

## ACT 71

S.B. NO. 867

A Bill for an Act Relating to Corporations.

*Be It Enacted by the Legislature of the State of Hawaii:*

SECTION 1. Chapter 416, Hawaii Revised Statutes, is amended by adding two new sections to read as follows:

**Sec. 416-35 Indemnification of officers, directors, employees, and agents.**

(a) As used in this section, unless the context otherwise requires:

- (1) "Agent" means any person who is or was a director, officer, employee or other agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another foreign or domestic corporation, partnership, joint venture, trust or other enterprise, or was a director, officer, employee or agent of a foreign or domestic corporation which was a predecessor corporation of the corporation or of another enterprise at the request of such predecessor corporation.
- (2) "Expenses" includes, without limitation, attorneys' fees, and any expenses of establishing a right to indemnification under section 416-35(d) or section 416-35(e)(4).
- (3) "Proceeding" means any threatened, pending or completed action or proceeding, whether civil, criminal, administrative or investigative.

(b) A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any proceeding (other than an action by or in the right of the corporation) by reason of the fact that such person is or was an agent of the corporation, against expenses, judgments, fines, settlements and other amounts actually and reasonably incurred in connection with such proceeding if such person acted in good faith and in a manner such person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal proceeding, had no reasonable cause to believe the conduct of such person was unlawful. The termination of any proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which the person reasonably believed to be in or not opposed to the best interests of the corporation or that the person had reasonable cause to believe that the person's conduct was unlawful.

(c) A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action by or in the right of the corporation to procure a judgment in its favor by reason of the fact that such person is or was an agent of the corporation, against expenses actually and reasonably incurred by such person in connection with the defense or settlement of such action if such person acted in good faith and in a manner such person reasonably believed to be in or not opposed to the best interests of the corporation and, except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable for negligence or misconduct in the performance of such person's duty to the corporation unless and only to the

extent that the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which such court shall deem proper.

(d) To the extent that an agent has been successful on the merits or otherwise in defense of any proceeding referred to in section 416-35(b) or section 416-35(c), or in defense of any claim, issue or matter therein, the agent shall be indemnified by the corporation against expenses actually and reasonably incurred by the agent in connection therewith.

(e) Any indemnification under section 416-35(b) or section 416-35(c) shall be made by the corporation only as authorized in the specific case upon a determination that indemnification of the agent is proper in the circumstances because the agent has met the applicable standard of conduct set forth in section 416-35(b) or section 416-35(c). Such determination shall be made as follows:

- (1) by the board of directors by a majority vote of a quorum consisting of directors who were not parties to such proceeding; or
- (2) if such a quorum is not obtainable, or, even if obtainable a quorum of disinterested directors so directs, by independent legal counsel in a written opinion; or
- (3) by the stockholders; or
- (4) the court in which such proceeding is or was pending upon application made by the corporation or the agent or the attorney or other person rendering services in connection with the defense, whether or not such application by the agent, attorney or other person is opposed by the corporation.

(f) Expenses incurred in defending any proceeding may be paid by the corporation in advance of the final disposition of such proceeding upon receipt of an undertaking by or on behalf of the agent to repay such amount unless it shall ultimately be determined that the agent is entitled to be indemnified by the corporation as authorized in this section.

(g) The indemnification provided by this section shall not be deemed exclusive of any other rights to which those indemnified may be entitled under any bylaw, agreement, vote of stockholders or disinterested directors or otherwise, both as to action in a person's official capacity and as to action in another capacity while holding such office, and shall continue as to a person who has ceased to be an agent and shall inure to the benefit of the heirs, executors and administrators of such a person.

(h) A corporation shall have power to purchase and maintain insurance on behalf of any agent of the corporation, against any liability asserted against or incurred by the agent in any such capacity or arising out of the agent's status as such, whether or not the corporation would have the power to indemnify the agent against such liability under this section.

(i) This section does not apply to any proceeding against any trustee, investment manager or other fiduciary of an employee benefit plan in such person's capacity as such, even though such person may also be an agent of the employer corporation as defined in section 416-35(a). Nothing contained in this section shall limit any right to indemnification to which such a trustee,

investment manager or other fiduciary may be entitled by contract or otherwise.

**Sec. 416-82 Action by directors without a meeting.** Unless otherwise provided by the articles of incorporation or bylaws, any action required or permitted to be taken at any meeting of the directors or of a committee of the directors may be taken without a meeting if all of the directors or all of the members of the committee, as the case may be, sign written consent setting forth the action taken or to be taken at any time before or after the intended effective date of such action. Such consent shall be filed with the minutes of the directors' meetings or committee meetings, as the case may be, and shall have the same effect as a unanimous vote."

SECTION 2. Section 416-18, Hawaii Revised Statutes, is amended to read as follows:

**"Sec. 416-18 Officers.** The officers of a corporation for profit shall consist of a president, one or more vice-presidents as may be prescribed by the bylaws, a secretary, and a treasurer, each of whom shall be elected or appointed by the board of directors at such time and in such manner as may be prescribed by the bylaws. Such other officers and assistant officers and agents as may be deemed necessary may be elected or appointed by the board of directors or chosen in such other manner as may be prescribed by the bylaws. Any two or more offices may be held by the same person; provided that every corporation shall have not less than two persons as officers.

All officers and agents of the corporation, as between themselves and the corporation, shall have such authority and perform such duties in the management of the corporation as may be provided in the bylaws, or as may be determined by resolution of the board of directors not inconsistent with the bylaws."

SECTION 3. Section 416-26, Hawaii Revised Statutes, is amended to read as follows:

**"Sec. 416-26 Powers, express.** Every corporation created in the State shall have the following powers, in addition to any other powers set forth in or reasonably implied from its articles of association or charter, except as otherwise expressly limited or denied by its articles of association or charter:

- (1) To have succession by its corporate name for the period limited in its articles of association or charter, but not beyond the period, if any, limited by law, and when no period is limited, perpetually;
- (2) To sue and be sued in any court;
- (3) To make and use a common seal, and alter it at its pleasure;
- (4) To hold, purchase, and convey such property as the purposes of the corporation require, not exceeding the amount limited by its articles of association or charter if any limit is therein prescribed, and to mortgage, pledge, and hypothecate the same to secure any debt of the corporation;
- (5) To appoint such subordinate officers and agents as the business of the corporation requires;
- (6) To sell, convey, mortgage, pledge, lease, exchange, transfer, and other-

- wise dispose of all or any part of its property and assets;
- (7) To lend money to its employees, officers, and directors, and otherwise assist its employees, officers, and directors;
  - (8) To purchase, take, receive, subscribe for, or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, lend, pledge, or otherwise dispose of, and otherwise use and deal in and with, shares or other interests in, or obligations of, other domestic or foreign corporations, associations, partnerships, or individuals, or direct or indirect obligations of the United States or of any other government, state, territory, governmental district or municipality, or of any instrumentality thereof;
  - (9) To make contracts and guarantees and incur liabilities, borrow money at such rates of interest as the corporation may determine, issue its notes, bonds, and other obligations, and secure any of its obligations by mortgage or pledge of all or any of its property, franchises, and income;
  - (10) To lend money for its corporate purposes, invest and reinvest its funds, and take and hold real and personal property as security for the payment of funds so loaned or invested;
  - (11) To conduct its business, carry on its operations, and have offices and exercise the powers granted by this section in any state, territory, district, or possession of the United States, or in any foreign country;
  - (12) To elect or appoint officers and agents of the corporation, and define their duties and fix their compensation;
  - (13) To make and alter bylaws, not inconsistent with its articles of association or charter or with the laws of this State;
  - (14) To make donations for the public welfare or for charitable, scientific, or educational purposes, and in time of war to make donations in aid of war activities;
  - (15) In time of war to transact any lawful business in aid of the United States in the prosecution of the war;
  - (16) To pay pensions and establish pension plans, pension trusts, profit-sharing plans, stock bonus plans, stock option plans, and other incentive or benefit plans for any of its directors, officers and employees; and, to the extent permitted by applicable federal law, to indemnify and purchase and maintain insurance on behalf of any fiduciary of any employee benefit plan or trust maintained for the benefit of employees of the corporation or another corporation in which it owns shares.
  - (17) To cease its corporate activities and surrender its corporate franchise;
  - (18) To have and exercise all powers necessary or convenient to effect any or all of the purposes for which the corporation is organized."

SECTION 4. Section 416-72, Hawaii Revised Statutes, is amended to read as follows:

**"Sec. 416-72 Annual meeting.** A meeting of the stockholders or members of every corporation shall be held at least once each year following the year of

incorporation, unless this is dispensed with pursuant to unanimous consent under section 416-78. Meetings of stockholders or members may be held at such place within or without this State as may be stated in or fixed in accordance with the bylaws. If no other place is stated or so fixed, meetings shall be held at the principal office of the corporation within this State. Unless otherwise provided in the articles of association or charter of incorporation or bylaws, the annual meeting of the stockholders or members of every corporation, for the election of directors and the consideration of such other business as may come before the meeting, shall be held on the first Monday of April in each year, if not a legal holiday, and if a legal holiday, on the next secular day following."

SECTION 5. Section 416-79, Hawaii Revised Statutes, is amended to read as follows:

**"Sec. 416-79 Bylaws; corporation procedure.** The initial bylaws of a corporation shall be adopted by its board of directors or by the incorporators. The power to alter, amend or repeal the bylaws or adopt new bylaws, subject to repeal or change by action of the stockholders or members, shall be vested in the board of directors unless reserved to the stockholders or members by the articles of association or charter of incorporation. The bylaws may contain any provisions for the regulation and management of the affairs of the corporation not inconsistent with law or the articles of association or the charter of incorporation.

Every corporation shall keep in its principal office for the transaction of its business in the State the original or a copy of the bylaws as amended or otherwise altered to date, certified by the secretary or other proper officer, which shall be open to inspection by the stockholders or members at all reasonable times during office hours.

No person dealing with the corporation shall be charged with constructive notice of the bylaws."

SECTION 6. Statutory material to be repealed is bracketed. New material is underscored. In printing this Act, the revisor of statutes need not include the brackets, the bracketed material, or the underscoring.\*

SECTION 7. This Act shall take effect upon its approval.

(Approved May 10, 1977.)

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\*Edited accordingly.