartered accountant or chartered secretary may engage in business entity registration work (as defined in *clause 280(1)*), but persons qualified in terms of *clause 280(2)* may be licensed by the Registrar to do such work. The same goes for business entity service providers (as defined in *clause 280(1)*), except that such persons cannot be licensed as individuals but must themselves be incorporated as a company under this Bill.

Clause 281 makes special provision for what are called "shell companies" and "shelf companies" as defined in this clause. Such companies may pose significant administrative challenges and legal risks for the Registrar. As respects the administrative challenges, such companies burden the Office without being economically useful to the country; frequently they are "dumped" by their creators, who fail to render the statutory annual returns and fees, leaving the Office with the task of ascertaining whether they are "defunct". Regarding the legal risks of such companies, they are sometimes used as vehicles for money-laundering, fraud, hiding the assets of crime and terrorism, and are of special concern to the Financial Action Task Force. Moreover, shelf companies in particular are commoditised companies, that is to say, shell companies intended to be sold on for a profit to others who intend to operate them. The Office is accordingly entitled to additional revenue from registering such entities.

Clause 282 allows the Registrar to undertake a periodic census of companies and PBCs that are not submitting to their statutory returns and notices, or that appear to the Registrar not to be operating in accordance with their stated objects, or that have become defunct.

Chapter VII provides for general and transitional matters.

Part I of Chapter VII contains provisions (*clauses 283 to 286*) governing the civil penalty regime proposed for the better and easier enforcement of this Bill. The majority of offences under the existing Act are of a minor character involving only minor offences and "default fines" (fines for infringements of statutory requirements). This is because infringements concerned are in the nature of administrative breaches and not criminal in themselves. In order therefore to avoid ascribing criminal stigma to persons who commit minor offences, and to save time and resources expended in prosecuting offenders, it is proposed to deal with these by way of civil penalties leviable by the Registrar, the proceeds of which will be treated as debts due to the registry and accordingly recoverable through civil courts. The civil penalty regime is hedged about with safeguards to prevent abuses and due process challenges.

Clause 287 requires the timeous making of returns, accounts and records on part of companies and other business entities required to do so by this Bill, for default in compliance with which a civil penalty will be leviable.

This Part also contains provisions as to agreements with other countries with a view to the rendering of reciprocal assistance in the field of company registration and law (*clause 288*), the giving by the Minister of policy directions to the Registrar (*clause 289*), and the making by the Minister of regulations necessary or expedient for this Bill (*clause 290*). *Clause 291* empowers the Minister to amend certain Schedules of the Bill and of the Part on the electronic registry with the view to keep those provisions up to date and current with respect to the payments of fees, and changes in computer technology affecting the smooth running of the electronic Registry.

Clause 292 contains provisions governing transitional issues and savings, including the repeal of the Companies Act [*Chapter 24:03*] and the Private Business Corporations Act [*Chapter 24:11*] and the saving of regulations made under them until such time as they are replaced.

Clause 293 enacts special transitional provisions with respect to the status of shares, treasury shares, capital accounts and share certificates of companied existing before the enactment of this Bill as an Act.