



Tonga

RECEIVERSHIP ACT 2015

Act 8 of 2015



RECEIVERSHIP ACT 2015

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RECEIVERSHIP ACT 2015

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AN ACT TO PROVIDE FOR THE LAW RELATING TO RECEIVERSHIPS, AND FOR PURPOSES INCIDENTAL OR CONSEQUENTIAL THERETO

I assent,
TUPOU VI,
25th May 2017.

BE IT ENACTED by the King and Legislative Assembly of Tonga in the Legislature of the Kingdom as follows:

1 Short title and commencement

- (1) This Act may be cited as the Receivership Act 2015.
- (2) This Act shall come into force on a day to be appointed by the Minister responsible for Commerce by Notice in the Gazette and different provisions may be brought into force on different dates.

2 Interpretation

- (1) In this Act, unless the context otherwise requires –
 - “**account**” has the same meaning as in section 2(1) of the Personal Property Securities Act 2010;
 - “**Bankruptcy Act**” means an Act by that name that may be enacted at a future date and brought into force but until there is such an Act all provisions of this Act, to the extent that they refer to the Official Assignee, are deemed not to have been brought into force;

“company” has the same meaning as in section 2 of the Companies Act 1995 and includes statutory corporations;

“Court” means the Supreme Court of Tonga;

“Creditor” includes a person to whom the grantor owes a debt or is under a liability, whether present or future, certain or contingent, and whether an ascertained debt or liability or a liability in damages;

“director”, in relation to –

- (a) a company within the meaning of section 2 of the Companies Act 1995 includes –
 - (i) any person occupying the position of director of the company by whatever name called;
 - (ii) a person in accordance with whose directions or instructions a person referred to in subparagraph (i) may be required or is accustomed to act; and
 - (iii) a person in accordance with whose directions or instructions the board of the company may be required or is accustomed to act;
- (b) an overseas company, includes an agent, officer, or employee responsible in Tonga for the business of the overseas company;
- (c) any other body corporate, means a person having functions similar to those of a director of a company;
but does not include a receiver;

“document” means a document in any form, and includes—

- (a) any writing on material;
- (b) information recorded or stored by means of a tape recorder, computer, or other device; and material subsequently derived from information so recorded or stored;
- (c) a book, graph, or drawing; and
- (d) a photograph, film, negative, tape, or other device in which one or more visual images are embodied so as to be capable (with or without the aid of equipment) of being reproduced;

“failure to comply”, in relation to a receiver, means a failure by a receiver to comply with a relevant duty arising –

- (a) under the deed or agreement or the order of the court by or under which the receiver was appointed;
- (b) under this or any other Act or rule of law or rules of court; or
- (c) under any order or direction of the court other than an order to comply made under that section;

and “**comply**”, “**compliance**”, and “**failed to comply**” have corresponding meanings;

“**grantor**” means the person or company in respect of whose property a receiver is, or may be, appointed;

“**inventory**” has the same meaning as in section 2 of the Personal Property Securities Act 2010;

“**liquidator**” means a liquidator appointed under Part 16 of the Companies Act 1995; and “**liquidation**” has a corresponding meaning;

“**mortgage**” includes an equitable mortgage and a charge on property for securing money or money’s worth;

“**mortgagee**” includes a person from time to time deriving title under the original mortgagee, but does not include a receiver;

“**value**” has the same meaning as in section 2 of the Personal Property Securities Act 2010;

“**Official Assignee**” means, in relation to the estate of a bankrupt, any Official Assignee or Deputy Assignee appointed under a Bankruptcy Act and having charge of that estate;

“**overseas company**” means a company incorporated outside Tonga;

“**preferential claim**” means a claim referred to in Schedule 6 of the Companies Act 1995;

“**proceeds**” has the same meaning as in section 2 of the Personal Property Securities Act 2010;

“**property**” includes –

- (a) real and personal property;
- (b) a legal or equitable estate or interest in real or personal property;
- (c) a debt;
- (d) any other thing in action; and
- (e) any other right or interest;

“**property in receivership**” means property in respect of which a receiver is appointed;

“**purchase-money security interest**” has the same meaning as in section 2 of the Personal Property Securities Act 2010;

“**receiver**” means a receiver, or a manager or a receiver and manager in respect of any property appointed –

- (a) by or under any deed or agreement; or
- (b) by the court in the exercise of a power conferred on the court or in the exercise of its inherent jurisdiction;

whether or not the person appointed is empowered to sell any of the property in receivership, but does not include –

- (c) a mortgagee who, whether personally or through an agent, exercises a power to –
 - (i) enter into possession of mortgaged property; or
 - (ii) sell or otherwise alienate mortgaged property; or
- (d) an agent of any such mortgagee;

“Registrar”, in relation to a company, has the same meaning as in section 2 of the Companies Act 1995;

“security agreement” has the same meaning as in section 2 of the Personal Property Securities Act 2010;

“security interest” has the same meaning as in section 2 of the Personal Property Securities Act 2010;

“surplus” is defined in section 33.

- (2) In this Act, unless the context otherwise requires, a reference to a person by whom, or in whose interests, a receiver was appointed, as the case may be, includes a reference to a person to whom the rights and interests under any deed or agreement by or under which the receiver was appointed have been transferred or assigned.
- (3) Except as otherwise expressly provided by this Act, any express provision of the Companies Act 1995 shall take precedence over this Act.

3 Public notice

- (1) Where, pursuant to this Act, public notice shall be given of any matter affecting a grantor, not being a grantor that is an overseas company, that notice shall be given by publishing notice of the matter in at least one issue of a newspaper circulating in the area in Tonga in which is situated –
 - (a) the grantor’s place of business;
 - (b) if the grantor has more than 1 place of business, the grantor’s principal place of business; or
 - (c) if the grantor has no place of business or neither its place of business nor its principal place of business is known, the grantor’s registered office in the case of a body corporate, or the residence of the grantor in the case of an individual.
- (2) Where, pursuant to this Act, public notice shall be given of any matter affecting a grantor that is an overseas company, that notice shall be given by publishing notice of the matter in at least one issue of a newspaper circulating in the area in which is situated –
 - (a) the place of business in Tonga of the grantor; or

- (b) if the grantor has more than one place of business in Tonga, the principal place of business in Tonga of the grantor.

4 Application

This Act applies to a receiver appointed after the coming into force of this Act, including to replace a receiver.

5 Scope

- (1) This Act shall apply to receiverships of property of persons, companies registered under the Companies Act 1995 and statutory corporations.
- (2) This Act shall not apply to receiverships of property of societies registered under the Incorporated Societies Act, cooperative societies incorporated under the Cooperative Societies Act, credit unions incorporated under the Credit Union Act or charitable trusts incorporated under the Charitable Trusts Act.

6 Qualifications of receivers

- (1) Unless the court orders otherwise, none of the following persons may be appointed or act as a receiver of property –
 - (a) a person who is under 18 years of age;
 - (b) a mortgagee of the property;
 - (c) a person who is, or who has within the period of 2 years immediately preceding the commencement of the receivership, been –
 - (i) a director of the grantor; or
 - (ii) a director of a mortgagee of the property;
 - (d) a person who has, or who has had within the period of 2 years preceding the commencement of the receivership, an interest, whether direct or indirect, in –
 - (i) a share issued by the grantor; or
 - (ii) 5% or more of any class of shares issued by the mortgagee of the property;
 - (e) an undischarged bankrupt;
 - (f) a person who is, or is deemed to be, subject to a mental health order made under Part 3 of the Mental Health Act 2001;
 - (g) a person in respect of whom an order has been made under section 295(5) of the Companies Act 1995;
 - (h) a person in respect of whom an order has been made under section 37(6);

- (i) a person who is prohibited under the Companies Act 1995 from being a director or promoter of, or being concerned in the management of, a company or class of company;
 - (j) a person who is prohibited under a Bankruptcy Act from acting as a director or taking part directly or indirectly in the management of a company or class of company;
 - (k) a person who is disqualified from acting as a receiver by the instrument that confers the power to appoint a receiver.
- (2) A body corporate shall not be appointed or act as a receiver.
- (3) If:
- (a) a person is appointed as a receiver; and
 - (b) the person making the appointment knew or ought reasonably to have known that the appointment contravenes subsection (1) or subsection (2),
- the person making the appointment commits an offence and shall be liable upon conviction to a fine not exceeding \$1000.
- (4) If:
- (a) a person acts as a receiver; and
 - (b) the person knew or ought reasonably to have known that by so acting, he contravenes subsection (1) or subsection (2),
- the person commits an offence and shall be liable upon conviction to a fine not exceeding \$1000.

7 Appointment of receivers under deeds and agreements

- (1) An appointment of a receiver in respect of property of a person by, or under a power conferred by, a deed or agreement is of no effect unless –
- (a) the person is a party to the deed or agreement; and
 - (b) the appointment is in writing.
- (2) A receiver appointed by, or under a power conferred by, a deed or agreement is the agent of the grantor unless it is expressly provided otherwise in the deed or agreement by or under which the receiver was appointed.

8 Extent of power to appoint receiver

- (1) A power conferred by a deed or an agreement to appoint a receiver includes the power to appoint –
- (a) 2 or more receivers;
 - (b) a receiver additional to one or more presently in office; and
 - (c) a receiver to succeed a receiver whose office has become vacant,

unless the deed or agreement expressly provides otherwise.

- (2) If –
 - (a) 2 or more receivers are appointed in respect of property; and
 - (b) they have the same power,then, except to the extent that the deed or agreement by or under which, or the order of the court by which, they are appointed expressly provides otherwise, they shall exercise the power jointly.

9 Notice of appointment

- (1) A receiver shall, forthwith after being appointed –
 - (a) give written notice of his appointment to the grantor; and
 - (b) give public notice of his appointment, including –
 - (i) the receiver's full name;
 - (ii) the date of the appointment;
 - (iii) the receiver's office address; and
 - (iv) a brief description of the property in receivership.
- (2) Where the appointment of the receiver is in addition to a receiver who already holds office or is in place of a person who has vacated office as receiver, as the case may be, every notice under this section shall state that fact.
- (3) If the grantor is a body corporate, the receiver shall, within 7 days after being appointed, send a copy of the public notice to the Registrar.
- (4) Every receiver who contravenes this section commits an offence and shall be liable upon conviction to a fine not exceeding \$1000.

10 Notice of receivership

- (1) Where a receiver is appointed in relation to a specific asset or specific assets, every deed or agreement entered into, and every document issued, by or on behalf of the grantor or the receiver that relates to the asset or assets and on which the name of the grantor appears shall state that a receiver has been appointed.
- (2) Where a receiver is appointed in any other case, every deed or agreement entered into, and every document issued, by or on behalf of the grantor or the receiver and on which the name of the grantor appears shall state that a receiver has been appointed.
- (3) A failure to comply with subsection (1) or subsection (2) does not affect the validity of the deed or agreement or document.
- (4) Every person who contravenes subsection (1) or subsection (2) commits an offence and shall be liable upon conviction to a fine not exceeding \$500.

11 Vacancy in office of receiver

- (1) The office of receiver becomes vacant if the person holding office resigns, dies or becomes disqualified under section 5.
- (2) A receiver may resign office by giving not less than 7 days written notice of his intention to resign to the person by whom the receiver was appointed.
- (3) Where a vacancy in the office of receiver occurs as a result of the disqualification of the person holding office as receiver, that person shall forthwith give written notice of the vacancy to the person by whom the receiver was appointed.
- (4) Where a vacancy in the office of receiver occurs as the result of the resignation or disqualification of the person holding office as receiver, that person shall –
 - (a) forthwith give public notice of the vacancy; and
 - (b) if the receiver held office in relation to the property of a company, within 7 days of the vacancy occurring, give written notice of the vacancy to the Registrar for registration in the register of charges.
- (5) A receiver appointed by the court may resign office by giving not less than 7 days' notice of his intention to resign to the Registrar of the court that made the appointment.
- (6) A person vacating the office of receiver shall provide such information and give such assistance in the conduct of the receivership to his successor as that person reasonably requires.
- (7) On the application of a person appointed to fill a vacancy in the office of receiver, the court may make any order that it considers necessary or desirable to facilitate the performance of the receiver's duties.
- (8) Every person who fails to comply with subsection (3) or subsection (4) commits an offence and shall be liable upon conviction to a fine not exceeding \$500.

12 Obligations of grantor

- (1) A grantor and, in the case of a grantor that is a body corporate, every director of the grantor, shall –
 - (a) make available to the receiver all books, documents and information relating to the property in receivership in the grantor's or director's possession or under the grantor's or director's control;
 - (b) if required to do so by the receiver, verify, by statutory declaration, that the books, documents, and information are complete and correct;
 - (c) give the receiver such assistance as he may reasonably require; and
 - (d) if the grantor is a body corporate that has a common seal, make the common seal available for use by the receiver.

- (2) On the application of the receiver, the court may make an order requiring the grantor, or if the grantor is a body corporate, a director of the grantor, to comply with subsection (1).

13 Execution of documents

- (1) A receiver may execute in the name and on behalf of the grantor all documents necessary or incidental to the exercise of the receiver's powers.
- (2) A document signed by a receiver in the name and on behalf of a grantor that is a company within the meaning of section 2 of the Companies Act 1995 shall be deemed to have been properly executed for the purposes of section 189 of that Act.
- (3) Notwithstanding any other enactment or rule of law, or any memorandum or articles of association or other document defining the constitution of a grantor that is a body corporate, where the instrument under which a receiver is appointed empowers the receiver to execute documents and to use the grantor's common seal for that purpose, the receiver may execute the documents in the name and on behalf of the grantor by affixing the grantor's common seal to the documents and attesting the affixing of the common seal.
- (4) A document executed in the manner prescribed by subsection (3) shall be deemed to have been properly executed by the grantor for the purposes of section 189 of the Companies Act 1995.

14 Powers of receivers

- (1) A receiver has the powers and authorities expressly or impliedly conferred by the deed or agreement, or the order of the court, by or under which the appointment was made.
- (2) In addition to subsection (1) but subject to any contrary provision in the deed or agreement, or the order of the court, by or under which the appointment was made, a receiver may do any of the following –
 - (a) demand and recover, by action or otherwise, income of the property in receivership;
 - (b) issue receipts for income received in respect of the property in receivership;
 - (c) manage the property in receivership;
 - (d) insure the property in receivership;
 - (e) repair and maintain the property in receivership;
 - (f) inspect at any reasonable time books or documents that relate to the property in receivership and that are in the possession or under the control of the grantor;

- (g) exercise, on behalf of the grantor, a right to inspect books or documents that relate to the property in receivership and that are in the possession or under the control of a person other than the grantor;
 - (h) in a case where the receiver is appointed in respect of all or substantially all of the assets and undertaking of a grantor that is a body corporate, change the registered office or address for service of the body corporate.
- (3) Without limiting section 12, the grantor shall provide all information, and execute all documents, that the receiver requires it to do for the purpose of:
- (a) insuring the property under receivership; and
 - (b) making a claim under such an insurance.

15 Power to make calls on shares

- (1) A receiver has the same powers as the directors of a grantor that is a company have or, if the grantor is being wound up or in liquidation, as the directors would have if it were not being wound up or in liquidation, to make calls on the members or shareholders of the company in respect of uncalled capital that is charged under the deed or agreement by or under which the receiver was appointed and to charge interest on, and enforce payment of, calls.
- (2) For the purposes of subsection (1), the expression “**uncalled capital**” includes the amount of any unpaid premium payable in respect of the issue of shares.
- (3) The making of a call or the exercise of a power under sub-section (1) is, as between the members or shareholders of the company affected and the company, deemed to be a proper call or power made or exercised by the directors of the company.

16 Validity of acts of receivers

- (1) Subject to subsection (2), no act of a receiver is invalid merely because the receiver was not validly appointed or is disqualified from acting as a receiver or is not authorised to do the act.
- (2) No transaction entered into by a receiver is invalid merely because the receiver was not validly appointed or is disqualified from acting as a receiver or is not authorised to enter into the transaction unless the person dealing with the receiver has, or ought reasonably to have, knowledge that the receiver was not validly appointed or was disqualified from acting as a receiver or did not have authority to enter into the transaction.
- (3) This section does not affect the liability of a receiver to the grantor or a creditor of the grantor.

17 General duties of receivers

- (1) A receiver shall exercise his powers in good faith and for a proper purpose.
- (2) A receiver shall exercise his powers in a manner that he believes on reasonable grounds to be in the best interests of the person in whose interests he was appointed.
- (2A) A receiver is deemed to comply with subsection (2) to the extent that he complies with lawful directions given by the person in whose interests he was appointed.
- (3) In addition to subsections (1) and (2), a receiver shall exercise his powers with reasonable regard to the interests of –
 - (a) the grantor;
 - (b) persons claiming, through the grantor, interests in the property in receivership;
 - (c) unsecured creditors of the grantor; and
 - (d) sureties who may be called upon to fulfill obligations of the grantor.
- (5) Subsection (3) does not limit or affect section 18.

18 Duty of receiver selling property

A receiver who exercises a power of sale of property in receivership owes a duty to –

- (a) the grantor;
 - (b) persons claiming, through the grantor, interests in the property in receivership;
 - (c) unsecured creditors of the grantor; and
 - (d) sureties who may be called upon to fulfill obligations of the grantor;
- to obtain the best price reasonably obtainable as at the time of sale.

19 No defence or indemnity

Notwithstanding any enactment or rule of law or anything contained in the deed or agreement by or under which a receiver is appointed –

- (a) it is not a defence to proceedings against a receiver for a breach of the duty imposed by section 18 that the receiver was acting as the grantor's agent or under a power of attorney from the grantor; and
- (b) a receiver is not entitled to compensation or indemnity from the property in receivership or the grantor in respect of any liability incurred by the receiver arising from a breach of the duty imposed by section 18.

20 Duty in relation to money

A receiver shall keep money relating to the property in receivership separate from other money received in the course of, but not relating to, the receivership and from other money held by or under the control of the receiver.

21 Accounting records

- (1) A receiver shall at all times keep accounting records that correctly record and explain the receipts, expenditure, and other transactions relating to the property in receivership.
- (2) The accounting records shall be retained for not less than 6 years after the receivership ends.

22 First report by receiver

- (1) Not later than 2 months after his appointment, a receiver shall prepare a report on the state of affairs with respect to the property in receivership including –
 - (a) particulars of the assets comprising the property in receivership;
 - (b) particulars of the debts and liabilities to be satisfied from the property in receivership;
 - (c) the names and addresses of the creditors with an interest in the property in receivership;
 - (d) particulars of any encumbrance over the property in receivership held by any creditor including the date on which it was created;
 - (e) particulars of any default by the grantor in making relevant information available; and
 - (f) such other information as may be prescribed.
- (2) The report shall also include details of –
 - (a) the events leading up to the appointment of the receiver, so far as the receiver is aware of them;
 - (b) property disposed of and any proposals for the disposal of property in receivership;
 - (c) amounts owing, as at the date of appointment, to any person in whose interests the receiver was appointed;
 - (d) amounts owing, as at the date of appointment, to creditors of the grantor having preferential claims; and
 - (e) amounts likely to be available for payment to creditors other than those referred to in paragraph (c) or paragraph (d).
- (3) A receiver may omit from the report details of any proposals for disposal of the property in receivership if he considers that their inclusion would materially prejudice the exercise of his functions.

- (4) A receiver who fails to comply with this section commits an offence and shall be liable upon conviction to a fine not exceeding \$10,000.

23 Further reports by receiver

- (1) Not later than 2 months after –
- (a) the end of each period of 6 months after his appointment as receiver; and
 - (b) the date on which the receivership ends,
- a receiver or a person who was a receiver at the end of the receivership, as the case may be, shall prepare a further report summarising the state of affairs with respect to the property in receivership as at those dates, and the conduct of the receivership, including all amounts received and paid, during the period to which the report relates.
- (2) The report shall include details of –
- (a) property disposed of since the date of any previous report and any proposals for the disposal of property in receivership;
 - (b) amounts owing, as at the date of the report, to any person in whose interests the receiver was appointed;
 - (c) amounts owing, as at the date of the report, to creditors of the grantor having preferential claims; and
 - (d) amounts likely to be available as at the date of the report for payment to creditors other than those referred to in paragraph (b) or paragraph (c).
- (3) A receiver may omit from the report required to be prepared in accordance with subsection (1)(a) details of any proposals for disposal of property in receivership if he considers that their inclusion would materially prejudice the exercise of his functions.
- (4) Every person who fails to comply with this section commits an offence and shall be liable upon conviction to a fine not exceeding \$10,000.

24 Extension of time for preparing reports

A period of time within which a person shall prepare a report referred to in section 22 or section 23 may be extended, on the application of that person, by –

- (a) the court, where the person was appointed a receiver by the court; or
- (b) the Registrar, where the person was appointed a receiver by or under a deed or agreement.

25 Persons entitled to receive reports

- (1) A copy of every report prepared under section 22 or section 23 shall be sent by the person required to prepare it to –
 - (a) the grantor; and
 - (b) every person in whose interests the receiver was appointed.
- (2) If the person was appointed a receiver by the court, he shall file a copy of every report prepared under section 22 or section 23 in the office of the court.
- (3) Not later than 21 days after receiving a written request for a copy of any report prepared under section 22 or section 23 from –
 - (a) a creditor, director, or surety of the grantor;
 - (b) any other person with an interest in any of the property in receivership;
or
 - (c) the authorised agent of any of them,and on payment of the reasonable costs of making and sending the copy, the person who prepared the report shall send a copy of the report to the person requesting it.
- (4) Within 7 days after preparing a report under section 22 or section 23 in relation to a grantor that is a body corporate, the person who prepared the report shall send or deliver a copy of the report to the Registrar.
- (5) Every person who fails to comply with this section commits an offence and shall be liable upon conviction to a fine not exceeding \$10,000.

26 Persons entitled to inspect reports

A person to whom a report shall be sent in accordance with section 25 is entitled to inspect the report during normal office hours at the office of the person required to send it.

27 Duty to notify suspected offences against other Acts

- (1) A receiver of a grantor that is a company and who considers that the grantor or any director of the grantor has committed an offence against –
 - (a) the Companies Act 1995; or
 - (b) the Criminal Offences Act (Cap.18),being an offence that relates to the receivership, shall report that fact to the Registrar.
- (2) A report made under subsection (1), and any communications between the receiver and Registrar relating to that report, are protected by absolute privilege.

- (3) A receiver who fails to comply with subsection (1) commits an offence and shall be liable upon conviction to a fine not exceeding \$10,000.

28 Notice of end of receivership

- (1) Not later than 7 days after the receivership of a grantor that is a body corporate ceases, the person who held office as receiver at the end of the receivership shall send or deliver to the Registrar notice in writing of the fact that the receivership has ceased.
- (2) Every person who fails to comply with subsection (1) commits an offence and shall be liable upon conviction to a fine not exceeding \$10,000.

29 Preferential claims

- (1) This section applies to a receiver of the property of a grantor that is a company, other than a company in liquidation at the time of the receiver's appointment, and who was appointed under a security agreement that created or provided for a security interest that –
 - (a) is over all or any part of the company's accounts receivable and inventory or all or any part of either of them;
 - (b) is not a purchase money security interest that has been perfected at the time specified in section 13 of the Personal Property Securities Act 2010; and
 - (c) is not a security interest that –
 - (i) has been perfected under the Personal Property Securities Act 2010 at the time of the receiver's appointment; and
 - (ii) arises from the transfer of an account for which new value is provided by the transferee for the acquisition of that account (whether or not the transfer of the account secures payment or performance of an obligation).
- (2) A receiver to whom this section applies shall apply accounts receivable and inventory that are subject to the security interest or their proceeds –
 - (a) to reimburse the receiver for his expenses and remuneration;
 - (b) to pay secured creditors; and
 - (c) pay preferential claims to the extent and in the order of priority specified in Schedule 6 of the Companies Act 1995.
- (3) The receiver shall apply the accounts receivable and inventory as set out in subsection (2) before paying the claims of any person under a security interest.
- (4) In the application of Schedule 6 of the Companies Act 1995 in accordance with subsection (2) –

- (a) references to a liquidator are to be read as references to a receiver;
- (b) references to the commencement of the liquidation are to be read as references to the appointment of the receiver; and
- (c) references to a company being put into or being in liquidation are to be read as references to the company being put into or being in receivership.

30 Extinguishment of subordinate security interests

- (1) If property has been disposed of by a receiver, all security interests in the property and its proceeds that are subordinate to the security interest of the person in whose interests the receiver was appointed are extinguished on the disposition of the property.
- (2) If there is a surplus left after the receiver has disposed of personal property, that surplus shall be distributed according to the priorities set out in section 31(1) and (2) unless otherwise required by any other law.

31 Priorities on distribution by receiver of surplus representing proceeds of personal property

- (1) A surplus representing the proceeds of personal property shall be distributed in the following order –
 - (a) to any person who has registered a notice under the Personal Property Securities Act 2010, or a security interest under any other Act, in the name of the grantor over the property, if –
 - (i) the registration was effective immediately before the receiver disposed of the property; and
 - (ii) the security interest relating to that registration was subordinate to the security interest of the person in whose interests the receiver was appointed;
 - (b) to any other person, if the receiver has notice that the person had an interest in the property when it was disposed of, and the receiver is satisfied that the person's interest was legally enforceable;
 - (c) to the grantor.
- (2) Priority as between persons referred to in subsection (1)(a), and as between persons referred to in subsection (1)(b), shall be determined according to the applicable law (including Part 2 of the Personal Property Securities Act 2010) as if, in the case of persons referred to in subsection (1)(a), their security interests had not been extinguished.
- (3) If, in the case of a distribution of the surplus to a grantor, the grantor cannot be found after reasonable inquiry by the receiver, the receiver shall –

- (a) deliver to the Registrar a statutory declaration setting out, to the best of the mortgagee's knowledge and belief, particulars of –
 - (i) the relevant property;
 - (ii) the current grantor;
 - (iii) the sale;
 - (iv) the application of the proceeds of the sale; and
 - (v) the information in the possession or control of the receiver as to the persons beneficially entitled to the surplus and the steps taken by the receiver to locate those persons;
 - (b) pay the surplus to the Crown by remitting it to the Registrar; and
 - (c) deliver to the Registrar any further statutory declaration setting out further and better particulars of any matter required to in paragraph (a) that the Registrar may require.
- (4) The Registrar shall, on being satisfied that the particulars required to be supplied by the mortgagee under this section are true and complete, give a receipt to the receiver for the amount paid to the Crown under this section.

32 Surplus may be paid into court

- (1) A receiver may pay a surplus referred to in section 31 into court if there is a question who is entitled to receive payment according to the priorities in section 31(1) or (2).
- (2) The surplus may only be paid out on an application by the receiver or by a person claiming an entitlement to the surplus.

33 Meaning of surplus and net proceeds

- (1) For the purposes of this Act, there is a surplus if the receiver has disposed of personal property in receivership, and the net proceeds exceed –
 - (a) the amount of the debt owed by the grantor to the person in whose interests the receiver was appointed (where the property secures payment of that debt); or
 - (b) the monetary value of the obligation owed by the grantor to the person in whose interests the receiver was appointed (where the property secures performance of that obligation).
- (2) If the deed or agreement by or under which, or the order of the court under which, the receiver was appointed prescribes how the monetary value of the obligation is to be calculated, the monetary value of the obligation shall be calculated in that way.

- (3) In subsection (1), “**net proceeds**”, in relation to the disposal of personal property in receivership, means the net proceeds of the disposal after deducting –
- (a) the receiver’s expenses and remuneration; and
 - (b) any amount or the monetary value of any obligation, as the case may be, secured by any security interest that ranks in priority to the security interest granted to the person in whose interests the receiver was appointed; and
 - (c) any other preferential claims or priority claims according to law.

34 Powers of receiver on liquidation or bankruptcy

- (1) Subject to subsection (2), a receiver may be appointed or continue to act as a receiver and exercise all the powers of a receiver in respect of property of –
- (a) a company that is being wound up or that has been put into liquidation; or
 - (b) a debtor who is a bankrupt under a Bankruptcy Act unless the court orders otherwise.
- (2) A receiver holding office in respect of property referred to in subsection (1) may act as the agent of the grantor only –
- (a) with the approval of the court; or
 - (b) with the written consent of the liquidator or the Official Assignee, as the case may be.
- (3) A receiver who, by reason of subsection (2), is not able to act as the agent of the grantor does not, by reason only of that fact, become the agent of a person by whom or in whose interests the receiver was appointed.
- (4) A debt or liability incurred by a grantor through the acts of a receiver who is acting as the agent of the grantor in accordance with subsection (2) is not a cost, charge or expense of the liquidation or the administration of the bankrupt’s estate.

35 Court supervision of receivers

- (1) The court may, on the application of a receiver –
- (a) give directions in relation to any matter arising in connection with the performance of the functions of the receiver; and
 - (b) revoke or vary any such directions.
- (2) The court may, on the application of a person referred to in subsection (3), do any of the following –
- (a) in respect of any period, review or fix the remuneration of a receiver at a level which is reasonable in the circumstances;

- (b) to the extent that an amount retained by a receiver as remuneration is found by the court to be unreasonable in the circumstances, order the receiver to refund the amount to the grantor; and
 - (c) declare whether or not a receiver was validly appointed in respect of any property or validly entered into possession or assumed control of any property.
- (3) Any of the following persons may apply to the court under subsection (2) –
 - (a) the receiver;
 - (b) the grantor;
 - (c) a creditor of the grantor;
 - (d) a person claiming, through the grantor, an interest in the property in receivership;
 - (e) a director of the grantor or, in the case of a grantor that is in liquidation, a director of the grantor at the time the liquidator was appointed;
 - (f) if the grantor is a company, a liquidator;
 - (g) if the grantor is a person who has been adjudged bankrupt, the Official Assignee of the estate of the grantor.
- (4) The powers given by subsections (1) and (2) –
 - (a) are in addition to any other powers the court may exercise under this Act, any other Act, or in its inherent jurisdiction; and
 - (b) may be exercised in relation to a matter occurring either before or after the commencement of this Act and whether or not the receiver has ceased to act as receiver when the application is made.
- (5) The court may, on the application of a person referred to in subsection (3), revoke or vary an order made under subsection (2).
- (6) Subject to subsection (7), it is a defence to a claim against a receiver in relation to any act or omission by the receiver that he acted or omitted to act in accordance with a direction given under subsection (1).
- (7) The court may, on the application of a person referred to in subsection (3), order that, by reason of the circumstances in which a direction was obtained under subsection (1), a receiver is not entitled to the protection given by subsection (6).

36 Court may terminate or limit receivership

- (1) The court may, on the application of a person referred to in subsection (2), make any of the following orders –
 - (a) an order that a receiver cease to act as such as from a specified date;

- (b) if it makes an order under paragraph (a), an order prohibiting the appointment of any other receiver in respect of the property in receivership;
 - (c) an order that a receiver, as from a specified date, act only in respect of specified assets forming part of the property in receivership.
- (2) Any of the following persons may apply to the court under subsection (1) –
- (a) the grantor;
 - (b) if the grantor is a company, a liquidator;
 - (c) if the grantor is a bankrupt, the Official Assignee of the estate of the grantor.
- (3) An order may be made under subsection (1) only if the court is satisfied that –
- (a) the purpose of the receivership has been satisfied so far as possible; or
 - (b) circumstances no longer justify its continuation.
- (4) Unless the court orders otherwise, a copy of an application under this section shall be served on the receiver not less than 7 days before the hearing of the application and the receiver may appear and be heard at the hearing.
- (5) An order under subsection (1) may be made on such terms and conditions as the court thinks fit.
- (6) In making an order under subsection (1), the court may prohibit a person in whose interests the receiver was appointed from taking possession or assuming control of the property in receivership.
- (7) Except as provided by subsection (6), an order under this section does not affect a security or charge over the property in respect of which the order is made.
- (8) The court may, on the application of any person who applied for or is affected by the order, rescind or amend an order made under this section.

37 Orders to enforce receiver's duties

- (1) An application for an order under this section may be made by any of the following –
- (a) the grantor;
 - (b) a person with an interest in the property in receivership;
 - (c) a creditor of the grantor;
 - (d) a guarantor of an obligation of the grantor;
 - (e) if the grantor is a company, a liquidator of the grantor;
 - (f) if the receiver is a chartered accountant, the President of the Tonga Society of Accountants;

- (g) if the receiver is a law practitioner, the President of the Tonga Law Society;
 - (h) if the grantor is a person who has been adjudged bankrupt, the Official Assignee of the estate of the grantor.
- (2) An application for an order under this section may be made by a receiver of the property of a grantor in relation to a failure to comply by another receiver of the property of the grantor.
- (3) No application may be made to the court in relation to a failure to comply unless notice of the failure to comply has been served on the receiver not less than 7 days before the date of the application and, as at the date of the application, there is a continuing failure to comply.
- (4) If the court is satisfied that there is, or has been, a failure to comply, the court may –
- (a) relieve the receiver of the duty to comply, wholly or in part; or
 - (b) without prejudice to any other remedy that may be available in relation to a breach of duty by the receiver, order the receiver to comply to the extent specified in the order.
- (5) The court may, in respect of a person who fails to comply with an order made under subsection (4)(b), or is or becomes disqualified under section 5 to become or remain a receiver –
- (a) remove the receiver from office; or
 - (b) order that the person may be appointed and act or may continue to act as a receiver, notwithstanding the provisions of section 5.
- (6) If it is shown to the satisfaction of the court that a person is unfit to act as a receiver by reason of –
- (a) persistent failures to comply; or
 - (b) the seriousness of a failure to comply,
- the court shall make, in relation to that person, a prohibition order for a period not exceeding 5 years.
- (7) A person to whom a prohibition order applies shall not –
- (a) act as a receiver in any current or other receivership; or
 - (b) act as a liquidator in any current or other liquidation.
- (8) In making an order under this section the court may, if it thinks fit, do any of the following –
- (a) make an order extending the time for compliance;
 - (b) impose a term or condition;
 - (c) make an ancillary order.

- (9) A copy of every order made under subsection (6) shall, within 14 days of the order being made, be delivered by the applicant to the Registrar who shall keep it on a public file indexed by reference to the name of the receiver concerned.

38 Special provisions relating to evidence

- (1) If it is established that, within the preceding 5 years, while a person was acting as a receiver or as a liquidator –
- (a) the court has, in relation to that person, on two or more occasions made an order to comply under section 37;
 - (b) the court has, in relation to that person, on two or more occasions made an order to comply under section 295 of the Companies Act 1995; or
 - (c) the court has, in relation to that person, made one or more orders to comply under section 37 and has also made one or more orders to comply under section 295 of the Companies Act 1995,

the court is to presume, in the absence of special reasons to the contrary, that that person has persistently failed to comply for the purposes of section 37(6)(a).

- (2) If it is established that, within the preceding 5 years and while a person was acting as a receiver or as a liquidator –
- (a) two or more applications for an order to comply under section 37 were made in relation to that person;
 - (b) two or more applications for an order to comply under section 295 of the Companies Act 1995 were made in relation to that person; or
 - (c) one or more applications for an order to comply under section 37 and one or more applications for an order to comply under section 295 of the Companies Act 1995 were made in relation to that person,

and, in each case, the person complied after the making of the application and before the hearing, the court is to presume, in the absence of special reasons to the contrary, that that person has persistently failed for the purposes of section 37(6)(a).

39 Orders protecting property in receivership

The court may, on making an order that removes, or has the effect of removing, a receiver from office, make such orders as it thinks fit for preserving property in receivership, including orders requiring the receiver for that purpose to make available to any person specified in the order any information and documents in the possession or under the control of the receiver.

40 Refusal to supply essential services prohibited

- (1) For the purposes of this section, “**essential service**” means any of the following –
 - (a) the retail supply of gas;
 - (b) the retail supply of electricity;
 - (c) the supply of water;
 - (d) telecommunications services.
- (2) For the purposes of this section, telecommunications services means the conveyance from one device to another by any line, radio frequency or other medium of any sign, signal, impulse, writing, image, sound, instruction, information, or intelligence of any nature, whether or not for the information of a person using the device.
- (3) Notwithstanding the provisions of any other Act or any contract, a supplier of an essential service shall not –
 - (a) refuse to supply the service to a receiver or to the owner of property in receivership by reason of the grantor’s default in paying charges due for the service in relation to a period before the date of the appointment of the receiver; or
 - (b) make it a condition of the further supply of the service to a receiver or to the owner of property in receivership that payment be made of outstanding charges due for the service in relation to a period before the date of the appointment of the receiver.
- (4) A provision in a contract for the supply of an essential service is void to the extent of its inconsistency with subsection (3).

41 Regulations

The Minister responsible for Commerce may make regulations not inconsistent with this Act or any other Act that are necessary or convenient for the administration of this Act.

Passed by the Legislative Assembly this 5th day of October 2015.