

# COMPANY OFFICERS (DISQUALIFICATION) BILL 2008

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## Explanatory Memorandum

1. This Bill is promoted by the Treasury on behalf of the Financial Supervision Commission (“the Commission”). Its primary purpose is to restate the law relating to the disqualification of directors and other company officers in a more coherent way.
2. *Clauses 1 and 2* introduce the two main concepts in the Bill: disqualification orders made by the courts and disqualification undertakings given by a company officer after agreement with the Commission.
3. *Clause 3* provides that an application for a disqualification order may only be made by a defined class of persons, and requires the proposed applicant to give notice to the person proposed to be disqualified.
4. *Clause 4* gives the Court the power, and *clause 5* imposes upon the Court the duty, to make a disqualification order against a company officer in certain circumstances.
5. *Clause 6* specifies the circumstances in which a disqualification undertaking may be accepted by the Commission.
6. *Clause 7* imposes requirements that an office-holder (the liquidator, official receiver or receiver) report to the Commission if it appears to the office-holder that the conditions of either section 4(1) or 5(1) are met.
7. *Clause 8 and Schedule 1* together specify matters to which a Court is to have regard in determining an application for a disqualification order, or which the Commission is to have regard to in considering the offer of a disqualification undertaking.
8. *Clause 9* provides that where a company officer is liable to contribute personally by reason of a company’s fraudulent trading, the court shall consider making a disqualification order against the officer.

9. *Clause 10* deals with undischarged bankrupts.
10. *Clause 11* specifies the penalties for breach of disqualification orders and undertakings.
11. *Clause 12* makes a person who contravenes a disqualification order or undertaking, or acts on the instructions of an undischarged bankrupt, personally for the relevant debts of the company.
12. *Clause 13* empowers the Commission to require information about disqualification orders and undertakings, and requires it to maintain the disqualification register.
13. *Clause 14* deals with the admissibility of statements made to the Commission in the course of an investigation in subsequent proceedings.
14. *Clause 15* and Schedule 2 provide the Commission's powers of inspection and investigation.
15. *Clause 16* and Schedule 3 impose restrictions on the disclosure of information obtained during an investigation.
16. *Clauses 17 and 18* create offences in relation respectively to the concealment of information and the provision of false or misleading documents or information.
17. *Clause 19* specifies the penalties for offences under the Act.
18. *Clause 20* provides that if a company's commission of an offence was with the consent or connivance of an officer, or is attributable to the officer's neglect, the officer is also guilty of an offence and liable to the penalty to which the company would have been subject had it been an individual.
19. *Clause 21* provides for interpretation.
20. *Clause 22* provides for Schedules 4 and 5 (consequential amendments and repeals) to have effect.
21. *Clause 23* provides for the Tynwald procedure for statutory documents made under the resulting Act.

**22.** *Clause 24* provides for the short title and commencement of the resulting Act.

**23.** It is not envisaged that the resulting Act will have any impact on either public sector or private sector resources.

**24.** In the view of the member moving the Bill its provisions are compatible with the Convention rights within the meaning of the Human Rights Act 2001.

## **Arrangement of Sections**

### *Preliminary*

#### Section

1. Disqualification orders: introduction
2. Disqualification undertakings

### *Disqualification for unfitness*

3. Application for disqualification order
4. Power of High Court to disqualify unfit officers
5. Duty of High Court to disqualify unfit officers of insolvent companies
6. Acceptance of undertaking
7. Reporting provisions
8. Matters for determining unfitness of officers

### *Other cases of disqualification*

9. Participation in fraudulent trading
10. Undischarged bankrupts

### *Consequences of contravention*

11. Criminal penalties
12. Personal liability for company's debts if P acts while disqualified

### *Supplementary provisions*

13. Register of disqualification orders and undertakings
14. Admissibility in evidence of statements
15. Inspection and investigation
16. Restrictions on disclosure of information

17. Falsification of documents, etc. relevant to an investigation
18. False or misleading statements
19. Offences
20. Offences by company

*General*

21. Interpretation
22. Consequential amendments and repeals
23. Orders and regulations
24. Short title and commencement

SCHEDULES:

Schedule 1 — Matters for determining unfitness of officers

Part I — Matters applicable in all cases

Part II — Matters applicable where company insolvent

Part III — Interpretation

Schedule 2 — Inspection and investigation

Schedule 3 — Restrictions on disclosure of information

Schedule 4 — Amendments

Schedule 5 — Repeals

## A BILL

to amend the law relating to the disqualification of persons for being officers of companies and for being otherwise concerned with a company's affairs; and for connected purposes.

**B**E IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the Council and Keys in Tynwald assembled, and by the authority of the same, as follows:—

### *Preliminary*

**1.** (1) A disqualification order is an order that a person must not, without leave of the High Court, be an officer of a company for a period specified in the order.

Disqualification  
orders:  
introduction

P1986/46/1

**5** (2) The following are officers of a company for the purposes of this Act —

(a) a director, secretary or registered agent;

(b) a liquidator;

(c) a receiver;

**10** (d) a person holding an office under any relevant foreign law analogous to any of the offices specified in paragraph (a), (b) or (c) in respect of a company; or

**15** (e) a person who, in any way, whether directly or indirectly, is concerned or takes part in the promotion, formation or management of a company.

(3) Unless the court otherwise orders, the period of disqualification shall begin at the end of the period of 21 days beginning with the date of the order.

(4) If a disqualification order is made against a person who is already subject to such an order or to a disqualification undertaking, the court may order the periods specified in those orders or (as the case may be) in the order and the undertaking to run concurrently or consecutively. **5**

(5) A disqualification order may be made on grounds which are or include matters other than criminal convictions, despite the fact that the person in respect of whom the order is to be made may be criminally liable in respect of those matters. **10**

(6) In the subsequent provisions of this Act “P” means the person who is, or is liable to be, the subject of a disqualification order or a disqualification undertaking. **15**

(7) In subsection (2)(d) “relevant foreign law” means the law of a place outside the Island under which the company is for the time being established.

Disqualification undertakings  
P1986/46/1A **2.** (1) A disqualification undertaking is an undertaking by P that for a period specified in it, P will not be an officer of a company without the leave of the High Court or the Financial Supervision Commission (referred to in this Act as “the Commission”). **20**

(2) The Commission may accept a disqualification undertaking in the circumstances specified in section 6.

(3) The maximum period which may be specified in a disqualification undertaking is 15 years and the minimum period is 2 years. **25**

(4) If the Commission accepts a disqualification undertaking and P is already subject to such an undertaking or to a disqualification order, the periods specified in those undertakings or (as the case may be) the undertaking and the order may run concurrently or consecutively as the Commission and P may agree. **30**

(5) In determining whether to accept a disqualification undertaking offered by P, the Commission may take account of matters other than criminal convictions, despite the fact that P may be criminally liable in respect of those matters. **35**

*Disqualification for unfitness*

Application for disqualification order  
P1986/46/16 **3.** (1) An application to the High Court for the making of a disqualification order against P may be made —

- (a) by the Commission (if it appears to the Commission that it is expedient in the public interest to do so);
  - (b) by the official receiver;
  - (c) by the liquidator; or
  - 5** (d) by any past or present member or creditor of any company in relation to which P has engaged in conduct rendering P unfit to be an officer.
- 10** (2) A person intending to apply to the High Court for the making of a disqualification order must give not less than 28 days notice of that intention to the person against whom the order is sought.
- 15** (3) Proceedings for a disqualification order may only be brought within 2 years of the date on which the applicant could reasonably be expected to have sufficient knowledge of evidence to justify proceedings, unless the High Court grants leave for an application to be made later.
- 20** **4.** (1) On an application under this section the High Court may make a disqualification order against P if it is satisfied —
- (a) that P is or has been an officer of a company, and
  - (b) that P’s conduct renders P unfit to be an officer of a company.
- (2) Under this section the maximum period of disqualification is 15 years and the minimum period is 2 years.
- 25** **5.** (1) On an application under this section the High Court must make a disqualification order against P if it is satisfied —
- (a) that P is or has been an officer of a company which has at any time become insolvent (whether while P was an officer or subsequently), and
  - (b) that P’s conduct as an officer of that company (either taken alone or taken together with P’s conduct as an officer of any other company or companies) makes P unfit to be an officer of a company.
- 30** (2) Under this section the maximum period of disqualification is 15 years and the minimum period is 2 years.
- 35** (3) An application for the making of a disqualification order under this section against P may only be made before the end of

Power of High Court to disqualify unfit officers  
1992/4/26

Duty of High Court to disqualify unfit officers of insolvent companies  
1982/2/31  
P1986/46/6

the period of 2 years beginning with the day on which the company is wound up or dissolved, unless the High Court grants leave for an application to be made later.

(4) In this section references to P's conduct as an officer of any company or companies include, where that company or any of those companies has become insolvent, P's conduct in relation to any matter connected with or arising out of the insolvency of that company. **5**

Acceptance of undertaking

P1986/46/  
7(2A)

**6.** (1) If it appears to the Commission that —

- (a) the conditions in section 4(1) or 5(1) are satisfied; and **10**
- (b) P has offered a disqualification undertaking,

the Commission may accept the undertaking if satisfied that it is expedient in the public interest that it should do so (instead of applying, or proceeding with an application, for a disqualification order). **15**

(2) The Commission must prescribe the form of a disqualification undertaking after consulting the Deemsters.

Reporting provisions

**7.** (1) If it appears to an office-holder responsible under this section that the conditions mentioned in section 4(1) or section 5(1) are satisfied in relation to P as an officer of that company, the office-holder must forthwith report the matter to the Commission. **20**

(2) The office-holders are —

- (a) in the case of a company which is being wound up by the High Court, the official receiver;
- (b) in the case of a company which is being wound up otherwise, the liquidator; or **25**
- (c) in the case of a company in respect of the property of which a receiver has been appointed, that receiver.

(3) The Commission or the official receiver may require an office-holder — **30**

- (a) to furnish such information with respect to P's conduct as an officer of the company, and
- (b) to produce and permit inspection of such books, papers and other records relevant to that conduct,

as the Commission or official receiver reasonably requires for the purpose of exercising, or determining whether to exercise, any function under this Act.

- 5** **8.** (1) Where it falls to a court to determine whether the conduct of P as an officer of any particular company or companies makes P unfit to be an officer of a company, in assessing that conduct, the court must have regard, amongst other things, to the following —
- (a) the matters mentioned in Part I of Schedule 1; and
- 10** (b) if the company has become insolvent, to the matters mentioned in Part II of that Schedule,
- and references in that Schedule to the officer and the company are to be read accordingly.
- (2) In determining whether the Commission may accept a disqualification undertaking from P, it must have regard to the same matters as those to which the court must have regard under subsection (1).
- 15** (3) The Commission may by order amend or repeal any of the provisions of Schedule 1 and such an order may contain such incidental, supplemental and transitional provisions as may appear to the Commission necessary or expedient.
- 20**

Matters for determining unfitness of officers

P1986/46/9

*Other cases of disqualification*

- 25** **9.** (1) Where the High Court makes a declaration under section 259 of the Companies Act 1931 (responsibility of directors for fraudulent trading) that P is liable to make a contribution to a company's assets, then, whether or not an application for such an order is made by any person, it shall consider making a disqualification order against P.
- (2) The maximum period of disqualification under this section is 15 years.
- 30** **10.** (1) P must not, whilst an undischarged bankrupt, act as an officer of a company, except with the leave of the High Court.
- (2) The High Court must not give leave unless P has given notice of P's intention to apply for leave to P's trustee in bankruptcy and the Commission.
- 35** (3) If the Commission is of the opinion that the grant of leave would be contrary to the public interest, it must attend on the hearing of the application and oppose it.

Participation in fraudulent trading

P1986/46/10

[XIII p. 235]

Undischarged bankrupts

1931/XIII/141  
P1986/46/11

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- (4) For the purpose of this section P is bankrupt if —
- (a) P has been adjudged bankrupt by any court in the Island, England, Wales or Northern Ireland,
  - (b) sequestration of P's estate has been awarded by a court in Scotland, or
  - (c) a court in the Republic of Ireland or any of the Channel Islands has made an order in respect of P having the like effect as an adjudication of the High Court.

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*Consequences of contravention*

Criminal penalties

P1986/46/13

**11.** (1) If P contravenes a disqualification order, a disqualification undertaking or section 10(1), P commits an offence. **10**

(2) A person who commits an offence under subsection (1) is liable —

(a) on conviction on information, to custody for not more than 2 years or a fine, or both; and

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(b) on summary conviction, to custody for not more than 6 months or a fine not exceeding £5,000, or both.

(3) Proceedings for an offence under subsection (1) may only be instituted by, or with the consent of, the Attorney General.

(4) If P is convicted of an offence under subsection (1) whilst subject to a disqualification order or undertaking, the court by which P is convicted may make a disqualification order to run concurrently or consecutively with the disqualification order or disqualification undertaking (as the case may be) which is breached. **20**

(5) Proceedings under subsection (1) may not be brought more than 12 months after the date on which evidence, sufficient in the opinion of the Attorney General to justify proceedings, comes to his or her knowledge. **25**

(6) For the purpose of subsection (5) a certificate signed by the Attorney General stating the date upon which such evidence came to his or her knowledge shall be conclusive of that fact, and for the purposes of subsections (3) and (5) a document purporting to be signed by the Attorney General shall be presumed to be so signed unless the contrary is proved. **30**

Personal liability for company's debts if P acts while disqualified

P1986/46/15

**12.** (1) P is personally responsible for all the relevant debts of a company if at any time — **35**

- 5 (a) P contravenes a disqualification order or disqualification undertaking by acting as an officer of the company, or
- (b) as an officer of the company, P acts or is willing to act on instructions given, without the leave of the court, by a person whom P knows to be the subject of a disqualification order or disqualification undertaking or to be an undischarged bankrupt.
- 10 (2) If P is personally responsible under this section for the relevant debts of a company, P is jointly and severally liable in respect of those debts with the company and any other person who, whether under this section or otherwise, is so liable.
- (3) For the purposes of this section the relevant debts of a company are —
- 15 (a) if paragraph (a) of subsection (1) applies, such debts and other liabilities of the company as were incurred at a time when P was involved in the management of the company, and
- 20 (b) if paragraph (b) of that subsection applies, such debts and other liabilities of the company as were incurred at a time when P was acting or was willing to act on instructions given as mentioned in that paragraph.
- 25 (4) For the purposes of this section if P has at any time acted on instructions, given without the leave of the court, by a person whom P knew at that time to be the subject of a disqualification order or disqualification undertaking or to be an undischarged bankrupt, P is presumed, unless the contrary is shown, to have been willing at any time after acting on such instructions for the first time, to act on any instructions given by that person.

30 *Supplementary provisions*

13. (1) The Commission may require the Chief Registrar to furnish it with such particulars as it may specify of cases in which —
- 35 (a) a disqualification order is made;
- (b) any action is taken by a court in consequence of which such an order or disqualification undertaking is varied or ceases to be in force; or
- (c) leave is granted by the High Court for P, while subject to such an order, to do any thing which the order would otherwise prohibit P from doing; or

Register of  
disqualification  
orders and  
undertakings

P1986/46/18

- (d) leave is granted by a court for P while subject to such an undertaking to do anything which otherwise the undertaking prohibits P from doing,

and may specify the time within which, and the form and manner in which, such particulars are to be furnished. **5**

(2) The Commission must, from the particulars so furnished, maintain a register of orders, and of cases in which leave has been granted as mentioned in subsection (1)(c).

The register is referred to in the following provisions of this Act as the “disqualification register”. **10**

(3) The Commission must incorporate into the disqualification register such of the information in the indexes kept by it under —

[XIII p. 235] (a) section 259(8) of the Companies Act 1931; and

[c. 4] (b) section 26(5) of the Companies Act 1992, **15**

(which are superseded by this section) as is relevant at the coming into operation of this section.

(4) The Commission must include in the disqualification register such particulars as it considers appropriate of disqualification undertakings accepted under section 6 and of cases in which leave has been granted as mentioned in subsection (1)(d). **20**

(5) When an order or undertaking of which entry is made in the disqualification register ceases to be in force, the Commission must delete the entry from the register and all particulars relating to it which have been furnished to it under this section or any previous provision corresponding to it, and, in the case of a disqualification undertaking, any other particulars it has included in the disqualification register. **25**

(6) The Commission must make the disqualification register available for inspection — **30**

- (a) at the office for the registration of companies; and  
(b) on the Commission’s website or in such other manner as it may deem appropriate.

(7) The Commission may from time to time publish the disqualification register, or changes to it, if it appears to it desirable in the public interest to do so. **35**

This subsection does not limit the scope of subsection (6).

- 5** **14.** (1) In any proceedings (whether or not under this Act), any statement made in pursuance of a requirement imposed by or under any provision of this Act, may be used in evidence against any person making, or concurring in the making of, the statement. Admissibility  
in evidence  
of statements  
  
P1986/46/20
- (2) But in criminal proceedings in which any such person is charged with an offence to which this subsection applies —
- (a) no evidence relating to the statement may be adduced, and
- 10** (b) no question relating to it may be asked, by or on behalf of the prosecution, unless evidence relating to it is adduced, or a question relating to it is asked, in the proceedings by or on behalf of that person.
- 15** (3) Subsection (2) applies to proceedings for an offence other than —
- (a) an offence under section 17 (falsification of documents, etc.) or 18 (false statements); or
- 20** (b) an offence under section 5 of the Perjury Act 1952 (false statutory declarations and other false statements made without oath). [XVIII p. 86]
- 15.** Schedule 2 (inspection and investigation) has effect. Inspection and  
investigation
- 16.** Schedule 3 (restrictions on disclosure of information) has effect. Restriction on  
disclosure of  
information
- 25** **17.** (1) A person commits an offence if he or she —
- (a) knows or suspects that an investigation by the Commission is being or is likely to be carried out; and
- 30** (b) falsifies, conceals, destroys or otherwise disposes of, or causes or permits the falsification, concealment, destruction or disposal of documents which he or she knows or suspects are or would be relevant to such an investigation. Falsification  
of documents,  
etc. relevant to  
an investigation
- (2) It is a defence, in proceedings for an offence under subsection (1), for the defendant to prove that he or she had no intention of concealing the facts disclosed by the documents from persons carrying out the investigation.
- 35**

False or misleading statements

**18.** A person commits an offence if he or she provides a document or information to the Commission which is false or misleading in a material particular and —

- (a) he or she knows the document or information is false or misleading in a material particular; or **5**
- (b) he or she is reckless as to whether the document or information is false or misleading in a material particular.

Offences

**19.** (1) A person guilty of an offence under section 17 is liable —

- (a) on conviction on information, to a fine or to custody not exceeding 5 years, or to both; or **10**
- (b) on summary conviction, to a fine not exceeding £5,000 or to custody not exceeding 6 months, or to both.

(2) A person guilty of an offence under section 18, paragraph 1(5) or 3(8) of Schedule 2 or paragraph 1(5) of Schedule 3 is liable — **15**

- (a) on conviction on information, to custody not exceeding 2 years or to a fine, or to both;
- (b) on summary conviction, to custody not exceeding 6 months or to a fine not exceeding £5,000 or to both. **20**

Offences by company

**20.** (1) If an offence under this Act is committed by a company and it is proved that the offence —

- (a) was committed with the consent or connivance of a responsible person; or
- (b) was attributable to neglect on the part of a responsible person, **25**

subsections (2) and (3) apply.

(2) The responsible person, as well as the company, is guilty of the offence.

(3) Where an individual is convicted of an offence under this Act by virtue of subsection (2), that individual is liable to the same penalty as that to which the company would have been liable had it been an individual. **30**

(4) In this section “responsible person” means —

- (a) a director, manager or secretary or other similar officer of the company;
- (b) if the affairs of the company are managed by its members, a member;
- 5** (c) in respect of a limited liability company constituted under the Limited Liability Companies Act 1996, a member of the limited liability company, its manager and its registered agent; [c.19]
- 10** (d) a registered agent of a company incorporated under the Companies Act 2006; and [c.13]
- (e) a person purporting to act in the capacity of an officer specified in paragraphs (a), (b), (c) or (d).

*General*

- 21.** (1) In this Act — Interpretation  
P1986/46/22
- 15** “Commission” has the meaning given in section 2(1);
- “Companies Acts” means the Companies Acts 1931 to 2004, the Limited Liability Companies Act 1996 and the Companies Act 2006;
- “company” includes —
- 20** (a) a company formed and registered under the Companies Acts 1931 to 2004;
  - (b) a company which may be wound up under Part X of the Companies Act 1931;
  - 25** (c) a company registered under Part XI of the Companies Act 1931;
  - (d) a company within the meaning of section 219(1) of the Companies Act 2006;
  - 30** (e) a limited liability company within the meaning of section 1 of the Limited Liability Companies Act 1996; and
  - (f) in the application of Schedule 1, a company within the meaning of paragraph 15 of that Schedule;
- “director” includes any person occupying the position of director, by whatever name called;

“disqualification register” has the meaning given in section 13(2);

“financial services legislation” means —

- [c. 8] (a) the Financial Services Act 2008;
- (b) the Insurance Act 2008; **5**
- [c. 2] (c) the Insider Dealing Act 1998;
- [c. 7] (d) the Collective Investment Schemes Act 2008;
- [c. 24] (e) the Insurance Act 1986;
- [c. 26] (f) any legislation applied to the Island and contained in, or made under, the Pension Schemes Act 1995 (of Parliament); and **10**
- [c. 14] (g) the Retirement Benefits Schemes Act 2000;

“officer” has the meaning given in section 1(2);

“official receiver” means a person who —

- (a) by virtue of section 173 or 174 of the Companies Act 1931 is authorised to act as the official receiver in relation to a winding-up; **15**
- (b) by virtue of an enactment having corresponding effect outside the Island is authorised to discharge similar functions to a person appointed under paragraph (a); **20**

“P” has the meaning given by section 1(6);

“registered agent” means a registered agent appointed for the purposes of section 5 of the Limited Liability Companies Act 1996 or section 74 of the Companies Act 2006. **25**

(2) Part V of the Companies Act 1931(winding up) applies as regards construction of references to a company’s insolvency and to its going into liquidation.

(3) Any expression for whose interpretation provision is made by an enactment contained in the Companies Acts, and not by subsection (1) or (2) above, is to be construed in accordance with that enactment. **30**

- 22.** (1) Schedule 4, which contains amendments consequential on the provisions of this Act, has effect. Consequential amendments and repeals
- (2) The enactments specified in column 2 of Schedule 5 are repealed to the extent specified in column 3.
- 5** **23.** Orders and regulations under this Act, except orders under section 24(2), shall not have effect unless approved by Tynwald. Orders and regulations
- 24.** (1) This Act may be cited as the Company Officers (Disqualification) Act 2008. Short title and commencement
- 10** (2) This Act, other than section 23 and this section, shall come into operation on such day or days as the Commission may by order appoint and different days may be so appointed for different provisions and different purposes.

MATTERS FOR DETERMINING UNFITNESS OF OFFICERS

PART I

MATTERS APPLICABLE IN ALL CASES

1. Any misfeasance or breach of any fiduciary or other duty by P in relation to the company.

2. Any misapplication or retention by P, or any conduct by P giving rise to an obligation to account for, any money or other property of the company.

[I p. 216] 3. The extent of P's responsibility for the company entering into any transaction liable to be set aside under section (4) of the Fraudulent Assignments Act 1736, at common law or under any laws having similar effect in any country or territory outside the Island.

4. (1) The extent of P's responsibility for any failure by the company to comply with a relevant provision.

(2) For the purposes of this paragraph the following are relevant provisions —

[c. 2] (a) section 1 of the Companies Act 1982, section 19 of the Limited Liability  
[c. 19] Companies Act 1996 and section 80 of the Companies Act 2006  
[c. 13] (companies to keep accounting records);

(b) section 143 of the Companies Act 1931 (register of directors and secretaries) and section 78 of the Companies Act 2006 (documents to be kept at office of registered agent);

(c) section 96 of the Companies Act 1931 and section 62 of the Companies Act 2006 (obligation to keep and enter up register of members);

(d) sections 107 and 108 of the Companies Act 1931, section 85 of the Companies Act 2006 and section 10 of the Limited Liability Companies Act 1996 (duty of company to make annual returns);

(e) sections 80 and 81 of the Companies Act 1931 (company's duty to register charges it creates), section 20 of the Limited Liability Companies Act 1996 and section 137 of the Companies Act 2006 (both of which provide for a company to keep a register of charges); and

(f) legislation having equivalent effect in any country or territory outside the Island.

5. In the case of a company incorporated under the Companies Acts 1931 to 2004, the extent of P's responsibility for any failure by the directors of the company to comply with Part 1 of the Companies Act 1982 (accounts and audit).

6. If P or a company of which P is or was an officer —

- (a) has been convicted of an offence (whether in the Island or elsewhere) which involves dishonesty; or SCH. 1
- (b) has been convicted (whether in the Island or elsewhere) within the 25 years ending with the date of the application of any combination of 3 or more offences under —
- (i) the Companies Acts or financial services legislation; or
  - (ii) legislation having equivalent effect in any country or territory outside the Island.

For this purpose it is immaterial that the offences or the convictions occurred on the same occasion.

**7.** If P has failed to comply with an order of the High Court under section 26(4) of the Companies Act 1992.

**8.** The extent of P's responsibility as an officer of the company for failure to comply with a direction of the High Court under section 26(4) of the Companies Act 1992.

**9.** (1) If a company of which P is or was an officer is subject to foreign restrictions in consequence of which P —

- (a) is, by reason of misconduct or unfitness, disqualified to any extent, by or under the law by or under which the foreign restrictions were imposed, from being an officer of a company,
- (b) is, by reason of misconduct or unfitness, required —
  - (i) to obtain permission from a court or other authority, or
  - (ii) to meet any other condition,before acting as an officer of a company, or
- (c) has given undertakings, in connection with P's misconduct or unfitness, to a court or other authority of a country or territory outside the Island —
  - (i) not to act as an officer of a company, or
  - (ii) restricting the extent to which, or the way in which, P may do so.

(2) In this paragraph "foreign restrictions" means restrictions imposed by or under the law of a country or territory outside the Island.

## PART II

### MATTERS APPLICABLE WHERE COMPANY INSOLVENT

**10.** The extent of the P's responsibility for the causes of the company becoming insolvent.

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**11.** The extent of the P's responsibility for any failure by the company to supply any goods or services which have been paid for (in whole or in part).

**12.** The extent of the P's responsibility for the company entering into any transaction or giving any preference, being a transaction or preference liable to be set aside under section 167 or 250 of the Companies Act 1931, or under any laws having similar effect in any country or territory outside the Island.

**13.** The extent of the P's responsibility for any failure by the officers of a company incorporated under the Companies Acts 1931 to 2004 or the Companies Act 2006 to comply with section 226 of the Companies Act 1931 (meeting of creditors in creditors' voluntary winding up).

**14.** (1) Any failure of P, as a director of a company, to comply with any obligation imposed on P by or under any of the relevant provisions of the Companies Act 1931 —

(a) as those provisions apply to companies incorporated, formed and registered or capable of being wound up under that Act; or

(b) as those provisions apply to companies incorporated or continued under the Companies Act 2006 and to limited liability companies formed under the Limited Liability Companies Act 1996.

(2) Any failure by P as a director of a company to comply with any obligation imposed on P by any provision of legislation having equivalent effect to the relevant provisions of the Companies Act 1931 in any country or territory outside the Island.

(3) For the purposes of this paragraph, the relevant provisions of the Companies Act 1931 are —

(a) section 175 (statement of affairs in winding up by the Court);

(b) section 234 (delivery of company property to liquidator); and

(c) section 255 (duty to co-operate with liquidator, etc).

PART III

INTERPRETATION

**15.** In the application of this Schedule to a body incorporated under the law of a country or territory outside the Island "company" means a body which according to the law of that country or territory (including its rules of private international law) has the characteristics of a company.

Section 15

SCHEDULE 2

INSPECTION AND INVESTIGATION

*Inspection and investigation*

1. (1) The powers provided by this paragraph may be exercised in relation to P if P is, on reasonable grounds, suspected by the Commission of —

- (a) being unfit to act as an officer of a company; or
- (b) acting in breach of a disqualification order or a disqualification undertaking.

(2) The Commission may inspect the books, accounts and documents and investigate the transactions of a company.

(3) The Commission shall have every such power of entry and access as may be necessary for the purposes of sub-paragraph (2), and it may take possession of all such books, accounts and documents as, and for so long as, may be necessary for those purposes.

(4) The Commission may take copies of all books, accounts and documents in its possession for the purposes of an inspection and investigation under this paragraph.

(5) Any person who intentionally obstructs the Commission when acting in the execution of its powers under sub-paragraph (2), (3) or (4) shall be guilty of an offence.

(6) In this paragraph references to the Commission include any person authorised by the Commission in writing for the purposes of this paragraph.

(7) The Commission shall exercise its right of entry and access under sub-paragraph (3) only during reasonable hours, and any person authorised by the Commission under sub-paragraph (6) to exercise that right shall, when doing so, produce written evidence of his or her appointment if required to do so.

(8) A person shall not be under an obligation under this paragraph to disclose any items subject to legal privilege within the meaning of section 13 of the Police Powers and Procedures Act 1998.

[c. 9]

*Requests for information*

2. (1) The powers provided by this paragraph may be exercised if P is, on reasonable grounds, suspected by the Commission of —

- (a) being unfit to act as an officer of a company; or
- (b) acting in breach of a disqualification order or a disqualification undertaking.

(2) The Commission may request a company to provide the Commission with any information that it may reasonably require for the performance of its functions under this Act and may require such information to be verified in such manner as the Commission directs.

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SCH. 2

(3) But the Commission may only exercise the powers under this paragraph if, on reasonable grounds, it appears to the Commission necessary for the performance of its functions under this Act.

(4) The Commission may in particular request information about —

(a) the affairs of an actual or prospective customer of the company, subject to sub-paragraph (6);

(b) any other company which is or has at any relevant time been —

[c. 8]

(i) a holding company, subsidiary or related company (within the meaning of the Financial Services Act 2008) of the company;

(ii) a subsidiary of a holding company of the company;

(iii) a holding company of a subsidiary of the company; or

(iv) a company in the case of which a shareholder controller of the company, either alone or with any associate or associates, is entitled to exercise, or control the exercise of, more than 50 per cent of the voting power at a general meeting; and

(c) any partnership of which the company is or has at any relevant time been a partner.

(5) The Commission may issue directions to a company to secure that effect is given to a request under sub-paragraph (2) and the directions shall include a statement of reasons for their issue.

(6) The Commission shall not make any request under sub-paragraph (2) with respect to the affairs of any particular actual or prospective customer of a company mentioned in sub-paragraph (2) unless the Commission is satisfied that it is necessary for the purpose of —

(a) securing that a direction issued under sub-paragraph (5) is complied with; or

(b) protecting the interests of that company's other customers.

(7) If a company contravenes any direction under sub-paragraph (5), the Commission may apply to the High Court for an order requiring the company to comply with it.

(8) A statement by a person in response to a direction issued under this paragraph may not be used in evidence against that person in respect of any criminal proceedings except proceedings alleging contravention of section 17 or 18 or section 5 of the Perjury Act 1952.

[XVIII p. 86]

(9) A person shall not be under an obligation under this paragraph to disclose any information subject to legal privilege within the meaning of section 13 of the Police Powers and Procedures Act 1998.

[c. 9]

(10) In this paragraph —

“associate”, “holding company” and “subsidiary” have the meanings given by section 48(1) of the Financial Services Act 2008; and

“shareholder controller” means a person who either alone or with any associate or associates is entitled to exercise or controls the exercise of at least 15% of the voting power at any general meeting of a body corporate or of another body corporate of which the first is a subsidiary. SCH. 2

(11) For the purposes of this paragraph —

- (a) “related company” in relation to a company (“A”) means a company (“B”) which is not a subsidiary of A but in which A holds a qualifying capital interest;
- (b) “qualifying capital interest” means an interest in relevant shares of B which A holds on a long-term basis for the purpose of securing a contribution to its own activities by the exercise of control or influence arising from that interest;
- (c) “relevant shares” are shares comprised in the equity share capital (within the meaning of section 1(5) of the Companies Act 1974) of B of a class carrying rights to vote in all circumstances at general meetings of B; [c. 30]
- (d) a holding of at least 20% of the nominal value of the relevant shares of a company shall be presumed to be a qualifying capital interest unless the contrary is shown.

*Power of Commission to require information*

3. (1) Where, on an application made by the Commission, a justice of the peace is satisfied that there is good reason to do so for the purpose of investigating the affairs, or any aspect of the affairs, of any company so far as is relevant to the performance of the Commission’s functions under this Act the justice may by written instrument, authorise the Commission to exercise the powers under this paragraph and such powers shall not otherwise be exercisable.

(2) The Commission may by notice in writing, accompanied by a copy of the instrument issued under sub-paragraph (1), require —

- (a) the person whose affairs are to be investigated (“the person under investigation”); or
- (b) any other person whom it has reason to believe has relevant information,

to attend before the Commission at a specified time and place to answer questions or otherwise furnish information with respect to any matter relevant to the investigation.

(3) The Commission may by notice in writing, accompanied by a copy of the instrument issued under sub-paragraph (1), require any person to produce at a specified time and place any specified documents, copies of documents, or any documents of a specified class, which appear to the Commission to relate to any matter relevant to the investigation.

(4) If documents or copies of documents are not produced as required under sub-paragraph (3), the Commission may require the person who was required to produce them to state, to the best of that person’s knowledge and belief, where they are.

SCH. 2 (5) Where any documents are produced as required under sub-paragraph (3), the Commission may —

- (a) take possession of them for so long as may be necessary; or
- (b) take copies or extracts from them; or
- (c) require the person producing them to provide an explanation of any of them.

(6) A statement by a person in response to a requirement imposed under this paragraph may not be used in evidence against that person in respect of any criminal proceedings except proceedings for an offence under —

- (a) sub-paragraph (8);
- (b) section 17 or 18; or

[XVIII p. 86] (c) section 5 of the Perjury Act 1952.

[c. 9] (7) A person shall not be under an obligation under this paragraph to disclose any items subject to legal privilege within the meaning of section 13 of the Police Powers and Procedures Act 1998.

(8) Any person who without reasonable excuse fails to comply with a requirement imposed under this paragraph is guilty of an offence.

(9) In this paragraph, “documents” includes information recorded in any form and, in relation to information recorded otherwise than in legible form, references to its production include references to producing a copy of the information in legible form.

(10) Where a person claims a lien on a document, its production under this paragraph does not affect the lien.

*Judge’s search warrant*

**4.** (1) Where, on information on oath laid by the Commission, a judge of the High Court is satisfied, in relation to any documents, that there are reasonable grounds for believing —

- (a) that —
  - (i) a person has failed to comply with an obligation under paragraph 3 to produce them or copies of them; or
  - (ii) it is not practicable to serve a notice under paragraph 3(3) in relation to them; or
  - (iii) the service of such a notice in relation to them might seriously prejudice the investigation; and
- (b) that the documents are on premises specified in the information,

the judge may issue a warrant.

- (2) The warrant authorises any person named in it — SCH. 2
- (a) to enter (using such force as is reasonably necessary for the purpose) and search the premises; and
  - (b) to take possession of any documents appearing to be documents of the description specified in the information, or to take in relation to any documents so appearing any other steps which may appear to be necessary for preserving them and preventing interference with them.
- (3) If, during the course of a search of premises for documents of a description specified in the information, other documents are discovered which appear to contain evidence relating to the discharge of the Commission's functions under this Act or to an offence under this Act, the financial services legislation or the Companies Acts, the person named in the warrant may —
- (a) take possession of those documents; or
  - (b) take any other steps in relation to those documents which may appear to be necessary for preserving them and preventing interference with them.
- (4) A person executing a warrant issued under sub-paragraph (1) shall be accompanied by a constable.
- (5) A person shall not be under an obligation under this paragraph to disclose any items subject to legal privilege within the meaning of section 13 of the Police Powers and Procedures Act 1998.
- (6) In this paragraph "documents" has the same meaning as in paragraph 3.

*Authorised persons*

- 5.** (1) The Commission may authorise any person to exercise on its behalf all or any of the powers conferred by or under this Schedule.
- (2) But authority must not be granted except for the purpose of investigating the affairs, or any aspect of the affairs, of a person specified in the authority.
- (3) No person is bound to comply with any requirement imposed by a person exercising powers by virtue of any authority granted under sub-paragraph (1) unless he or she has, if required to do so, produced evidence of his or her authority.

RESTRICTIONS ON DISCLOSURE OF INFORMATION

*Restrictions on disclosure of information*

1. (1) Information which is restricted information for the purposes of this Schedule and relates to the business or other affairs of any person must not be disclosed —

- (a) by the primary recipient; or
- (b) any person obtaining the information directly or indirectly from a primary recipient,

without the consent of the person to whom it relates.

This sub-paragraph is subject to paragraph 2.

(2) Information is restricted information for the purposes of this Schedule if it is obtained by a primary recipient for the purposes of, or in the discharge of its functions under this Act or any regulations made under this Act (whether or not by virtue of any requirement to supply it made under those provisions).

(3) But information is not restricted information if it has been made available to the public by virtue of being disclosed in any circumstances in which, or for any purpose for which, disclosure is not precluded by this paragraph.

(4) In this paragraph “primary recipient” means —

- (a) the Commission and its members;
- (b) the Registrar of Companies appointed under section 205 of the Companies Act 2006; and
- (c) any officer or servant of any such person.

[c.13]

(5) Any person who contravenes this paragraph is guilty of an offence.

*Exceptions from restrictions on disclosure*

2. (1) Paragraph 1 does not preclude the disclosure of information —

- (a) with a view to the institution of or otherwise for the purposes of criminal proceedings (whether in the Island or elsewhere);
- (b) to any constable for the purpose of enabling or assisting the Isle of Man Constabulary to discharge its functions;
- (c) with a view to the institution of or otherwise for the purposes of any civil proceedings arising under or by virtue of this Act or the Financial Services Act 2008;
- (d) for the purpose of enabling or assisting the Treasury to discharge its functions under the Financial Services Act 2008, the Companies Acts, the enactments relating to insurance companies or insolvency or for

[c. 8]

- the purpose of enabling or assisting any inspector appointed by the High Court under the Companies Acts to discharge the inspector's functions; SCH. 3
- (e) for the purpose of enabling or assisting the body administering a compensation scheme under section 25 of the Financial Services Act 2008 to discharge its functions under the scheme;
  - (f) for the purpose of enabling or assisting the Commission to discharge its functions;
  - (g) for the purpose of enabling or assisting the Insurance and Pensions Authority, the Insurance Supervisor and the Retirement Benefits Schemes Supervisor to discharge their functions under the Retirement Benefits Schemes Act 2000 and the Insurance Act 2008; [c.14]
  - (h) for the purpose of enabling or assisting the Assessor of Income Tax to discharge the Assessor's functions under enactments relating to income tax;
  - (i) for the purpose of enabling or assisting the Collector of Customs and Excise to discharge the Collector's functions under enactments relating to customs and excise or in relation to any assigned matter (as defined in section 184 of the Customs and Excise Management Act 1986); [c.34]
  - (j) for the purpose of enabling or assisting an official receiver (whether appointed in the Island or elsewhere and whether in respect of a person in the Island or elsewhere) to discharge the official receiver's functions under any enactment (whether having effect in the Island or elsewhere) relating to insolvency;
  - (k) for the purpose of enabling or assisting a trustee in bankruptcy, a receiver or liquidator (whether appointed in the Island or elsewhere and whether in respect of a person in the Island or elsewhere) to discharge that officer's functions;
  - (l) with a view to the institution of, or otherwise for the purposes of, any disciplinary proceedings relating to a person's profession;
  - (m) for the purpose of enabling or assisting any person appointed or authorised to exercise any powers under section 19 of the Collective Investment Schemes Act 2008 to discharge that person's functions; [c. 7]
  - (n) for the purpose of enabling or assisting in the discharge of the functions of an auditor of a permitted person (within the meaning of section 35(1) of the Financial Services Act 2008);
  - (o) for the purpose of enabling or assisting the Isle of Man Office of Fair Trading and any adjudicator to discharge their functions under Schedule 4 of the Financial Services Act 2008 or for the purpose of enabling or assisting any person exercising equivalent functions outside the Island;
  - (p) for the purpose of enabling or assisting the Isle of Man Gambling Supervision Commission in the discharge of its functions under enactments relating to all forms of gambling;
  - (q) if the information is or has been available to the public from other sources;

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SCH. 3

- (r) in a summary or collection of information framed in such a way as not to enable the identity of any person to whom the information relates to be ascertained; or
- (s) for the purpose of enabling the Civil Service Commission to investigate the conduct of members of the Isle of Man Civil Service.

(2) Paragraph 1 does not preclude the disclosure of information for the purpose of enabling or assisting any public or other authority in the Island for the time being designated for the purposes of this paragraph by an order made by the Treasury to discharge any functions which are specified in the order.

(3) An order under sub-paragraph (2) designating an authority for the purposes of that sub-paragraph may —

- (a) impose conditions subject to which the disclosure of information is permitted by that subsection; and
- (b) otherwise restrict the circumstances in which that subsection permits disclosure.

(4) Paragraph 1 does not preclude the disclosure of any information contained —

- (a) in any notice or copy of a notice served under this Act, notice of the contents of which has not been given to the public, by the person on whom it was served or any person obtaining the information directly or indirectly from them; or
- (b) in any register required to be kept under this Act.

(5) Paragraph 1 does not preclude the disclosure of information —

- (a) to a regulatory authority within the meaning of section 48(1) of the Financial Services Act 2008; or
- (b) for the purpose of enabling or assisting an authority (whether a governmental or private body) in a country or territory outside the Island —

[c. 2]

- (i) to exercise functions in connection with rules of law corresponding to the provisions of the Insider Dealing Act 1998;
- (ii) to exercise functions corresponding to any of those of the Insurance and Pensions Authority, the Insurance Supervisor and the Retirement Benefits Schemes Supervisor under the Retirement Benefits Schemes Act 2000 or the Insurance Act 2008; or
- (iii) to exercise functions corresponding to any of those of the Commission under this Act, the Financial Services Act 2008 or the Collective Investment Schemes Act 2008.

(6) But sub-paragraph (5) does not permit the disclosure of any information relating to the affairs of an actual or prospective customer unless —

- (a) that customer consents; or

- (b) the Commission has given its written consent to the disclosure in accordance with sub-paragraphs (7) to (9). SCH. 3

(7) The Commission may consent to a disclosure of information to which sub-paragraph (6) applies if satisfied that disclosure is appropriate having regard to —

- (a) the Commission's functions;
- (b) the confidential nature of the information;
- (c) the purpose for which it is required.

(8) In deciding whether to consent to a disclosure of information to which sub-paragraph (6) applies, the Commission shall take the following factors into account —

- (a) the seriousness of the circumstances of the particular case;
- (b) whether the disclosure is (either itself or when taken with other material) likely to be of substantial value to the body to which it is made;
- (c) whether the information could be obtained by other means;
- (d) the standards of confidentiality and information security which will be applied by the recipient;
- (e) whether the making of the disclosure is proportionate to what is sought to be achieved by it; and
- (f) whether reciprocal assistance would be given in the country or territory in which the recipient is based.

(9) The factors set out in sub-paragraph (8) are neither exhaustive nor definitive.

(10) The Commission may by order amend —

- (a) the list of matters in respect of which the Commission must be satisfied in sub-paragraph (7); or
- (b) the list of factors in sub-paragraph (8).

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Section 22(1) SCHEDULE 4

CONSEQUENTIAL AMENDMENTS

*Industrial and Building Societies Act 1892 (VI p.405)*

1. After section 22(4) add —

“(5) The inspectors shall provide a copy of any report produced under paragraph (1)(a) to the Commission.”.

*Companies Act 1931 (XIII p.235)*

2. In section 134(6) after “by the court to” insert “the Financial Supervision Commission and”.

*Companies Act 1982 (c. 2)*

3. In section 14D(2)(c) for “section 26 of the Companies Act 1992” substitute “section 4 or 5 of the Company Officers (Disqualification) Act 2008”.

*Companies Act 1992 (c. 4)*

4. For the heading to section 26 (disqualification of unfit persons) substitute “Power of the Court to require rectification of default”.

*Insider Dealing Act 1998 (c. 2)*

5. In Schedule 3 (inspection and investigation), in paragraph 1(6), after “The Treasury” in the second sentence insert “shall provide to the Financial Supervision Commission a copy of the final report and”.

*Companies Act 2006 (c. 13)*

6. In section 198(3) and (4) after “the Registrar” add “and the Financial Supervision Commission”.

*Financial Services Act 2008 (c. 8)*

7. In section 33(4) at the end add —

“(f) the Company Officers (Disqualification) Act 2008.”.

8. In Schedule 1, in paragraph 2(1) at the end add —

“(z) the Company Officers (Disqualification) Act 2008.”.

Section 22(2)

SCHEDULE 5

REPEALS

| <i>Chapter No. or<br/>Volume reference</i> | <i>Enactment</i>                           | <i>Extent of Repeal</i>   |
|--|--|---|
| Vol. XIII p.235                            | Companies Act 1931                         | Section 141.<br><br>Section 208.<br><br>In section 259 subsections (4) and (8) and, in subsection (7), the words “for leave under subsection (4) of this section, and on the hearing of an application under that subsection or”. |
| 1982 c.2                                   | Companies Act 1982                         | Section 31.<br><br>In Schedule 2 the entry relating to section 259(4) of the Companies Act 1931.  |
| 1986 c. 45                                 | Companies Act 1986                         | Section 20.   |
| 1992 c.4                                   | Companies Act 1992                         | Section 26 (1) to (3) and (5) and section 27.   |
| 1998 c.2                                   | Insider Dealing Act 1998                   | Section 15(2).  |
| 2000 c.3                                   | Companies (Transfer of Functions) Act 2000 | In Schedule 2, in paragraph 36 “(1) and”.   |
| 2003 c.16                                  | Companies, etc. (Amendment) Act 2003       | In Schedule 1, entry 13 in respect of the Companies Act 1931 and entry 2 in respect of the Companies Act 1982.  |
| 2006 c.13                                  | Companies Act 2006                         | In Schedule 1, the entry relating to the Companies Act 1992 and the cross-heading relating to that entry.   |

IN THE KEYS

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## **Company Officers (Disqualification)**

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### **A BILL**

*to amend the law relating to the disqualification of persons for being officers of companies and for being otherwise concerned with a company's affairs; and for connected purposes.*

Approved by the Council of Ministers for introduction in the House of Keys.

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MR. BRAIDWOOD

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OCTOBER 2008

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