

Fiji Companies Act 2015: What it means

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Key Points

- The new Companies Act 2015 (**The Act**) came into effect from 1 January 2016.
- The Act repeals the Companies Act (Cap 247) (**Previous Act**)
- The legislation introduces some fundamental changes to company regulation that will have important consequences for your company

Introduction

The aim of the Act is to introduce modern business practices and streamline regulation within Fiji while also improving corporate governance practices to ensure that Company Directors and company officers are more accountable for their conduct. The Act regulates Companies carrying on business in Fiji, impacting both local and foreign corporations.

What are the key changes?

Types of companies

The Act allows both private and public companies to be registered. While the Previous Act did not distinguish between private companies¹, the Act differentiates between small, medium and large private companies.²

A company is deemed a small private company if its consolidated revenue at the end of the Financial Year and the entities it controls, if any, is less than \$FJD5 million.³ These companies are not required to prepare Financial Statements,⁴ unless directed to do so by Members with at least 10% of the votes.⁵ They are only required to prepare proforma financial statements if directed by the Registrar of Companies and/or if the company was controlled by a foreign company which has not otherwise lodged any financial statements.⁶

A medium private company has a consolidated revenue at the end of the Financial Year and the entities it controls, if any, is more than \$FJD5 million but less than \$FJD20 million.⁷ These companies must prepare and lodge proforma financial statements.⁸

¹ *Companies Act (Cap. 247) s 32.*

² *Companies Act No 3 of 2015 s 19.*

³ *Companies Act No 3 of 2015 s 19 (1).*

⁴ *Companies Act No 3 of 2015 s 388 (3) (a).*

⁵ *Companies Act No 3 of 2015 s 389.*

⁶ *Companies Act No 3 of 2015 s 388 (3) (b).*

⁷ *Companies Act No 3 of 2015 s 19 (2).*

⁸ *Companies Act No 3 of 2015 s 388 (2).*

A large private company has a consolidated revenue at the end of the Financial Year and the entities it controls, if any, is more than \$FJD20 million.⁹ These companies must prepare and lodge full financial statements and a Director's Report.¹⁰

Incorporating of a company

Minimum number of members in a company

The Previous Act required seven members for a public company, and two members for a private company.¹¹ The Act merely requires a company to have one member, irrespective of the type of company.¹² But a private company limits the number of its members to 50 by its Article of Association, not including persons who are in the employment of the Company and persons who, having been formerly in the employment of the company, were while in that employment, to be, Members of the Company.¹³

Company names

Under the Act, a public company must have "Limited" or "Ltd" or "An Unlimited Liability Company" and a private company must have "Pte limited" or "pte Ltd" at the end of its name.¹⁴

Requirement of articles of association

In contrast to the position under the Previous Act¹⁵, a company incorporated under the Act must not have a memorandum of association but must adopt articles of association, which govern the internal management of the company.¹⁶ In other words, a company is incorporated under the Act without the need of a Memorandum of Association, only the Article of Association.

The Articles of Association will have effect as a contract:

- between the company and each member;
- between the company and each director and company secretary; and
- between a member and each member.¹⁷

Unless a Member of a Company Limited by Shares agrees in writing to be bound, they are not bound by a modification of the Articles of Association made after the date on which they became a Member, so far as the modification-

- requires the Member to take up additional shares, or
- increases the Member's liability to contribute to the share capital of, or otherwise to pay money to, the Company.¹⁸

⁹ *Companies Act No 3 of 2015* s 19 (3).

¹⁰ *Companies Act No 3 of 2015* s 388 (1) (b).

¹¹ *Companies Act (Cap. 247)* s 35.

¹² *Companies Act No 3 of 2015* s 14.

¹³ *Companies Act No 3 of 2015* s 16(b).

¹⁴ *Companies Act No 3 of 2015* s 26.

¹⁵ *Companies Act (Cap. 247)* s 4.

¹⁶ *Companies Act No 3 of 2015* s 46.

¹⁷ *Companies Act No 3 of 2015* s 47 (1).

¹⁸ *Companies Act No 3 of 2015* s 47(2).

Pre-incorporation contracts

The Previous Act did not contain any provisions regarding the ratification of pre-incorporation contracts. The Act now provides that a person may enter into a written agreement in the name of, or purport to act in the name of, or on behalf of, an entity that is contemplated to be registered as a company under this Act but does not yet exist,¹⁹ and introduces liability if the company is not subsequently registered or the contract is not ratified.²⁰

Legal capacity of a company

Under the Act, a company has the legal capacity and powers of an individual both in and outside Fiji, subject to any restriction in its Articles of Association.²¹ Moreover, the ultra vires doctrine does not apply under the Act; no act of a company can be deemed invalid by reason only of the fact that the company was without capacity or power to do the act.²²

Execution of documents

Under the Act, a company is no longer required to have a common seal.²³ The execution of documents is now in line with Australian legislation, requiring the document to be signed by two Directors of the Company, a Director and a Secretary of the Company, or, in the case of a Private company that has a sole director, who is also the sole secretary of the Company, that director.²⁴

Directors and Officers

A director is a person appointed as a director or alternate director of a company, but excludes those acting as directors.

An officer includes a director, secretary, a person who makes decision on the business of the company, receiver, manager, liquidator or trustee.

Requirements

Under the Act, directors and officers must be a natural person over the age of 18.²⁵

A public company must have:

- At least 3 directors, not counting alternate directors, of at least 2 which must ordinarily reside in Fiji;²⁶
- At least 1 company secretary, and at least 1 of them must ordinarily reside in Fiji;²⁷

A private company must have:

- At least 1 director, and at least 1 of them must ordinarily resides in Fiji;²⁸
- Is not required to have a company secretary, but if it does, at least one of them must ordinarily reside in Fiji;²⁹

¹⁹ *Companies Act No 3 of 2015* s 73 (1).

²⁰ *Companies Act No 3 of 2015* s 73 (2).

²¹ *Companies Act No 3 of 2015* s 44.

²² *Companies Act No 3 of 2015* s 45.

²³ *Companies Act No 3 of 2015* s 52.

²⁴ *Companies Act No 3 of 2015* s 53.

²⁵ *Companies Act No 3 of 2015* s 93 (1).

²⁶ *Companies Act No 3 of 2015* s 91 (1).

²⁷ *Companies Act No 3 of 2015* s 92 (1).

²⁸ *Companies Act No 3 of 2015* s 91 (2).

Duties

The Previous Act did not impose any general duties on directors and officers of a company, with the exception of disclosure requirements. Under the Act a wide range of duties have been imposed, bringing Fijian company law more in line with Australian legislation.

Some of the duties include:

- Duty to act within the powers conferred upon them;³⁰
- Duty to act in good faith and in a way that would most likely promote the success of the company;³¹
- Duty to exercise independent judgment;³²
- Duty to exercise reasonable care, skill and diligence;³³
- Duty to avoid conflicts of interest;³⁴
- Duty not to accept benefits from third parties;³⁵ and
- Duty to declare interest in a proposed transaction or arrangement;³⁶

More than one of the general duties may apply in any given case.³⁷

The Act does not add any statutory remedies for a breach of directors' duties; rather, common law and equitable principles will apply. As such, the duties are enforceable in the same way as any other fiduciary duty owed to a company by its directors with the exception of the duty to exercise reasonable care, skill and diligence.³⁸

The Act contains severe consequences for a director who breaches his or her duties and was reckless or intentionally dishonest. These consequences include conviction of a criminal offence and imprisonment.³⁹

Annual actions

Solvency

Directors of a Company must pass a Solvency Resolution within 2 months after the end of each financial year, unless the Directors of the Company have lodged a financial report with the Registrar within the last financial year.⁴⁰ If the Directors of the Company pass a negative resolution, the Company must notify the Registrar within 7 days after the resolution is passed.⁴¹

²⁹ *Companies Act No 3 of 2015* s 92 (2).

³⁰ *Companies Act No 3 of 2015* s 103.

³¹ *Companies Act No 3 of 2015* s 104.

³² *Companies Act No 3 of 2015* s 105.

³³ *Companies Act No 3 of 2015* s 106.

³⁴ *Companies Act No 3 of 2015* s 107.

³⁵ *Companies Act No 3 of 2015* s 108.

³⁶ *Companies Act No 3 of 2015* s 109.

³⁷ *Companies Act No 3 of 2015* s 113.

³⁸ *Companies Act No 3 of 2015* s 112.

³⁹ *Companies Act No 3 of 2015* s 115.

⁴⁰ *Companies Act No 3 of 2015* s 408.

⁴¹ *Companies Act No 3 of 2015* s 409.

Directors Reports and Financial Statements

Financial Statements must be prepared annually for all public companies, large private companies, and managed investment schemes.⁴² A small private company is not required to prepare Financial Statements unless directed to do so by Members with at least 10% of the votes.⁴³ They are only required to prepare proforma financial statements if directed by Registrar of Companies and/or if the company was controlled by a foreign company which has not otherwise lodged any financial statements.⁴⁴

It is imperative that the Financial Statements are prepared in accordance with the Act.⁴⁵

Annual Return

There is no requirement to lodge an annual return under the new Act as was the case under the previous Act.

Audits

For an audit or review of Financial Statements, the Auditor must give the Directors of the Company a written declaration that:

- to the best of the Auditor's knowledge and belief, there have been no contraventions of Auditor independence requirements of the Act; and,
- no contraventions of professional codes of conduct, or set out the breaches in the declarations.⁴⁶

This declaration must be given when the Auditor's Report is given to the Directors and must be signed by the declarer. The declaration is given to the Directors before the Directors' approval of the Directors' Report.⁴⁷

Foreign Companies

A foreign company cannot carry on business in Fiji unless it is both registered under the Act and has been granted a foreign investment registration certificate under the Foreign Investment Act 1999.⁴⁸ Companies incorporated outside Fiji must, within 28 days of establishing a place of business in Fiji, apply to the Registrar for registration, and include the names and postal addresses of a local agent. A local agent is a resident in Fiji authorised to accept, on behalf of the Foreign Company, service of process and any notices required to be served on the Foreign Company.⁴⁹

Transitional Provisions

Part 46 of the Companies Act 2015 contains a number of transitional provisions, which continue the incorporation of all existing companies and business names as well as all existing registrations, licences and approvals.⁵⁰ Under the provisions, private companies now have three years from the commencement of the Act to comply with section 26(1)(b).⁵¹

⁴² *Companies Act No 3 of 2015* s 388.

⁴³ *Companies Act No 3 of 2015* s 389.

⁴⁴ *Companies Act No 3 of 2015* s 388 (3) (b).

⁴⁵ *Companies Act No 3 of 2015* s 390.

⁴⁶ *Companies Act No 3 of 2015* s 395 (1).

⁴⁷ *Companies Act No 3 of 2015* s 395 (3).

⁴⁸ *Companies Act No 3 of 2015* s 56.

⁴⁹ *Companies Act No 3 of 2015* s 57.

⁵⁰ *Companies Act No 3 of 2015* Explanatory note 4.45.

⁵¹ *Companies Act No 3 of 2015* Explanatory note 4.45.

The provisions allow for the continuation of the appointments of existing company officers⁵² and the nomination of registered offices.⁵³ The provisions also ensure that company meetings called under the old law can lawfully proceed under the new law.⁵⁴

The provisions mean that a company is not required to submit new articles of association.⁵⁵ However, any provisions that provide for the issue of, or refer to, Bearer Shares, Bearer Stock or Share Warrants in an Existing Company are null and void as at the commencement date of the Act.⁵⁶

The provisional transactions also provide additional guidance on par value of shares⁵⁷, authorised share capital⁵⁸, share premium accounts⁵⁹ and bearer shares.⁶⁰

Prescribed Registration Fee

Under the new Act, all companies must pay an annual registration fee to the Registrar of Companies within 28 days after the anniversary of the day on which the company was registered.⁶¹

Please make certain that the Prescribed Registration Fee is paid by the due date to avoid the imposition of any late payment penalties. A private company may be fined \$1,000 while public companies and Managers of Managed Investment Schemes may be fined up to \$2,000. The Registrar may also decide to deregister a Company if the Company's Prescribed Registration Fee has not been paid in full at least 12 months after the due date for payment.⁶²

How will this affect you?

If you are currently operating within Fiji, either locally or as a foreign company, the new Company Act will affect your business. To ensure compliance with the legislation, an understanding of both the new and transitional provisions is necessary.

Please contact **PLN** for advice on how this legislation will affect your company.

Disclaimer

The information set out in this article is a general guide only about the laws in Fiji and is not intended as specific legal advice.

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⁵² *Companies Act no 3 of 2015* s 730.

⁵³ *Companies Act no 3 of 2015* s 729.

⁵⁴ *Companies Act no 3 of 2015* ss 731, 732.

⁵⁵ *Companies Act no 3 of 2015* s 728.

⁵⁶ *Companies Act no 3 of 2015* s 728.

⁵⁷ *Companies Act no 3 of 2015* s 733.

⁵⁸ *Companies Act no 3 of 2015* s 735.

⁵⁹ *Companies Act no 3 of 2015* s 737.

⁶⁰ *Companies Act no 3 of 2015* s 734.

⁶¹ *Companies Act No 3 of 2015* s 24.

⁶² *Companies Act No 3 of 2015* s 603 (2).

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