

LAW ON PRIVATIZATION

**Prepared by the Legal Reform and Private Sector Development Unit
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The attached law is a composite of a number of examples of privatization laws enacted in common law jurisdictions. It is not intended to be a model law, but rather to provide an illustration of possible approaches to key drafting issues in the preparation of such a law.

An Act to provide for the privatization of State owned enterprises; to provide for the establishment of the [name of country] Privatization Agency and to define the functions of the Agency; and to provide for matters connected with or incidental to the foregoing.

ENACTED by the Parliament of [name of country].

PART I

PRELIMINARY

1. This Act may be cited as the Privatization Act, 19[].
2. In this Act, unless the context otherwise requires -

”Agency” means the [name of country] Privatization Agency established under section three;

“associate” means:

- (a) a body corporate of which that person beneficially owns or controls, directly or indirectly, shares or securities currently convertible into shares carrying more than ten per cent of the voting rights under all circumstances or by reason of the occurrence of an

event that has occurred and is continuing, or a currently exercisable option or right to purchase such shares or such convertible securities;

(b) a partner of that person acting on behalf of the partnership of which they are partners;

(c) a trust in which that person has a substantial beneficial interest or in respect of which he serves as trustee or in a similar capacity;

(d) a spouse or child of that person; and

(e) a relative of that person or of his spouse if that relative has the same residence as that person;

"consultant" means any person or firm, or employee of such person or firm, engaged by the Agency to provide advisory services connected with the privatization program;

"golden share" means a share in the capital of a company formed by conversion of a State owned enterprise pursuant to this Act carrying such special rights as are set out in the charter or articles of association of the company to enable the Government in the national interest to intervene in the operations of the company;

"person" means an individual, partnership, association, body corporate, or trustee other than a State owned enterprise;

"privatization" means a transaction or transactions utilizing one or more of the methods referred to in section twenty-one and resulting in either the sale to private parties of a controlling interest in the share capital of a State owned enterprise or of a substantial part

of its assets, or the transfer to private parties of operational control of a State owned enterprise or a substantial part of its assets;

“State owned company” means a State owned enterprise that is a company or is converted into a company in accordance with section sixteen;

"State owned enterprise" means a corporation, board, company, parastatal or body that is owned or controlled by [name of country] or by a State owned enterprise or that is otherwise an agency or instrumentality of the Government, but does not include a Government department.

PART II

THE [NAME OF COUNTRY] PRIVATIZATION AGENCY

3. (1) There is hereby established the [name of country] Privatization Agency which shall have not less than 6 and not more than 10 members. The members of the Agency shall comprise the permanent secretaries of the ministries of Trade and Finance *ex officio* and additional members appointed by the President having regard to their expertise in such matters as will ensure that the Agency achieves its objectives.

(2) The Agency shall be a body corporate with perpetual succession and a common seal capable of suing and of being sued in its corporate name, and with power, subject to the provisions of this Act, to do all such acts and things as a body corporate may by law do or perform.

4. The Agency shall have a Chairman and a Vice-Chairman who shall be appointed by the Minister responsible for privatization from amongst the members except the ex officio members.
5. The office of a member, except an ex-officio member, shall become vacant -
 - (a) upon his death or resignation;
 - (b) if he is absent without reasonable excuse from three consecutive meetings of the Agency of which he has had notice; or
 - (c) if he is removed from office by the President.
6. A member shall be paid such remuneration and allowances as the Agency may, with the approval of the Minister responsible for privatization, determine.
7. (1) It shall be the function of the Agency to plan, manage, implement and control the privatization of State owned enterprises.
 - (2) Notwithstanding the generality of subsection (1), the functions of the Agency shall be to -
 - (a) recommend privatization policy guidelines to the Cabinet;
 - (b) implement the privatization program according to the policy guidelines issued by the Cabinet;

- (c) oversee all aspects of the implementation of the privatization program;
- (d) monitor progress of the privatization program;
- (e) recommend to the Cabinet that a State owned enterprise or its assets be eligible for privatization;
- (f) recommend to the Cabinet the most appropriate privatization method for each State owned enterprise or its assets;
- (g) carry out or cause to be carried out a valuation of a State owned enterprise or its assets to be privatized;
- (h) take all necessary steps in order to effect the privatization of a State owned enterprise or its assets eligible for privatization;
- (i) ensure that monopolies are not created in the process of privatization;
- (j) maintain records, safeguard information and establish administrative procedures to ensure confidentiality of information;
- (k) maintain close liaison with all relevant institutions in the process of privatization;
- (l) publicize the activities of the privatization program; and
- (m) do all such things as are necessary or incidental or conducive to the better carrying out of the functions specified in this Act.

8. Subject to this Act, the Agency may regulate its own procedure.
9. (1) Meetings of the Agency shall be held at such times and places as the Agency or the Chairman from time to time appoints.
- (2) A majority of the members then in office shall form a quorum at any meeting of the Agency.
- (3) There shall preside at any meeting of the Agency -
- (a) The Chairman;
 - (b) in the absence of the Chairman, the Vice-Chairman; or
 - (c) in the absence of both the Chairman and the Vice-Chairman such member as the members present may elect for the purpose of that meeting.
- (4) A decision of the Agency on any question shall be by a majority of the members present and voting at the meeting and, in the event of an equality of votes, the person presiding at the meeting shall have the casting vote in addition to his deliberative vote.
- (5) The Agency may invite any person, whose presence is in its opinion desirable, to attend and to participate in the deliberations of the meeting of the Agency but such person shall have no vote.
- (6) The validity of any proceedings or decision of the Agency shall not be affected by any vacancy in the membership of the Agency or by any defect in the appointment of any member.

(7) The Agency shall cause minutes to be kept of the proceedings of every meeting of the Agency and of every meeting of any committee established by the Agency.

10. (1) The Agency may for the purpose of performing its functions under this Act establish Committees and delegate to any such committee such of its functions as it considers necessary.

(2) The Agency may appoint as members of a committee established under subsection (1) persons who are or are not members of the Agency and such persons shall hold office for such period as the Agency may determine.

(3) Subject to any specific or general direction of the Agency any committee established under subsection (1) may regulate its own procedure.

11. If any person is present at a meeting of the Agency or any committee of the Agency at which any matter is the subject of consideration and in which matter that person or his immediate family or his professional and business partners, is directly or indirectly interested in a private or professional capacity, he shall as soon as is practicable after the commencement of the meeting disclose such interest and shall not, unless the Agency or the committee otherwise directs, take part in any consideration or discussion of or vote on, any question touching on such matter.

PART III

ADMINISTRATION

12. (1) The Agency shall appoint, on such terms and conditions as it may determine, a Director who shall be the chief executive officer of the Agency and who shall be responsible for the conduct of the day-to-day affairs of the Agency.

(2) The Agency may appoint, on such terms and conditions as it may determine, a Deputy Director to assist the Director.

(3) The Director, or in his absence the Deputy Director, shall attend meetings of the Agency and may address such meetings, but shall not vote on any matter.

Provided that the person presiding at any meeting of the Agency, may for good cause, require the Director or Deputy Director to withdraw from such meeting.

(4) Section eleven shall apply, with the necessary modifications, to the Director and the Deputy Director.

13. (1) There shall be a Secretary to the Agency who shall be appointed by the Agency on such terms and conditions as the Agency may determine.

(2) The Director may appoint, on such terms and conditions as he may determine, such other staff as he considers necessary for the performance of the functions of the Agency.

14. (1) An employee of the Agency, or a consultant, who is, or whose spouse is, directly or indirectly interested in a private or professional capacity, in any matter relating to the privatization program shall be required to disclose such interests.

(2) A disclosure of interest made under this section shall be made to the Director who shall take such decision as he considers appropriate in each case.

15. (1) No person shall, without consent in writing given by, or on behalf of, the Agency, publish or disclose to any person, otherwise than in the course of his duties, the contents of any documents, communication or information, which relates to, and which has come to his knowledge in the course of his duties under this Act.

(2) Any person who knowingly contravenes the provisions of subsection (1) shall be guilty of an offense and shall be liable upon conviction to a fine not exceeding [] or to a term of imprisonment not exceeding [], or to both.

(3) If any person having information which to his knowledge has been published or disclosed in contravention of subsection (1) unlawfully publishes or communicates any such information to any person he shall be guilty of an offense and shall be liable upon conviction to a fine not exceeding [] or to a term of imprisonment not exceeding [], or to both.

PART IV

PRIVATIZATION

16. (1) The Agency may by a notice to that effect in the Gazette convert a State owned enterprise eligible for privatization, which is not a public company, into a public company in accordance with the provisions of the Companies Act.

(2) The Agency shall by notice in writing to a State owned company appoint from time to time the board of directors of the company. The board shall be accountable to the Minister responsible for privatization for the operation of the company.

(3) The shares in a State owned company shall be allotted to the Minister responsible for privatization.

(4) The notice of conversion referred to in subsection (1) shall vest in or impose on the State owned company any asset or liability, or any class of such asset or liability, specified in such notice.

(5) Any asset or liability of the Government may be vested in or imposed on a State owned company whether or not any Act or agreement relating to the asset or liability permits such vesting or imposition or requires any consent.

(6) Where a transfer of the kind described in subsection (4) takes place -

(a) The transfer shall not entitle any person to terminate, alter, or in any way affect the rights or liabilities of the Government or the State owned company under any Act or agreement;

(b) The Government shall remain liable to any third party as if the asset or liability had not been transferred; and

(c) Any contract relating to the activities carried on by the State owned company shall, from the publication date of the notice described in subsection (1) of this section, be deemed to be a contract entered into by the State owned company.

17. The Agency may by a notice to that effect in the Gazette initiate the liquidation of a State owned enterprise, or a State owned company in accordance with the provisions of the Companies Act. The Director shall be appointed as the liquidator of the enterprise or company.

18. The Minister responsible for finance may, after consultation with the Minister responsible for privatization, retain a share in the capital of a State owned company and convert such share into a golden share, and may at any time by notice in the Gazette cancel or limit the special rights applicable to that share.

19. A State owned enterprise eligible for privatization shall -

- (a) carry out any directions given by the Agency in writing to prepare the enterprise or its assets for privatization or to implement the privatization;
- (b) keep up-to-date business records and books of account;
- (c) prepare a rolling two year investment and financing plan and a manpower development plan;
- (d) prepare annual financial statements and cause them to be audited not later than four months after each financial year;
- (e) maintain a fixed asset register which shall be reconciled with the financial statements;
- (f) not perform any action or actions that would result in the assets of the enterprise being dissipated;

- (g) not undertake any new capital investment program, unless a project appraisal document is prepared demonstrating to the satisfaction of the Agency that -

 - (i) routine plant, equipment or vehicle renewal is required; or
 - (ii) the investment has a pay-back period of less than two years; or
 - (iii) the investment will within a period of two years, or such lesser period as the Agency shall specify, result in a reduction of the liabilities of the enterprise in excess of the amount of the investment; or
 - (iv) the investment will within a period of two years, or such lesser period as the Agency shall specify, result in a reduction of the operating costs of the enterprise during that period in excess of the amount of the investment;
- (h) not incur any liabilities other than in the ordinary course of business without the prior written approval of the Agency;
- (i) not give any person information other than in the ordinary course of business which might confer any advantage on that person or any potential investor;
- (j) when directed by the Agency, pay any costs incidental to the privatization of the enterprise relating to -

 - (i) valuation fees;
 - (ii) legal costs;

- (iii) advertising charges;
 - (iv) marketing expenses; and
 - (v) any other expense;
- (k) when directed by the Agency, disclose to the Agency or to the general public or to such other persons as the Agency shall direct such information about the enterprise as the Agency shall specify; and
- (l) refrain from taking any action or actions which may cause industrial unrest.
20. The Agency may employ the following modes of privatization:
- (a) public offering of shares;
 - (b) sale of shares through negotiated or competitive bids;
 - (c) sale of the assets and business of a State owned enterprise;
 - (d) management or employee buyouts by management or employees of a State owned enterprise;
 - (e) lease, management or concession contracts; or
 - (f) any other method the Agency may consider appropriate.

21. The Agency shall for each proposed privatization publish in at least [two] newspapers with a national circulation on at least [two] occasions not less than seven days apart, details of the method of privatization, the bidding terms and conditions (if appropriate) and the bid closing date.

22. (1) The valuation of a State owned enterprise or its assets shall be performed by independent valuers who shall issue a certificate of valuation to the Agency.

(2) The valuation of a State owned enterprise or its assets shall be done as follows:

(a) the valuation shall be based on the current value of the State owned enterprise or its assets as a going concern;

(b) where the enterprise or the assets are not a going concern, the valuation shall be based on net asset value; or

(c) any other prudent valuation method approved by the Agency.

(3) Net asset value shall be based on -

(a) the market value of real property as assessed by a real estate valuer;

(b) the depreciated replacement value of tangible assets other than real property; and

(c) the fair value of other assets.

23. Subject to the provisions of this Act or any statutory instrument made under it, any person, whether or not such person is a citizen of [name of country] or is formed under the laws of [name of country], shall be eligible to participate in a privatization.

24. No member or members of a committee or any employee or consultant or an associate of any such person shall participate directly or indirectly, in a privatization except through a public offer of shares.

25. (1) The Agency shall appoint a negotiating team for each privatization other than a public offering of shares.

(2) Each member of the negotiating team shall -

(a) have proper professional qualifications, experience and good business standing:

(b) take an oath of secrecy as prescribed by the Agency; and

(c) disclose to the Agency any personal or professional interest in the transaction before accepting the appointment.

26. The Agency shall publish by notice in the Gazette promptly following the settlement of each privatization transaction:

(a) the name of the State owned enterprise and a summary description of the transaction;

(b) the consultants advising the Agency on the transaction;

- (c) the name and address of the successful bidder; and
- (d) any other matters deemed appropriate.

PART VI

FINANCIAL AND OTHER PROVISIONS

27. (1) Any proceeds from completed privatizations shall be paid net of the costs of the transaction into a Privatization Revenue Account established by the Minister responsible for finance.

(2) With the prior approval of the Minister responsible for finance the proceeds of sale referred to in subsection (1) may be used for -

- (a) settling all or part of the liabilities of any State owned enterprise, including any such liabilities retained by the Government for the purposes of preparing such enterprise for privatization; or
- (b) funding the financial restructuring of State owned enterprises to be privatized; or
- (c) supporting redundancy payment schemes in consultation with the Minister responsible for labor; or
- (d) repaying official internal or external debt of [name of country].

28. (1) The funds of the Agency shall consist of such moneys as may -
- (a) be appropriated by Parliament for the purposes of the Agency;
 - (b) be paid to the Agency by way of grants or donations; or
 - (c) be retained by the Agency from the proceeds of privatization as may be approved by the Minister responsible for finance.
- (2) There shall be paid from the funds of the Agency -
- (a) the salaries and allowances of the staff of the Agency;
 - (b) such reasonable traveling, transport and other allowances for the members of the Agency or a committee of the Agency when engaged on the business of the Agency at such rates as the Agency may, with the approval of the Minister responsible for finance, determine; and
 - (c) any other expenses incurred by the Agency in the performance of its functions.
- (3) The Agency may invest in such manner as it thinks fit such of its funds as it does not immediately require for the performance of its functions.
29. The financial year of the Agency shall be the period of twelve months ending 31st December, in each year.
30. (1) The Agency shall cause to be kept proper books of account and other records relating to its financial affairs.

(2) The accounts of the Agency shall be audited annually by independent auditors appointed by the Agency.

(3) The auditors' fees shall be paid by the Agency.

31. (1) As soon as practicable, but not later than six months after the expiration of each financial year, the Agency shall submit to the Minister responsible for privatization a report concerning its activities during the financial year.

(2) The report referred to in subsection (1) shall include information on the financial affairs of the Agency and there shall be appended to the report -

(a) an audited balance sheet;

(b) an audited statement of income and expenditure; and

(c) such other information as the Agency may consider appropriate.

(3) The Minister responsible for privatization shall, not later than seven days after the first sitting of Parliament next after receipt of the report referred to in subsection (1) lay it before Parliament.

(4) The report shall be published for sale to the public.

32. The Minister responsible for privatization, on the advice of the Agency, may by statutory instrument prescribe -

- (a)* tender procedures;
- (b)* public flotation procedures;
- (c)* pre-qualification and registration of bidders procedures;
- (d)* public announcement requirements;
- (e)* any forms for the purpose of this Act;
- (f)* any fees payable in respect of any service provided by the Agency; and
- (g)* such other matters as are necessary or conducive to the carrying out of the purposes of this Act.