



REPUBLIC OF VANUATU

**PROTECTED CELL COMPANIES (AMENDMENT)
ACT NO. 32 OF 2009**

Arrangement of Sections

1	Amendment.....
2	Commencement.....

REPUBLIC OF VANUATU

Assent: 19/10/09
Commencement: 16/11/09

PROTECTED CELL COMPANIES (AMENDMENT) ACT NO. 32 OF 2009

An Act to amend the Protected Cell Companies Act No. 37 of 2005.

Be it enacted by the President and Parliament as follows-

1 Amendment

The Protected Cell Companies Act No.37 of 2005 is amended as set out in the Schedule.

2 Commencement

This Act commences on the day on which it is published in the Gazette.

SCHEDULE

AMENDMENTS OF THE PROTECTED CELL COMPANIES ACT NO. 37 OF 2005

1 Section 1

Insert the following definitions in their correct alphabetical positions:

“**core** means a protected cell company excluding its cells.

protected assets means :

- (a) any cellular assets attributable to a cell of a protected cell company in respect of a liability not attributable to that cell; and
- (b) any non-cellular assets in respect of a liability attributable to a cell.

recourse agreement means a written agreement between a protected cell company and a third party which provides that, pursuant to an arrangement effected under section 19A, the protected assets may, in spite of this Act, be subject to a liability owed to that third party.”

2 Section 1 (definition of administration order)

- (a) Delete “to the cell or,” (first occurring), substitute “to the cell, if the company has entered into a recourse agreement, the assets liable under that agreement or,”
- (b) Repeal paragraph (b), substitute
 - “(b) the more advantageous realisation of :
 - (i) the business and assets of or attributable to the cell; or
 - (ii) if the company has entered into a recourse agreement , the assets liable under that agreement; or
 - (iii) the business and assets of the company, than would be achieved by a receivership of the cell or as the case may be by the liquidation of the company.”

3 Section 1 (definition of cell)

After “cellular assets”, insert “and non-cellular assets”

4 Section 1 (definition of cellular dividend)

Delete “7(3)”, substitute “7(6)”.

5 Section 1 (definition of receivership order - Paragraph (b))

After “attributable to the cell”, insert “and, if the company has entered into a recourse agreement, the assets liable under that agreement”

6 Section 1 (definition of transaction)

Delete “imposed.”, substitute “imposed and also includes the meaning given by the Financial Transactions Reporting Act [CAP 268].”

7 Subsection 4(1)

After “cellular assets”, insert “and non-cellular assets”

8 Subsection 4(7)

Delete “assets of the company that are not cellular assets”, substitute “assets of the core”

9 After section 4

Insert

“4A. Recourse Agreement

- (1) A protected cell company may, subject to subsection (2), enter into a recourse agreement with a third party.
 - (2) Before entering into a recourse agreement, each director of the protected cell company who authorises the agreement must make a declaration that he or she believes on reasonable grounds:
 - (a) that no creditor of the company will be unfairly prejudiced by the recourse agreement; and
 - (b) that unless the memorandum or articles provide to the contrary:
 - (i) if the protected assets are assets attributable to a cell, the members of that cell; or
 - (ii) if the protected assets are non –cellular assets , the members of the company,
- have passed a resolution approving the recourse agreement.

- (3) A director who makes a declaration under subsection (2) without having the grounds to do so, is guilty of an offence and is liable on conviction to a fine not exceeding VT1,000,000 or imprisonment for a period not exceeding one year, or both.
- (4) A member, creditor or a prospective creditor of the protected cell company or cell may, subject to any reasonable conditions that the protected cell company may impose, inspect or request a copy of the declaration made by a director under subsection (2).
- (5) If a company fails to allow an inspection or refuses to provide a copy of the declaration requested under subsection (4), it is guilty of an offence and is liable on conviction to a fine not exceeding VT100,000.”

10 Subsection 5(1)

Repeal the subsection, substitute

- “(1) Subject to the terms of a recourse agreement, the rights of creditors of a protected cell company must correspond with the liabilities provided for in sections 14 and 15A.”

11 Subsection 5(2)

Repeal the subsection, substitute

- “(2) Subject to the terms of any recourse agreement, a creditor of a protected cell company has no rights other than the rights referred to in this section and in sections 6, 6A, 14 and 15A.”

12 Paragraphs 5(3)(a), 5(3)(b) and 5(3)(c)

Delete “cellular assets attributable to one cell of the company to satisfy a liability not attributable to that cell”, substitute “protected assets”

13 Paragraph 5(5)(b), 5(6)(c) and 5(7)(a) and (b)

After “ cell affected”, insert “or, as the case may be the core”

14 Subsection 5(8)

Repeal the subsection.

15 Subsection 6(1)

After “sections 5 and 14 of this Act”, insert “and to any terms of a recourse agreement”

16 Subsection 6(2)

Delete “Cellular assets” (first occurring), substitute “Subject to the terms of any recourse agreement, cellular assets”.

17 After section 6

Insert

“6A. Recourse to non-cellular assets by creditors

- (1) This section is subject to sections 5 and 15A of this Act.
- (2) Non-cellular assets attributable to a protected cell company are:
 - (a) only available to the creditors of the company who are creditors of the core and entitled under this Act to have recourse to the non-cellular assets ;and
 - (b) protected from the creditors of the company who are not creditors of the core and not entitled to have recourse to the non-cellular assets .”

18 After paragraph 7(7) (b)

Insert

- “(8) To avoid doubt, a protected cell company may:
- (a) purchase cell shares of its own cells; and
 - (b) give financial assistance for the acquisition of its cell shares.”

19 Paragraph 10(1)(c)

Delete “ (when account is taken of the company’s non-cellular assets , unless there are no creditors in respect of that cell entitled to have recourse to the company’s non-cellular assets), substitute “and, where the company has entered into a recourse agreement, the assets liable under that agreement”

20 Paragraph 12(1)(a)

Delete “captive insurer”, substitute “captive insurance company”

21 Paragraph 12(1)(c)

After “trust”, insert “, scheme”

22 Section 13

Delete “The Companies Act [CAP 191]”, substitute “Subject to section 12, the Companies Act [CAP 191]”

23 Section 14

Repeal the section, substitute

“14. Liability of cellular assets

- (1) Subject to subsection (2) and to the terms of any recourse agreement, if a liability is attributable to a particular cell of a protected cell company:
 - (a) the cellular assets attributable to that cell must be used to satisfy the liability; and
 - (b) any protected assets must not be used to satisfy the liability.
- (2) Loss or damage that is suffered by a particular cell of a protected cell company and that is caused by fraud committed by or upon the core or another cell, is the liability solely of the company’s non cellular assets or, as the case may be, that other cell’s assets, without prejudice to any liability of any person other than the company.
- (3) Any liability not attributable to a particular cell of a protected cell company is the liability solely of the company’s non-cellular assets.
- (4) Despite the other provisions of this section, the liabilities under paragraph (1)(a) of the cellular assets attributable to a particular cell of a protected cell company *abate pro rata* until the value of the aggregate liabilities equals the value of those assets, except that this paragraph must be disregarded if there is a recourse agreement, or if any of the liabilities of the company’s cellular assets arises from fraud referred to in subsection (2).
- (5) This section applies to cellular assets of a protected cell company wherever situated.”

24 After section 15

Insert

“15A Liability of non-cellular assets

- (1) Subject to subsection (2), and to the terms of any recourse agreement , if a liability is attributable to the core of a protected cell company:
 - (a) the non-cellular assets must be used to satisfy the liability; and
 - (b) the protected assets must not be used to satisfy the liability.
- (2) The loss or damage that is suffered by the core of a protected cell company and that is caused by fraud committed by or upon a cell, is the liability

solely of the cellular assets of that cell, without prejudice to any liability of any person other than the company.

- (3) This section applies to non-cellular assets of a protected cell company wherever situated.”

25 After section 19

Insert

“19A Arrangement between cells affecting cellular assets, etc

- (1) To avoid doubt a protected cell company may, in the ordinary course of its business or the business attributable to any of its cells, effect an arrangement within the meaning of subsection (2).
- (2) For the purposes of this section, an arrangement is a dealing with or a transfer, disposition or attribution of the cellular assets or non cellular assets of a protected cell company that has effect:
- (a) as between any of the company’s cells; or
- (b) as between the company and any of its cells, but an arrangement does not include a transaction between the company and another person.
- (3) On the application of any person mentioned in subsection (4), and subject to any terms and conditions it thinks fit, the Court may make, vary, rescind, replace or confirm, an order in respect of:
- (a) the execution , administration or enforcement of an arrangement; or
- (b) any cellular assets or non-cellular assets of a protected cell company subject to, or affected by, an arrangement, including (without limitation) an order as to their attribution, transfer, disposition, tracing, vesting, preservation, application, recovery or delivery.
- (4) An application for an order under subsection (3) may be made by:
- (a) a protected cell company;
- (b) a director, liquidator or administrator of the company;

- (c) the receiver or administrator of any cell of the company affected by the arrangement;
 - (d) a manager of the business of the company;
 - (e) a manager of the business of or attributable to any cell of the company affected by the arrangement ; or
 - (f) with leave of the Court, any other person who has directly or indirectly some interest in, or who is affected by, the arrangement.
- (5) The Court may vary, rescind, replace or confirm an order made under subsection (3).
- (6) A protected cell company must, in respect of an arrangement, make necessary adjustments to its accounting records, including those of or attributable to its cells.
- (7) To avoid doubt:
- (a) adjustments referred to in subsection (6) may include the transfer, disposition or attribution of assets, rights and liabilities of the protected cell company:
 - (i) as between any of the company’s cells; or
 - (ii) as between the company and any of its cells;but without prejudice to the singular legal personality of the company provided by subsection 2(2); and
 - (b) the effecting of an arrangement does not require a cell transfer order.
- (8) An order under subsection (3) may be made *ex parte*.
- (9) This section applies to an arrangement effected in respect of cellular assets or non-cellular assets of a protected cell company, wherever situated.”

26 Paragraph 20(1)(a)

Delete “(when account is taken of the company’s non-cellular assets, unless there are no creditors of the cell entitled to have recourse to the company’s non

cellular assets)", substitute "and, where the company has entered into a recourse agreement, the assets liable under that agreement"

27 Subparagraph 22(1)(a)(ii)

After "attributable to the cell", insert "and, where the company has entered into a recourse agreement, the assets liable under that agreement"

28 Subsection 22(5)

Repeal the subsection, substitute:

" (5) After an application has been made for a receivership order, and while the order is in force, no proceedings may be started or continued by or against the protected cell company in relation to the cell for which the receivership order was made without:

- (a) the consent of the receiver; or
- (b) leave of the Court that may be subject to any terms or conditions the Court thinks fit.

(5A) To avoid doubt and without limitation, rights of set –off and secured interests , including security interests and the rights of enforcement , are unaffected by subsection (5)."

(5B) "Security", in relation to security interest referred to in subsection (5A), means any mortgage, charge, hypothèque, lien or other security."

29 Paragraph 22(6) (b)

Repeal the paragraph, substitute:

"(b) If the company has entered into a recourse agreement , the receiver of the cell is taken to be a director of the protected cell company in respect of the assets liable under that agreement."

30 Paragraph 23(5) (b)

Delete "cell shares", substitute "holders of the cell shares"

31 Section 24

Repeal the section, substitute:

"24 Remuneration of receiver

The remuneration of a receiver and any expenses he or she properly incurs are payable, in priority to all other claims, from the cellular assets attributable to the cell for which the receiver was appointed.”

32 Paragraph 25(1) (a)

Delete the words “(when account is taken of the company’s non-cellular assets, unless there are no creditors of that cell entitled to the company’s non-cellular assets)”, substitute “and, where the company has entered into a recourse agreement, the assets liable under that agreement”

33 Subparagraph 27(7) (a)(ii)

Repeal the subparagraph, substitute

“(ii) if the company has entered into a recourse agreement, the administrator of the cell is taken to be a director of the company in respect of the assets liable under that agreement; and”

34 Paragraph 29(a)

Repeal the paragraph, substitute

“(a) in the case of the administration of the cell, from the cellular assets attributable to the cell;”

35 After section 30

Insert

“ 30A Criminal penalties

(1) If a protected cell company is liable to any criminal penalty, under this Act or any other Act, due to the act or default of an officer acting in relation to a cell of the company, the penalty:

- (a) may only be met by the company from the cellular assets attributable to the cell; and
- (b) must not be enforceable in any way against any other assets of the company, whether cellular or non-cellular.

(2) If a protected cell company is liable to any criminal penalty, under this Act or any other Act, due to the act or default of an officer acting in relation to the core , the penalty :

- (a) may only be met by the company from non-cellular assets; and
- (b) must not be enforceable in any way against any cellular assets.”