Discussion Paper

Proposed Companies Bill 2019, Company Insolvency Bill 2019, and Business Names Bill 2019

Ministry of Commerce, Industries and Cooperatives

Prepared by the Asian Development Bank Pacific Private Sector Development Initiative

Making a Submission

All interested parties are invited to submit written comments on the proposed:

- Companies Bill 2019
- Company Insolvency Bill 2019
- Business Names Bill 2019.

Submissions will be made publicly available unless requested to be kept confidential in part or in full.

Electronic submissions are preferred; however, hand-delivered or posted submissions will also be accepted.

The closing date for submissions is **Sunday, 9 June 2019.**

Electronic submissions should be directed to: jarrod.harrington@adbpsdi.org

Hand-delivered or posted submissions should be directed to:

Ministry of Commerce, Industry, and Cooperatives
Betio

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Background

The private sector is a small, but growing part of the Kiribati economy. Using Kiribati Provident Fund data, indicatively, private sector employment has grown 51.2% in Kiribati from 2009 to 2015. The formal private sector is concentrated on public transportation, motor vehicle importation, construction, light engineering, wholesale, retail, hospitality, and furniture making. With the Government's ongoing commitment to state-owned enterprise reform, there may be future opportunities for private sector expansion.

While there has been substantial growth in the private sector, substantial challenges and constraints remain. The Kiribati Chamber of Commerce has highlighted a series of constraints to private sector development:[1]

- domination of public sector where the private sector could play a greater role, such as in marine services, fisheries, fuel supply, insurance and hotels
- isolation from trading partners leading to transportation challenges
- poor state of core infrastructure (roads, ports and airports)
- widely dispersed land areas
- an unreliable telecommunications network
- a lack of a skilled and qualified workforce, with minimal education options
- inadequate access to finance
- high start-up costs for doing business, and
- outdated business laws.

Some of these constraints are reflected in the World Bank's Doing Business Indicators 2016 for Kiribati (shown in Figure 1). While it is noted that the Doing Business Indicators have methodological issues, the rough rankings demonstrate that there are some deficiencies with the current situation. In particular, Kiribati ranks 140 out of 190 economies for ease of starting a business. Other issues of concern include protection of minority investors (123), and getting credit (167).

[1] Submission to Parliament of Australia by the Kiribati Chamber of Commerce and Industries—the private sector in economic growth and reducing poverty, undated.

Figure 1: Doing Business 2016, Kiribati report. Source: World Bank

Modern, well-adapted legal frameworks can be a significant enabler to promote a vibrant private sector. Heightened entrepreneurial activity and better governance have been found to correspond with an easier environment in which to start a business.[2] Countries with heavier regulation for the entry of businesses exhibit higher levels of corruption and larger unofficial economies, without an improvement in the quality of public or private goods.[3] Other studies have confirmed that weak investor protection, difficulties in accessing finance, and poorly functioning procedures for dissolving companies all slow economic growth.[4] Accordingly, the companies and business names legal frameworks should both support business activity as well as protect the interests of investors, public authorities, and the general public.

Current companies and registration of business names framework

Companies are currently primarily regulated by the Companies Ordinance 1979.[5] The Ordinance outlines the law regarding a number of matters including incorporation, shares, mortgages and debentures, insolvency, reporting requirements, shareholder rights, and director duties. In a recent review of the Companies Ordinance by the Asian Development Bank (ADB) Pacific Private Sector Development Initiative (PSDI), it was determined that the current regime was not conducive to supporting the modern private sector development needs of Kiribati. MCIC agrees with this appraisal. Particular issues concerning old fashioned rules relating to critical issues company formation, shareholding and directorship requirements, insolvency provisions, and the powers of the Registrar of Companies were noted.

Business names are currently regulated by the Registration of Business Names Act 1988. The Act provides for procedures for individuals, firms, and companies to register business names where they are not conducting business under their actual name. PSDI has noted that several improvements to the law and its administration could be implemented, including simplifying application procedures, and providing more flexible ways for businesses to register.

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[2] See the 2008 World Bank Group Entrepreneurship Survey and Djankov and others, 'The Regulation of Entry', 2002, *Quarterly Journal of Economics,* (Feb)

[3] Djankov and others, 'The Regulation of Entry' (2002) *Quarterly Journal of Economics* (Feb).

[4] R Levine, 'The Legal Environment, Banks, and Long-Run Economic Growth' (1998), *Journal of Money, Credit and Banking* 30(3), 596-613.

[5] Note that State Owned Enterprises are also governed by the State Owned Enterprise Act. Consideration of the interplay between amendments to the Companies Ordinance and this Act will be considered later in the public policy development process.

Government priorities for private sector development

Reform of enabling business laws in support of private sector-led, inclusive economic growth is consistent with the development priorities of the Government of Kiribati. The Government recognises the importance of private sector development as a driver of economic growth, and has committed in the Kiribati Development Plan 2016-2019 to enhance opportunities for external investors and reform business laws to create a conducive business environment.[6] Specific linkages include:

- **Kiribati Development Priority 2:** Economic Growth and Poverty Reduction
    - **Goal 2:** to enhance inclusive economic development through improving and increasing sustainable employment, financial inclusion for vulnerable groups, structural and fiscal reforms, and accelerating private sector development
        - **Outcome 1:** Increased sustainable economic development and improved standards of living for all I-Kiribati
            - **Strategy:** promotion of private sector development including enhancing opportunities for external investors and reform of business law to create a conductive business environment

This reform is further supported by the Private Sector Development Strategy, written by the previous government with support from the Chamber of Commerce and Industry, and affirmed in principle by the current Government. The first objective of the strategy is to create an enabling environment; the second is to generate small-to-medium (SME) business opportunities; and the third is to strengthen public–private partnerships. This paper focuses on the foundations of the first strategy, in particular through business law reforms.

What is this reform trying to achieve?

The overarching policy objective is to enable Kiribati's dynamic private sector – and contribute to inclusive economic growth – by structural reform of key business laws. Specifically, this policy seeks to identify changes to the current Companies Ordinance and Registration of Business Names Act regime that will support this objective.

MCIC is proposing to repeal the Companies Ordinance and Registration of Business Names Act, and replace them with three new laws:

- Companies Bill 2019
- Company Insolvency Bill 2019
- Business Names Bill 2019.

MCIC anticipates that the end result will be a complete repeal and replacement of both of the laws. While reformed laws will not remove all constraints to private sector growth in Kiribati, having laws which are designed to encourage private sector growth is an important step.

[6] Government of Kiribati, Kiribati Development Plan 2016–2020.

As expanded in more detail below, the proposed policy reform seeks to support private sector growth through a number of means, including:

- encouraging more businesses to enter the formal economy by making it quicker, easier, and cheaper for companies to incorporate
- making it more attractive for smaller, informal business to enter the formal economy, by providing the benefits of registration while protecting legal and operational control of the business
- simplifying the requirements for running companies, and implementing safeguards that are proportionate to the type and size of the company
- addressing some of the constraints making difficult for overseas companies to establish themselves, and invest in, Kiribati
- streamlining the process to secure a business name, including making it easier for women and I-Kiribati living outside Tarawa to apply, and
- modernising MCIC's powers and approach to administering companies and business names so that information is reliable, accurate, and trustworthy.

Part One: The Companies Ordinance 1979

1. The current law and best practice

The company form[7] can be a powerful tool through which to achieve economic development. While beyond the scope of this discussion paper, companies create several advantages for economic development, including:

- enabling businesses to continue even after the death or departure of individual members pooling resources of investors
- enabling transfer of shares to other persons, and
- creating a separate legal entity than the identity of its members.

The Companies Ordinance 1979 regulates the incorporation, management, and dissolution of companies in Kiribati.[8] While there have been numerous amendments to the Ordinance, there is no current, consolidated version. Overall, the Ordinance does not represent modern company law regional or global best practices. Several older practices such as par values of shares, authorised capital, minimum paid up capital, and a lack of options for default company constitutions no longer reflect best practices and should be reviewed.

In summary, the current legal framework for companies imposes barriers to doing business through overcomplicated procedures, burdensome compliance requirements, and a lack of flexibility and tailoring for the smaller, closely-held nature of most businesses in Kiribati.[9]

While these factors are not exhaustive, indicatively, good company law should:[10]

- provide a system that enables simple and inexpensive incorporation
- provide standard rules for company organisation that are flexible enough to meet the needs of different organisations
- clearly identify the duties and powers within the corporate structure designed to be understood and applied by directors and shareholders
- be the primary source for identifying rights and duties within a company, and
- ensure that safeguards to prevent abuse is appropriate and proportionate to the risk of abuse so as not to work against the economic and social benefits of companies.

2. Purpose of company reform

The major purpose of reforming the Companies Ordinance is to contribute to economic growth in Kiribati by reforming the law governing companies. MCIC considers that a well-adapted legal framework will ease a substantial constraint to private sector development (for other constraints, see Background above).

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[7] as opposed to other business forms such as sole traders, partnerships, cooperative etc

[8] Note: the State Owned Enterprise Act 2013 modifies some requirements as they relate to state owned enterprises

[9] A separate diagnostic, which focuses on the company and other business registries also highlights deficiencies in process, many of which stem from the outdated law on which company registration is based. See M Brosnahan, "Kiribati, Action Plan for Upgrading the Company Registration System", 29 July 2014.

[10] Adapted from para 20 http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R9%20part%201.pdf

The legal issues and recommendations identified below seek to ensure that the companies legal framework reflects the circumstances of the private sector environment in Kiribati. Several considerations are balanced, including making the law clearer, making compliance with the law more proportionate to the size of the company, ensuring that the Registrar is appropriately empowered to keep the registry system accurate and trustworthy, and protect investors in the public in certain circumstances where things go wrong.

While the overall volume of companies remains low, and expectations must remain realistic about the potential impact of reform on levels of incorporations, at the very least, reform will provide a clearer path for existing and potential entrepreneurs seeking to benefit from joining the formal sector and having limited liability.

3. Discussion of selected legal issues and recommendations

a) Entity types

The current Companies Ordinance provides for three types of companies: private companies, public companies, and external companies. Being based on an older English model, the Ordinance is structured to favour the public company model with extensive provisions covering for example, prospectuses and offering shares to the public,[11] debentures,[12] and protection against illegal or oppressive action.[13]

The proposed Bill does not draw a distinction between public and private companies. Rather, requirements for companies are common; however, the constitutions for companies can be amended to better reflect any requirements due to the size of the company.

b) Director and shareholder requirements

Under the current law, companies must have at least two directors and for local companies (private and public), at least two of the directors must be in Kiribati.[14] A private company must have at least two shareholders, and a public company must have at least 10 shareholders.[15] Failure to maintain these minimums can result in personal liability of the shareholders and directors for the debts of the company.

These requirements are not aligned with regional or global practices, and act as a constraint to both foreign investors (who are forced to find local partners as directors) and to sole traders who may wish to take advantage of the company structure without taking on business partners.

Proposed s 6 of the Companies Bill changes this position. It requires companies to have the following minimum requirements:

- a name; and
- a constitution; and

[11] Companies Ordinance 1970, s 61.
[12] Ibid, ss 48-52.
[13] Ibid, ss 119-129.
[14] Ibid, s 91.
[15] Ibid, s 25.

- 1 or more shares; and
- 1 or more shareholders, having limited or unlimited liability for the obligations of the company; and
- 1 or more directors, of whom at least 1 must live in Kiribati.

This proposed change enables the formation of 'one person' companies so that sole proprietors can benefit from the company structure. This would enable smaller businesses to maintain control over their businesses without bringing in unnecessary parties to meet formal requirements. The proprietor would be the sole director and shareholder in the company.

In Kiribati, it would be sensible to encourage the formation of 'one-person' companies so that sole proprietors can benefit from a company structure.

c) Company Secretary

The Companies Ordinance requires every company to have a secretary, who must also be resident in Kiribati.[16] In the context of most companies being closely held in Kiribati, this creates a further unnecessary transaction costs in company maintenance. Secretaries are required to attend both shareholder and director meetings and must take minutes of every such meeting.

The proposed Companies Bill no longer has this requirement; however, should companies choose to have a secretary they may continue to do so.

d) Incorporation Procedures (including company seal)

i. Use of technology

Current practice is that all incorporation applications must be made in person at the Companies Registry in Betio. This current practice creates additional costs for applicants outside South Tarawa and can act as a disincentive to incorporate. It is proposed that specific provisions should be included in the new law to allow for the submission of incorporation documentation to take place remotely. This would require the new law to have expanded definitions of 'signature' and 'writing' to include electronic mediums.

The proposed Bill makes better allowances for digitisation of operations. Part XVI, Division 2 generally, and specifically s 208 will enable the Registry to be kept in digital format. Further, the definitions for 'writing' and 'signature' in schedule 1 have been made more digital friendly.

ii. Reservation of name

The current Ordinance includes a preliminary step to incorporation where the proposed company name must be reserved.[17] The intention of the provision is to ensure that companies are not registered in the same name or that other restrictions on name are complied with. However, in practice this can cause substantial delays with Registry officers undertaking a manual search.

[16] Companies Ordinance 1979, s 114.
[17] Companies Ordinance, s 14(10).

The proposed Bill has no provision for a name reservation process. It is proposed that the incorporation process at MCIC be streamlined to advise applicants whether a name is already in use. Given the relatively small number of companies in Kiribati, it is not foreseen that this will create substantial difficulties. Further, in the event of mistake, section 215 of the Bill provides the Registrar with sufficient powers to amend the Register.

iii. Company seal

A company seal is optional under the Companies ordinance, reflecting modern company law practices. The proposed Bill makes no change to this position; however, does make it clear in s 118(4) that even if a company's constitution requires a seal to be affixed to a written obligation its absence does not affect the validity of the transaction.

e) Memoranda and Articles of Association

The Companies Ordinance currently uses an older approach to incorporation whereby companies must prepare Articles of Association.[18] These Articles must provide a number of pieces of information including:

- the name of the company
- the location of the company's registered address
- the objects of the company, the amount of share capital
- specification of shares and their rights, the names of company officers, and
- the company rules.[19] (Schedule 1 of the Ordinance provides for default rules to be incorporated into the company Articles).

It is costly and time-consuming to engage a lawyer to prepare Articles of Association (also known as a constitution) for a company, and is therefore a significant barrier to incorporation.
Part IV of the proposed Bill deals with company constitutions. Section 15(1) requires all companies to have a company constitution. Companies have the option of selecting:

- the default constitution for single shareholder companies (Schedule 2)
- the default constitution for companies with more than one shareholder (Schedule 3)
- a modified version of the default constitutions
- a substituted constitution instead of the default constitution.

The default constitutions deal with a number of important matters including:

- how shares are issued and dealt with
- shareholders and shareholder rights
- the appointment and conduct of directors, including directors' meetings and the managing director, and
- liquidation.

[18] Companies Ordinance 1979, s 13.
[19] Ibid

In pursuit of the objective of making incorporation simple and accessible, much of the information currently required in the Companies Ordinance will not be required for company constitutions. Information such as the registered address, specification of shares and rights, company officers, and company rules are still valuable; however, are largely addressed in the application procedure under s 7 of the proposed Bill.

Under the proposed Bill, all companies will be required to re-register to remain valid. Section 245(3) will require re-registering companies to confirm their arrangements with respect to their constitutions. This can include keeping the existing Articles of Association as long as its provisions are not inconsistent with the Bill.

f) Minimum paid-up capital

The Companies Ordinance requires a minimum paid-up capital of $20,000 for a public company and $500 for a private company. In effect, it means that an applicant must prove that the company has assets equal or more to this amount in order to incorporate.

Minimum capital requirements were initially considered to be a mechanism for ensuring that companies had sufficient capital reserves to meet contractual obligations and to protect creditors. However, in practice, this requirement has little use, potentially ties up needed start-up cash, slows entrepreneurship, can discourage entrepreneurs with less initial capital (for example, a services based company may not be initially capital intensive, but founders would still need to find $500 initial capital), and is not, in reality, used by banks to assess credit worthiness of a business.

The proposed Bill does not incorporate minimum paid-up capital requirements.

g) Share capital

The Ordinance currently:[20]

- requires companies to state its share capital (i.e. the maximum value of shares in the company) in its Articles, and
- provides the option of shares having 'par value' (i.e. a minimum value), no par value, or a combination of the two.

Under the Ordinance, a company wishing to alter its share capital (e.g. increasing share capital by creating new shares) must do so by amending its Articles, which can only be done through a special resolution. A certified copy of such a resolution must then be provided to the Registrar to give it any effect.

The proposed Bill does not require companies to state its share capital at incorporation; however, s7(3)(e) will require an application for incorporation to specify the full name of every shareholder of the proposed company, and the number of shares to be issued to every shareholder. Section 19(1) prohibits shares from having par value.

[20] Companies Ordinance 1979, s 41.

Part IV, Division 2 of the proposed Bill outlines the procedure for the issuance of new shares. Section 24 enables companies to issue new shares in accordance with its constitution or in accordance with s 62 which requires unanimous shareholder agreement.

Section 26 works to protect the rights of existing shareholders by requiring the issue of shares that would rank the same or higher than existing shares to be offered to existing shareholders in a manner which would keep the existing voting or distribution rights, if accepted.

h) Annual return obligations

The present annual return requirements do not work in a way which promotes transparent up-to-date information, and would need significant revision.

Regardless of the company size, companies must provide annual financial accounts to the company registry (which must be audited for companies other than private companies). Without any auditors in Kiribati, this is an impossible task, even for the larger entities. For private companies, which are typically closely held in Kiribati, there is no public purpose to provide financial accounts to the company registry. Hence the systemic failure to submit annual returns.

Late fees for failure to submit annual returns are so high (AUD 150 per month that they are overdue), that they could have a significant impact on company finances. This then becomes a barrier to the company submitting any annual returns at all, which only compounds the debt. As a consequence, two Amnesty Acts were specifically passed in 1996 and in 2009 to forgive some of the debts owed by the companies. However, the acts failed to resolve the underlying issue.

Part IX, Division 5 of the proposed Bill deals with annual returns. Section 143 of the Bill requires a company to file an annual return that includes the prescribed information and be accompanied by the relevant fee. It is anticipated that the prescribed information will only be key biographical information, i.e. names and addresses of shareholders and directors and would not require financial statements.

The proposed Bill outlines serious consequences for companies that fail to submit their annual returns. Section 176 requires the Registrar to remove non-compliant companies for the Register if they have not filed after 6 months from their allocated return month. Section 182 vests the property of removed companies in the State. Part XIV, Division 5 outlines how companies can be restored to the Register.

Section 147 outlines other events that must be reported to the Registrar.

i) Financial Reporting and Disclosure Obligations

Under the current Companies Ordinance, financial reporting requirements are somewhat complex and can be significantly simplified. [21]

[21] Companies Ordinance 1979, ss 62-65.

Part X, Divisions 2 and 3 of the proposed Bill deal with financial statements. Section 150 only requires audited financial statements where a company exceeds a prescribed number of shareholders. While there is no minimum number of shareholders contemplated currently, any prescription would be subject to public consultation. Section 153 specifies when a company can opt out of audited financial statements.

j) Procedures for meetings–shareholders and directors

The Companies Ordinance provides for procedures for meetings of directors and shareholders. The requirements for general shareholder meetings[22] are tailored to a large company with many shareholders, and are not appropriate to the Kiribati context. While there is provision for private companies to hold meetings by written resolution,[23] these can be further simplified. Further, there are no provisions for electronic methods of communication. Requirements to submit resolutions to the Registrar[24] are also onerous and redundant in a modern company law context.

Part VI, Division 4 of the proposed Bill deals with shareholder meetings generally. Section 67 requires meetings to be held in accordance with the company constitution. Section 70 enables written resolutions in lieu of meetings under defined circumstances. Section 71 enables better use of technology for written resolutions.

The default constitutions provide guidance for directors' meetings.

k) Officers and Director Duties

Since the Companies Ordinance was passed, there have been significant global developments in corporate governance, in particular relating to the duties of directors in relation to their company. The Kiribati courts have not made any rulings on directors duties, so a complex web of common law precedent would need to be applied alongside the lengthy provisions on directors duties in the Companies Ordinance.[25] Several of the listed duties would also be irrelevant to the small company context for directors in Kiribati. For example, the provisions relating to takeover bids and the sale and purchase of securities.

Part VII, Division 3 of the proposed Bill deals with directors' duties. Section 87 outlines the fundamental director duty, i.e. that the director must, when exercising or performing the duties as a director, act:

- in good faith, and
- in what the director believes to be the best interests of the company.

This fundamental duty is supported by other duties:

- director must comply with the Act and the company constitution (s 88)
- director must not engage in activities which could constitute reckless trading (s 89)

[22] Ibid, ss 70-82.
[23] Ibid, s 89.
[24] Ibid, s 87
[25] Companies Ordinance 1979, ss 101-108.

- director must not agree to a company incurring an obligation unless he or she believes the company can meet the obligation (s 90)
- director must not exercise power if he or she is (directly or indirectly) materially interested in the exercise of the power (s 91)
- director must not disclose or act upon company information except in defined circumstances (s 92).

Section 93 outlines a director's duty of care to the company.

It is noted that the State Owned Enterprises Act 2012 places different obligations on directors of state owned enterprises. Section 86 works to ensure that there is no inconsistency between the obligations of directors under this Act and the proposed Companies Bill.

l) Shareholder rights

In order to ensure that shareholders can hold the directors accountable, certain provisions must be included in a company law to protect shareholders – especially minority shareholders. The Companies Ordinances allows for a court to prevent a company from acting illegally or in breach of the company's own articles. The application may be made by any shareholder.[26] This is an appropriate provision that should be retained, though it may be extended to other parties, such as a director, the Registrar, or another person the Court sees fit (for example a creditor to the company).

Specific provisions in the Companies Ordinance also deal with conduct by the company that is oppressive or discriminatory against one or more particular shareholders, or is not in the interests of Kiribati.[27] The Court then has broad powers to end or remedy the matter complained of.[28] While protections around shareholders being unfairly treated are appropriate, it is questionable whether it is going too far to allow any shareholder to take a company to court over what is in 'the best interests of Kiribati'. This is a broad and vague power, and we would recommend its removal. There is no evidence of cases being brought under this provision.

Part VI of the proposed Bill outlines the general rights of shareholder and the decisions that they may take. Part VIII, Division 1 provides for how company maladministration can be addressed through a maladministration proceeding. Under s 111(1)(a)-(b) a current and former shareholder can bring a maladministration proceeding if there are grounds under s 112 which, importantly include if the affairs of a company have been or are being conducted in a manner that is, or is likely to be, unfairly prejudicial to a shareholder or shareholders. Section 113 nominates instances which would be unfairly prejudicial. Remedies are outlined in s 114.

m) Solvency requirements

The Companies Ordinance reflects the traditional approach to preventing a company from decreasing its equity capital whilst in operation. Complex provisions regarding company solvency

[26] Companies Ordinance 1979, s 119.
[27] Ibid, s 120.
[28] Ibid.

are in place around decisions to alter capital, such as through redeemable shares and reduction of capital,[29] issuing dividends,[30] and giving financial assistance to acquire shares.[31]

These requirements together form part of what was known as the 'capital maintenance doctrine'. The doctrine seeks to put in place measures that protect creditors against the company's capital being returned to shareholders, except in the case of winding up where creditors have been paid first. The approach is problematic in that many companies have relatively low share capital amounts, thus the complex provisions often provide little protection to creditors. Provisions based on the capital maintenance doctrine have been abolished in New Zealand, Solomon Islands, and Vanuatu.

The proposed Bill introduces a new solvency test for certain situations. A solvency test is a more flexible approach to protecting both creditors and shareholders. A company will satisfy the solvency test if:

- the company is able to pay its debts as they become due in the normal course of business; and
- the value of the company' assets is not less than the value of its liabilities.

The test applies to:

- distributions to shareholders (s 29)
- provision of financial assistance for share purchases (s 44)
- director duty in relation to self interest (s 91), and
- director duty in relation to company information (s 92).

n) Re-registration

As discussed above, the Kiribati Companies Register currently suffers from a number of inaccuracies attributable to poor reporting compliance. In order to enhance the accuracy and trustworthiness of the Register, it is proposed that the transition to the new companies law be accompanied by a re-registration process. Existing companies would be provided with a certain, well-publicised timeframe in which to re-register, after which they would be removed from the Register. The re-registration process serves the purpose of ensuring that the company is validly incorporated and bound by the new laws, and provides the opportunity for the company to update its details to the company registry.

Part XVIII, Division 4 deals with re-registration.

o) Winding-Up

The Companies Ordinance includes detailed provisions for the winding up of companies. Winding up of companies is an important mechanism to provide the best chances for creditors to be paid if a company is insolvent. Under the current law, a company may be wound up on action of a company

[29] Companies Ordinance 1979, ss 44-45.
[30] Ibid, s 66.
[31] Ibid, s 38.

itself, or by a court.[32] There is only one documented case of a company being wound up in Kiribati, ordered by the court.[33] The provisions, such as those relating to companies ceasing trading at the commencement of a winding up procedure,[34] do not reflect modern practices which provide more flexible options to 'rescue' companies.

A dedicated new Bill – the Company Insolvency Bill – is proposed to cover compromises with creditors, as well liquidation and receivership. Given the relative complexity of these provisions, it is proposed that a separate law is beneficial as it will increase the readability of the Companies Bill.

p) Registrar of Companies

The Registrar of Companies holds a vital role in the administration and enforcement of the Companies Ordinance. The efficient and effective functioning of the companies law reduces transaction costs for companies, provides trust in the system, and helps protect shareholders, creditors, and the public. However, the current Ordinance does not reflect modern practice and requires the Registrar to be involved in several matters – such as reviewing resolutions – that should more rightly be considered internal company matters.

Modern notions of the Registrar and registries seek to streamline compliance requirements to the minimum necessary while still balancing other public policy objectives (e.g. minority shareholder rights, transparency of company details etc). In practice, this is reflected in the registry becoming a simple noticeboard of key details of companies and limited biographical details of its officers and shareholders.

Part XVI of the proposed Bill outlines the functions and powers of the Registrar.

[32] Companies Ordinance 1979, s 125.

[33] In *re Abamakoro Trading Company Ltd* [2012] KIHC 2; Civil Case 147 of 2011 (22 February 2012).

[34] Companies Ordinance 1979, s 125(2).

Part Two: The Registration of Business Names Act 1988

1. The current law

Business names are an important way through which sole traders, partnerships, companies, and other entities trade under a name different to their own (e.g. John Smith trading as Tarawa Building Supplies). With approximately 200 registrations in the past year, business name registration is a popular way for businesses to operate under a simpler brand than their formal name. Business names are also valuable in that it is often required to open business bank accounts, participate in the formal sector, and access grant funding.

The registration of business names under the Registration of Business Names Act 1988 is an important feature of the business law framework. It provides for formal registration of businesses that wish to use a name that differs from their own personal or company name.[35] It ensures that the owner of a business is identifiable by government, by other businesses, and by consumers. It is also the cheapest and least complicated method of formal business registration and maintenance, and for those reasons it is most often used by sole traders, a predominant business form in Kiribati.

As at July 2014, there were 1,871 business names registered in Kiribati at MCIC under the Act. However, many of these may be inactive, as there is no annual return requirement confirming which business name registrations relate to active businesses.

To register a business name, these steps must be followed:

1. Lodge a signed application in the prescribed form, with a statutory declaration and an AUD100 fee.
2. Lodge the 'non-mandated' Screening form (discussed below).
3. On registration, a Certificate of registration is issued.

Only changes to registered details need to be updated on the register,[36] and a previous diagnostic on the registry noted that few changes were reported. The register is currently kept both in paper format, and in a Microsoft Access database.

2. Purpose of business names reform and benefits for I-Kiribati

While the analysis at section 4 indicates that there are no major problems with the current legislation, there are a number of areas that could be streamlined. As business names registration is relatively popular in Kiribati, the purpose of the reform would focus on making the system more accessible and reliable, including for women and rural I-Kiribati.

Anticipated benefits include:

- Greater business certainty that the business being dealt with is legitimate, leading to:

[35] Registration of Business Names Act 1988, s 3 – Every individual, firm or registered company carrying on business using a name that does not consist of the individual's true name, the firm's partners, corporations and or individuals' true surnames or companies' registered name, must register a business name.
[36] Ibid, s 8

    - Increased willingness to contract with new business partners
    - Increased capacity to check for fraudulent transactions
- Existing businesses and entities being better empowered to proactively protect their business goodwill and/or defend against detriment
- The ability for consumers to identify with whom they are dealing in the event of a dispute
- Government having better information on the distribution and composition of the Kiribati private sector.

3. Future direction

It is proposed that the Registration of Business Names Act be completely repealed and replaced with a new Act. It is further proposed that the new Act be modelled along similar lines to the recent Business Names Act 2014 of Solomon Islands. The principal objectives of that Act were to ensure that:

- if an entity carries on a business under a business name, those who engage or propose to engage with that business can identify and contact the entity
- business names that are the same or almost the same as other business names, or the registered names of companies, charitable trusts or co-operative societies, are not used where that would confuse or mislead, and
- that business names that should not be used, including because they are misleading, deceptive or offensive to the public, are not used.

Implementation of the new Act would be accompanied by reform to the Business Names Registry at MCIC. Further details on proposed Registry reforms will be detailed in due course.

4. Discussion of select legal issues and recommendations

A summarised table of the following recommendations is at **Attachment A**.

a) When a business name is needed

The current Act requires the registration of business names where an individual or firm has a place of business in Kiribati and is carrying out a business in a name other than their own.[37] A 'business' includes any profession, trade, or any activity carried on for the purpose of gain or profit.[38] The current drafting is somewhat broad and there may be some circumstances where a person may technically be in breach of the Act.

Section 12(1) of the proposed Bill defines carrying on a business if a person:

- establishes a place of business in Kiribati, or
- while in Kiribati, solicits or procures an order from another person in Kiribati.

[37] Registration of Business Names Act 1988, s4.
[38] Ibid, s 2.

Section 12(2) clarifies the current law by confirming that the following do not constitute carrying on a business where a person:

- becomes a party to a legal or administrative proceeding or an arbitration
- buys or holds a particular property
- creates a charge over property or creates evidence of a debt secured by property
- maintains a bank account
- invests money in Kiribati
- conducts an isolated transaction that is completed within 28 days, not being one of a number of similar transactions repeated from time to time, or
- winds up a bankrupt estate or liquidates a body corporate.

b) Filing requirements

The Registration of Business Names Act requires that documents be sent by post or in writing to the Registrar,[39] and contain signatures.[40] Given the remote nature of many I-Kiribati residents, more flexible options should be built into the law, allowing for electronic based transactions and signatures.

The proposed Bill better supports electronic filing. Section 3 definitions of document, electronic signature, signature, and writing all support better use of technology for filing purposes. Further, 44(2) enables regulations to be made to support electronic filings.

c) Annual renewal

The Act currently does not have a requirement for business names registrations to be renewed. This can mean that potentially desirable business names may not be available any more, even years after the business using the name has ceased operations. Further, without a renewal process, it is difficult for MCIC to ascertain the number of active businesses in Kiribati, making targeting policy more difficult.

Part III, Division 3 of the proposed Bill covers returns generally. Section 19 creates the requirement for business name holders to submit a return with the prescribed information to the Registrar in the return month allocated by the Registrar under s 18.

d) Restricted names

The Act prohibits the registration of names that are identical to existing business or company names, or names that are similar enough that are likely to mislead, deceive or cause confusion.[41] While this provision would cover off of the majority of cases of similar or identical names, there are additional circumstances where a proposed name could be undesirable.

Section 16 of the proposed Bill expands names that cannot be used to include where:

- the name is the same, or almost the same, as—

[39] Registration of Business Names Act 1988, ss 5 and 8.
[40] Ibid, ss 6 and 8.
[41] Ibid, s 18.

    - a currently registered business name;
    - the actual name of a body corporate (except if the body corporate is the applicant);
    - the name in which an entity that has filed an application (which is yet to be determined) for registration or re-registration as a company, co-operative society, or other registered entity; or
    - a prescribed name;
- the name is the same, or almost the same, as a previously registered business name that has been removed within 6 months before the application is made, unless the person to whom the name was previously registered consents;
- the Registrar considers that the use of the name as a business name would contravene another written law;
- the Registrar considers that the use of the name as a business name by the applicant would infringe another person's intellectual property rights (including rights in respect of trade marks); or
- the Registrar considers that the name is likely to mislead, deceive or offend the public.

e) Appeals

The Act does not provide for any circumstances for persons affected by registration decisions to appeal.

The proposed Bill will enable a number of appeals on decisions of the Registrar:

- registration of a business name (section 15(1))
- refusal to register a business name (section 15(3))
- removal of a business name from the register on a ground set out in section 23(1)(b) to (e), and
- refusal to restore a business name to the register (section 26(2)).

The person who may bring the appeal is:

- in the case of registration of a business name, a person affected who claims that there is a real risk that the registration will cause substantial detriment to that person
- in the case of a refusal to register a business name or to restore a business name to the register, the applicant, or
- in the case of the removal of a business name from the register, the person to whom the business name was registered.

f) Powers of the Registrar

The Act provides limited powers for the Registrar in maintaining the business names registration system. This is, in part, attributable to the fact that there are limited obligations on those holding business names. However, in recognition of the proposed expanded role of the Registrar in more proactively managing the business names registration system, a guiding principle of the reform process should be ensuring that the Registrar is appropriately empowered.

The proposed Bill provides a number of powers for the Registrar.

g) Transitional re-registration

As part of a reform process, it will be necessary to include provisions requiring existing business name registrations to be re-registered under a new Act. This serves the purpose of 'cleaning out' the inactive business names, as well as updating the information for new business names.

Section 46 in the proposed Bill is drafted in two alternative ways for consultation. One is where all names remain registered; however, will be cleaned out through the annual return process. The alternative is where all names are de-registered and must be re-registered during a transition period.