



# Corporations Act 1989

No. 109, 1989

## Compilation No. 36

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This compilation is in 5 volumes

Volume 1: sections 1-82, Corporations Law sections 1-111J,  
Part 1.5—Small Business Guide

**Volume 2: section 82, Corporations Law sections 112-451D**

Volume 3: section 82, Corporations Law sections 459A-864

Volume 4: section 82, Corporations Law sections 865-1273

Volume 5: section 82, Corporations Law sections 1274-1493,  
Schedules 2-4 and Endnotes

Each volume has its own contents

**Section 82 of the *Corporations Act 1989* includes the Corporations Law.  
The Corporations Law appears in this compilation as part of the Act.**

Prepared by the Office of Parliamentary Counsel, Canberra

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## About this compilation

This is a compilation of the *Corporations Act 1989* that shows the text of the law as amended and in force on 24 November 2000 (the **compilation date**).

The notes at the end of this compilation (the **endnotes**) include information about amending laws and the amendment history of provisions of the compiled law.

### Uncommenced amendments

The effect of uncommenced amendments is not shown in the text of the compiled law. Any uncommenced amendments affecting the law are accessible on the Register ([www.legislation.gov.au](http://www.legislation.gov.au)). The details of amendments made up to, but not commenced at, the compilation date are underlined in the endnotes. For more information on any uncommenced amendments, see the Register for the compiled law.

### Application, saving and transitional provisions for provisions and amendments

If the operation of a provision or amendment of the compiled law is affected by an application, saving or transitional provision that is not included in this compilation, details are included in the endnotes.

### Editorial changes

For more information about any editorial changes made in this compilation, see the endnotes.

### Presentational changes

The *Legislation Act 2003* provides for First Parliamentary Counsel to make presentational changes to a compilation. Presentational changes are applied to give a more consistent look and feel to legislation published on the Register, and enable the user to more easily navigate those documents.

### Modifications

If the compiled law is modified by another law, the compiled law operates as modified but the modification does not amend the text of the law. Accordingly, this compilation does not show the text of the compiled law as modified. For more information on any modifications, see the Register for the compiled law.

### Self-repealing provisions

If a provision of the compiled law has been repealed in accordance with a provision of the law, details are included in the endnotes.

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*NOTE: Section 82 of the Corporations Act 1989 contains the Corporations Law. The material in this volume is a continuation of section 82 of the Corporations Act 1989 and the Corporations Law from the previous volume.*

## **Chapter 2A—Registering a company**

### **Part 2A.1—What companies can be registered**

#### **112 Types of companies**

##### *Types of companies*

- (1) The following types of companies can be registered under this Law:

Proprietary companies	Limited by shares
	Unlimited with share capital
Public companies	Limited by shares
	Limited by guarantee
	Unlimited with share capital
	No liability company

Note: Other types of companies that were previously allowed continue to exist under section 1413.

##### *No liability companies*

- (2) A company may be registered as a no liability company only if:
- (a) the company has a share capital; and
  - (b) the company's constitution states that its sole objects are mining purposes; and
  - (c) the company has no contractual right under its constitution to recover calls made on its shares from a shareholder who fails to pay them.

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Note 1: Section 9 defines *mining purposes* and *minerals*.

Note 2: Special provisions on no liability companies are found in the sections referred to in the following table:

No liability company provisions		
item	topic	sections
1	names	148, 156, 162
2	terms of issue of shares	254B
3	liability on partly-paid shares	254M
4	calls	254P-254R
5	winding up	477-478, 483, 514
6	registering a body as a company	610BA
7	transitional	1413

- (3) A no liability company must not engage in activities that are outside its mining purposes objects.
- (4) The directors of a no liability company must not:
- (a) let the whole or proportion of a mine or claim on tribute; or
  - (b) make any contract for working any land on tribute;
- unless:
- (c) the letting or contract is approved by a special resolution; or
  - (d) no such letting or contract has been made within the period of 2 years immediately preceding the proposed letting or contract.
- (5) An act or transaction is not invalid merely because of a contravention of subsection (3) or (4).

### 113 Proprietary companies

- (1) A company must have no more than 50 non-employee shareholders if it is to:
- (a) be registered as a proprietary company; or
  - (b) change to a proprietary company; or
  - (c) remain registered as a proprietary company.



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Note: Proprietary companies have different financial reporting obligations depending on whether they are small proprietary companies or large proprietary companies (see section 45A and Part 2M.3).

- (2) In applying subsection (1):
- (a) count joint holders of a particular parcel of shares as 1 person; and
  - (b) an employee shareholder is:
    - (i) a shareholder who is an employee of the company or of a subsidiary of the company; or
    - (ii) a shareholder who was an employee of the company, or of a subsidiary of the company, when they became a shareholder.
- (3) A proprietary company must not engage in any activity that would require disclosure to investors under Chapter 6D, except for an offer of its shares to:
- (a) existing shareholders of the company; or
  - (b) employees of the company or of a subsidiary of the company.
- (4) An act or transaction is not invalid merely because of a contravention of subsection (3).

Note: If a proprietary company contravenes this section, ASIC may require it to change to a public company (see section 165).

### **114 Minimum of 1 member**

A company needs to have at least 1 member.

### **115 Restrictions on size of partnerships and associations**

A person must not participate in the formation of a partnership or association which has as an object gain for itself or for any of its members and which either:

- (a) has more than 20 members; or
- (b) has more than the number of members it is allowed to have under an application order made by the Minister under Part 1.3;

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unless the partnership or association is incorporated or formed under an Australian law.

Note: For the effect of a contravention of this section, see section 103.

**116 Trade unions cannot be registered**

A trade union cannot be registered under this Law.

## Part 2A.2—How a company is registered

### 117 Applying for registration

#### *Lodging application*

- (1) To register a company, a person must lodge an application with ASIC.

Note: For the types of companies that can be registered, see section 112.

#### *Contents of the application*

- (2) The application must state the following:
  - (a) the type of company that is proposed to be registered under the Corporations Law of this jurisdiction
  - (b) the company's proposed name (unless the ACN is to be used in its name)
  - (c) the name and address of each person who consents to become a member
  - (d) the present given and family name, all former given and family names and the date and place of birth of each person who consents in writing to become a director
  - (e) the present given and family name, all former given and family names and the date and place of birth of each person who consents in writing to become a company secretary
  - (f) the address of each person who consents in writing to become a director or company secretary
  - (g) the address of the company's proposed registered office
  - (h) for a public company—the proposed opening hours of its registered office (if they are not the standard opening hours)
  - (j) the address of the company's proposed principal place of business (if it is not the address of the proposed registered office)

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- (k) for a company limited by shares or an unlimited company—the following:
  - (i) the number and class of shares each member agrees in writing to take up
  - (ii) the amount (if any) each member agrees in writing to pay for each share
  - (iii) if that amount is not to be paid in full on registration—the amount (if any) each member agrees in writing to be unpaid on each share
- (l) for a public company that is limited by shares or is an unlimited company, if shares will be issued for non-cash consideration—the prescribed particulars about the issue of the shares, unless the shares will be issued under a written contract and a copy of the contract is lodged with the application
- (m) for a company limited by guarantee—the proposed amount of the guarantee that each member agrees to in writing.

Note 1: Paragraph (b)—sections 147 and 152 deal with the availability and reservation of names.

Note 2: Paragraph (f)—the address that must be stated is usually the residential address, although an alternative address can sometimes be stated instead (see section 205D).

Note 3: Paragraph (g)—if the company is not to be the occupier of premises at the address of its registered office, the application must state that the occupier has consented to the address being specified in the application and has not withdrawn that consent (see section 100).

Note 4: Paragraph (h)—for *standard opening hours*, see section 9.

- (3) If the company is to be a public company and is to have a constitution on registration, a copy of the constitution must be lodged with the application.
- (4) The application must be in the prescribed form.
- (5) An applicant must have the consents and agreements referred to in subsection (2) when the application is lodged. After the company is registered, the applicant must give the consents and agreements to

the company. The company must keep the consents and agreements.

### **118 ASIC gives company ACN, registers company and issues certificate**

#### *Registration*

- (1) If an application is lodged under section 117, ASIC may:
  - (a) give the company an ACN; and
  - (b) register the company; and
  - (c) issue a certificate that states:
    - (i) the company's name; and
    - (ii) the company's ACN; and
    - (iii) the company's type; and
    - (iv) that the company is registered as a company under the Corporations Law of this jurisdiction; and
    - (v) the date of registration.

Note: For the evidentiary value of a certificate of registration, see subsection 1274(7A).

#### *ASIC must keep record of registration*

- (2) ASIC must keep a record of the registration. Subsections 1274(2) and (5) apply to the record as if it were a document lodged with ASIC.

### **119 Company comes into existence on registration**

A company comes into existence as a body corporate at the beginning of the day on which it is registered. The company's name is the name specified in the certificate of registration.

Note: The company remains in existence until it is deregistered (see Chapter 5A).

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**120 Members, directors and company secretary of a company**

- (1) A person becomes a member, director or company secretary of a company on registration if the person is specified in the application with their consent as a proposed member, director or company secretary of the company.
- (2) The shares to be taken up by the members as specified in the application are taken to be issued to the members on registration of the company.

Note: A member's name must be entered in the register of members (see section 169).

**121 Registered office**

The address specified in the application for registration for the company's proposed registered office becomes the address of the company's registered office on registration.

**122 Expenses incurred in promoting and setting up company**

The expenses incurred before registration in promoting and setting up a company may be paid out of the company's assets.

**123 Company may have common seal**

- (1) A company may have a common seal. If a company does have a common seal, the company must set out on it:
  - (a) for a company that has its ACN in its name—the company's name; or
  - (b) otherwise—the company's name, the expression "Australian Company Number" and the company's ACN.

Note 1: A company may make contracts and execute documents without using a seal (see sections 126 and 127).

Note 2: For abbreviations that can be used on a seal, see section 149.

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- (2) A company may have a duplicate common seal. The duplicate must be a copy of the common seal with the words “duplicate seal”, “share seal” or “certificate seal” added.
- (3) A person must not use, or authorise the use of, a seal that purports to be the common seal of a company or a duplicate if the seal does not comply with the requirements set out in subsection (1) or (2).

## Chapter 2B—Basic features of a company

### Part 2B.1—Company powers and how they are exercised

#### 124 Legal capacity and powers of a company

- (1) A company has the legal capacity and powers of an individual both in and outside this jurisdiction. A company also has all the powers of a body corporate, including the power to:
  - (a) issue and cancel shares in the company
  - (b) issue debentures (despite any rule of law or equity to the contrary, this power includes a power to issue debentures that are irredeemable, redeemable only if a contingency, however remote, occurs, or redeemable only at the end of a period, however long)
  - (c) grant options over unissued shares in the company
  - (d) distribute any of the company's property among the members, in kind or otherwise
  - (e) give security by charging uncalled capital
  - (f) grant a floating charge over the company's property
  - (g) arrange for the company to be registered or recognised as a body corporate in any place outside this jurisdiction
  - (h) do anything that it is authorised to do by any other law (including a law of a foreign country).

A company limited by guarantee does not have the power to issue shares.

Note: For a company's power to issue bonus, partly-paid, preference and redeemable preference shares, see section 254A.

- (2) A company's legal capacity to do something is not affected by the fact that the company's interests are not, or would not be, served by doing it.



### **125 Constitution may limit powers and set out objects**

- (1) If a company has a constitution, it may contain an express restriction on, or a prohibition of, the company's exercise of any of its powers. The exercise of a power by the company is not invalid merely because it is contrary to an express restriction or prohibition in the company's constitution.
- (2) If a company has a constitution, it may set out the company's objects. An act of the company is not invalid merely because it is contrary to or beyond any objects in the company's constitution.

### **126 Agent exercising a company's power to make contracts**

- (1) A company's power to make, vary, ratify or discharge a contract may be exercised by an individual acting with the company's express or implied authority and on behalf of the company. The power may be exercised without using a common seal.
- (2) This section does not affect the operation of a law that requires a particular procedure to be complied with in relation to the contract.

### **127 Execution of documents (including deeds) by the company itself**

- (1) A company may execute a document without using a common seal if the document is signed by:
  - (a) 2 directors of the company; or
  - (b) a director and a company secretary of the company; or
  - (c) for a proprietary company that has a sole director who is also the sole company secretary—that director.

Note: If a company executes a document in this way, people will be able to rely on the assumptions in subsection 129(5) for dealings in relation to the company.

- (2) A company with a common seal may execute a document if the seal is fixed to the document and the fixing of the seal is witnessed by:
  - (a) 2 directors of the company; or

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- (b) a director and a company secretary of the company; or
- (c) for a proprietary company that has a sole director who is also the sole company secretary—that director.

Note: If a company executes a document in this way, people will be able to rely on the assumptions in subsection 129(6) for dealings in relation to the company.

- (3) A company may execute a document as a deed if the document is expressed to be executed as a deed and is executed in accordance with subsection (1) or (2).
- (4) This section does not limit the ways in which a company may execute a document (including a deed).

## **Part 2B.2—Assumptions people dealing with companies are entitled to make**

### **128 Entitlement to make assumptions**

- (1) A person is entitled to make the assumptions in section 129 in relation to dealings with a company. The company is not entitled to assert in proceedings in relation to the dealings that any of the assumptions are incorrect.
- (2) A person is entitled to make the assumptions in section 129 in relation to dealings with another person who has, or purports to have, directly or indirectly acquired title to property from a company. The company and the other person are not entitled to assert in proceedings in relation to the dealings that any of the assumptions are incorrect.
- (3) The assumptions may be made even if an officer or agent of the company acts fraudulently, or forges a document, in connection with the dealings.
- (4) A person is not entitled to make an assumption in section 129 if at the time of the dealings they knew or suspected that the assumption was incorrect.

### **129 Assumptions that can be made under section 128**

#### *Constitution and replaceable rules complied with*

- (1) A person may assume that the company's constitution (if any), and any provisions of this Law that apply to the company as replaceable rules, have been complied with.

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*Director or company secretary*

- (2) A person may assume that anyone who appears, from information provided by the company that is available to the public from ASIC, to be a director or a company secretary of the company:
- (a) has been duly appointed; and
  - (b) has authority to exercise the powers and perform the duties customarily exercised or performed by a director or company secretary of a similar company.

*Officer or agent*

- (3) A person may assume that anyone who is held out by the company to be an officer or agent of the company:
- (a) has been duly appointed; and
  - (b) has authority to exercise the powers and perform the duties customarily exercised or performed by that kind of officer or agent of a similar company.

*Proper performance of duties*

- (4) A person may assume that the officers and agents of the company properly perform their duties to the company.

*Document duly executed without seal*

- (5) A person may assume that a document has been duly executed by the company if the document appears to have been signed in accordance with subsection 127(1). For the purposes of making the assumption, a person may also assume that anyone who signs the document and states next to their signature that they are the sole director and sole company secretary of the company occupies both offices.

*Document duly executed with seal*

- (6) A person may assume that a document has been duly executed by the company if:

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- (a) the company's common seal appears to have been fixed to the document in accordance with subsection 127(2); and
- (b) the fixing of the common seal appears to have been witnessed in accordance with that subsection.

For the purposes of making the assumption, a person may also assume that anyone who witnesses the fixing of the common seal and states next to their signature that they are the sole director and sole company secretary of the company occupies both offices.

*Officer or agent with authority to warrant that document is genuine or true copy*

- (7) A person may assume that an officer or agent of the company who has authority to issue a document or a certified copy of a document on its behalf also has authority to warrant that the document is genuine or is a true copy.
- (8) Without limiting the generality of this section, the assumptions that may be made under this section apply for the purposes of this section.

**130 Information available to the public from ASIC does not constitute constructive notice**

- (1) A person is not taken to have information about a company merely because the information is available to the public from ASIC.
- (2) Subsection (1) does not apply in relation to a document that has been lodged with ASIC to the extent that the document relates to a charge that is registrable under this Law.

## Part 2B.3—Contracts before registration

### 131 Contracts before registration

- (1) If a person enters into, or purports to enter into, a contract on behalf of, or for the benefit of, a company before it is registered, the company becomes bound by the contract and entitled to its benefit if the company, or a company that is reasonably identifiable with it, is registered and ratifies the contract:
  - (a) within the time agreed to by the parties to the contract; or
  - (b) if there is no agreed time—within a reasonable time after the contract is entered into.
  
- (2) The person is liable to pay damages to each other party to the pre-registration contract if the company is not registered, or the company is registered but does not ratify the contract or enter into a substitute for it:
  - (a) within the time agreed to by the parties to the contract; or
  - (b) if there is no agreed time—within a reasonable time after the contract is entered into.

The amount that the person is liable to pay to a party is the amount the company would be liable to pay to the party if the company had ratified the contract and then did not perform it at all.
  
- (3) If proceedings are brought to recover damages under subsection (2) because the company is registered but does not ratify the pre-registration contract or enter into a substitute for it, the court may do anything that it considers appropriate in the circumstances, including ordering the company to do 1 or more of the following:
  - (a) pay all or part of the damages that the person is liable to pay
  - (b) transfer property that the company received because of the contract to a party to the contract
  - (c) pay an amount to a party to the contract.

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- (4) If the company ratifies the pre-registration contract but fails to perform all or part of it, the court may order the person to pay all or part of the damages that the company is ordered to pay.

**132 Person may be released from liability but is not entitled to indemnity**

- (1) A party to the pre-registration contract may release the person from all or part of their liability under section 131 to the party by signing a release.
- (2) Despite any rule of law or equity, the person does not have any right of indemnity against the company in respect of the person's liability under this Part. This is so even if the person was acting, or purporting to act, as trustee for the company.

**133 This Part replaces other rights and liabilities**

This Part replaces any rights or liabilities anyone would otherwise have on the pre-registration contract.

## Part 2B.4—Replaceable rules and constitution

### 134 Internal management of companies

A company's internal management may be governed by provisions of this Law that apply to the company as replaceable rules, by a constitution or by a combination of both.

Note: There are additional rules about internal management in ordinary provisions of this Law and also in the common law.

### 135 Replaceable rules

*Companies to which replaceable rules apply*

- (1) A section or subsection (except subsection 129(1), this section and sections 140 and 141) whose heading contains the words:
  - (a) *replaceable rule*—applies as a replaceable rule to:
    - (i) each company that is registered after the commencement of this Part; and
    - (ii) any company registered before that commencement that repeals its constitution after that commencement; and
  - (b) *replaceable rule for proprietary companies and mandatory rule for public companies*—applies:
    - (i) as a replaceable rule to any proprietary company that is registered after the commencement of this Part; and
    - (ii) as a replaceable rule to any company that is registered after that commencement and that changes to a proprietary company (but only while it is a proprietary company); and
    - (iii) as a replaceable rule to any proprietary company registered before that commencement that repeals its constitution after that commencement; and
    - (iv) as an ordinary provision of this Law to any public company whenever registered.



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The section or subsection does not apply to a proprietary company while the same person is both its sole director and sole shareholder.

Note 1: See sections 198E, 201F and 202C for the special provisions that apply to a proprietary company while the same person is both its sole director and sole shareholder.

Note 2: A company may include in its constitution (by reference or otherwise) a replaceable rule that does not otherwise apply to it.

*Company's constitution can displace or modify replaceable rules*

- (2) A provision of a section or subsection that applies to a company as a replaceable rule can be displaced or modified by the company's constitution.

*Failure to comply with replaceable rules*

- (3) A failure to comply with the replaceable rules as they apply to a company is not of itself a contravention of this Law (so the provisions about criminal liability, civil liability and injunctions do not apply).

Note: Replaceable rules that apply to a company have effect as a contract (see section 140).

### **136 Constitution of a company**

- (1) A company adopts a constitution:
- (a) on registration—if each person specified in the application for the company's registration as a person who consents to become a member agrees in writing to the terms of a constitution before the application is lodged; or
  - (b) after registration—if the company passes a special resolution adopting a constitution or a court order is made under section 233 that requires the company to adopt the constitution.

Note 1: The memorandum and articles of a company immediately before the commencement of this Part are taken together to make up the company's constitution after commencement (see section 1414).

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Note 2: The *Life Insurance Act 1995* has rules about how benefit fund rules become part of a company's constitution and about amending those rules. They override this Law. Consequential amendments to the rest of the company's constitution can be made under that Act or this Law. See Subdivision 2 of Division 4 of Part 2A of that Act.

- (2) The company may modify or repeal its constitution, or a provision of its constitution, by special resolution.

Note: The company may need leave of the Court to modify or repeal its constitution if it was adopted as the result of a Court order (see subsection 233(3)).

- (3) The company's constitution may provide that the special resolution does not have any effect unless a further requirement specified in the constitution relating to that modification or repeal has been complied with.
- (4) Unless the constitution provides otherwise, the company may modify or repeal a further requirement described in subsection (3) only if the further requirement is itself complied with.
- (5) A public company must lodge with ASIC a copy of a special resolution adopting, modifying or repealing its constitution within 14 days after it is passed. The company must also lodge with ASIC within that period:
- (a) if the company adopts a constitution—a copy of that constitution; or
  - (b) if the company modifies its constitution—a copy of that modification.

This also applies to a proprietary company that has applied under Part 2B.7 to change to a public company, while its application has not yet been determined.

**137 Date of effect of adoption, modification or repeal of constitution**

If a new constitution is adopted or an existing constitution is modified or repealed, that adoption, modification or repeal takes effect:

- (a) if it is the result of a special resolution:

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- (i) on the date on which the resolution is passed if it specified no later date; or
- (ii) on a date specified in, or determined in accordance with, the resolution if the relevant date is later than the date on which the resolution is passed; or
- (b) if it is the result of a Court order made under section 233:
  - (i) on the date on which the order is made if it specifies no later date; or
  - (ii) on a date specified by the order.

**138 ASIC may direct company to lodge consolidated constitution**

ASIC may direct a company to lodge a consolidated copy of its constitution with ASIC.

**139 Company must send copy of constitution to member**

A company must send a copy of its constitution to a member of the company within 7 days if the member:

- (a) asks the company, in writing, for the copy; and
- (b) pays any fee (up to the prescribed amount) required by the company.

**140 Effect of constitution and replaceable rules**

- (1) A company's constitution (if any) and any replaceable rules that apply to the company have effect as a contract:
  - (a) between the company and each member; and
  - (b) between the company and each director and company secretary; and
  - (c) between a member and each other member;under which each person agrees to observe and perform the constitution and rules so far as they apply to that person.
- (2) Unless a member of a company agrees in writing to be bound, they are not bound by a modification of the constitution made after the date on which they became a member so far as the modification:

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- (a) requires the member to take up additional shares; or
- (b) increases the member's liability to contribute to the share capital of, or otherwise to pay money to, the company; or
- (c) imposes or increases restrictions on the right to transfer the shares already held by the member, unless the modification is made:
  - (i) in connection with the company's change from a public company to a proprietary company under Part 2B.7; or
  - (ii) to insert proportional takeover approval provisions into the company's constitution.

**141 Table of replaceable rules**

The following table sets out the provisions of this Law that apply as replaceable rules.

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<b>Provisions that apply as replaceable rules</b>		
<b>Directors</b>		
1	Company may appoint a director	201G
2	Alternate directors	225A
3	Powers of directors	226A
4	Executing negotiable instruments	226B
5	Managing director	226C
6	Delegation to committees	226D
8	Director may resign by giving written notice to company	227A
9	Director interested in contract with proprietary company	231(1A)
10	Remuneration of directors	236A
<b>Directors' meetings</b>		
10	Material interests—directors of proprietary companies	194
12	Calling directors' meetings	248C
13	Chairing directors' meetings	248E
14	Quorum at directors' meetings	248F
15	Passing of directors' resolutions	248G
<b>Meetings of members</b>		
16	Calling of meetings of members by a director	249C
17	Notice to joint members	249J(2)

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<b>Provisions that apply as replaceable rules</b>		
18	When notice by post or fax is given	249J(4)
19	Notice of adjourned meetings	249M
20	Quorum	249T
21	Chairing meetings of members	249U
22	Business at adjourned meetings	249W(2)
23	Who can appoint a proxy <i>[replaceable rule for proprietary companies only]</i>	249X
24	Proxy vote valid even if member dies, revokes appointment etc.	250C(2)
25	How many votes a member has	250E
26	Jointly held shares	250F
27	Objection to right to vote	250G
28	How voting is carried out	250J
29	When and how polls must be taken	250M
<b>Company secretary</b>		
30	Terms of office determined by directors	240(4A)
<b>Inspection of books</b>		
31	Company or directors may allow member to inspect books	247D
<b>Shares</b>		
32	Pre-emption for existing shareholders on issue of shares in proprietary company	254D
33	Other provisions about paying dividends	254U
34	Dividend rights for shares in proprietary companies	254W(2)
<b>Transfer of shares</b>		
35	Transmission of shares on death	1091AA
36	Transmission of shares on bankruptcy	1091AB
37	Transmission of shares on mental incapacity	1091B
38	Registration of transfers	1091D
39	Additional general discretion for directors of proprietary companies to refuse to register transfers	1091E
<b>Share capital</b>		
40	Capitalisation of profits	254S

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## Part 2B.5—Registered office and places of business

### 142 Registered office

- (1) A company must have a registered office in Australia.  
Communications and notices to the company may be addressed to its registered office.

Note: A document may be served on a company by leaving it at, or posting it to, the company's registered office (see subsection 109X(1)).

- (2) A company must lodge notice of a change of address of its registered office with ASIC not later than 14 days after the date on which the change occurs. The notice must be in the prescribed form.

Note: If the company is not to be the occupier of premises at the address of its new registered office, the notice must state that the occupier has consented to the address being specified in the notice and has not withdrawn that consent (see section 100).

- (3) A notice of change of address takes effect from the later of:
- (a) the 7th day after the notice was lodged; or
  - (b) a later day specified in the notice as the date from which the change is to take effect.

### 143 ASIC may change address of registered office to a director's address

- (1) A company that does not occupy the premises at the address of its registered office must be able to show to ASIC the occupier's written consent to the company's use of those premises as its registered office.

Note: ASIC can require the company to produce the consent (see section 100).

- (2) If ASIC becomes aware that the occupier of those premises:

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- (a) has not consented to the use of the premises as the address of the company's registered office; or
  - (b) has withdrawn the consent;
- ASIC may give written notice to a director of the company who resides in Australia that ASIC intends to change the address of the company's registered office to the director's address.
- (3) If ASIC is not notified of the address of the company's proposed new registered office under subsection 142(2) within 14 days after the notice under subsection (2) is sent, ASIC may change the address of the company's registered office to the director's address.

#### **144 Company's name must be displayed at registered office etc.**

- (1) A company must display its name prominently at every place at which the company carries on business and that is open to the public.
- (2) A public company must also display its name and the words "Registered Office" prominently at its registered office.

#### **145 Opening hours of registered office of public company**

- (1) The registered office of a public company must be open to the public:
  - (a) each business day from at least 10 am to 12 noon and from at least 2 pm to 4 pm; or
  - (b) at least 3 hours chosen by the company between 9 am and 5 pm each business day.
- (2) If the company chooses its own opening hours, the hours must be specified:
  - (a) if the company is to have its own opening hours from its registration—in the application for registration of the company under section 117; or
  - (b) if the company changes its opening hours after its registration—in the most recent notice of change of opening hours lodged with ASIC under subsection (3).

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- (3) The company must lodge notice of a change in the opening hours of its registered office with ASIC before the day on which a change occurs. The notice must be in the prescribed form.

**146 Change of address of principal place of business**

A company must lodge with ASIC notice of a change of the address of its principal place of business not later than 14 days after the date on which the change occurs. The notice must be in the prescribed form.



## **Part 2B.6—Names**

### **Division 1—Selecting and using a name**

#### **147 When a name is available**

*Name is available unless identical or unacceptable*

- (1) A name is available to a company unless the name is:
  - (a) identical (under rules set out in the regulations) to a name that is reserved or registered under this Law for another body; or
  - (b) identical (under rules set out in the regulations) to a name that is included on the national business names register in respect of another individual or body who is not the person applying to have the name; or
  - (c) unacceptable for registration under the regulations.

*Minister may consent to a name being available to a company*

- (2) The Minister may consent in writing to a name being available to a company even if the name is:
  - (a) identical to a name that is reserved or registered under this Law for another body; or
  - (b) unacceptable for registration under the regulations.
- (3) The Minister's consent may be given subject to conditions.

Note: If the company breaches a condition, ASIC may direct it to change its name under section 158.
- (4) The regulations may specify that a particular unacceptable name is available to a company if:
  - (a) a specified public authority, or an instrumentality or agency of the Crown in right of the Commonwealth, a State or the Capital Territory has consented to the company using or assuming the name; or

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- (b) the company is otherwise permitted to use or assume the name by or under:
  - (i) an Act of the Commonwealth, a State or the Capital Territory; or
  - (ii) a specified provision of an Act of the Commonwealth, a State or the Capital Territory.

The consent of the authority, instrumentality or agency may be given subject to conditions.

Note: If the consent is withdrawn, the company ceases to be permitted or the company breaches a condition, ASIC may direct it to change its name under section 158.

### 148 A company's name

*Company may use available name or ACN*

- (1) A company may have as its name:
  - (a) an available name; or
  - (b) the expression “Australian Company Number” followed by the company's ACN.

The name must also include the words required by subsection (2) or (3).

*Limited companies*

- (2) A limited public company must have the word “Limited” at the end of its name unless section 150 or 151 applies. A limited proprietary company must have the words “Proprietary Limited” at the end of its name.

*Unlimited proprietary companies*

- (3) An unlimited proprietary company must have the word “Proprietary” at the end of its name.

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*No liability companies*

- (4) A no liability company must have the words “No Liability” at the end of its name.

*Public companies with “Proprietary” included in their name*

- (5) A public company must not include the word “Proprietary” (or an abbreviation of it) in its name unless:
- (a) it was a public company before the commencement of this section; and
  - (b) the word “Proprietary” (or an abbreviation of it) was included in its name before that commencement.

**149 Acceptable abbreviations**

- (1) The abbreviations set out in the following table may be used:
- (a) instead of words that this Law requires to be part of a company’s name or to be included in a document or on a company’s common seal; and
  - (b) instead of words that are part of a company’s name; and
  - (c) with or without full stops.

<b>Acceptable abbreviations</b>		[operative table]
<b>Word</b>	<b>Abbreviation</b>	
1 Company	Co or Coy	
2 Proprietary	Pty	
3 Limited	Ltd	
4 No Liability	NL	
5 Australian	Aust	
6 Number	No	
7 and	&	
8 Australian Company Number	ACN	

- (2) If a company’s name includes any of these abbreviations, the word corresponding to the abbreviation may be used instead.

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**150 Exception to requirement for using “Limited” in name**

- (1) ASIC may register a company limited by guarantee without “Limited” in its name, or alter the registration of a company of that type by omitting “Limited” from its name, if its constitution:
  - (a) requires the company to pursue charitable purposes only and to apply its income in promoting those purposes; and
  - (b) prohibits the company making distributions to its members and paying fees to its directors; and
  - (c) requires the directors to approve all other payments the company makes to directors.
- (2) The company must notify ASIC as soon as practicable if any of those requirements or prohibitions in its constitution are not complied with or if its constitution is modified to remove any of those requirements or prohibitions.

**151 Exception to requirement for using “Limited” in name—pre-existing licences**

- (1) A licence in force immediately before the commencement of this section that allowed a company to omit “Limited” from its name continues in force subject to subsection (3).
- (2) The company must notify ASIC as soon as practicable if it:
  - (a) breaches a condition of the licence; or
  - (b) pursues objects or purposes that would have prevented it being granted the licence; or
  - (c) applies its profits or other income to promote objects or purposes that would have prevented it being granted the licence; or
  - (d) pays a dividend to its members; or
  - (e) modifies its constitution to allow it to do anything set out in paragraphs (a) to (d).
- (3) ASIC may revoke the company’s licence if the company does anything set out in paragraphs (2)(a) to (e).

### **152 Reserving a name**

- (1) A person may lodge an application in the prescribed form with ASIC to reserve a name for a company. If the name is available, ASIC must reserve it.

Note: For available names, see section 147.

- (2) The reservation lasts for 2 months from the date when the application was lodged. An applicant may ask ASIC in writing for an extension of the reservation during a period that the name is reserved, and ASIC may extend the reservation for 2 months.
- (3) ASIC must cancel a reservation if the applicant asks ASIC in writing to do so.

### **153 Using a name and ACN on documents**

- (1) A company must set out its name on all its public documents and negotiable instruments.
- (2) Subject to sections 154 and 155, if the company's ACN is not used in its name, the company must also set out with its name, or with 1 of the references to its name, the expression "Australian Company Number" followed by its ACN. If the company's name appears on 2 or more pages of the document or instrument, this must be done on the first of those pages.

Note 1: If a company has a common seal, its name and ACN must be set out on the seal (see section 123).

Note 2: A public company must display its name at its registered office. Every company must display its name at places at which the company carries on business and that are open to the public (see section 144).

Note 3: Section 149 provides that "ACN" is an acceptable abbreviation of "Australian Company Number".

### **154 Exception to requirement to have ACN on receipts**

A company does not have to set out the expression "Australian Company Number" followed by its ACN on a receipt (for example,

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a cash register receipt) that sets out information recorded in the machine that produced the receipt.

**155 Regulations may exempt from requirement to set out information on documents**

The regulations may exempt a specified company, or a class of companies, from the requirement in subsection 153(2) to set out information on its public documents and negotiable instruments. The exemption may relate to specified documents or instruments, or a class of documents or instruments.

**156 Carrying on business using “Limited”, “No Liability” or “Proprietary” in name**

A person must not carry on business under a name or title that:

- (a) has the words “Limited” or “No Liability” (or an abbreviation of those words) at the end; or
  - (b) includes the word “Proprietary” (or an abbreviation of it);
- unless allowed or required to do so under an Australian law.

## **Division 2—Changing a company's name**

### **157 Company changing its name**

- (1) If a company wants to change its name, it must:
  - (a) pass a special resolution adopting a new name; and
  - (b) lodge an application in the prescribed form with ASIC.

Note: The company may reserve a name before the resolution is passed or the application is lodged (see section 152).

- (2) The company must lodge a copy of the special resolution with ASIC within 14 days after it is passed.
- (3) If the proposed name is available, ASIC must change the company's name by altering the details of the company's registration to reflect the change. The change of name takes effect when ASIC alters the details of the company's registration.

Note: For available names, see section 147.

### **158 ASIC's power to direct company to change its name**

- (1) ASIC may direct a company in writing to change its name within 2 months if:
  - (a) the name should not have been registered; or
  - (b) the company has breached a condition under subsection 147(3) on the availability of the name; or
  - (c) a consent given under subsection 147(4) to use or assume the name has been withdrawn; or
  - (d) the company has breached a condition on a consent given under subsection 147(4); or
  - (e) the company ceases to be permitted to use or assume the name (as referred to in paragraph 147(4)(b)).
- (2) The company must comply with the direction within 2 months after being given it by doing everything necessary to change its name under section 157.

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- (3) If the company does not comply with subsection (2), ASIC may change the company's name to its ACN and any other words that section 148 requires, by altering the details of the company's registration to reflect the change.
- (4) A change of name under subsection (3) takes effect when ASIC alters the details of the company's registration.

**159 ASIC's power to include "Limited" in company's name**

- (1) ASIC may change a company's name so that it includes the word "Limited" by altering the details of the company's registration to reflect the change if:
  - (a) the company contravenes any of the requirements or prohibitions in its constitution referred to in subsection 150(1); or
  - (b) the company modifies its constitution to remove any of those requirements or prohibitions; or
  - (c) ASIC revokes a licence referred to in section 151 that applies to the company.
- (2) The change of name takes effect when ASIC alters the details of the company's registration.

**160 ASIC must issue new certificate if company's name changes**

If ASIC changes a company's name, it must give the company a new certificate of registration. The company's new name is the name specified in the certificate of registration issued under this section.

Note: For the evidentiary value of a certificate of registration, see subsection 1274(7A).

**161 Effect of name change**

- (1) A change of company name does not:
  - (a) create a new legal entity; or



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- (b) affect the company's existing property, rights or obligations;  
or
  - (c) render defective any legal proceedings by or against the  
company.
- (2) Any legal proceedings that could have been continued or begun by  
or against the company in its former name may be continued or  
begun by or against it in its new name.

## Part 2B.7—Changing company type

### 162 Changing company type

- (1) A company may change to a company of a different type as set out in the following table by:
- (a) passing a special resolution resolving to change its type; and
  - (b) complying with sections 163 and 164.

Allowed conversions		[operative table]
This type of company may change	to this type of company	
1	proprietary company limited by shares	unlimited proprietary company unlimited public company public company limited by shares
2	unlimited proprietary company	proprietary company limited by shares ( <i>but only if, within the last 3 years, it was not a limited company that became an unlimited company</i> ) public company limited by shares ( <i>but only if, within the last 3 years, it was not a limited company that became an unlimited company</i> )
3	public company limited by shares	unlimited public company unlimited public company unlimited proprietary company proprietary company limited by shares no liability company (see subsection (2))

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<b>Allowed conversions</b>		[operative table]
<b>This type of company may change</b>		<b>to this type of company</b>
4	company limited by guarantee	public company limited by shares unlimited public company proprietary company limited by shares unlimited proprietary company
5	unlimited public company	public company limited by shares ( <i>but only if, within the last 3 years, it was not a limited company that became an unlimited company</i> ) proprietary company limited by shares ( <i>but only if, within the last 3 years, it was not a limited company that became an unlimited company</i> ) unlimited proprietary company
6	public no liability company	public company limited by shares ( <i>but only if all the issued shares are fully paid up</i> ) proprietary company limited by shares ( <i>but only if all the issued shares are fully paid up</i> )

Note 1: A public company seeking to change to a proprietary company must comply with the requirements for proprietary companies set out in section 113.

Note 2: Other types of companies that were previously allowed can change type under section 1416.

- (2) A public company limited by shares may only convert to a no liability company if:
- (a) the company's constitution states that its sole objects are mining purposes; and

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- (b) under the constitution the company has no contractual right to recover calls made on its shares from a shareholder who fails to pay them; and
- (c) all the company's issued shares are fully paid up.

Note: Section 9 defines *mining purposes* and *minerals*.

- (3) The company must lodge a copy of the special resolution with ASIC within 14 days after it is passed.
- (4) A special resolution to change an unlimited company that has share capital to a company limited by shares may also provide that a specified portion of its uncalled share capital may only be called up if the company becomes an externally-administered body corporate.

### **163 Applying for change of type**

#### *Lodging application*

- (1) To change its type, a company must lodge an application with ASIC.

#### *Contents of the application*

- (2) The application must be accompanied by the following:
  - (a) a copy of:
    - (i) the special resolution that resolves to change the type of the company, specifies the new type and the company's new name (if a change of name is necessary); and
    - (ii) any other special resolution passed in connection with the change of type
  - (b) for a company limited by guarantee changing to a company limited by shares:
    - (i) a statement signed by the directors of the company that in their opinion the company's creditors are not likely to be materially prejudiced by the change of type and that sets out their reasons for that opinion; and

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- (ii) any special resolution dealing with an issue of shares according to section 167
- (c) for a company limited by shares or a company limited by guarantee changing to an unlimited company:
  - (i) an assent to the change of type in the prescribed form signed by all the members of the company; and
  - (ii) a statement signed by a director or a company secretary of the company that all the members of the company have signed the assent
- (d) for a proprietary company changing to a public company:
  - (i) a consolidated copy of the company's constitution (if any) as at the date of lodgment; and
  - (ii) a copy of each document (including an agreement or consent) or resolution that is necessary to ascertain the rights attached to issued or unissued shares of the company.

Note 1: The company must lodge a copy of any special resolution modifying its constitution passed after the application is lodged (see subsection 136(5)).

Note 2: The company must lodge information relating to any change of rights attached to its shares, or any division or conversion of its shares into new classes, occurring after the application is lodged (see section 246F).

*Company limited by guarantee to company limited by shares*

- (3) If shares will be issued to persons under paragraph 166(2)(c) on the change of type from a company limited by guarantee to a company limited by shares, the application must state:
  - (a) that the company has prepared a list that sets out the following details about each person to whom the shares will be issued:
    - (i) name and address
    - (ii) the number and class of shares the person will take up
    - (iii) the amount (if any) the person will pay for the shares
    - (iv) the amount (if any) that will be unpaid on the shares; and

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- (b) the number and class of shares those persons will take up; and
- (c) the amount (if any) those persons will pay for the shares; and
- (ca) the amount (if any) that will be unpaid on the shares; and
- (d) if the shares will be issued for non-cash consideration—the prescribed particulars about the issue of the shares, unless the shares will be issued under a written contract and a copy of the contract is lodged with the application; and
- (e) that each of those persons who is not a member of the company when the application is made consents in writing to the inclusion in the list of the details about them that are referred to in paragraph (a).

The shares may be issued to existing members only, to new members only or to existing and new members.

Note: An offer of shares associated with a proposed change of type may need disclosure to investors under Part 6D.2 (see sections 706, 707 and 708).

- (4) The application must be in the prescribed form.
- (5) The company must have the consents referred to in paragraph (3)(e) (if any) when the application is lodged. The company must keep the consents.

**164 ASIC changes type of company**

- (1) ASIC must give notice under subsection (3) that it intends to alter the details of the company's registration if:
  - (a) ASIC is satisfied that:
    - (i) the application complies with section 163; and
    - (ii) for an application by a company limited by guarantee to change to a company limited by shares—the company's creditors are not likely to be materially prejudiced by the change; and
  - (b) for an application by a company limited by guarantee to change to a company limited by shares that is accompanied by a copy of a special resolution dealing with an issue of

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shares according to section 167—ASIC is not of the opinion that the obligations that would attach to the shares are unreasonable compared with the obligations that attach to membership of the company limited by guarantee.

- (2) To make a decision under subparagraph (1)(a)(ii), ASIC may direct the company in writing to:
  - (a) notify some or all of its creditors of the proposed change in the way ASIC specifies; and
  - (b) invite those creditors to make submissions to ASIC.
- (3) The notice that ASIC intends to alter the details of the company's registration must be:
  - (a) included on ASIC database; and
  - (b) published in the *Gazette*.

The notice must also state that ASIC will alter the details of the company's registration 1 month after the notice has been published in the *Gazette* unless an order by a court or the Administrative Appeals Tribunal prevents it from doing so.
- (4) Subject to an order made by a court or the Administrative Appeals Tribunal within that month, after that month has passed ASIC must alter the details of the company's registration to reflect the company's new type.
- (5) A change of type under this section takes effect when ASIC alters the details of the company's registration. Despite subsection 246D(3) and section 246E, a special resolution passed in connection with the change of type also takes effect when ASIC alters the details of the company's registration.
- (6) ASIC must give the company a new certificate of registration after it alters the details of the company's registration. The company's name is the name specified in the certificate of registration issued under this section.

Note: For the evidentiary value of a certificate of registration, see subsection 1274(7A).

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- (7) If ASIC alters the details of a company's registration under subsection (4), a court is not to make an order reversing the alteration of the details of the company's registration.

Note: The Administrative Appeals Tribunal cannot review the change of the company's type once ASIC has issued a new certificate of registration to the company (see subsection 1274(7A) and paragraph 1317C(b)).

**165 ASIC may direct a proprietary company to change to a public company in certain circumstances**

- (1) ASIC may direct a proprietary company in writing to change to a public company within 2 months if it is satisfied that the company has contravened section 113 (requirements for proprietary companies).
- (2) The company must comply with the direction within 2 months after being given it by doing everything necessary to change to a public company under section 164.
- (3) If a proprietary company does not comply with subsection (2), ASIC may change the company from a proprietary to a public company by altering the details of the company's registration to reflect the company's new type.
- (4) A change of type under this section takes effect when ASIC alters the details of the company's registration.
- (5) ASIC must give the company a new certificate of registration after it alters the details of the company's registration under subsection (3). The company's name is the name specified in the certificate of registration issued under this section.

Note: For the evidentiary value of a certificate of registration, see subsection 1274(7A).

**166 Effect of change of type**

- (1) A change of type does not:
  - (a) create a new legal entity; or



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- (b) affect the company's existing property, rights or obligations (except as against the members of the company in their capacity as members); or
  - (c) render defective any legal proceedings by or against the company or its members.
- (2) On the change of type of a company from a company limited by guarantee to a company limited by shares:
- (a) the liability of each member and past member as a guarantor on the winding up of the company is extinguished; and
  - (b) the members cease to be members of the company; and
  - (c) if shares are to be issued to a person as specified in the list referred to in subsection 163(3):
    - (i) the shares are taken to be issued to that person; and
    - (ii) the person is taken to have consented to be a member of the company; and
    - (iii) the person becomes a member of the company.

Note: The company must maintain a register of members that complies with subsection 169(3).

**167 Issue of shares by company or holding company—company limited by guarantee changing to company limited by shares**

- (1) If:
- (a) a company limited by guarantee changes type under this Part to a company limited by shares; and
  - (b) that company, or another company that beneficially owns all the shares in that company, issues shares to a person who was a member of that company immediately before the change of type took effect;
- the person becomes a member of the company issuing the shares if:
- (c) the issue of the shares is in accordance with the special resolution that accompanied the application to change type under subparagraph 163(2)(a)(ii); and
  - (d) the shares are fully paid up; and

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- (e) the business, assets and liabilities of the issuing company (together with its subsidiaries) when the shares are issued are substantially the same as the business, assets and liabilities of the company changing type (together with its subsidiaries) immediately before the change of type took effect.
- (2) If shares are issued according to this section, a court is not to make an order reversing the issue of the shares.

## Chapter 2C—Registers

### 167A Who is covered by this Chapter

- (1) This Chapter covers:
  - (a) all companies; and
  - (b) all registered schemes.
- (2) A registered scheme's responsible entity:
  - (a) must perform the obligations imposed under this Chapter in respect of the scheme; and
  - (b) may exercise the powers given by this Chapter in respect of the scheme.

### 168 Registers to be maintained

- (1) A company or registered scheme must set up and maintain:
  - (a) a register of members (see section 169); and
  - (b) if the company or scheme grants options over unissued shares or interests—a register of option holders and copies of options documents (see section 170); and
  - (c) if the company issues debentures—a register of debenture holders (see section 171).

Note 1: See also section 271 (register of charges).

Note 2: The registers may be kept on computer (see section 1306).

- (2) For the purposes of this Chapter, choses in action (including an undertaking) that fall into one of the exceptions in paragraphs (a), (b), (e) and (f) of the definition of *debenture* in section 9 must also be entered into the register of debenture holders.

### 169 Register of members

- (1) *General requirements*

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The register of members must contain the following information about each member:

- (a) the member's name and address
- (b) the date on which the entry of the member's name in the register is made.

(2) *Index to register*

If the company or scheme has more than 50 members, the company or scheme must include in the register an up-to-date index of members' names. The index must be convenient to use and allow a member's entry in the register to be readily found. A separate index need not be included if the register itself is kept in a form that operates effectively as an index.

(3) *Companies with share capital*

If the company has a share capital, the register must also show:

- (a) the date on which every allotment of shares takes place; and
- (b) the number of shares in each allotment; and
- (c) the shares held by each member; and
- (d) the class of shares; and
- (e) the share numbers (if any), or share certificate numbers (if any), of the shares; and
- (f) the amount unpaid on the shares (if any).

Note 1: Transfers of shares are entered in the register under section 1092. Section 1091C deals with the registration of trustees etc. on the death, incapacity or bankruptcy of the shareholder.

Note 2: For the treatment of joint holders see subsection (8).

(4) The register does not have to show the amount unpaid on the shares (see paragraph (1)(f)) if:

- (a) all of the company's shares were issued before Schedule 2 of the *Company Law Review Act 1997* commenced; and
- (b) the register continues to show the par values of the shares as they were immediately before that commencement.

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- (5) The register does not have to show the amount unpaid on the shares (see paragraph (1)(f)) if:
- (a) all of the company's shares were issued before Schedule 5 of the *Company Law Review Act 1998* commenced; and
  - (b) the register continues to show amount of unpaid par value for the shares as they were immediately before that commencement.

(5) *Non-beneficial ownership—companies other than listed companies*

The register of a company that:

- (a) has a share capital; and
- (b) is not a listed company;

must indicate any shares that a member does not hold beneficially.

Note: See also section 1096A (in particular, subsection 1096A(9) which contains relevant presumptions about beneficial ownership).

- (6) In deciding for the purposes of subsection (5) whether a member holds shares beneficially or non-beneficially, the company is to have regard only to information in notices given to the company under section 1096A, 672B or 672C.

*Registered schemes*

- (6A) The register of a registered scheme must also show:
- (a) the date on which every issue of interests takes place; and
  - (b) the number of interests in each issue; and
  - (c) the interests held by each member; and
  - (d) the class of interests; and
  - (e) the amount paid, or agreed to be considered as paid, on the interests.

(7) *Former members*

A register of members must also show:

- (a) the name and details of each person who stopped being a member of the company or scheme within the last 7 years; and

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(b) the date on which the person stopped being a member.  
The company or scheme may keep these entries separately from the rest of the register.

*Joint holders*

- (8) For the purposes of this section:
- (a) 2 or more persons who jointly hold shares in the company or interests in the scheme are taken to be a single member of the company or scheme in relation to those shares or interests; and
  - (b) 2 or more persons who have given a guarantee jointly are taken to be a single member of the company.

They may also be members of the company or scheme because of shares or interests that they hold, or a guarantee that they have given, in their own right or jointly with others.

**170 Register of option holders and copies of options documents**

- (1) The register of option holders must contain the following information about each holder of options over unissued shares in the company or unissued interests in the scheme:
- (a) the option holder's name and address
  - (b) the date on which the entry of the option holder's name in the register is made
  - (c) the date of grant of the options
  - (d) the number and description of the shares or interests over which the options were granted
  - (e) either:
    - (i) the period during which the options may be exercised; or
    - (ii) the time at which the options may be exercised
  - (f) any event that must happen before the options can be exercised
  - (g) any consideration for the grant of the options

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- (h) any consideration for the exercise of the options or the method by which that consideration is to be determined.  
 Because it is a register of the holders of options that are still exercisable, the register must be updated whenever options are exercised or expire.
- (2) Information about the grant of an option must be entered in the register within 14 days after the grant of the option.
- (3) *Copies of options documents*
- The company or scheme must keep with the register a copy of every document that grants an option over unissued shares or interests unless the option has been granted official quotation by a securities exchange.
- (4) The company or scheme must change the register to reflect the transfer of an option only if the person transferring the option gives the company or scheme written notice of the transfer.
- (5) A failure to comply with this section in relation to an option does not affect the option itself.

**171 Register of debenture holders**

- (1) The register of debenture holders must contain the following information about each holder of a debenture:
- (a) the debenture holder's name and address
  - (b) the amount of the debentures held.
- Note: See subsection 168(2) for the coverage of *debenture*.
- (2) A company's failure to comply with this section in relation to a debenture does not affect the debenture itself.

**172 Location of registers**

- (1) A register kept under this Chapter that relates to a company must be kept at:
- (a) the company's registered office; or

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- (b) the company's principal place of business in Australia; or
  - (c) a place in Australia (whether of the company or of someone else) where the work involved in maintaining the register is done; or
  - (d) another place in Australia approved by ASIC.
- (1A) A register kept under this Chapter that relates to a registered scheme must be kept at:
- (a) the responsible entity's registered office; or
  - (b) an office at the responsible entity's principal place of business; or
  - (c) an office (whether of the responsible entity or of someone else) where the work involved in maintaining the register is done; or
  - (d) another office approved by ASIC.
- The office must be in Australia.

(2) *Notice to ASIC*

The company or scheme must lodge with ASIC a notice of the address at which the register is kept within 7 days after the register is:

- (a) established at an office that is neither the registered office, nor at the principal place of business, of the company or responsible entity; or
- (b) moved from one place to another.

Notice is not required for moving the register between the registered office and the principal place of business.

## 173 Right to inspect and get copies

(1) *Right to inspect*

A company or registered scheme must allow anyone to inspect a register kept under this Chapter. If the register is not kept on a computer, the person inspects the register itself. If the register is kept on a computer, the person inspects a hard copy of the



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information on the register unless the person and the company or the responsible entity agree that the person can access the information by computer.

Note: Other provisions that are relevant to the inspection of registers are:

- section 1300 (place and times for inspection)
- section 1301 (the location of documents that are kept on computers)
- section 1306 (form and evidentiary value).

(2) *Inspection fees*

A member of a company or a registered scheme, a registered option holder or a registered debenture holder may inspect a register kept under this Chapter without charge. Other people may inspect the register only on payment of any fee (up to the prescribed amount) required by the company or scheme.

(3) *Right to get copies*

The company or scheme must give a person a copy of the register (or a part of the register) within 7 days if the person:

- (a) asks for the copy; and
- (b) pays any fee (up to the prescribed amount) required by the company or scheme.

ASIC may allow a longer period to comply with the request. If the register is kept on a computer and the person asks for the data on floppy disk, the company or scheme must give the data to the person on floppy disk. The data must be readable but the floppy disk need not be formatted for the person's preferred operating system.

- (4) A person has the same rights to inspect, and obtain copies of, the documents kept under subsection 170(3) as the person has in respect of the register of option holders itself.
- (5) The company is not required under subsection (1) or (3) to allow a person to see, or to give a person a copy that contains, share certificate numbers.

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(6) *ASIC power in relation to register of debenture holders*

ASIC may exempt a company from complying with subsections (1) and (3) in relation to information in a register of debenture holders about debentures that are not convertible into shares or options over unissued shares.

(7) The exemption:

- (a) must be in writing; and
- (b) may be general or limited; and
- (c) may be subject to conditions specified in the exemption.

(8) ASIC must publish a copy of the exemption in the *Gazette*.

(9) A person must not contravene a condition of the exemption.

(10) On application by ASIC, the Court may order a person who contravenes a condition of the exemption to comply with the condition.

### 174 Agent's obligations

A person who agrees to maintain a register on behalf of a company or registered scheme for the purposes of this Chapter must:

- (a) make the register available for inspection under this Chapter; and
- (b) provide the copies required by this Chapter.

### 175 Correction of registers

(1) A company or registered scheme or a person aggrieved may apply to the Court to have a register kept by the company or scheme under this Chapter corrected.

(2) If the Court orders the company or scheme to correct the register, it may also order the company or scheme to compensate a party to the application for loss or damage suffered.

(3) If:

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- (a) the Court orders a company or scheme to correct its register of members; and
  - (b) the company or scheme has lodged a list of its members with ASIC;
- the company or scheme must lodge notice of the correction with ASIC.

**176 Evidentiary value of registers**

In the absence of evidence to the contrary, a register kept under this Chapter is proof of the matters shown in the register under this Chapter.

**177 Use of information on registers**

- (1) A person must not:
  - (a) use information about a person obtained from a register kept under this Chapter to contact or send material to the person; or
  - (b) disclose information of that kind knowing that the information is likely to be used to contact or send material to the person;
 unless that use or disclosure of the information is:
  - (c) relevant to the holding of the interests recorded in the register or the exercise of the rights attaching to them; or
  - (d) approved by the company or scheme.

Note: An example of using information to send material to a person is putting a person's name and address on a mailing list for advertising material.

- (2) A person who contravenes subsection (1) is liable to compensate anyone else who suffers loss or damage because of the contravention.
- (3) A person who makes a profit from a contravention of subsection (1) owes a debt to the company or the scheme. The amount of the debt is the amount of the profit.

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- (4) If a person owes a debt under subsection (3) to the scheme:
  - (a) the debt may be recovered by the responsible entity as a debt due to it; and
  - (b) any amount paid or recovered in respect of the debt forms part of the scheme property.

**178 Overseas branch registers**

- (1) A company may keep a branch register of members at a place outside Australia.
- (2) If a company keeps an overseas branch register under subsection (1):
  - (a) the company must keep the branch register in the same manner as this Law requires the company to keep the register kept under section 169 (the *principal register*); and
  - (b) the company must enter in the principal register the details contained in the branch register; and
  - (c) the company must distinguish shares that are registered in the branch register from the shares registered in the principal register.

## **Chapter 2D—Officers and employees**

### **Part 2D.1—Duties and powers**

#### **179 Background to duties of directors, other officers and employees**

- (1) This Part sets out some of the most significant duties of directors, secretaries, other officers and employees of corporations. Other duties are imposed by other provisions of this Law and other laws (including the general law).
- (2) Section 9 defines both *director* and *officer*. *Officer* includes, as well as directors and secretaries, some other people who manage the corporation or its property (such as receivers and liquidators).

## Division 1—General duties

### 180 Care and diligence—civil obligation only

#### *Care and diligence—directors and other officers*

- (1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
  - (a) were a director or officer of a corporation in the corporation's circumstances; and
  - (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

Note: This subsection is a civil penalty provision (see section 1317E).

#### *Business judgment rule*

- (2) A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:
  - (a) make the judgment in good faith for a proper purpose; and
  - (b) do not have a material personal interest in the subject matter of the judgment; and
  - (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and
  - (d) rationally believe that the judgment is in the best interests of the corporation.

The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.

Note: This subsection only operates in relation to duties under this section and their equivalent duties at common law or in equity (including the duty of care that arises under the common law principles governing liability for negligence)—it does not operate in relation to duties under any other provision of this Law or under any other laws.

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(3) In this section:

***business judgment*** means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.

### **181 Good faith—civil obligations**

*Good faith—directors and other officers*

- (1) A director or other officer of a corporation must exercise their powers and discharge their duties:
- (a) in good faith in the best interests of the corporation; and
  - (b) for a proper purpose.

Note 1: This subsection is a civil penalty provision (see section 1317E).

Note 2: Section 187 deals with the situation of directors of wholly-owned subsidiaries.

- (2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Note 1: Section 79 defines *involved*.

Note 2: This subsection is a civil penalty provision (see section 1317E).

### **182 Use of position—civil obligations**

*Use of position—directors, other officers and employees*

- (1) A director, secretary, other officer or employee of a corporation must not improperly use their position to:
- (a) gain an advantage for themselves or someone else; or
  - (b) cause detriment to the corporation.

Note: This subsection is a civil penalty provision (see section 1317E).

- (2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Note 1: Section 79 defines *involved*.

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Note 2: This subsection is a civil penalty provision (see section 1317E).

**183 Use of information—civil obligations**

*Use of information—directors, other officers and employees*

- (1) A person who obtains information because they are, or have been, a director or other officer or employee of a corporation must not improperly use the information to:
- (a) gain an advantage for themselves or someone else; or
  - (b) cause detriment to the corporation.

Note 1: This duty continues after the person stops being an officer or employee of the corporation.

Note 2: This subsection is a civil penalty provision (see section 1317E).

- (2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Note 1: Section 79 defines *involved*.

Note 2: This subsection is a civil penalty provision (see section 1317E).

**184 Good faith, use of position and use of information—criminal offences**

*Good faith—directors and other officers*

- (1) A director or other officer of a corporation commits an offence if they:
- (a) are reckless; or
  - (b) are intentionally dishonest;
- and fail to exercise their powers and discharge their duties:
- (c) in good faith in the best interests of the corporation; or
  - (d) for a proper purpose.

Note: Section 187 deals with the situation of directors of wholly-owned subsidiaries.



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*Use of position—directors, other officers and employees*

- (2) A director, other officer or employee of a corporation commits an offence if they use their position dishonestly:
- (a) with the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation; or
  - (b) recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage, or in causing detriment to the corporation.

*Use of information—directors, other officers and employees*

- (3) A person who obtains information because they are, or have been, a director or other officer or employee of a corporation commits an offence if they use the information dishonestly:
- (a) with the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation; or
  - (b) recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage, or in causing detriment to the corporation.

**185 Interaction of sections 180 to 184 with other laws etc.**

Sections 180 to 184:

- (a) have effect in addition to, and not in derogation of, any rule of law relating to the duty or liability of a person because of their office or employment in relation to a corporation; and
- (b) do not prevent the commencement of civil proceedings for a breach of a duty or in respect of a liability referred to in paragraph (a).

This section does not apply to subsections 180(2) and (3) to the extent to which they operate on the duties at common law and in equity that are equivalent to the requirements of subsection 180(1).

### **186 Territorial application of sections 180 to 184**

Sections 180 to 184 do not apply to an act or omission by a director or other officer or employee of a foreign company unless the act or omission occurred in connection with:

- (a) the foreign company carrying on business in Australia; or
- (b) an act that the foreign company does, or proposes to do, in Australia; or
- (c) a decision by the foreign company whether or not to do, or refrain from doing, an act in Australia.

### **187 Directors of wholly-owned subsidiaries**

A director of a corporation that is a wholly-owned subsidiary of a body corporate is to be taken to act in good faith in the best interests of the subsidiary if:

- (a) the constitution of the subsidiary expressly authorises the director to act in the best interests of the holding company; and
- (b) the director acts in good faith in the best interests of the holding company; and
- (c) the subsidiary is not insolvent at the time the director acts and does not become insolvent because of the director's act.

### **188 Responsibility of secretaries and directors for certain contraventions**

#### *Secretary's functions*

- (1) A secretary of a company contravenes this subsection if the company contravenes:
  - (a) section 142 (requirement for companies to have registered office); or
  - (b) section 145 (requirement for registered office of public company to be open to public); or
  - (c) section 345 (annual returns); or

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(d) section 205B (lodgment of notices with ASIC).

Note: See section 203C for the circumstances in which a company must have a secretary.

*Consequence if director of proprietary company without secretary does not fulfil secretary's function*

- (2) Each director of a proprietary company contravenes this subsection if:
- (a) the proprietary company contravenes section 142, 145, 205B or 345; and
  - (b) the proprietary company does not have a secretary when it contravenes that section.

*Defence*

- (3) A person does not contravene subsection (1) or (2) if they show that they took all reasonable steps to ensure that the company complied with the section.

### **189 Reliance on information or advice provided by others**

If:

- (a) a director relies on information, or professional or expert advice, given or prepared by:
  - (i) an employee of the corporation whom the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned; or
  - (ii) a professional adviser or expert in relation to matters that the director believes on reasonable grounds to be within the person's professional or expert competence; or
  - (iii) another director or officer in relation to matters within the director's or officer's authority; or
  - (iv) a committee of directors on which the director did not serve in relation to matters within the committee's authority; and

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- (b) the reliance was made:
    - (i) in good faith; and
    - (ii) after making an independent assessment of the information or advice, having regard to the director's knowledge of the corporation and the complexity of the structure and operations of the corporation; and
  - (c) the reasonableness of the director's reliance on the information or advice arises in proceedings brought to determine whether a director has performed a duty under this Part or an equivalent general law duty;
- the director's reliance on the information or advice is taken to be reasonable unless the contrary is proved.

**190 Responsibility for actions of delegate**

- (1) If the directors delegate a power under section 198D, a director is responsible for the exercise of the power by the delegate as if the power had been exercised by the directors themselves.
- (2) A director is not responsible under subsection (1) if:
  - (a) the director believed on reasonable grounds at all times that the delegate would exercise the power in conformity with the duties imposed on directors of the company by this Law and the company's constitution (if any); and
  - (b) the director believed:
    - (i) on reasonable grounds; and
    - (ii) in good faith; and
    - (iii) after making proper inquiry if the circumstances indicated the need for inquiry;that the delegate was reliable and competent in relation to the power delegated.

## **Division 2—Disclosure of, and voting on matters involving, material personal interests**

### **191 Material personal interest—director’s duty to disclose**

*Director’s duty to notify other directors of material personal interest when conflict arises*

- (1) A director of a company who has a material personal interest in a matter that relates to the affairs of the company must give the other directors notice of the interest unless subsection (2) says otherwise.
- (2) The director does not need to give notice of an interest under subsection (1) if:
  - (a) the interest:
    - (i) arises because the director is a member of the company and is held in common with the other members of the company; or
    - (ii) arises in relation to the director’s remuneration as a director of the company; or
    - (iii) relates to a contract the company is proposing to enter into that is subject to approval by the members and will not impose any obligation on the company if it is not approved by the members; or
    - (iv) arises merely because the director is a guarantor or has given an indemnity or security for all or part of a loan (or proposed loan) to the company; or
    - (v) arises merely because the director has a right of subrogation in relation to a guarantee or indemnity referred to in subparagraph (iv); or
    - (vi) relates to a contract that insures, or would insure, the director against liabilities the director incurs as an officer of the company (but only if the contract does not make the company or a related body corporate the insurer); or

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- (vii) relates to any payment by the company or a related body corporate in respect of an indemnity permitted under section 199A or any contract relating to such an indemnity; or
- (viii) is in a contract, or proposed contract, with, or for the benefit of, or on behalf of, a related body corporate and arises merely because the director is a director of the related body corporate; or
- (b) the company is a proprietary company and the other directors are aware of the nature and extent of the interest and its relation to the affairs of the company; or
- (c) all the following conditions are satisfied:
  - (i) the director has already given notice of the nature and extent of the interest and its relation to the affairs of the company under subsection (1)
  - (ii) if a person who was not a director of the company at the time when the notice under subsection (1) was given is appointed as a director of the company—the notice is given to that person
  - (iii) the nature or extent of the interest has not materially increased above that disclosed in the notice; or
- (d) the director has given a standing notice of the nature and extent of the interest under section 192 and the notice is still effective in relation to the interest.

Note: Subparagraph (c)(ii)—the notice may be given to the person referred to in this subparagraph by someone other than the director to whose interests it relates (for example, by the secretary).

- (3) The notice required by subsection (1) must:
  - (a) give details of:
    - (i) the nature and extent of the interest; and
    - (ii) the relation of the interest to the affairs of the company; and
  - (b) be given at a directors' meeting as soon as practicable after the director becomes aware of their interest in the matter.

The details must be recorded in the minutes of the meeting.

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*Effect of contravention by director*

- (4) A contravention of this section by a director does not affect the validity of any act, transaction, agreement, instrument, resolution or other thing.

*Section does not apply to single director proprietary company*

- (5) This section does not apply to a proprietary company that has only 1 director.

**192 Director may give other directors standing notice about an interest**

*Power to give notice*

- (1) A director of a company who has an interest in a matter may give the other directors standing notice of the nature and extent of the interest in the matter in accordance with subsection (2). The notice may be given at any time and whether or not the matter relates to the affairs of the company at the time the notice is given.

Note: The standing notice may be given to the other directors before the interest becomes a material personal interest.

- (2) The notice under subsection (1) must:
- (a) give details of the nature and extent of the interest; and
  - (b) be given:
    - (i) at a directors' meeting (either orally or in writing); or
    - (ii) to the other directors individually in writing.

The standing notice is given under subparagraph (b)(ii) when it has been given to every director.

*Standing notice must be tabled at meeting if given to directors individually*

- (3) If the standing notice is given to the other directors individually in writing, it must be tabled at the next directors' meeting after it is given.

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*Nature and extent of interest must be recorded in minutes*

- (4) The director must ensure that the nature and extent of the interest disclosed in the standing notice is recorded in the minutes of the meeting at which the standing notice is given or tabled.

*Dates of effect and expiry of standing notice*

- (5) The standing notice:
- (a) takes effect as soon as it is given; and
  - (b) ceases to have effect if a person who was not a director of the company at the time when the notice was given is appointed as a director of the company.

A standing notice that ceases to have effect under paragraph (b) commences to have effect again if it is given to the person referred to in that paragraph.

Note: The notice may be given to the person referred to in paragraph (b) by someone other than the director to whose interests it relates (for example, by the secretary).

*Effect of material increase in nature or extent of interest*

- (6) The standing notice ceases to have effect in relation to a particular interest if the nature or extent of the interest materially increases above that disclosed in the notice.

*Effect of contravention by director*

- (7) A contravention of this section by a director does not affect the validity of any act, transaction, agreement, instrument, resolution or other thing.

**193 Interaction of sections 191 and 192 with other laws etc.**

Sections 191 and 192 have effect in addition to, and not in derogation of:

- (a) any general law rule about conflicts of interest; and



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- (b) any provision in a company's constitution (if any) that restricts a director from:
  - (i) having a material personal interest in a matter; or
  - (ii) holding an office or possessing property;involving duties or interests that conflict with their duties or interests as a director.

**194 Voting and completion of transactions—directors of proprietary companies** (*replaceable rule—see section 135*)

If a director of a proprietary company has a material personal interest in a matter that relates to the affairs of the company and:

- (a) under section 191 the director discloses the nature and extent of the interest and its relation to the affairs of the company at a meeting of the directors; or
- (b) the interest is one that does not need to be disclosed under section 191;

then:

- (c) the director may vote on matters that relate to the interest; and
- (d) any transactions that relate to the interest may proceed; and
- (e) the director may retain benefits under the transaction even though the director has the interest; and
- (f) the company cannot avoid the transaction merely because of the existence of the interest.

If disclosure is required under section 191, paragraphs (e) and (f) apply only if the disclosure is made before the transaction is entered into.

Note: A director may need to give notice to the other directors if the director has a material personal interest in a matter relating to the affairs of the company (see section 191).

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**195 Restrictions on voting—directors of public companies only**

*Restrictions on voting and being present*

- (1) A director of a public company who has a material personal interest in a matter that is being considered at a directors' meeting must not:
  - (a) be present while the matter is being considered at the meeting; or
  - (b) vote on the matter;unless:
  - (c) subsection (2) or (3) allows the director to be present; or
  - (d) the interest does not need to be disclosed under section 191.

*Participation with approval of other directors*

- (2) The director may be present and vote if directors who do not have a material personal interest in the matter have passed a resolution that:
  - (a) identifies the director, the nature and extent of the director's interest in the matter and its relation to the affairs of the company; and
  - (b) states that those directors are satisfied that the interest should not disqualify the director from voting or being present.

*Participation with ASIC approval*

- (3) The director may be present and vote if they are so entitled under a declaration or order made by ASIC under section 196.

*Director may consider or vote on resolution to deal with matter at general meeting*

- (4) If there are not enough directors to form a quorum for a directors' meeting because of subsection (1), 1 or more of the directors (including those who have a material personal interest in that matter) may call a general meeting and the general meeting may pass a resolution to deal with the matter.

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*Effect of contravention by director*

- (5) A contravention by a director of:
- (a) this section; or
  - (b) a condition attached to a declaration or order made by ASIC under section 196;
- does not affect the validity of any resolution.

**196 ASIC power to make declarations and class orders**

*ASIC's power to make specific declarations*

- (1) ASIC may declare in writing that a director of a public company who has a material personal interest in a matter that is being, or is to be, considered at a directors' meeting may, despite the director's interest, be present while the matter is being considered at the meeting, vote on the matter, or both be present and vote. However, ASIC may only make the declaration if:
- (a) the number of directors entitled to be present and vote on the matter would be less than the quorum for a directors' meeting if the director were not allowed to vote on the matter at the meeting; and
  - (b) the matter needs to be dealt with urgently, or there is some other compelling reason for the matter being dealt with at the directors' meeting, rather than by a general meeting called under subsection 195(4).
- (2) The declaration may:
- (a) apply to all or only some of the directors; or
  - (b) specify conditions that the company or director must comply with.

*ASIC's power to make class orders*

- (3) ASIC may make an order in writing that enables directors who have a material personal interest in a matter to be present while the matter is being considered at a directors' meeting, vote on that matter, or both be present and vote. The order may be made in

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**Part 2D.1** Duties and powers

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respect of a specified class of public companies, directors, resolutions or interests.

- (4) The order may be expressed to be subject to conditions.
- (5) Notice of the making, revocation or suspension of the order must be published in the *Gazette*.

## **Division 3—Duty to discharge certain trust liabilities**

### **197 Directors liable for debts and other obligations incurred by corporation as trustee**

- (1) A person who is a director of a corporation when it incurs a liability while acting, or purporting to act, as trustee, is liable to discharge the whole or a part of the liability if the corporation:
  - (a) has not, and cannot, discharge the liability or that part of it; and
  - (b) is not entitled to be fully indemnified against the liability out of trust assets.

This is so even if the trust does not have enough assets to indemnify the trustee. The person is liable both individually and jointly with the corporation and anyone else who is liable under this subsection.

- (2) The person is not liable under subsection (1) if the person would be entitled to have been fully indemnified by 1 of the other directors against the liability had all the directors of the corporation been trustees when the liability was incurred.
- (3) This section does not apply to a liability incurred outside Australia by a foreign company.

## Division 4—Powers

### 198A Powers of directors (*replaceable rule—see section 135*)

- (1) The business of a company is to be managed by or under the direction of the directors.

Note: See section 198E for special rules about the powers of directors who are the single director/shareholder of proprietary companies.

- (2) The directors may exercise all the powers of the company except any powers that this Law or the company's constitution (if any) requires the company to exercise in general meeting.

Note: For example, the directors may issue shares, borrow money and issue debentures.

### 198B Negotiable instruments (*replaceable rule—see section 135*)

- (1) Any 2 directors of a company that has 2 or more directors, or the director of a proprietary company that has only 1 director, may sign, draw, accept, endorse or otherwise execute a negotiable instrument.
- (2) The directors may determine that a negotiable instrument may be signed, drawn, accepted, endorsed or otherwise executed in a different way.

### 198C Managing director (*replaceable rule—see section 135*)

- (1) The directors of a company may confer on a managing director any of the powers that the directors can exercise.
- (2) The directors may revoke or vary a conferral of powers on the managing director.

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### **198D Delegation**

- (1) Unless the company's constitution provides otherwise, the directors of a company may delegate any of their powers to:
  - (a) a committee of directors; or
  - (b) a director; or
  - (c) an employee of the company; or
  - (d) any other person.

Note: The delegation must be recorded in the company's minute book (see section 251A).

- (2) The delegate must exercise the powers delegated in accordance with any directions of the directors.
- (3) The exercise of the power by the delegate is as effective as if the directors had exercised it.

### **198E Single director/shareholder proprietary companies**

#### *Powers of director*

- (1) The director of a proprietary company who is its only director and only shareholder may exercise all the powers of the company except any powers that this Law or the company's constitution (if any) requires the company to exercise in general meeting. The business of the company is to be managed by or under the direction of the director.

Note: For example, the director may issue shares, borrow money and issue debentures.

#### *Negotiable instruments*

- (2) The director of a proprietary company who is its only director and only shareholder may sign, draw, accept, endorse or otherwise execute a negotiable instrument. The director may determine that a negotiable instrument may be signed, drawn, accepted, endorsed or otherwise executed in a different way.

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**198F Right of access to company books**

*Right while director*

- (1) A director of a company may inspect the books of the company (other than its financial records) at all reasonable times for the purposes of a legal proceeding:
  - (a) to which the person is a party; or
  - (b) that the person proposes in good faith to bring; or
  - (c) that the person has reason to believe will be brought against them.

Note: Section 290 gives the director a right of access to financial records.

*Right during 7 years after ceasing to be director*

- (2) A person who has ceased to be a director of a company may inspect the books of the company (including its financial records) at all reasonable times for the purposes of a legal proceeding:
  - (a) to which the person is a party; or
  - (b) that the person proposes in good faith to bring; or
  - (c) that the person has reason to believe will be brought against them.

This right continues for 7 years after the person ceased to be a director of the company.

*Right to take copies*

- (3) A person authorised to inspect books under this section for the purposes of a legal proceeding may make copies of the books for the purposes of those proceedings.

*Company not to refuse access*

- (4) A company must allow a person to exercise their rights to inspect or take copies of the books under this section.



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*Interaction with other rules*

- (5) This section does not limit any right of access to company books that a person has apart from this section.

## Part 2D.2—Restrictions on indemnities, insurance and termination payments

### Division 1—Indemnities and insurance for officers and auditors

#### 199A Indemnification and exemption of officer or auditor

*Exemptions not allowed*

- (1) A company or a related body corporate must not exempt a person (whether directly or through an interposed entity) from a liability to the company incurred as an officer or auditor of the company.

*When indemnity for liability (other than for legal costs) not allowed*

- (2) A company or a related body corporate must not indemnify a person (whether by agreement or by making a payment and whether directly or through an interposed entity) against any of the following liabilities incurred as an officer or auditor of the company:
  - (a) a liability owed to the company or a related body corporate
  - (b) a liability for a pecuniary penalty order under section 1317G or a compensation order under section 1317H
  - (c) a liability that is owed to someone other than the company or a related body corporate and did not arise out of conduct in good faith.

This subsection does not apply to a liability for legal costs.

*When indemnity for legal costs not allowed*

- (3) A company or related body corporate must not indemnify a person (whether by agreement or by making a payment and whether directly or through an interposed entity) against legal costs

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incurred in defending an action for a liability incurred as an officer or auditor of the company if the costs are incurred:

- (a) in defending or resisting proceedings in which the person is found to have a liability for which they could not be indemnified under subsection (2); or
- (b) in defending or resisting criminal proceedings in which the person is found guilty; or
- (c) in defending or resisting proceedings brought by ASIC or a liquidator for a court order if the grounds for making the order are found by the court to have been established; or
- (d) in connection with proceedings for relief to the person under this Law in which the Court denies the relief.

Paragraph (c) does not apply to costs incurred in responding to actions taken by ASIC or a liquidator as part of an investigation before commencing proceedings for the court order.

Note 1: Paragraph (c)—This includes proceedings by ASIC for an order under section 206C, 206D or 206E (disqualification), section 232 (oppression), section 1317E, 1317G or 1317H (civil penalties) or section 1324 (injunction).

Note 2: The company may be able to give the person a loan or advance in respect of the legal costs (see section 212).

- (4) For the purposes of subsection (3), the outcome of proceedings is the outcome of the proceedings and any appeal in relation to the proceedings.

**199B Insurance premiums for certain liabilities of director, secretary, other officer or auditor**

A company or a related body corporate must not pay, or agree to pay, a premium for a contract insuring a person who is or has been an officer or auditor of the company against a liability (other than one for legal costs) arising out of:

- (a) conduct involving a wilful breach of duty in relation to the company; or
- (b) a contravention of section 182 or 183.

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This section applies to a premium whether it is paid directly or through an interposed entity.

**199C Certain indemnities, exemptions, payments and agreements not authorised and certain documents void**

- (1) Sections 199A and 199B do not authorise anything that would otherwise be unlawful.
- (2) Anything that purports to indemnify or insure a person against a liability, or exempt them from a liability, is void to the extent that it contravenes section 199A or 199B.

## **Division 2—Termination payments**

### **200A When benefit given in connection with retirement from office**

- (1) For the purposes of this Division:
  - (a) a benefit is given in connection with a person's retirement from an office if the benefit is given:
    - (i) by way of compensation for, or otherwise in connection with, the loss by the person of the office; or
    - (ii) in connection with the person's retirement from the office; and
  - (b) giving a benefit includes:
    - (i) if the benefit is a payment—making the payment; and
    - (ii) if the benefit is an interest in property—transferring the interest; and
  - (c) a person gives a benefit even if the person is obliged to give the benefit under a contract; and
  - (d) a pension or lump sum is paid or payable in connection with the person's retirement from an office if the pension or lump sum is paid or payable:
    - (i) by way of compensation for, or otherwise in connection with, the loss by the person of the office; or
    - (ii) in connection with the person's retirement from the office; and
  - (e) retirement from an office includes:
    - (i) loss of the office; and
    - (ii) resignation from the office; and
    - (iii) death of a person at a time when they hold the office.
- (2) For the purposes of this Division, if:
  - (a) a person (***person A***) gives another person a benefit (***benefit A***); and
  - (b) person A gives benefit A for the purpose, or for purposes including the purpose, of enabling or assisting someone to

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give a person a benefit in connection with the retirement of a person (*person B*) from an office;  
person A is taken to give benefit A in connection with the person B's retirement from that office.

**200B Retirement benefits generally need membership approval**

*Benefits in connection with retirement from board or managerial office*

- (1) The following must not give a person a benefit in connection with that person's, or someone else's, retirement from a board or managerial office in a company, or a related body corporate, without member approval under section 200E:
- (a) the company
  - (b) an associate of the company (other than a body corporate that is related to the company and is itself a company)
  - (c) a prescribed superannuation fund in relation to the company.

Note 1: Sections 200F, 200G and 200H provide for exceptions to this rule.

Note 2: Section 9 defines *board or managerial office*.

*Prescribed superannuation funds*

- (2) For the purposes of this section:
- (a) a superannuation fund is taken to be a prescribed superannuation fund in relation to a company if the company, or an associate of the company, gives a benefit to the superannuation fund in prescribed circumstances; and
  - (b) if a prescribed superannuation fund in relation to a company gives a benefit to another superannuation fund in prescribed circumstances, the other superannuation fund is taken to be a prescribed superannuation fund in relation to the company.

*Prescribed circumstances*

- (3) For the purposes of this section, if:

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- (a) a company, or an associate of a company, gives a benefit to a superannuation fund solely for the purpose of enabling or assisting the superannuation fund to give to a person a benefit in connection with a person's retirement from an office in the company or a related body corporate; or
  - (b) a superannuation fund gives a benefit to another superannuation fund solely for the purpose of enabling or assisting the other superannuation fund to give to a person a benefit in connection with a person's retirement from an office in a company or a related body corporate;
- the benefit first referred to in paragraph (a) or (b) is taken to be given in prescribed circumstances.
- (4) In this section:

*superannuation fund* means a provident, benefit, superannuation or retirement fund.

**200C Benefits on transfer of undertaking or property need membership approval**

A person must not give a benefit to a person who:

- (a) holds, or has at any previous time held, a board or managerial office in a company or a related body corporate; or
- (b) is the spouse of a person referred to in paragraph (a); or
- (c) is a relative of a person referred to in paragraph (a) or of the spouse of such a person; or
- (d) is an associate of a person referred to in paragraph (a) or the spouse of an associate of such a person;

in connection with the transfer of the whole or any part of the undertaking or property of the company without member approval under section 200E.

Note: Section 9 defines *board or managerial office*.

**200D Contravention to receive benefit without member approval**

A person who:

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- (a) holds, or has at any previous time held, a board or managerial office in a company or related body corporate; or
  - (b) is the spouse of a person referred to in paragraph (a); or
  - (c) is a relative of a person referred to in paragraph (a) or of the spouse of such a person; or
  - (d) is an associate of a person referred to in paragraph (a) or the spouse of an associate of such a person;
- must not receive a benefit if the giving of the benefit contravenes section 200B or 200C.

Note: Section 9 defines *board or managerial office*.

**200E Approval by members**

- (1) If section 200B or 200C requires member approval for giving a person a benefit, it must be approved by a resolution passed at a general meeting of:
  - (a) the company; and
  - (b) if the company is a subsidiary of a listed domestic corporation—the listed corporation; and
  - (c) if the company has a holding company that:
    - (i) is a domestic corporation that is not listed; and
    - (ii) is not itself a subsidiary of a domestic corporation—the holding company.
- (2) Details of the benefit must be set out in, or accompany, the notice of the meeting at which the resolution is to be considered. The details must include:
  - (a) if the proposed benefit is a payment:
    - (i) the amount of the payment; or
    - (ii) if that amount cannot be ascertained at the time of the disclosure—the manner in which that amount is to be calculated and any matter, event or circumstance that will, or is likely to, affect the calculation of that amount; and
  - (b) otherwise:
    - (i) the money value of the proposed prescribed benefit; or



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- (ii) if that value cannot be ascertained at the time of the disclosure—the manner in which that value is to be calculated and any matter, event or circumstance that will, or is likely to, affect the calculation of that value.

These requirements are in addition to, and not in derogation of, any other law that requires disclosure to be made with respect to giving or receiving a benefit.

- (3) The approval extends to the giving of another benefit to the person if:
  - (a) the other benefit is given to the person instead of the proposed benefit; and
  - (b) the amount or money value of the benefit is less than the amount or money value of the proposed benefit.
- (4) The approval does not relieve a director of a body corporate from any duty to the body corporate (whether under section 180, 181, 182, 183 or 184 or otherwise and whether of a fiduciary nature or not) in connection with the giving of the benefit.

**200F Exempt benefits and benefits given in certain circumstances**

Subsection 200B(1) does not apply to:

- (a) a benefit given in connection with a person's retirement from an office in relation to a company if the benefit is:
  - (i) given under an agreement entered into before 1 January 1991 if giving the benefit in accordance with the agreement would have been lawful if the benefit were given when the agreement was entered into; or
  - (ii) a genuine payment by way of damages for breach of contract; or
  - (iii) given to the person under an agreement made between the company and the person before the person became the holder of the office as the consideration, or part of the consideration, for the person agreeing to hold the office; or

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- (iv) a payment made in respect of leave of absence to which the person is entitled under an industrial instrument; or
- (b) a benefit given in prescribed circumstances.

**200G Genuine payments of pension and lump sum**

- (1) Subsection 200B(1) does not apply to a benefit if:
  - (a) the benefit is a payment in connection with a person's retirement from a board or managerial office (the *relevant office*) in a company or a related body corporate; and
  - (b) the payment is for past services the person rendered to:
    - (i) the company; or
    - (ii) a related body corporate; or
    - (iii) a body that was a related body corporate of the company when the past services were rendered; and
  - (c) the value of the benefit, when added to the value of all other payments (if any) already made or payable in connection with the person's retirement from board or managerial offices in the company and related bodies corporate does not exceed the payment limit set by subsection (1A).

In applying paragraph (c), disregard any pensions or lump sums that section 200F applies to.

- (2) The payment limit is:
  - (a) the amount worked out under subsection (3) if the person:
    - (i) was an eligible employee in relation to the company at the time when the person retired from the relevant office; and
    - (ii) has been an eligible employee in relation to the company throughout a period (the *relevant period*), or throughout periods totalling a period (also the *relevant period*), of more than 3 years; or
  - (b) otherwise—the total remuneration of the person from the company and related bodies corporate during the period of 3 years ending when the person retired from the relevant office.

Note: Section 9 defines *remuneration*.

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- (3) The amount worked out under this subsection is the amount worked out using the formula:

$$\frac{\text{Total remuneration} \times \text{Relevant period}}{3}$$

where:

**total remuneration** is the amount of the total remuneration of the person from the company and related bodies corporate during the last 3 years of the relevant period.

**relevant period** is the number of years in the relevant period or 7, whichever is the lesser number.

- (4) In determining for the purposes of paragraph (1)(c) the value of a pension or lump sum payment, disregard any part of the pension or lump sum payment that is attributable to:
- (a) a contribution made by the person; or
  - (b) a contribution made by a person other than:
    - (i) the company; or
    - (ii) a body corporate (a **relevant body corporate**) that is a related body corporate of the company, or that was, when the contribution was made, such a related body corporate; or
    - (iii) an associate of the company, or of a relevant body corporate, in respect of:
      - (A) the payment of the pension, or the making of the lump sum payment, as the case may be; or
      - (B) the making of the contribution.
- (5) For the purposes of subparagraph (2)(a), a person is taken to have been an eligible employee in relation to a company at a particular time if:
- (a) the person was a genuine full-time employee of the company at that time; or
  - (b) the person was a genuine full-time employee of a body corporate at that time and the body corporate was related to the company at that time.

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(6) In this section:

*payment* means a payment by way of pension or lump sum and includes a superannuation, retiring allowance, superannuation gratuity or similar payment.

**200H Benefits required by law**

Subsection 200B(1) does not apply to a benefit given by a person if failure to give the benefit would constitute a contravention of a law in force in Australia or elsewhere (otherwise than because of breach of contract or breach of trust).

**200J Benefits to be held in trust for company**

- (1) If giving a benefit to a person contravenes section 200B, then:
  - (a) if the benefit is a payment—the amount of the payment; or
  - (b) otherwise—the money value of the prescribed benefit;is taken to be received by the person in trust for the company concerned.
- (2) Subsection (1) applies to the whole of the amount of a payment or of the money value of the benefit even though giving the benefit would not have contravened section 200B if that amount or value of the benefit had been less.

## **Part 2D.3—Appointment, remuneration and cessation of appointment of directors**

### **Division 1—Appointment of directors**

#### **201A Minimum number of directors**

*Proprietary companies*

- (1) A proprietary company must have at least 1 director. That director must ordinarily reside in Australia.

*Public companies*

- (2) A public company must have at least 3 directors (not counting alternate directors). At least 2 directors must ordinarily reside in Australia.

#### **201B Who can be a director**

- (1) Only an individual who is at least 18 may be appointed as a director of a company.
- (2) A person who is disqualified from managing corporations under Part 2D.6 may only be appointed as director of a company if the appointment is made with permission granted by ASIC under section 206F or leave granted by the Court under section 206G.

#### **201C Directors of public companies, or subsidiaries, over 72**

- (1) A person who has turned 72 may only be appointed or act as a director of:
  - (a) a public company; or
  - (b) a company that is a subsidiary of a public company;if authorised to do so under this section.

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- (2) A person may act as a director of a company during the period that:
    - (a) starts on the day on which they turn 72; and
    - (b) ends at the conclusion of the AGM beginning next after that day.
  - (3) The office of a director of a public company, or of a subsidiary of a public company, becomes vacant at the conclusion of the AGM of the public company, or the subsidiary, beginning next after the director turns 72.
  - (4) If a proprietary company is a subsidiary of a public company:
    - (a) subsection (3) does not apply to it; and
    - (b) a person may continue to act as a director of the proprietary company until the next AGM of the public company after the person turns 72; and
    - (c) the person's office of director becomes vacant at the end of that meeting.
- Note: Proprietary companies do not need to hold annual general meetings (see section 250N).
- (5) An act done by a person as a director is valid even if it is afterwards discovered that they had turned 72 at the time when they were appointed or that their appointment had terminated under subsection (3) or (4).
  - (6) If the office of a director has become vacant under subsection (3) or (4), no provision for the automatic re-appointment of retiring directors in default of another appointment applies in relation to that director.
  - (7) If a vacancy created under subsection (3) or (4) is not filled at the meeting at which the office became vacant, the office may be filled as a casual vacancy.
  - (8) Subject to subsections (9) and (10), a person who has turned 72 may by special resolution be appointed or re-appointed as a director of that company to hold office until the conclusion of the company's next AGM company if:

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- (a) the resolution states the person's age; and
  - (b) the notice of meeting states that the person is a candidate for election who has turned 72 and states the person's age.
- (9) If the company is a subsidiary of a public company, the appointment or re-appointment referred to in subsection (8) does not have effect unless:
- (a) the person appointed or re-appointed is a director of the public company; or
  - (b) the appointment or re-appointment of the person as a director of the company has been approved by a special resolution of the public company and the notice of meeting states that the person is a candidate for election as a director of the company who has turned 72 and states the person's age.
- (10) If the subsidiary is a proprietary company:
- (a) the person may be appointed or re-appointed as a director of the subsidiary until the end of the next AGM of the holding company; and
  - (b) the appointment does not need a resolution under subsection (8); and
  - (c) the appointment must satisfy either paragraph (9)(a) or (b).
- (11) If:
- (a) the constitution of a company limited by guarantee provides for the holding of postal ballots for the election of a director or directors; and
  - (b) a postal ballot for the election of a director or directors is held and in the ballot:
    - (i) the members entitled to vote have been given notice in writing by the company stating that a candidate for election has turned 72 and stating the age of the candidate; and
    - (ii) that candidate is elected by a majority of not less than 75% of the members who, being entitled to vote, vote in the ballot;

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that candidate may be appointed or re-appointed as a director to hold office until the conclusion of the next AGM of the company.

- (12) If:
- (a) the constitution of a company limited by guarantee provides for the election or appointment of a director or directors otherwise than by members at a general meeting or by postal ballot of members; and
  - (b) ASIC declares in writing that this section does not apply to the company or its directors;
- then, subject to the conditions (if any) that ASIC specifies in the declaration, this section does not so apply.
- (13) A vacancy in the office of a director occurring under subsection (3) or (4) is not to be taken into account in determining when other directors are to retire.
- (14) Nothing in this section limits, or affects the operation of, any provision of a company's constitution that prevents any person from being appointed as a director or requiring any director to vacate their office at any age less than 72 years.

**201D Consent to act as director**

- (1) A company contravenes this subsection if a person does not give the company a signed consent to act as a director of the company before being appointed.
- (2) The company must keep the consent.

**201E Special rules for the appointment of public company directors**

- (1) A resolution passed at a general meeting of a public company appointing or confirming the appointment of 2 or more directors is void unless:
  - (a) the meeting has resolved that the appointments or confirmations may be voted on together; and
  - (b) no votes were cast against the resolution.



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- (2) This section does not affect:
- (a) a resolution to appoint directors by an amendment to the company's constitution (if any); or
  - (b) a ballot or poll to elect 2 or more directors if the ballot or poll does not require members voting for 1 candidate to vote for another candidate.
- (3) For the purposes of paragraph (2)(b), a ballot or poll does not require a member to vote for a candidate merely because the member is required to express a preference among individual candidates in order to cast a valid vote.

**201F Special rules for the appointment of directors for single director/single shareholder proprietary companies**

- (1) The director of a proprietary company who is its only director and only shareholder may appoint another director by recording the appointment and signing the record.

*Appointment of new director on death, mental incapacity or bankruptcy*

- (2) If a person who is the only director and the only shareholder of a proprietary company:
- (a) dies; or
  - (b) cannot manage the company because of the person's mental incapacity;
- and a personal representative or trustee is appointed to administer the person's estate or property, the personal representative or trustee may appoint a person as the director of the company.
- (3) If:
- (a) the office of the director of a proprietary company is vacated under subsection 206B(3) or (4) because of the bankruptcy of the director; and
  - (b) the person is the only director and the only shareholder of the company; and

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- (c) a trustee in bankruptcy is appointed to the person's property; the trustee may appoint a person as the director of the company.
- (4) A person who has a power of appointment under subsection (2) or (3) may appoint themselves as director.
- (5) A person appointed as a director of a company under subsection (2), (3) or (4) holds office as if they had been appointed in the usual way.

**201G Company may appoint a director** (*replaceable rule—see section 135*)

A company may appoint a person as a director by resolution passed in general meeting.

**201H Directors may appoint other directors** (*replaceable rule—see section 135*)

*Appointment by other directors*

- (1) The directors of a company may appoint a person as a director. A person can be appointed as a director in order to make up a quorum for a directors' meeting even if the total number of directors of the company is not enough to make up that quorum.

*Proprietary company—confirmation by meeting within 2 months*

- (2) If a person is appointed under this section as a director of a proprietary company, the company must confirm the appointment by resolution within 2 months after the appointment is made. If the appointment is not confirmed, the person ceases to be a director of the company at the end of those 2 months.

*Public company—confirmation by next AGM*

- (3) If a person is appointed by the other directors as a director of a public company, the company must confirm the appointment by resolution at the company's next AGM. If the appointment is not

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confirmed, the person ceases to be a director of the company at the end of the AGM.

**201J Appointment of managing directors** (*replaceable rule—see section 135*)

The directors of a company may appoint 1 or more of themselves to the office of managing director of the company for the period, and on the terms (including as to remuneration), as the directors see fit.

**201K Alternate directors** (*replaceable rule—see section 135*)

- (1) With the other directors' approval, a director may appoint an alternate to exercise some or all of the director's powers for a specified period.
- (2) If the appointing director requests the company to give the alternate notice of directors' meetings, the company must do so.
- (3) When an alternate exercises the director's powers, the exercise of the powers is just as effective as if the powers were exercised by the director.
- (4) The appointing director may terminate the alternate's appointment at any time.
- (5) An appointment or its termination must be in writing. A copy must be given to the company.

Note: ASIC must be given notice of the appointment and termination of appointment of an alternate (see subsections 205B(2) and (5)).

**201L Signpost—ASIC to be notified of appointment**

Under section 205B, a company must notify ASIC within 14 days if a person is appointed as a director or as an alternate director.

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**201M Effectiveness of acts by directors**

- (1) An act done by a director is effective even if their appointment, or the continuance of their appointment, is invalid because the company or director did not comply with the company's constitution (if any) or any provision of this Law.
- (2) Subsection (1) does not deal with the question whether an effective act by a director:
  - (a) binds the company in its dealings with other people; or
  - (b) makes the company liable to another person.

Note: The kinds of acts that this section validates are those that are only legally effective if the person doing them is a director (for example, calling a meeting of the company's members or signing a document to be lodged with ASIC or minutes of a meeting). Sections 128-130 contain rules about the assumptions people are entitled to make when dealing with a company and its officers.

## **Division 2—Remuneration of directors**

### **202A Remuneration of directors** (*replaceable rule—see section 135*)

- (1) The directors of a company are to be paid the remuneration that the company determines by resolution.

Note: Chapter 2E makes special provision for the payment of remuneration to the directors of public companies.

- (2) The company may also pay the directors' travelling and other expenses that they properly incur:
- (a) in attending directors' meetings or any meetings of committees of directors; and
  - (b) in attending any general meetings of the company; and
  - (c) in connection with the company's business.

### **202B Members may obtain information about directors' remuneration**

- (1) A company must disclose the remuneration paid to each director of the company or a subsidiary (if any) by the company or by an entity controlled by the company if the company is directed to disclose the information by:
- (a) members with at least 5% of the votes that may be cast at a general meeting of the company; or
  - (b) at least 100 members who are entitled to vote at a general meeting of the company.

The company must disclose all remuneration paid to the director, regardless of whether it is paid to the director in relation to their capacity as director or another capacity.

- (2) The company must comply with the direction as soon as practicable by:
- (a) preparing a statement of the remuneration of each director of the company or subsidiary for the last financial year before the direction was given; and

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- (b) having the statement audited; and
- (c) sending a copy of the audited statement to each person entitled to receive notice of general meetings of the company.

**202C Special rule for single director/single shareholder proprietary companies**

A person who is the only director and the only shareholder of a proprietary company is to be paid any remuneration for being a director that the company determines by resolution. The company may also pay the director's travelling and other expenses properly incurred by the director in connection with the company's business.

### **Division 3—Resignation, retirement or removal of directors**

#### **203A Director may resign by giving written notice to company** *(replaceable rule—see section 135)*

A director of a company may resign as a director of the company by giving a written notice of resignation to the company at its registered office.

#### **203B Signpost to consequences of disqualification from managing corporations**

A person ceases to be a director of a company if the person becomes disqualified from managing corporations under Part 2D.6 (see subsection 206A(2)) unless ASIC or the Court allows them to manage the company (see sections 206F and 206G).

#### **203C Removal by members—proprietary companies** *(replaceable rule—see section 135)*

A proprietary company:

- (a) may by resolution remove a director from office; and
- (b) may by resolution appoint another person as a director instead.

#### **203D Removal by members—public companies**

*Resolution for removal of director*

- (1) A public company may by resolution remove a director from office despite anything in:
  - (a) the company's constitution (if any); or
  - (b) an agreement between the company and the director; or
  - (c) an agreement between any or all members of the company and the director.

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If the director was appointed to represent the interests of particular shareholders or debenture holders, the resolution to remove the director does not take effect until a replacement to represent their interests has been appointed.

Note: See sections 249C to 249G for the rules on who may call meetings, sections 249H to 249M on how to call meetings and sections 249N to 249Q for rules on members' resolutions.

*Notice of intention to move resolution for removal of director*

- (2) Notice of intention to move the resolution must be given to the company at least 2 months before the meeting is to be held. However, if the company calls a meeting after the notice of intention is given under this subsection, the meeting may pass the resolution even though the meeting is held less than 2 months after the notice of intention is given.

Note: Short notice of the meeting cannot be given for this resolution (see subsection 249H(3)).

*Director to be informed*

- (3) The company must give the director a copy of the notice as soon as practicable after it is received.

*Director's right to put case to members*

- (4) The director is entitled to put their case to members by:
- (a) giving the company a written statement for circulation to members (see subsections (5) and (6)); and
  - (b) speaking to the motion at the meeting (whether or not the director is a member of the company).
- (5) The written statement is to be circulated by the company to members by:
- (a) sending a copy to everyone to whom notice of the meeting is sent if there is time to do so; or



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- (b) if there is not time to comply with paragraph (a)—having the statement distributed to members attending the meeting and read out at the meeting before the resolution is voted on.
- (6) The director's statement does not have to be circulated to members if it is more than 1,000 words long or defamatory.

*Time of retirement*

- (7) If a person is appointed to replace a director removed under this section, the time at which:
  - (a) the replacement director; or
  - (b) any other director;is to retire is to be worked out as if the replacement director had become director on the day on which the replaced director was last appointed a director.

**203E Director cannot be removed by other directors—public companies**

A resolution, request or notice of any or all of the directors of a public company is void to the extent that it purports to:

- (a) remove a director from their office; or
- (b) require a director to vacate their office.

**203F Termination of appointment of managing director (*replaceable rule—see section 135*)**

- (1) A person ceases to be managing director if they cease to be a director.
- (2) The directors may revoke or vary an appointment of a managing director.

## Part 2D.4—Appointment of secretaries

### 204A Minimum number of secretaries

#### *Proprietary companies*

- (1) A proprietary company is not required to have a secretary but, if it does have 1 or more secretaries, at least 1 of them must ordinarily reside in Australia.

#### *Public companies*

- (2) A public company must have at least 1 secretary. At least 1 of them must ordinarily reside in Australia.

### 204B Who can be a secretary

- (1) Only an individual who is at least 18 may be appointed as a secretary of a company.
- (2) A person who is disqualified from managing corporations under Part 2D.6 may only be appointed as a secretary of a company if the appointment is made with permission granted by ASIC under section 206F or leave granted by the Court under section 206G.

### 204C Consent to act as secretary

- (1) A company contravenes this subsection if a person does not give the company a signed consent to act as secretary of the company before being appointed.
- (2) The company must keep the consent.

### 204D How a secretary is appointed

A secretary is to be appointed by the directors.

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Note 1: The company must notify ASIC of the appointment within 14 days (see subsection 205B(1)).

Note 2: Section 188 deals with the responsibilities of secretaries for contraventions by the company.

**204E Effectiveness of acts by secretaries**

- (1) An act done by a secretary is effective even if their appointment, or the continuance of their appointment, is invalid because the company or secretary did not comply with the company's constitution (if any) or any provision of this Law.
- (2) Subsection (1) does not deal with the question whether an effective act by a secretary:
  - (a) binds the company in its dealings with other people; or
  - (b) makes the company liable to another person.

Note: The kinds of acts that this section validates are those that are only legally effective if the person doing them is a secretary (for example, signing and sending out a notice of a meeting of directors if the company's constitution authorises the secretary to do so or signing a document to be lodged with ASIC). Sections 128-130 contain rules about the assumptions people are entitled to make when dealing with a company and its officers.

**204F Terms and conditions of office for secretaries** (*replaceable rule—see section 135*)

A secretary holds office on the terms and conditions (including as to remuneration) that the directors determine.

**204G Signpost to consequences of disqualification from managing corporations**

A person ceases to be a secretary of a company if the person becomes disqualified from managing corporations under Part 2D.6 (see subsection 206A(2)) unless ASIC or the Court allows them to manage the company (see sections 206F and 206G).

## Part 2D.5—Public information about directors and secretaries

### 205A Director, secretary or alternate director may notify ASIC of resignation or retirement

- (1) If a director, secretary or alternate director retires or resigns, they may give ASIC written notice of the retirement or resignation. The notice must be in the prescribed form.
- (2) To be effective, a notice of resignation must be accompanied by a copy of the letter of resignation given to the company.
- (3) Nothing in this section affects the company's obligations to notify ASIC of the resignation or retirement.

### 205B Notice of name and address of directors and secretaries to ASIC

#### *New directors or secretaries*

- (1) A company must lodge with ASIC a notice of the personal details of a director or secretary within 14 days after they are appointed. The notice must be in the prescribed form.

Note 1: If a person becomes a director under subsection 120(1) there is no appointment and no notice is required under this subsection.

Note 2: If a person who was appointed as an alternate director becomes a director under the terms of their appointment as an alternate director, there is no appointment as a director and no notice is required under this subsection.

#### *New alternate directors*

- (2) A company must lodge with ASIC a notice of:
  - (a) the personal details of a person who is appointed as an alternate director; and

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(b) the terms of their appointment (including terms about when the alternate director is to act as a director);  
within 14 days after their appointment as an alternate director. The notice must be in the prescribed form.

*Personal details*

- (3) The personal details of a director, alternate director, or secretary are:
- (a) their given and family names; and
  - (b) all of their former given and family names; and
  - (c) their date and place of birth; and
  - (d) their address.

Note: For *address* see section 205D.

*Changes in details*

- (4) The company must lodge with ASIC notice of any change in the personal details of a director, alternate director or secretary within 14 days after the change. The notice must be in the prescribed form.

*Notice required if person stops being a director or secretary*

- (5) If a person stops being a director, alternate director or secretary of the company, the company must lodge with ASIC notice of the fact within 14 days. The notice must be in the prescribed form. However, the company does not need to lodge a notice if the person was an alternate director who stopped being a director in accordance with the terms of their appointment as an alternate director.

**205C Director and secretary must give information to company**

- (1) A director, alternate director or secretary must give the company any information the company needs to comply with subsection 205B(1) or (2) within 7 days after their initial

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appointment unless they have previously given the information to the company.

- (2) A director, alternate director or secretary must give the company any information the company needs to comply with subsection 205B(4) within 7 days after any change in their personal details.

**205D Address for officers**

*Address is normally residential address*

- (1) A person's address for the purposes of a notice or application under subsection 205B(1), (2), (3) or (5) or 117(2) or 601BC(2) must be their usual residential address unless they are entitled to have an alternative address substituted for their usual residential address under subsection (2).

*Entitlement to have alternative address*

- (2) The person is entitled to have an alternative address substituted for their usual residential address if:
  - (a) their name, but not their residential address, is on an electoral roll under the *Commonwealth Electoral Act 1918* because of section 104 of that Act; or
  - (b) their name is not on an electoral roll under that Act and ASIC determines, in writing, that including their residential address in the notice or application would put at risk their personal safety or the personal safety of members of their family.

This alternative address must be in Australia and be one at which documents can be served on the person. At any particular time, a person is entitled to have only 1 alternative address under this section.

Note: See subsection 109X(2) on the status of the alternative address as an address for service.

- (3) A person who takes advantage of subsection (2) must:

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- (a) before or at the same time as the alternative address is first included in a notice or application, lodge with ASIC notice of the person's usual residential address; and
- (b) lodge with ASIC notice of any change in the person's usual residential address within 14 days after the change.

A notice under this subsection must be in the prescribed form.

- (4) If a court gives a judgment for payment of a sum of money against a person who is taking advantage of subsection (2), ASIC may give details of the person's usual residential address to an officer of the court for the purposes of enforcing the judgment debt.

**205E ASIC's power to ask for information about person's position as director or secretary**

- (1) ASIC may ask a person, in writing, to inform ASIC:
  - (a) whether the person is a director or secretary of a particular company; and
  - (b) if the person is no longer a director or secretary of the company—the date on which the person stopped being a director or secretary.
- (2) The person must give the information to ASIC in writing by the date specified in the request.

**205F Director must give information to company**

A director must give the company any information affecting or relating to the director that the company needs, or will need, to comply with Chapter 6. The director must give the information to the company as soon as practicable after becoming aware that the company needs, or will need, the information. The company must give the information to each of the other directors of the company within 7 days of receiving it.

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**205G Listed company—director to notify securities exchange of shareholdings etc.**

*Notifiable interests*

- (1) A director of a listed public company must notify the relevant securities exchange under subsections (3) and (4) of the following interests of the director:
  - (a) relevant interests in securities of the company or a related body corporate
  - (b) contracts:
    - (i) to which the director is a party or under which the director is entitled to a benefit; and
    - (ii) that confer a right to call for or deliver shares in, debentures of, or interests in a collective investment scheme made available by, the company or a related body corporate.
- (2) A notice of a relevant interest in securities under paragraph (1)(a) must give details of:
  - (a) the number of securities; and
  - (b) the circumstances giving rise to the relevant interest.

*Occasions for initial notification*

- (3) The director must notify the exchange within 14 days after each of the following occasions:
  - (a) appointment as a director of the company
  - (b) the listing of the company.

Paragraph (a) does not apply to a director who retires and is then reappointed at the same meeting.

*Updating notices*

- (4) The director must notify the exchange within 14 days after any change in the director's interests.



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The Corporations Law—Section 205G

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- (5) The director need not give the information to the exchange under this section if the director has already given the information to the exchange.

*ASIC's power to make class orders*

- (6) ASIC may make an order in writing relieving a director of the obligation to notify the relevant securities exchange of an interest in a security or contract. The order may be made in respect of a specified class of companies, directors, securities or contracts.
- (7) The order may be expressed to be subject to conditions.
- (8) Notice of the making, revocation or suspension of the order must be published in the *Gazette*.

## Part 2D.6—Disqualification from managing corporations

### 206A Disqualified person not to manage corporations

- (1) A person who is disqualified from managing corporations under this Part commits an offence if:
- (a) they make, or participate in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
  - (b) they exercise the capacity to affect significantly the corporation's financial standing; or
  - (c) they communicate instructions or wishes (other than advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation) to the directors of the corporation:
    - (i) knowing that the directors are accustomed to act in accordance with the person's instructions or wishes; or
    - (ii) intending that the directors will act in accordance with those instructions or wishes.

It is a defence to the contravention if the person had permission to manage the corporation under either section 206F or 206G and their conduct was within the terms of that permission.

Note: Under section 1274AA, ASIC is required to keep a record of persons disqualified from managing corporations.

- (2) A person ceases to be a director, alternate director or a secretary of a company if:
- (a) the person becomes disqualified from managing corporations under this Part; and
  - (b) they are not given permission to manage the corporation under section 206F or 206G.

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The Corporations Law—Section 206B

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Note: If a person ceases to be a director, alternate director or a secretary under subsection (2) the company must notify ASIC (see subsection 205B(1)).

## **206B Automatic disqualification**

### *Convictions*

- (1) A person becomes disqualified from managing corporations if the person:
- (a) is convicted on indictment of an offence that:
    - (i) concerns the making, or participation in making, of decisions that affect the whole or a substantial part of the business of the corporation; or
    - (ii) concerns an act that has the capacity to affect significantly the corporation's financial standing; or
  - (b) is convicted of an offence that:
    - (i) is a contravention of the Corporations Law and is punishable by imprisonment for a period greater than 12 months; or
    - (ii) involves dishonesty and is punishable by imprisonment for at least 3 months; or
  - (c) is convicted of an offence against the law of a foreign country that is punishable by imprisonment for a period greater than 12 months.
- The offences covered by paragraph (a) and subparagraph (b)(ii) include offences against the law of a foreign country.
- (2) The period of disqualification under subsection (1) starts on the day the person is convicted and lasts for:
- (a) if the person does not serve a term of imprisonment—5 years after the day on which they are convicted; or
  - (b) if the person serves a term of imprisonment—5 years after the day on which they are released from prison.

The Corporations Law—Section 206C

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*Bankruptcy, deed of arrangement or composition with creditors*

- (3) A person is disqualified from managing corporations if the person is an undischarged bankrupt under the law of Australia, its external territories or another country.
- (4) A person is disqualified from managing corporations if:
  - (a) the person has executed a deed of arrangement under Part X of the *Bankruptcy Act 1966* (or a similar law of an external territory or another country) and the terms of the deed have not been fully complied with; or
  - (b) the person's creditors have accepted a composition under Part X of the *Bankruptcy Act 1966* (or a similar law of an external territory or another country) and final payment has not been made under the composition.

**206C Court power of disqualification—contravention of civil penalty provision**

- (1) On application by ASIC, the Court may disqualify a person from managing corporations for a period that the Court considers appropriate if:
    - (a) a declaration is made under section 1317E (civil penalty provision) that the person has contravened a civil penalty provision; and
    - (b) the Court is satisfied that the disqualification is justified.
- Note: The civil penalty provisions are subsection 180(1) and (2), 181(1) and (2), 182(1) and (2), 183(1) and (2), 209(2), 254L(2), 256D(3), 259F(2), 260D(2) or 344(1) or section 588G.
- (2) In determining whether the disqualification is justified, the Court may have regard to:
    - (a) the person's conduct in relation to the management, business or property of any corporation; and
    - (b) any other matters that the Court considers appropriate.

**206D Court power of disqualification—insolvency and non-payment of debts**

- (1) On application by ASIC, the Court may disqualify a person from managing corporations for up to 10 years if:
- (a) within the last 7 years, the person has been an officer of 2 or more corporations when they have failed; and
  - (b) the Court is satisfied that:
    - (i) the manner in which the corporation was managed was wholly or partly responsible for the corporation failing; and
    - (ii) the disqualification is justified.
- (2) For the purposes of subsection (1), a corporation fails if:
- (a) a Court orders the corporation to be wound up under section 459B because the Court is satisfied that the corporation is insolvent; or
  - (b) the corporation enters into voluntary liquidation and creditors are not fully paid or are unlikely to be fully paid; or
  - (c) the corporation executes a deed of company arrangement and creditors are not fully paid or are unlikely to be fully paid; or
  - (d) the corporation ceases to carry on business and creditors are not fully paid or are unlikely to be fully paid; or
  - (e) a levy of execution against the corporation is not satisfied; or
  - (f) a receiver, receiver and manager, or provisional liquidator is appointed in relation to the corporation; or
  - (g) the corporation enters into a compromise or arrangement with its creditors under Part 5.1; or
  - (h) the corporation is wound up and a liquidator lodges a report under subsection 533(1) about the corporation's inability to pay its debts.

Note: To satisfy paragraph (h), a corporation must begin to be wound up while the person is an officer or within 12 months after the person ceases to be an officer. However, the report under subsection 533(1) may be lodged by the liquidator at a time that is more than 12 months after the person ceases to be an officer. Sections 513A to 513D contain rules about when a company begins to be wound up.

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- (3) In determining whether the disqualification is justified, the Court may have regard to:
- (a) the person's conduct in relation to the management, business or property of any corporation; and
  - (b) any other matters that the Court considers appropriate.

**206E Court power of disqualification—repeated contraventions of Law**

- (1) On application by ASIC, the Court may disqualify a person from managing corporations for the period that the Court considers appropriate if:
- (a) the person:
    - (i) has at least twice been an officer of a body corporate that has contravened this Law while they were an officer of the body corporate and each time the person has failed to take reasonable steps to prevent the contravention; or
    - (ii) has at least twice contravened this Law while they were an officer of a body corporate; or
    - (iii) has been an officer of a body corporate and has done something that would have contravened subsection 180(1) or section 181 if the body corporate had been a corporation; and
  - (b) the Court is satisfied that the disqualification is justified.
- (2) In determining whether the disqualification is justified, the Court may have regard to:
- (a) the person's conduct in relation to the management, business or property of any corporation; and
  - (b) any other matters that the Court considers appropriate.

## **206F ASIC's power of disqualification**

### *Power to disqualify*

- (1) ASIC may disqualify a person from managing corporations for up to 5 years if:
  - (a) within 7 years immediately before ASIC gives a notice under paragraph (b)(i):
    - (i) the person has been an officer of 2 or more corporations; and
    - (ii) while the person was an officer, or within 12 months after the person ceased to be an officer of those corporations, each of the corporations was wound up and a liquidator lodged a report under subsection 533(1) about the corporation's inability to pay its debts; and
  - (b) ASIC has given the person:
    - (i) a notice in the prescribed form requiring them to demonstrate why they should not be disqualified; and
    - (ii) an opportunity to be heard on the question; and
  - (c) ASIC is satisfied that the disqualification is justified.

### *Grounds for disqualification*

- (2) In determining whether disqualification is justified, ASIC:
  - (a) must have regard to whether any of the corporations mentioned in subsection (1) were related to one another; and
  - (b) may have regard to:
    - (i) the person's conduct in relation to the management, business or property of any corporation; and
    - (ii) any other matters that ASIC considers appropriate.

### *Notice of disqualification*

- (3) If ASIC disqualifies a person from managing corporations under this section, ASIC must serve a notice on the person advising them of the disqualification. The notice must be in the prescribed form.

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*Start of disqualification*

- (4) The disqualification takes effect from the time when a notice referred to in subsection (3) is served on the person.

*ASIC power to grant leave*

- (5) ASIC may give a person who it has disqualified from managing corporations under this Part written permission to manage a particular corporation or corporations. The permission may be expressed to be subject to conditions and exceptions determined by ASIC.

**206G Court power to grant leave**

- (1) A person who is disqualified from managing corporations may apply to the Court for leave to manage:
- (a) corporations; or
  - (b) a particular class of corporations; or
  - (c) a particular corporation;
- if the person was not disqualified by ASIC.

- (2) The person must lodge a notice with ASIC at least 21 days before commencing the proceedings. The notice must be in the prescribed form.

- (3) The order granting leave may be expressed to be subject to exceptions and conditions determined by the Court.

Note: If the Court grants the person leave to manage the corporation, the person may be appointed as a director (see section 201B) or secretary (see section 204B) of a company.

- (4) The person must lodge with ASIC a copy of any order granting leave within 14 days after the order is made.
- (5) On application by ASIC, the Court may revoke the leave. The order revoking leave does not take effect until it is served on the person.



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The Corporations Law—Section 206H

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**206H Territorial application of this Part**

Part 2D.6 does not apply in respect of an act or omission by a person while they are managing a corporation that is a foreign company unless the act or omission occurred in connection with:

- (a) the foreign company carrying on business in Australia; or
- (b) an act that the foreign company does, or proposes to do, in Australia; or
- (c) a decision by the foreign company whether or not to do, or refrain from doing, an act in Australia.

## Chapter 2E—Related party transactions

### 207 Purpose

The rules in this Chapter are designed to protect the interests of a public company's members as a whole, by requiring member approval for giving financial benefits to related parties that could endanger those interests.

## **Part 2E.1—Member approval needed for related party benefit**

### **Division 1—Need for member approval**

#### **208 Need for member approval for financial benefit**

- (1) For a public company, or an entity that the public company controls, to give a financial benefit to a related party of the public company:
- (a) the public company or entity must:
    - (i) obtain the approval of the public company's members in the way set out in sections 217 to 227; and
    - (ii) give the benefit within 15 months after the approval; or
  - (b) the giving of the benefit must fall within an exception set out in sections 210 to 216.

Note: Section 228 defines *related party*, section 9 defines *entity*, section 55AA defines *control* and section 229 affects the meaning of *giving a financial benefit*.

- (2) If:
- (a) the giving of the benefit is required by a contract; and
  - (b) the making of the contract was approved in accordance with subparagraph (1)(a)(i) as a financial benefit given to the related party; and
  - (c) the contract was made:
    - (i) within 15 months after that approval; or
    - (ii) before that approval, if the contract was conditional on the approval being obtained;
- member approval for the giving of the benefit is taken to have been given and the benefit need not be given within the 15 months.

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**209 Consequences of breach**

- (1) If the public company or entity contravenes section 208:
- (a) the contravention does not affect the validity of any contract or transaction connected with the giving of the benefit; and
  - (b) the public company or entity is not guilty of an offence.

Note: A Court may order an injunction to stop the company or entity giving the benefit to the related party (see section 1324).

- (2) A person contravenes this subsection if they are involved in a contravention of section 208 by a public company or entity.

Note 1: This subsection is a civil penalty provision.

Note 2: Section 79 defines *involved*.

- (3) A person commits an offence if they are involved in a contravention of section 208 by a public company or entity and the involvement is dishonest.

## **Division 2—Exceptions to the requirement for member approval**

### **210 Arm’s length terms**

Member approval is not needed to give a financial benefit on terms that:

- (a) would be reasonable in the circumstances if the public company or entity and the related party were dealing at arm’s length; or
- (b) are less favourable to the related party than the terms referred to in paragraph (a).

### **211 Remuneration and reimbursement for officer or employee**

#### *Benefits that are reasonable remuneration*

- (1) Member approval is not needed to give a financial benefit if:
  - (a) the benefit is remuneration to a related party as an officer or employee of the following:
    - (i) the public company
    - (ii) an entity that the public company controls
    - (iii) an entity that controls the public company
    - (iv) an entity that is controlled by an entity that controls the public company; and
  - (b) to give the remuneration would be reasonable given:
    - (i) the circumstances of the public company or entity giving the remuneration; and
    - (ii) the related party’s circumstances (including the responsibilities involved in the office or employment).

#### *Benefits that are payments of expenses incurred*

- (2) Member approval is not needed to give a financial benefit if:

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- (a) the benefit is payment of expenses incurred or to be incurred, or reimbursement for expenses incurred, by a related party in performing duties as an officer or employee of the following:
    - (i) the public company
    - (ii) an entity that the public company controls
    - (iii) an entity that controls the public company
    - (iv) an entity that is controlled by an entity that controls the public company; and
  - (b) to give the benefit would be reasonable in the circumstances of the public company or entity giving the remuneration.
- (3) For the purposes of this section:
- (a) a contribution made by a body corporate to a fund for the purpose of making provision for, or obtaining, superannuation benefits for an officer of the body, or for dependants of an officer of the body, is remuneration provided by the body to the officer of the body; and
  - (b) a financial benefit given to a person because of the person ceasing to hold an office or employment as an officer or employee of a body corporate is remuneration paid or provided to the person in a capacity as an officer of the body.

**212 Indemnities, exemptions, insurance premiums and payment for legal costs for officers**

*Indemnities, exemptions and insurance premiums*

- (1) Member approval is not needed to give a financial benefit if:
- (a) the benefit is for a related party who is an officer of the public company or entity; and
  - (b) the benefit is:
    - (i) an indemnity, exemption or insurance premium in respect of a liability incurred as an officer of the public company or entity; or
    - (ii) an agreement to give an indemnity or exemption, or to pay an insurance premium, of that kind; and

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- (c) to give the benefit would be reasonable in the circumstances of the public company or entity giving the benefit.

Note: Sections 199A to 199C may prohibit giving an indemnity or exemption or paying an insurance premium for an officer.

*Payments in respect of legal costs*

- (2) Member approval is not needed to give a financial benefit if:
- (a) the benefit is for a related party who is an officer of the public company or entity; and
  - (b) the benefit is the making of, or an agreement to make, a payment (whether by way of advance, loan or otherwise) in respect of legal costs incurred by the officer in defending an action for a liability incurred as an officer of the public company or entity; and
  - (c) either:
    - (i) section 199A does not apply to the costs; or
    - (ii) if section 199A applies to the costs—the officer must repay the amount paid if the costs become costs for which the company must not give the officer an indemnity under that section; and
  - (d) to give the benefit would be reasonable in the circumstances of the public company or entity giving the benefit.
- (3) In working out for the purposes of subsection (1) or (2) whether giving the benefit is reasonable in the circumstances:
- (a) assess whether it would be reasonable on the basis of the circumstances existing:
    - (i) if the benefit is given under an agreement—at the time when the agreement is or was made; or
    - (ii) if the benefit is not given under an agreement—at the time when the benefit is or was given; and
  - (b) disregard any other financial benefit given or payable to the officer by the public company or entity.

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**213 Small amounts given to director or spouse**

- (1) Member approval is not needed to give a financial benefit that is an amount of money for a director of the public company or their spouse or de facto spouse if the amount does not exceed \$2,000 or a greater amount as prescribed by the regulations.
- (2) In working out the amount given:
  - (a) add in all amounts previously given by the public company and any entities controlled by the public company to:
    - (i) the director; or
    - (ii) their spouse; or
    - (iii) their de facto spouse; and
  - (b) disregard:
    - (i) amounts that have been repaid; and
    - (ii) amounts that fall under any other exception in this Part or a corresponding previous law.

For the purposes of this subsection, the time at which the entity must be controlled by the public company is the time at which the amount is given.

**214 Benefit to or by closely-held subsidiary**

- (1) Member approval is not needed to give a financial benefit if the benefit is given:
  - (a) by a body corporate to a closely-held subsidiary of the body; or
  - (b) by a closely-held subsidiary of a body corporate to the body or an entity it controls.
- (2) For the purposes of this section, a body corporate is a closely-held subsidiary of another body corporate if, and only if, no member of the first-mentioned body is a person other than:
  - (a) the other body; or
  - (b) a nominee of the other body; or



- (c) a body corporate that is a closely-held subsidiary of the other body because of any other application or applications of this subsection; or
  - (d) a nominee of a body referred to in paragraph (c).
- (3) For the purposes of subsection (2), disregard shares that are not voting shares.

### **215 Benefits to members that do not discriminate unfairly**

Member approval is not needed to give a financial benefit if:

- (a) the benefit is given to the related party in their capacity as a member of the public company; and
- (b) giving the benefit does not discriminate unfairly against the other members of the public company.

### **216 Court order**

Member approval is not needed to give a financial benefit under an order of a court.

## **Division 3—Procedure for obtaining member approval**

### **217 Resolution may specify matters by class or kind**

A resolution under this Division may specify anything either in particular or by reference to class or kind.

### **218 Company must lodge material that will be put to members with ASIC**

- (1) At least 14 days before the notice convening the relevant meeting is given, the public company must lodge:
  - (a) a proposed notice of meeting setting out the text of the proposed resolution; and
  - (b) a proposed explanatory statement satisfying section 219; and
  - (c) any other document that is proposed to accompany the notice convening the meeting and that relates to the proposed resolution; and
  - (d) any other document that any of the following proposes to give to members of the public company before or at the meeting:
    - (i) the company;
    - (ii) a related party of the company to whom the proposed resolution would permit a financial benefit to be given;
    - (iii) an associate of the company or of such a related party; and can reasonably be expected to be material to a member in deciding how to vote on the proposed resolution.
- (2) If, when the notice convening the meeting is given, ASIC:
  - (a) has approved in writing a period of less than 14 days for the purposes of subsection (1); and
  - (b) has not revoked the approval by written notice to the public company;subsection (1) applies as if the reference to 14 days were a reference to the approved period.

- (3) ASIC may give and revoke approvals for the purposes of subsection (2).

## **219 Requirements for explanatory statement to members**

- (1) The proposed explanatory statement lodged under section 218 must be in writing and set out:
- (a) the related parties to whom the proposed resolution would permit financial benefits to be given; and
  - (b) the nature of the financial benefits; and
  - (c) in relation to each director of the company:
    - (i) if the director wanted to make a recommendation to members about the proposed resolution—the recommendation and his or her reasons for it; or
    - (ii) if not—why not; or
    - (iii) if the director was not available to consider the proposed resolution—why not; and
  - (d) in relation to each such director:
    - (i) whether the director had an interest in the outcome of the proposed resolution; and
    - (ii) if so—what it was; and
  - (e) all other information that:
    - (i) is reasonably required by members in order to decide whether or not it is in the company's interests to pass the proposed resolution; and
    - (ii) is known to the company or to any of its directors.
- (2) An example of the kind of information referred to in paragraph (1)(d) is information about what, from an economic and commercial point of view, are the true potential costs and detriments of, or resulting from, giving financial benefits as permitted by the proposed resolution, including (without limitation):
- (a) opportunity costs; and
  - (b) taxation consequences (such as liability to fringe benefits tax); and

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(c) benefits forgone by whoever would give the benefits.

Note: Sections 180 and 181 require an officer of a corporation to act honestly and to exercise care and diligence. These duties extend to preparing an explanatory statement under this section. Section 1309 creates offences where false and misleading material relating to a corporation's affairs is made available or furnished to members.

**220 ASIC may comment on proposed resolution**

- (1) Within 14 days after a public company lodges documents under section 218, ASIC may give to the company written comments on those documents (other than comments about whether the proposed resolution is in the company's best interests).
- (2) ASIC may consult with the Exchange for the purposes of giving comments to a company that is included in the official list of the Exchange.
- (3) Subsection (2) does not limit the persons with whom ASIC may consult.
- (4) ASIC must keep a copy of the written comments it gives to a company under subsection (1), and subsections 1274(2) and (5) apply to the copy as if it were a document lodged with ASIC.
- (5) The fact that ASIC has given particular comments, or has declined to give comments, under subsection (1) does not in any way affect the performance or exercise of any of ASIC's functions and powers.

**221 Requirements for notice of meeting**

The notice convening the meeting:

- (a) must be the same, in all material respects, as the proposed notice lodged under section 218; and
- (b) must be accompanied by an explanatory statement that is the same, in all material respects, as the proposed explanatory statement lodged under that section; and

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- (c) must be accompanied by a document that is, or documents that are, the same, in all material respects, as the document or documents (if any) lodged under paragraph 218(1)(c); and
- (d) if ASIC has given to the public company, under section 220, comments on the documents lodged under section 218—must be accompanied by a copy of those comments; and
- (e) must not be accompanied by any other documents.

### **222 Other material put to members**

Each document (if any) that:

- (a) did not accompany the notice convening the meeting; and
- (b) was given to members of the public company before or at the meeting by:
  - (i) the public company; or
  - (ii) a related party of the public company to whom the proposed resolution would permit a financial benefit to be given; or
  - (iii) an associate of the public company or of such a related party; and
- (c) can reasonably be expected to have been material to a member in deciding how to vote on the proposed resolution; must be the same, in all material respects, as a document lodged under paragraph 218(1)(d).

### **223 Proposed resolution cannot be varied**

The resolution must be the same as the proposed resolution set out in the proposed notice lodged under section 218.

### **224 Voting by or on behalf of related party interested in proposed resolution**

- (1) At a general meeting, a vote on a proposed resolution under this Division must not be cast (in any capacity) by or on behalf of:

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- (a) a related party of the public company to whom the resolution would permit a financial benefit to be given; or
  - (b) an associate of such a related party.
- (2) Subsection (1) does not prevent the casting of a vote if:
  - (a) it is cast by a person as a proxy appointed by writing that specifies how the proxy is to vote on the proposed resolution; and
  - (b) it is not cast on behalf of a related party or associate of a kind referred to in subsection (1).
- (3) The regulations may prescribe cases where subsection (1) does not apply.
- (4) ASIC may by writing declare that:
  - (a) subsection (1) does not apply to a specified proposed resolution; or
  - (b) subsection (1) does not prevent the casting of a vote, on a specified proposed resolution, by a specified entity, or on behalf of a specified entity;but may only do so if satisfied that the declaration will not cause unfair prejudice to the interests of any member of the public company.
- (5) A declaration in force under subsection (4) has effect accordingly.
- (6) If a vote is cast in contravention of subsection (1), the related party or associate, as the case may be, contravenes this subsection, whether or not the proposed resolution is passed.
- (7) For the purposes of this section, a vote is cast on behalf of an entity if, and only if, it is cast:
  - (a) as proxy for the entity; or
  - (b) otherwise on behalf of the entity; or
  - (c) in respect of a share in respect of which the entity has:
    - (i) power to vote; or
    - (ii) power to exercise, or control the exercise of, a right to vote.

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- (8) Subject to subsection 225(1), a contravention of this section does not affect the validity of a resolution.
- (9) This section has effect despite:
  - (a) anything else in this Law or in any other law of this jurisdiction (including the general law); or
  - (b) anything in a body corporate's constitution.

### **225 Voting on the resolution**

- (1) If any votes on the resolution are cast in contravention of subsection 224(1), it must be the case that the resolution would still be passed even if those votes were disregarded.
- (2) If a poll was duly demanded on the question that the resolution be passed, subsections (3) and (4) apply in relation to voting on the poll.
- (3) In relation to each member of the public company who voted on the resolution in person, the public company must record in writing:
  - (a) the member's name; and
  - (b) how many votes the member cast for the resolution and how many against.
- (4) In relation to each member of the public company who voted on the resolution by proxy, or by a representative authorised under section 250D, the public company must record in writing:
  - (a) the member's name; and
  - (b) in relation to each person who voted as proxy, or as such a representative, for the member:
    - (i) the person's name; and
    - (ii) how many votes the person cast on the resolution as proxy, or as such a representative, for the member; and
    - (iii) how many of those votes the person cast for the resolution and how many against.

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- (5) For 7 years after the day when a resolution under this Division is passed, the public company must retain the records it made under this section in relation to the resolution.

**226 Notice of resolution to be lodged**

The public company must lodge a notice setting out the text of the resolution within 14 days after the resolution is passed.

**227 Declaration by court of substantial compliance**

- (1) The Court may declare that the conditions prescribed by this Division have been satisfied if it finds that they have been substantially satisfied.
- (2) A declaration may be made only on the application of an interested person.



## **Part 2E.2—Related parties and financial benefits**

### **228 Related parties**

#### *Controlling entities*

- (1) An entity that controls a public company is a related party of the public company.

#### *Directors and their spouses*

- (2) The following persons are related parties of a public company:
  - (a) directors of the public company
  - (b) directors (if any) of an entity that controls the public company
  - (c) if the public company is controlled by an entity that is not a body corporate—each of the persons making up the controlling entity
  - (d) spouses and de facto spouses of the persons referred to in paragraphs (a), (b) and (c).

#### *Relatives of directors and spouses*

- (3) The following relatives of persons referred to in subsection (2) are related parties of the public company:
  - (a) parents
  - (b) children.

#### *Entities controlled by other related parties*

- (4) An entity controlled by a related party referred to in subsection (1), (2) or (3) is a related party of the public company unless the entity is also controlled by the public company.

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*Related party in previous 6 months*

- (5) An entity is a related party of a public company at a particular time if the entity was a related party of the public company of a kind referred to in subsection (1), (2), (3) or (4) at any time within the previous 6 months.

*Entity has reasonable grounds to believe it will become related party in future*

- (6) An entity is a related party of a public company at a particular time if the entity believes or has reasonable grounds to believe that it is likely to become a related party of the public company of a kind referred to in subsection (1), (2), (3) or (4) at any time in the future.

*Acting in concert with related party*

- (7) An entity is a related party of a public company if the entity acts in concert with a related party of the public company on the understanding that the related party will receive a financial benefit if the public company gives the entity a financial benefit.

**229 Giving a financial benefit**

- (1) In determining whether a financial benefit is given for the purposes of this Chapter:
- (a) give a broad interpretation to financial benefits being given, even if criminal or civil penalties may be involved; and
  - (b) the economic and commercial substance of conduct is to prevail over its legal form; and
  - (c) disregard any consideration that is or may be given for the benefit, even if the consideration is adequate.
- (2) ***Giving a financial benefit*** includes the following:
- (a) giving a financial benefit indirectly, for example, through 1 or more interposed entities
  - (b) giving a financial benefit by making an informal agreement, oral agreement or an agreement that has no binding force

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- (c) giving a financial benefit that does not involve paying money (for example by conferring a financial advantage).
- (3) The following are examples of *giving a financial benefit* to a related party:
- (a) giving or providing the related party finance or property
  - (b) buying an asset from or selling an asset to the related party
  - (c) leasing an asset from or to the related party
  - (d) supplying services to or receiving services from the related party
  - (e) issuing securities or granting an option to the related party
  - (f) taking up or releasing an obligation of the related party.

## **Part 2E.3—Interaction with other rules**

### **230 General duties still apply**

A director is not relieved from any of their duties under this Law (including sections 180 and 184), or their fiduciary duties, in connection with a transaction merely because the transaction is authorised by a provision of this Chapter or is approved by a resolution of members under a provision of this Chapter.

## **Chapter 2F—Members' rights and remedies**

### **231 Membership of a company**

A person is a member of a company if they:

- (a) are a member of the company on its registration; or
- (b) agree to become a member of the company after its registration and their name is entered on the register of members; or
- (c) become a member of the company under section 167 (membership arising from conversion of a company from one limited by guarantee to one limited by shares).

## Part 2F.1—Oppressive conduct of affairs

### 232 Grounds for Court order

The Court may make an order under section 233 if:

- (a) the conduct of a company's affairs; or
- (b) an actual or proposed act or omission by or on behalf of a company; or
- (c) a resolution, or a proposed resolution, of members or a class of members of a company;

is either:

- (d) contrary to the interests of the members as a whole; or
- (e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.

For the purposes of this Part, a person to whom a share in the company has been transmitted by will or by operation of law is taken to be a member of the company.

Note: For *affairs*, see section 53.

### 233 Orders the Court can make

- (1) The Court can make any order under this section that it considers appropriate in relation to the company, including an order:
  - (a) that the company be wound up
  - (b) that the company's existing constitution be modified or repealed
  - (c) regulating the conduct of the company's affairs in the future
  - (d) for the purchase of any shares by any member or person to whom a share in the company has been transmitted by will or by operation of law
  - (e) for the purchase of shares with an appropriate reduction of the company's share capital

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- (f) for the company to institute, prosecute, defend or discontinue specified proceedings
- (g) authorising a member, or a person to whom a share in the company has been transmitted by will or by operation of law, to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company
- (h) appointing a receiver or a receiver and manager of any or all of the company's property
- (i) restraining a person from engaging in specified conduct or from doing a specified act
- (j) requiring a person to do a specified act.

*Order that the company be wound up*

- (2) If an order that a company be wound up is made under this section, the provisions of this Law relating to the winding up of companies apply:
  - (a) as if the order were made under section 461; and
  - (b) with such changes as are necessary.

*Order altering constitution*

- (3) If an order made under this section repeals or modifies a company's constitution, or requires the company to adopt a constitution, the company does not have the power under section 136 to change or repeal the constitution if that change or repeal would be inconsistent with the provisions of the order, unless:
  - (a) the order states that the company does have the power to make such a change or repeal; or
  - (b) the company first obtains the leave of the Court.

**234 Who can apply for order**

An application for an order under section 233 in relation to a company may be made by:

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- (a) a member of the company, even if the application relates to an act or omission that is against:
  - (i) the member in a capacity other than as a member; or
  - (ii) another member in their capacity as a member; or
- (b) a person who has been removed from the register of members because of a selective reduction; or
- (c) a person who has ceased to be a member of the company if the application relates to the circumstances in which they ceased to be a member; or
- (d) a person to whom a share in the company has been transmitted by will or by operation of law; or
- (e) a person whom ASIC thinks appropriate having regard to investigations it is conducting or has conducted into:
  - (i) the company's affairs; or
  - (ii) matters connected with the company's affairs.

Note 1: If an application is made under this section, in certain cases the court may order that the company be wound up in insolvency (see section 459B).

Note 2: For *selective reduction*, see subsection 256B(2).

### 235 Requirement for person to lodge order

If an order is made under section 233, the applicant must lodge a copy of the order with ASIC within 14 days after it is made.



## **Part 2F.1A—Proceedings on behalf of a company by members and others**

### **236 Bringing, or intervening in, proceedings on behalf of a company**

- (1) A person may bring proceedings on behalf of a company, or intervene in any proceedings to which the company is a party for the purpose of taking responsibility on behalf of the company for those proceedings, or for a particular step in those proceedings (for example, compromising or settling them), if:
  - (a) the person is:
    - (i) a member, former member, or person entitled to be registered as a member, of the company or of a related body corporate; or
    - (ii) an officer or former officer of the company; and
  - (b) the person is acting with leave granted under section 237.
- (2) Proceedings brought on behalf of a company must be brought in the company's name.
- (3) The right of a person at general law to bring, or intervene in, proceedings on behalf of a company is abolished.

Note 1: For the right to inspect company books, see subsections 247A(3) to (6).

Note 2: For the requirements to disclose proceedings and leave applications in the annual directors' report, see subsections 300(14) and (15).

Note 3: This section does not prevent a person bringing, or intervening in, proceedings on their own behalf in respect of a personal right.

### **237 Applying for and granting leave**

- (1) A person referred to in paragraph 236(1)(a) may apply to the Court for leave to bring, or to intervene in, proceedings.
- (2) The Court must grant the application if it is satisfied that:

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- (a) it is probable that the company will not itself bring the proceedings, or properly take responsibility for them, or for the steps in them; and
  - (b) the applicant is acting in good faith; and
  - (c) it is in the best interests of the company that the applicant be granted leave; and
  - (d) if the applicant is applying for leave to bring proceedings—there is a serious question to be tried; and
  - (e) either:
    - (i) at least 14 days before making the application, the applicant gave written notice to the company of the intention to apply for leave and of the reasons for applying; or
    - (ii) it is appropriate to grant leave even though subparagraph (i) is not satisfied.
- (3) A rebuttable presumption that granting leave is not in the best interests of the company arises if it is established that:
- (a) the proceedings are:
    - (i) by the company against a third party; or
    - (ii) by a third party against the company; and
  - (b) the company has decided:
    - (i) not to bring the proceedings; or
    - (ii) not to defend the proceedings; or
    - (iii) to discontinue, settle or compromise the proceedings; and
  - (c) all of the directors who participated in that decision:
    - (i) acted in good faith for a proper purpose; and
    - (ii) did not have a material personal interest in the decision; and
    - (iii) informed themselves about the subject matter of the decision to the extent they reasonably believed to be appropriate; and
    - (iv) rationally believed that the decision was in the best interests of the company.

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The director's belief that the decision was in the best interests of the company is a rational one unless the belief is one that no reasonable person in their position would hold.

- (4) For the purposes of subsection (3):
- (a) a person is a third party if:
    - (i) the company is a public company and the person is not a related party of the company; or
    - (ii) the company is not a public company and the person would not be a related party of the company if the company were a public company; and
  - (b) proceedings by or against the company include any appeal from a decision made in proceedings by or against the company.

Note: *Related party* is defined in section 228.

### **238 Substitution of another person for the person granted leave**

- (1) Any of the following persons may apply to the Court for an order that they be substituted for a person to whom leave has been granted under section 237:
- (a) a member, former member, or a person entitled to be registered as a member, of the company or of a related body corporate
  - (b) an officer, or former officer, of the company.
- (2) The Court may make the order if it is satisfied that:
- (a) the applicant is acting in good faith; and
  - (b) it is appropriate to make the order in all the circumstances.
- (3) An order substituting one person for another has the effect that:
- (a) the grant of leave is taken to have been made in favour of the substituted person; and
  - (b) if the other person has already brought the proceedings or intervened—the substituted person is taken to have brought those proceedings or to have made that intervention.

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**239 Effect of ratification by members**

- (1) If the members of a company ratify or approve conduct, the ratification or approval:
  - (a) does not prevent a person from bringing or intervening in proceedings with leave under section 237 or from applying for leave under that section; and
  - (b) does not have the effect that proceedings brought or intervened in with leave under section 237 must be determined in favour of the defendant, or that an application for leave under that section must be refused.
- (2) If members of a company ratify or approve conduct, the Court may take the ratification or approval into account in deciding what order or judgment (including as to damages) to make in proceedings brought or intervened in with leave under section 237 or in relation to an application for leave under that section. In doing this, it must have regard to:
  - (a) how well-informed about the conduct the members were when deciding whether to ratify or approve the conduct; and
  - (b) whether the members who ratified or approved the conduct were acting for proper purposes.

**240 Leave to discontinue, compromise or settle proceedings brought, or intervened in, with leave**

Proceedings brought or intervened in with leave must not be discontinued, compromised or settled without the leave of the Court.

**241 General powers of the Court**

- (1) The Court may make any orders, and give any directions, that it considers appropriate in relation to proceedings brought or intervened in with leave, or an application for leave, including:
  - (a) interim orders; and

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- (b) directions about the conduct of the proceedings, including requiring mediation; and
  - (c) an order directing the company, or an officer of the company, to do, or not to do, any act; and
  - (d) an order appointing an independent person to investigate, and report to the Court on:
    - (i) the financial affairs of the company; or
    - (ii) the facts or circumstances which gave rise to the cause of action the subject of the proceedings; or
    - (iii) the costs incurred in the proceedings by the parties to the proceedings and the person granted leave.
- (2) A person appointed by the Court under paragraph (1)(d) is entitled, on giving reasonable notice to the company, to inspect any books of the company for any purpose connected with their appointment.
- (3) If the Court appoints a person under paragraph (1)(d):
- (a) the Court must also make an order stating who is liable for the remuneration and expenses of the person appointed; and
  - (b) the Court may vary the order at any time; and
  - (c) the persons who may be made liable under the order, or the order as varied, are:
    - (i) all or any of the parties to the proceedings or application; and
    - (ii) the company; and
  - (d) if the order, or the order as varied, makes 2 or more persons liable, the order may also determine the nature and extent of the liability of each of those persons.
- (4) Subsection (3) does not affect the powers of the Court as to costs.

**242 Power of the Court to make costs orders**

The Court may at any time make any orders it considers appropriate about the costs of the following persons in relation to proceedings brought or intervened in with leave under section 237 or an application for leave under that section:

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- (a) the person who applied for or was granted leave
  - (b) the company
  - (c) any other party to the proceedings or application.
- An order under this section may require indemnification for costs.

## Part 2F.2—Class rights

Note: This Part does not apply to the adoption or amendment of benefit fund rules or to consequential amendments to the rest of the company's constitution made under the *Life Insurance Act 1995*, see Subdivision 2 of Division 4 of Part 2A of that Act.

### 246B Varying and cancelling class rights

#### *If constitution sets out procedure*

- (1) If a company has a constitution that sets out the procedure for varying or cancelling:
  - (a) for a company with a share capital—rights attached to shares in a class of shares; or
  - (b) for a company without a share capital—rights of members in a class of members;those rights may be varied or cancelled only in accordance with the procedure. The procedure may be changed only if the procedure itself is complied with.

#### *If constitution does not set out procedure*

- (2) If a company does not have a constitution, or has a constitution that does not set out the procedure for varying or cancelling:
  - (a) for a company with a share capital—rights attached to shares in a class of shares; or
  - (b) for a company without a share capital—rights of members in a class of members;those rights may be varied or cancelled only by special resolution of the company and:
  - (c) by special resolution passed at a meeting:
    - (i) for a company with a share capital of the class of members holding shares in the class; or
    - (ii) for a company without a share capital of the class of members whose rights are being varied or cancelled; or

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- (d) with the written consent of members with at least 75% of the votes in the class.
- (3) The company must give written notice of the variation or cancellation to the members of the class within 7 days after the variation or cancellation is made.

**246C Certain actions taken to vary rights etc.**

*Company with share capital*

- (1) If the shares in a class of shares in a company are divided into further classes, and after the division the rights attached to all of those shares are not the same:
  - (a) the division is taken to vary the rights attached to every share that was in the class existing before the division; and
  - (b) members who hold shares to which the same rights are attached after the division form a separate class.
- (2) If the rights attached to some of the shares in a class of shares in a company are varied:
  - (a) the variation is taken to vary the rights attached to every other share that was in the class existing before the variation; and
  - (b) members who hold shares to which the same rights are attached after the variation form a separate class.

*Company without share capital*

- (3) If the members in a class of members in a company without share capital are divided into further classes of members, and after the division the rights of all of those members are not the same:
  - (a) the division is taken to vary the rights of every member who was in the class existing before the division; and
  - (b) members who have the same rights after the division form a separate class.



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The Corporations Law—Section 246D

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- (4) If the rights of some of the members in a class of members in a company without a share capital are varied:
- (a) the variation is taken to vary the rights of every other member who was in the class existing before the variation; and
  - (b) members who have the same rights after the variation form a separate class.

*Company with 1 class of shares issuing new class of shares*

- (5) If a company with 1 class of shares issues new shares, the issue is taken to vary the rights attached to shares already issued if:
- (a) the rights attaching to the new shares are not the same as the rights attached to shares already issued; and
  - (b) those rights are not provided for in:
    - (i) the company's constitution (if any); or
    - (ii) a notice, document or resolution that is lodged with ASIC.
- (6) If a company issues new preference shares that rank equally with existing preference shares, the issue is taken to vary the rights attached to the existing preference shares unless the issue is authorised by:
- (a) the terms of issue of the existing preference shares; or
  - (b) the company's constitution (if any) as in force when the existing preference shares were issued.

**246D Variation, cancellation or modification without unanimous support of class**

- (1) If members in a class do not all agree (whether by resolution or written consent) to:
- (a) a variation or cancellation of their rights; or
  - (b) a modification of the company's constitution (if any) to allow their rights to be varied or cancelled;

### The Corporations Law—Section 246E

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members with at least 10% of the votes in the class may apply to the Court to have the variation, cancellation or modification set aside.

- (2) An application may only be made within 1 month after the variation, cancellation or modification is made.
- (3) The variation, cancellation or modification takes effect:
  - (a) if no application is made to the Court to have it set aside—1 month after the variation, cancellation or modification is made; or
  - (b) if an application is made to the Court to have it set aside—when the application is withdrawn or finally determined.
- (4) The members of the class who want to have the variation, cancellation or modification set aside may appoint 1 or more of themselves to make the application on their behalf. The appointment must be in writing.
- (5) The Court may set aside the variation, cancellation or modification if it is satisfied that it would unfairly prejudice the applicants. However, the Court must confirm the variation, cancellation or modification if the Court is not satisfied of unfair prejudice.
- (6) Within 14 days after the Court makes an order, the company must lodge a copy of it with ASIC.

#### **246E Variation, cancellation or modification with unanimous support of class**

If the members in a class all agree (whether by resolution or written consent) to the variation, cancellation or modification, it takes effect:

- (a) if no later date is specified in the resolution or consent—on the date of the resolution or consent; or
- (b) on a later date specified in the resolution or consent.

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The Corporations Law—Section 246F

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**246F Company must lodge documents and resolutions with ASIC**

- (1) A company must lodge with ASIC a notice in the prescribed form setting out particulars of any of the following:
  - (a) a division of shares in the company into classes if the shares were not previously so divided
  - (b) a conversion of shares in a class of shares in the company into shares in another class.
- (2) The notice must be lodged within 14 days after the division or conversion.
- (3) A public company must lodge with ASIC a copy of each document (including an agreement or consent) or resolution that:
  - (a) does any of the following:
    - (i) attaches rights to issued or unissued shares
    - (ii) varies or cancels rights attaching to issued or unissued shares
    - (iii) varies or cancels rights of members in a class of members of a company that does not have a share capital
    - (iv) binds a class of members; and
  - (b) is not already lodged with ASIC.

This also applies to a proprietary company that has applied under Part 2B.7 to change to a public company, while its application has not yet been determined.
- (4) The document must be lodged within 14 days after it is made. The resolution must be lodged within 14 days after it is passed.

**246G Member's copies of documents and resolutions**

- (1) A member of a company may ask the company in writing for a copy of a document or resolution referred to in section 246F. The company must send the copy to the member.
- (2) If the company requires the member to pay for the copy, the company must send it:

**The Corporations Law—Section 246G**

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- (a) within 7 days after the company receives the payment; or
  - (b) within any longer period approved by ASIC.
- (3) The amount of any payment the company requires cannot exceed the prescribed amount.
- (4) If the company does not require payment for the copy, the company must send it:
  - (a) within 7 days after the member asks for it; or
  - (b) within any longer period approved by ASIC.

## **Part 2F.3—Inspection of books**

### **247A Order for inspection of books of company or registered managed investment scheme**

- (1) On application by a member of a company or registered managed investment scheme, the Court may make an order:
  - (a) authorising the applicant to inspect books of the company or scheme; or
  - (b) authorising another person (whether a member or not) to inspect books of the company or scheme on the applicant's behalf.

The Court may only make the order if it is satisfied that the applicant is acting in good faith and that the inspection is to be made for a proper purpose.

- (2) A person authorised to inspect books may make copies of the books unless the Court orders otherwise.
- (3) A person who:
  - (a) is granted leave under section 237; or
  - (b) applies for leave under that section; or
  - (c) is eligible to apply for leave under that section;may apply to the Court for an order under this section.
- (4) On application, the Court may make an order authorising:
  - (a) the applicant to inspect books of the company; or
  - (b) another person to inspect books of the company on the applicant's behalf.
- (5) The Court may make the order only if it is satisfied that:
  - (a) the applicant is acting in good faith; and
  - (b) the inspection is to be made for a purpose connected with:
    - (i) applying for leave under section 237; or

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- (ii) bringing or intervening in proceedings with leave under that section.
- (6) A person authorised to inspect books may make copies of the books unless the Court orders otherwise.

**247B Ancillary orders**

If the Court makes an order under section 247A, the Court may make any other orders it considers appropriate, including either or both of the following:

- (a) an order limiting the use that a person who inspects books may make of information obtained during the inspection
- (b) an order limiting the right of a person who inspects books to make copies in accordance with subsection 247A(2).

**247C Disclosure of information acquired in inspection**

A person who inspects books on behalf of an applicant under section 247A must not disclose information obtained during the inspection unless the disclosure is to:

- (a) ASIC; or
- (b) the applicant.

**247D Company or directors may allow member to inspect books**  
*(replaceable rule see section 135)*

The directors of a company, or the company by a resolution passed at a general meeting, may authorise a member to inspect books of the company.

## **Chapter 2G—Meetings**

### **Part 2G.1—Directors' meetings**

#### **Division 1—Resolutions and declarations without meetings**

##### **248A Circulating resolutions of companies with more than 1 director** (*replaceable rule see section 135*)

###### *Resolutions*

- (1) The directors of a company may pass a resolution without a directors' meeting being held if all the directors entitled to vote on the resolution sign a document containing a statement that they are in favour of the resolution set out in the document.

###### *Copies*

- (2) Separate copies of a document may be used for signing by directors if the wording of the resolution and statement is identical in each copy.

###### *When the resolution is passed*

- (3) The resolution is passed when the last director signs.

Note: Passage of a resolution under this section must be recorded in the company's minute books (see section 251A).

##### **248B Resolutions and declarations of 1 director proprietary companies**

###### *Resolutions*

- (1) The director of a proprietary company that has only 1 director may pass a resolution by recording it and signing the record.

**Corporations Law Chapter 2G Meetings**

**Part 2G.1 Directors' meetings**

**Division 1 Resolutions and declarations without meetings**

**The Corporations Law—Section 248B**

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*Declarations*

- (2) The director of a proprietary company that has only 1 director may make a declaration by recording it and signing the record. Recording and signing the declaration satisfies any requirement in this Law that the declaration be made at a directors' meeting.

Note 1: For directors' declarations, see sections 295 and 494.

Note 2: Passage of a resolution or the making of a declaration under this section must be recorded in the company's minute books (see section 251A).



## **Division 2—Directors' meetings**

### **248C Calling directors' meetings** (*replaceable rule see section 135*)

A directors' meeting may be called by a director giving reasonable notice individually to every other director.

Note: A director who has appointed an alternate director may ask for the notice to be sent to the alternate director (see subsection 201K(2)).

### **248D Use of technology**

A directors' meeting may be called or held using any technology consented to by all the directors. The consent may be a standing one. A director may only withdraw their consent within a reasonable period before the meeting.

### **248E Chairing directors' meetings** (*replaceable rule see section 135*)

- (1) The directors may elect a director to chair their meetings. The directors may determine the period for which the director is to be the chair.
- (2) The directors must elect a director present to chair a meeting, or part of it, if:
  - (a) a director has not already been elected to chair the meeting;  
or
  - (b) a previously elected chair is not available or declines to act, for the meeting or the part of the meeting.

### **248F Quorum at directors' meetings** (*replaceable rule see section 135*)

Unless the directors determine otherwise, the quorum for a directors' meeting is 2 directors and the quorum must be present at all times during the meeting.

Note 1: For special quorum rules for public companies, see section 195.

**Corporations Law Chapter 2G Meetings**

**Part 2G.1 Directors' meetings**

**Division 2 Directors' meetings**

**The Corporations Law—Section 248G**

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Note 2: For resolutions of 1 director proprietary companies without meetings, see section 248B.

**248G Passing of directors' resolutions** (*replaceable rule see section 135*)

- (1) A resolution of the directors must be passed by a majority of the votes cast by directors entitled to vote on the resolution.
- (2) The chair has a casting vote if necessary in addition to any vote they have in their capacity as a director.

Note: The chair may be precluded from voting, for example, by a conflict of interest.

## **Part 2G.2—Meetings of members of companies**

### **Division 1—Resolutions without meetings**

#### **249A Circulating resolutions of proprietary companies with more than 1 member**

- (1) This section applies to resolutions of the members of proprietary companies that this Law or, if a company has a constitution, the company's constitution requires or permits to be passed at a general meeting. It does not apply to a resolution under section 329 to remove an auditor.
- (2) A company may pass a resolution without a general meeting being held if all the members entitled to vote on the resolution sign a document containing a statement that they are in favour of the resolution set out in the document. Each member of a joint membership must sign.
- (3) Separate copies of a document may be used for signing by members if the wording of the resolution and statement is identical in each copy.
- (4) The resolution is passed when the last member signs.
- (5) A company that passes a resolution under this section without holding a meeting satisfies any requirement in this Law:
  - (a) to give members information or a document relating to the resolution—by giving members that information or document with the document to be signed; and
  - (b) to lodge with ASIC a copy of a notice of meeting to consider the resolution—by lodging a copy of the document to be signed by members; and
  - (c) to lodge a copy of a document that accompanies a notice of meeting to consider the resolution—by lodging a copy of the information or documents referred to in paragraph (a).

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- (6) The passage of the resolution satisfies any requirement in this Law, or a company's constitution (if any), that the resolution be passed at a general meeting.
- (7) This section does not affect any rule of law relating to the assent of members not given at a general meeting.

Note 1: A body corporate representative may sign a circulating resolution (see section 250D).

Note 2: Passage of a resolution under this section must be recorded in the company's minute books (see section 251A).

**249B Resolutions of 1 member companies**

- (1) A company that has only 1 member may pass a resolution by the member recording it and signing the record.
- (2) If this Law requires information or a document relating to the resolution to be lodged with ASIC, that requirement is satisfied by lodging the information or document with the resolution that is passed.

Note 1: A body corporate representative may sign such a resolution (see section 250D).

Note 2: Passage of a resolution under this section must be recorded in the company's minute books (see section 251A).

## **Division 2—Who may call meetings of members**

### **249C Calling of meetings of members by a director** (*replaceable rule—see section 135*)

A director may call a meeting of the company's members.

### **249CA Calling of meetings of members of a listed company by a director**

- (1) A director may call a meeting of the company's members.
- (2) This section applies only to a company that is:
  - (a) incorporated in Australia; and
  - (b) included in an official list of the Exchange.
- (3) This section applies despite anything in the company's constitution.

### **249D Calling of general meeting by directors when requested by members**

- (1) The directors of a company must call and arrange to hold a general meeting on the request of:
  - (a) members with at least 5% of the votes that may be cast at the general meeting; or
  - (b) at least 100 members who are entitled to vote at the general meeting.
- (1A) The regulations may prescribe a different number of members for the purposes of the application of paragraph (1)(b) to:
  - (a) a particular company; or
  - (b) a particular class of company.Without limiting this, the regulations may specify the number as a percentage of the total number of members of the company.
- (2) The request must:

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- (a) be in writing; and
  - (b) state any resolution to be proposed at the meeting; and
  - (c) be signed by the members making the request; and
  - (d) be given to the company.
- (3) Separate copies of a document setting out the request may be used for signing by members if the wording of the request is identical in each copy.
- (4) The percentage of votes that members have is to be worked out as at the midnight before the request is given to the company.
- (5) The directors must call the meeting within 21 days after the request is given to the company. The meeting is to be held not later than 2 months after the request is given to the company.

**249E Failure of directors to call general meeting**

- (1) Members with more than 50% of the votes of all of the members who make a request under section 249D may call and arrange to hold a general meeting if the directors do not do so within 21 days after the request is given to the company.
- (2) The meeting must be called in the same way—so far as is possible—in which general meetings of the company may be called. The meeting must be held not later than 3 months after the request is given to the company.
- (3) To call the meeting the members requesting the meeting may ask the company under section 173 for a copy of the register of members. Despite paragraph 173(3)(b), the company must give the members the copy of the register without charge.
- (4) The company must pay the reasonable expenses the members incurred because the directors failed to call and arrange to hold the meeting.
- (5) The company may recover the amount of the expenses from the directors. However, a director is not liable for the amount if they

prove that they took all reasonable steps to cause the directors to comply with section 249D. The directors who are liable are jointly and individually liable for the amount. If a director who is liable for the amount does not reimburse the company, the company must deduct the amount from any sum payable as fees to, or remuneration of, the director.

### **249F Calling of general meetings by members**

- (1) Members with at least 5% of the votes that may be cast at a general meeting of the company may call, and arrange to hold, a general meeting. The members calling the meeting must pay the expenses of calling and holding the meeting.
- (2) The meeting must be called in the same way—so far as is possible—in which general meetings of the company may be called.
- (3) The percentage of votes that members have is to be worked out as at the midnight before the meeting is called.

### **249G Calling of meetings of members by the Court**

- (1) The Court may order a meeting of the company's members to be called if it is impracticable to call the meeting in any other way.
- (2) The Court may make the order on application by:
  - (a) any director; or
  - (b) any member who would be entitled to vote at the meeting.

Note: For the directions the Court may give for calling, holding or conducting a meeting it has ordered be called, see section 1319.

## Division 3—How to call meetings of members

### 249H Amount of notice of meetings

#### *General rule*

- (1) Subject to subsection (2), at least 21 days notice must be given of a meeting of a company's members. However, if a company has a constitution, it may specify a longer minimum period of notice.

#### *Calling meetings on shorter notice*

- (2) A company may call on shorter notice:
  - (a) an AGM, if all the members entitled to attend and vote at the AGM agree beforehand; and
  - (b) any other general meeting, if members with at least 95% of the votes that may be cast at the meeting agree beforehand.

A company cannot call an AGM or other general meeting on shorter notice if it is a meeting of the kind referred to in subsection (3) or (4).

#### *Shorter notice not allowed—removing or appointing director*

- (3) At least 21 days notice must be given of a meeting of the members of a public company at which a resolution will be moved to:
  - (a) remove a director under section 203D; or
  - (b) appoint a director in place of a director removed under that section.

#### *Shorter notice not allowed—removing auditor*

- (4) At least 21 days notice must be given of a meeting of a company at which a resolution will be moved to remove an auditor under section 329.



**249HA Amount of notice of meetings of listed company**

- (1) Despite section 249H, at least 28 days notice must be given of a meeting of a company's members.
- (2) This section applies only to a company that is:
  - (a) incorporated in Australia; and
  - (b) included in an official list of the Exchange.
- (3) This section applies despite anything in the company's constitution.

**249J Notice of meetings of members to members and directors**

*Notice to members and directors individually*

- (1) Written notice of a meeting of a company's members must be given individually to each member entitled to vote at the meeting and to each director. Notice need only be given to 1 member of a joint membership.

*Notice to joint members (replaceable rule—see section 135)*

- (2) Notice to joint members must be given to the joint member named first in the register of members.

*How notice is given*

- (3) A company may give the notice of meeting to a member:
  - (a) personally; or
  - (b) by sending it by post to the address for the member in the register of members or the alternative address (if any) nominated by the member; or
  - (c) by sending it to the fax number or electronic address (if any) nominated by the member; or
  - (d) by any other means that the company's constitution (if any) permits.

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Note: A defect in the notice given may not invalidate a meeting (see section 1322).

*When notice by post or fax is given (replaceable rule—see section 135)*

- (4) A notice of meeting sent by post is taken to be given 3 days after it is posted. A notice of meeting sent by fax, or other electronic means, is taken to be given on the business day after it is sent.

**249K Auditor entitled to notice and other communications**

A company must give its auditor:

- (a) notice of a general meeting in the same way that a member of the company is entitled to receive notice; and
- (b) any other communications relating to the general meeting that a member of the company is entitled to receive.

Note 1: For when a company must have an auditor, see Part 2M.3.

Note 2: An auditor may appoint a representative to attend a meeting (see subsection 249V(4)).

**249L Contents of notice of meetings of members**

A notice of a meeting of a company's members must:

- (a) set out the place, date and time for the meeting (and, if the meeting is to be held in 2 or more places, the technology that will be used to facilitate this); and
- (b) state the general nature of the meeting's business; and
- (c) if a special resolution is to be proposed at the meeting—set out an intention to propose the special resolution and state the resolution; and
- (d) if a member is entitled to appoint a proxy—contain a statement setting out the following information:
  - (i) that the member has a right to appoint a proxy
  - (ii) whether or not the proxy needs to be a member of the company

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- (iii) that a member who is entitled to cast 2 or more votes may appoint 2 proxies and may specify the proportion or number of votes each proxy is appointed to exercise.

Note: There may be other requirements for disclosure to members.

**249M Notice of adjourned meetings** (*replaceable rule—see section 135*)

When a meeting is adjourned, new notice of the resumed meeting must be given if the meeting is adjourned for 1 month or more.

## **Division 4—Members' rights to put resolutions etc. at general meetings**

### **249N Members' resolutions**

- (1) The following members may give a company notice of a resolution that they propose to move at a general meeting:
  - (a) members with at least 5% of the votes that may be cast on the resolution; or
  - (b) at least 100 members who are entitled to vote at a general meeting.
- (1A) The regulations may prescribe a different number of members for the purposes of the application of paragraph (1)(b) to:
  - (a) a particular company; or
  - (b) a particular class of company.

Without limiting this, the regulations may specify the number as a percentage of the total number of members of the company.
- (2) The notice must:
  - (a) be in writing; and
  - (b) set out the wording of the proposed resolution; and
  - (c) be signed by the members proposing to move the resolution.
- (3) Separate copies of a document setting out the notice may be used for signing by members if the wording of the notice is identical in each copy.
- (4) The percentage of votes that members have is to be worked out as at the midnight before the members give the notice.

### **249O Company giving notice of members' resolutions**

- (1) If a company has been given notice of a resolution under section 249N, the resolution is to be considered at the next general meeting that occurs more than 2 months after the notice is given.

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- (2) The company must give all its members notice of the resolution at the same time, or as soon as practicable afterwards, and in the same way, as it gives notice of a meeting.
- (3) The company is responsible for the cost of giving members notice of the resolution if the company receives the notice in time to send it out to members with the notice of meeting.
- (4) The members requesting the meeting are jointly and individually liable for the expenses reasonably incurred by the company in giving members notice of the resolution if the company does not receive the members' notice in time to send it out with the notice of meeting. At a general meeting, the company may resolve to meet the expenses itself.
- (5) The company need not give notice of the resolution:
  - (a) if it is more than 1,000 words long or defamatory; or
  - (b) if the members making the request are to bear the expenses of sending the notice out—unless the members give the company a sum reasonably sufficient to meet the expenses that it will reasonably incur in giving the notice.

**249P Members' statements to be distributed**

- (1) Members may request a company to give to all its members a statement provided by the members making the request about:
  - (a) a resolution that is proposed to be moved at a general meeting; or
  - (b) any other matter that may be properly considered at a general meeting.
- (2) The request must be made by:
  - (a) members with at least 5% of the votes that may be cast on the resolution; or
  - (b) at least 100 members who are entitled to vote at the meeting.
- (2A) The regulations may prescribe a different number of members for the purposes of the application of paragraph (2)(b) to:

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- (a) a particular company; or
- (b) a particular class of company.

Without limiting this, the regulations may specify the number as a percentage of the total number of members of the company.

- (3) The request must be:
  - (a) in writing; and
  - (b) signed by the members making the request; and
  - (c) given to the company.
- (4) Separate copies of a document setting out the request may be used for signing by members if the wording of the request is identical in each copy.
- (5) The percentage of votes that members have is to be worked out as at the midnight before the request is given to the company.
- (6) After receiving the request, the company must distribute to all its members a copy of the statement at the same time, or as soon as practicable afterwards, and in the same way, as it gives notice of a general meeting.
- (7) The company is responsible for the cost of making the distribution if the company receives the statement in time to send it out to members with the notice of meeting.
- (8) The members making the request are jointly and individually liable for the expenses reasonably incurred by the company in making the distribution if the company does not receive the statement in time to send it out with the notice of meeting. At a general meeting, the company may resolve to meet the expenses itself.
- (9) The company need not comply with the request:
  - (a) if the statement is more than 1,000 words long or defamatory; or
  - (b) if the members making the request are responsible for the expenses of the distribution—unless the members give the company a sum reasonably sufficient to meet the expenses that it will reasonably incur in making the distribution.

## **Division 5—Holding meetings of members**

### **249Q Purpose**

A meeting of a company's members must be held for a proper purpose.

### **249R Time and place for meetings of members**

A meeting of a company's members must be held at a reasonable time and place.

### **249S Technology**

A company may hold a meeting of its members at 2 or more venues using any technology that gives the members as a whole a reasonable opportunity to participate.

Note: See section 1322 for the consequences of a member not being given a reasonable opportunity to participate.

### **249T Quorum** (*replaceable rule—see section 135*)

- (1) The quorum for a meeting of a company's members is 2 members and the quorum must be present at all times during the meeting.

Note: For single member companies, see section 249B.

- (2) In determining whether a quorum is present, count individuals attending as proxies or body corporate representatives. However, if a member has appointed more than 1 proxy or representative, count only 1 of them. If an individual is attending both as a member and as a proxy or body corporate representative, count them only once.

Note 1: For rights to appoint proxies, see section 249X.

Note 2: For body corporate representatives, see section 250D.

- (3) A meeting of the company's members that does not have a quorum present within 30 minutes after the time for the meeting set out in

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the notice of meeting is adjourned to the date, time and place the directors specify. If the directors do not specify 1 or more of those things, the meeting is adjourned to:

- (a) if the date is not specified—the same day in the next week;  
and
  - (b) if the time is not specified—the same time; and
  - (c) if the place is not specified—the same place.
- (4) If no quorum is present at the resumed meeting within 30 minutes after the time for the meeting, the meeting is dissolved.

**249U Chairing meetings of members** (*replaceable rule—see section 135*)

- (1) The directors may elect an individual to chair meetings of the company's members.
- (2) The directors at a meeting of the company's members must elect an individual present to chair the meeting (or part of it) if an individual has not already been elected by the directors to chair it or, having been elected, is not available to chair it, or declines to act, for the meeting (or part of the meeting).
- (3) The members at a meeting of the company's members must elect a member present to chair the meeting (or part of it) if:
  - (a) a chair has not previously been elected by the directors to chair the meeting; or
  - (b) a previously elected chair is not available, or declines to act, for the meeting (or part of the meeting).
- (4) The chair must adjourn a meeting of the company's members if the members present with a majority of votes at the meeting agree or direct that the chair must do so.

**249V Auditor's right to be heard at general meetings**

- (1) A company's auditor is entitled to attend any general meeting of the company.



- (2) The auditor is entitled to be heard at the meeting on any part of the business of the meeting that concerns the auditor in their capacity as auditor.
- (3) The auditor is entitled to be heard even if:
  - (a) the auditor retires at the meeting; or
  - (b) the meeting passes a resolution to remove the auditor from office.
- (4) The auditor may authorise a person in writing as their representative for the purpose of attending and speaking at any general meeting.

Note 1: At an AGM, members may ask the auditor questions (see section 250T).

Note 2: For when a company must have an auditor, see Part 2M.3.

## **249W Adjourned meetings**

### *When resolution passed*

- (1) A resolution passed at a meeting resumed after an adjournment is passed on the day it was passed.

### *Business at adjourned meetings (replaceable rule—see section 135)*

- (2) Only unfinished business is to be transacted at a meeting resumed after an adjournment

## Division 6—Proxies and body corporate representatives

### 249X Who can appoint a proxy (*replaceable rule for proprietary companies and mandatory rule for public companies—see section 135*)

- (1) A member of a company who is entitled to attend and cast a vote at a meeting of the company's members may appoint a person as the member's proxy to attend and vote for the member at the meeting.
- (2) The appointment may specify the proportion or number of votes that the proxy may exercise.
- (3) Each member may appoint a proxy. If the member is entitled to cast 2 or more votes at the meeting, they may appoint 2 proxies. If the member appoints 2 proxies and the appointment does not specify the proportion or number of the member's votes each proxy may exercise, each proxy may exercise half of the votes.
- (4) Disregard any fractions of votes resulting from the application of subsection (2) or (3).

### 249Y Rights of proxies

#### *Rights of proxies*

- (1) A proxy appointed to attend and vote for a member has the same rights as the member:
  - (a) to speak at the meeting; and
  - (b) to vote (but only to the extent allowed by the appointment); and
  - (c) join in a demand for a poll.

#### *Proxy's right to vote*

- (2) If a company has a constitution, the constitution may provide that a proxy is not entitled to vote on a show of hands.

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Note: Even if the proxy is not entitled to vote on a show of hands, they may make or join in the demand for a poll.

*Effect of member's presence on proxy's authority*

- (3) A company's constitution (if any) may provide for the effect that a member's presence at a meeting has on the authority of a proxy appointed to attend and vote for the member. However, if the constitution does not deal with this, a proxy's authority to speak and vote for a member at a meeting is suspended while the member is present at the meeting.

**249Z Company sending appointment forms or lists of proxies must send to all members**

If a company sends a member a proxy appointment form for a meeting or a list of persons willing to act as proxies at a meeting:

- (a) if the member requested the form or list—the company must send the form or list to all members who ask for it and who are entitled to appoint a proxy to attend and vote at the meeting; or
- (b) otherwise—the company must send the form or list to all its members entitled to appoint a proxy to attend and vote at the meeting.

**250A Appointing a proxy**

- (1) An appointment of a proxy is valid if it is signed by the member of the company making the appointment and contains the following information:
- (a) the member's name and address
  - (b) the company's name
  - (c) the proxy's name or the name of the office held by the proxy
  - (d) the meetings at which the appointment may be used.

An appointment may be a standing one.

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- (2) If a company has a constitution, the constitution may provide that an appointment is valid even if it contains only some of the information required by subsection (1).
- (3) An undated appointment is taken to have been dated on the day it is given to the company.
- (4) An appointment may specify the way the proxy is to vote on a particular resolution. If it does:
  - (a) the proxy need not vote on a show of hands, but if the proxy does so, the proxy must vote that way; and
  - (b) if the proxy has 2 or more appointments that specify different ways to vote on the resolution—the proxy must not vote on a show of hands; and
  - (c) if the proxy is the chair—the proxy must vote on a poll, and must vote that way; and
  - (d) if the proxy is not the chair—the proxy need not vote on a poll, but if the proxy does so, the proxy must vote that way.

If a proxy is also a member, this subsection does not affect the way that the person can cast any votes they hold as a member.

Note: A company's constitution may provide that a proxy is not entitled to vote on a show of hands (see subsection 249Y(2)).

- (5) A person who contravenes subsection (4) is guilty of an offence, but only if their appointment as a proxy resulted from the company sending to members:
  - (a) a list of persons willing to act as proxies; or
  - (b) a proxy appointment form holding the person out as being willing to act as a proxy.
- (6) An appointment does not have to be witnessed.
- (7) A later appointment revokes an earlier one if both appointments could not be validly exercised at the meeting.

## **250B Proxy documents**

### *Documents to be received by company before meeting*

- (1) For an appointment of a proxy for a meeting of a company's members to be effective, the following documents must be received by the company at least 48 hours before the meeting:
  - (a) the proxy's appointment
  - (b) if the appointment is signed by the appointor's attorney—the authority under which the appointment was signed or a certified copy of the authority.

### *Documents received following adjournment of meeting*

- (2) If a meeting of a company's members has been adjourned, an appointment and any authority received by the company at least 48 hours before the resumption of the meeting are effective for the resumed part of the meeting.

### *Receipt of documents*

- (3) A company receives an appointment authority when it is received at any of the following:
  - (a) the company's registered office
  - (b) a fax number at the company's registered office
  - (c) a place, fax number or electronic address specified for the purpose in the notice of meeting.

### *Constitution or notice of meeting may provide for different notification period*

- (5) The company's constitution (if any) or the notice of meeting may reduce the period of 48 hours referred to in subsection (1) or (2).

## **250BA Proxy documents—listed companies**

- (1) In a notice of meeting for a meeting of the members of a company, the company:

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- (a) must specify a place and a fax number; and
  - (b) may specify an electronic address;
- for the purposes of receipt of proxy appointments.
- (2) This section applies only to a company that is:
    - (a) incorporated in Australia; and
    - (b) included in an official list of the Exchange.
  - (3) This section applies despite anything in the company's constitution.

**250C Validity of proxy vote**

*Proxy vote valid even if proxy cannot vote as member*

- (1) A proxy who is not entitled to vote on a resolution as a member may vote as a proxy for another member who can vote if their appointment specifies the way they are to vote on the resolution and they vote that way.

*Proxy vote valid even if member dies, revokes appointment etc. (replaceable rule—see section 135)*

- (2) Unless the company has received written notice of the matter before the start or resumption of the meeting at which a proxy votes, a vote cast by the proxy will be valid even if, before the proxy votes:
  - (a) the appointing member dies; or
  - (b) the member is mentally incapacitated; or
  - (c) the member revokes the proxy's appointment; or
  - (d) the member revokes the authority under which the proxy was appointed by a third party; or
  - (e) the member transfers the share in respect of which the proxy was given.

Note: A proxy's authority to vote is suspended while the member is present at the meeting (see subsection 249Y(3)).

**250D Body corporate representative**

- (1) A body corporate may appoint an individual as a representative to exercise all or any of the powers the body corporate may exercise:
  - (a) at meetings of a company's members; or
  - (b) at meetings of creditors or debenture holders; or
  - (c) relating to resolutions to be passed without meetings.

The appointment may be a standing one.

- (2) The appointment may set out restrictions on the representative's powers. If the appointment is to be by reference to a position held, the appointment must identify the position.
- (3) A body corporate may appoint more than 1 representative but only 1 representative may exercise the body's powers at any one time.
- (4) Unless otherwise specified in the appointment, the representative may exercise, on the body corporate's behalf, all of the powers that the body could exercise at a meeting or in voting on a resolution.

Note: For resolutions of members without meetings, see sections 249A and 249B.

## Division 7—Voting at meetings of members

### 250E How many votes a member has (*replaceable rule—see section 135*)

#### *Company with share capital*

- (1) Subject to any rights or restrictions attached to any class of shares, at a meeting of members of a company with a share capital:
  - (a) on a show of hands, each member has 1 vote; and
  - (b) on a poll, each member has 1 vote for each share they hold.

Note: Unless otherwise specified in the appointment, a body corporate representative has all the powers that a body corporate has as a member (including the power to vote on a show of hands).

#### *Company without share capital*

- (2) Each member of a company that does not have a share capital has 1 vote, both on a show of hands and a poll.

#### *Chair's casting vote*

- (3) The chair has a casting vote, and also, if they are a member, any vote they have in their capacity as a member.

Note 1: The chair may be precluded from voting, for example, by a conflict of interest.

Note 2: For rights to appoint proxies, see section 249X.

### 250F Jointly held shares (*replaceable rule—see section 135*)

If a share is held jointly and more than 1 member votes in respect of that share, only the vote of the member whose name appears first in the register of members counts.



**250G Objections to right to vote** (*replaceable rule—see section 135*)

A challenge to a right to vote at a meeting of a company's members:

- (a) may only be made at the meeting; and
- (b) must be determined by the chair, whose decision is final.

**250H Votes need not all be cast in the same way**

On a poll a person voting who is entitled to 2 or more votes:

- (a) need not cast all their votes; and
- (b) may cast their votes in different ways.

Note: For proxy appointments that specify the way the proxy is to vote on a particular resolution, see subsection 250A(4).

**250J How voting is carried out** (*replaceable rule—see section 135*)

- (1) A resolution put to the vote at a meeting of a company's members must be decided on a show of hands unless a poll is demanded.
- (1A) Before a vote is taken the chair must inform the meeting whether any proxy votes have been received and how the proxy votes are to be cast.
- (2) On a show of hands, a declaration by the chair is conclusive evidence of the result, provided that the declaration reflects the show of hands and the votes of the proxies received. Neither the chair nor the minutes need to state the number or proportion of the votes recorded in favour or against.

Note: Even though the chair's declaration is conclusive of the voting results, the members present may demand a poll (see paragraph 250L(3)(c)).

**250K Matters on which a poll may be demanded**

- (1) A poll may be demanded on any resolution.
- (2) If a company has a constitution, the constitution may provide that a poll cannot be demanded on any resolution concerning:

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- (a) the election of the chair of a meeting; or
  - (b) the adjournment of a meeting.
- (3) A demand for a poll may be withdrawn.

**250L When a poll is effectively demanded**

- (1) At a meeting of a company's members, a poll may be demanded by:
- (a) at least 5 members entitled to vote on the resolution; or
  - (b) members with at least 5% of the votes that may be cast on the resolution on a poll; or
  - (c) the chair.

Note: A proxy may join in the demand for a poll (see paragraph 249Y(1)(c)).

- (2) If a company has a constitution, the constitution may provide that fewer members or members with a lesser percentage of votes may demand a poll.
- (3) The poll may be demanded:
- (a) before a vote is taken; or
  - (b) before the voting results on a show of hands are declared; or
  - (c) immediately after the voting results on a show of hands are declared.
- (4) The percentage of votes that members have is to be worked out as at the midnight before the poll is demanded.

**250M When and how polls must be taken** (*replaceable rule—see section 135*)

- (1) A poll demanded on a matter other than the election of a chair or the question of an adjournment must be taken when and in the manner the chair directs.
- (2) A poll on the election of a chair or on the question of an adjournment must be taken immediately.

## **Division 8—AGMs of public companies**

### **250N Public company must hold AGM**

- (1) A public company must hold an annual general meeting (*AGM*) within 18 months after its registration.
- (2) A public company must hold an AGM at least once in each calendar year and within 5 months after the end of its financial year.

Note: An AGM held to satisfy this subsection may also satisfy subsection (1).

- (3) An AGM is to be held in addition to any other meetings held by a public company in the year.

Note 1: The company's annual financial report, directors' report and auditor's report must be laid before the AGM (see section 317).

Note 2: The rules in sections 249C-250M apply to an AGM.

- (4) A public company that has only 1 member is not required to hold an AGM under this section.

### **250P Extension of time for holding AGM**

- (1) A public company may lodge an application with ASIC to extend the period within which section 250N requires the company to hold an AGM.
- (2) If the company applies before the end of the period within which the company would otherwise be required to hold an AGM, ASIC may extend the period in writing. ASIC must specify the period of the extension.
- (3) A company granted an extension under subsection (2) must hold its AGM within the extended period.
- (4) ASIC may impose conditions on the extension and the company must comply with those conditions.

**250R Business of AGM**

The business of an AGM may include any of the following, even if not referred to in the notice of meeting:

- (a) the consideration of the annual financial report, directors' report and auditor's report
- (b) the election of directors
- (c) the appointment of the auditor
- (d) the fixing of the auditor's remuneration.

**250S Questions and comments by members on company management at AGM**

The chair of an AGM must allow a reasonable opportunity for the members as a whole at the meeting to ask questions about or make comments on the management of the company.

**250T Questions by members of auditors at AGM**

If the company's auditor or their representative is at the meeting, the chair of an AGM must allow a reasonable opportunity for the members as a whole at the meeting to ask the auditor or their representative questions relevant to the conduct of the audit and the preparation and content of the auditor's report.

## **Part 2G.3—Minutes and members' access to minutes**

### **251A Minutes**

- (1) A company must keep minute books in which it records within 1 month:
  - (a) proceedings and resolutions of meetings of the company's members; and
  - (b) proceedings and resolutions of directors' meetings (including meetings of a committee of directors); and
  - (c) resolutions passed by members without a meeting; and
  - (d) resolutions passed by directors without a meeting; and
  - (e) if the company is a proprietary company with only 1 director—the making of declarations by the director.

Note: For resolutions and declarations without meetings, see sections 248A, 248B, 249A and 249B.

- (2) The company must ensure that minutes of a meeting are signed within a reasonable time after the meeting by 1 of the following:
  - (a) the chair of the meeting
  - (b) the chair of the next meeting.
- (3) The company must ensure that minutes of the passing of a resolution without a meeting are signed by a director within a reasonable time after the resolution is passed.
- (4) The director of a proprietary company with only 1 director must sign the minutes of the making of a declaration by the director within a reasonable time after the declaration is made.
- (5) A company must keep its minute books at:
  - (a) its registered office; or
  - (b) its principal place of business in Australia; or
  - (c) another place approved by ASIC.

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- (6) A minute that is so recorded and signed is evidence of the proceeding, resolution or declaration to which it relates, unless the contrary is proved.

**251AA Disclosure of proxy votes—listed companies**

- (1) A company must record in the minutes of a meeting, in respect of each resolution in the notice of meeting, the total number of proxy votes exercisable by all proxies validly appointed and:
- (a) if the resolution is decided by a show of hands—the total number of proxy votes in respect of which the appointments specified that:
    - (i) the proxy is to vote for the resolution; and
    - (ii) the proxy is to vote against the resolution; and
    - (iii) the proxy is to abstain on the resolution; and
    - (iv) the proxy may vote at the proxy's discretion; and
  - (b) if the resolution is decided on a poll—the information specified in paragraph (a) and the total number of votes cast on the poll:
    - (i) in favour of the resolution; and
    - (ii) against the resolution; and
    - (iii) abstaining on the resolution.
- (2) A company that must notify the Exchange of a resolution passed by members at a meeting of the company must, at the same time, give the Exchange the information specified in subsection (1).
- (3) This section applies only to a company that is:
- (a) incorporated in Australia; and
  - (b) included in an official list of the Exchange.
- (4) This section applies despite anything in the company's constitution.

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**251B Members' access to minutes**

- (1) A company must ensure that the minute books for the meetings of its members and for resolutions of members passed without meetings are open for inspection by members free of charge.
- (2) A member of a company may ask the company in writing for a copy of:
  - (a) any minutes of a meeting of the company's members or an extract of the minutes; or
  - (b) any minutes of a resolution passed by members without a meeting.
- (3) If the company does not require the member to pay for the copy, the company must send it:
  - (a) within 14 days after the member asks for it; or
  - (b) within any longer period that ASIC approves.
- (4) If the company requires payment for the copy, the company must send it:
  - (a) within 14 days after the company receives the payment; or
  - (b) within any longer period that ASIC approves.The amount of any payment the company requires cannot exceed the prescribed amount.

## **Part 2G.4—Meetings of members of registered managed investment schemes**

### **Division 1—Who may call meetings of members**

#### **252A Calling of meetings of members by responsible entity**

The responsible entity of a registered scheme may call a meeting of the scheme's members.

#### **252B Calling of meetings of members by responsible entity when requested by members**

- (1) The responsible entity of a registered scheme must call and arrange to hold a meeting of the scheme's members to consider and vote on a proposed special or extraordinary resolution on the request of:
  - (a) members with at least 5% of the votes that may be cast on the resolution; or
  - (b) at least 100 members who are entitled to vote on the resolution.
- (1A) The regulations may prescribe a different number of members for the purposes of the application of paragraph (1)(b) to:
  - (a) a particular scheme; or
  - (b) a particular class of scheme.Without limiting this, the regulations may specify the number as a percentage of the total number of members of the scheme.
- (2) The request must:
  - (a) be in writing; and
  - (b) state any resolution to be proposed at the meeting; and
  - (c) be signed by the members proposing to move the resolution.
- (3) The request may be accompanied by a statement about the proposed resolution provided by the members making the request.



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- (4) Separate copies of a document setting out the request and statement (if any) may be used for signing by members if the wording of the request and statement (if any) is identical in each copy.
- (5) The percentage of the votes that members have is to be worked out as at the midnight before the request is given to the responsible entity.
- (6) The responsible entity must call the meeting within 21 days after the request is given to it. The meeting is to be held not later than 2 months after the request is given to the responsible entity.
- (7) The responsible entity must give to each of the members a copy of the proposed resolution and statement (if any) at the same time, or as soon as practicable afterwards, as it gives notice of the meeting. The responsible entity must distribute the copies in the same way in which it gives notice of the meeting.
- (8) The responsible entity does not have to distribute a copy of the resolution or statement if either is more than 1,000 words long or defamatory.
- (9) The responsible entity is responsible for the expenses of calling and holding the meeting and making the distribution. The responsible entity may meet those expenses from the scheme's assets.

**252C Failure of responsible entity to call meeting of the scheme's members**

- (1) Members with more than 50% of the votes carried by interests held by the members who make a request under section 252B may call and arrange to hold a meeting of the scheme's members and distribute the statement (if any) if the responsible entity does not do so within 21 days after the request is given to the responsible entity.
- (2) The meeting must be called and the statement is to be distributed in the same way—so far as is possible—in which meetings of the

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scheme's members may be called by the responsible entity and information is distributed to members by the responsible entity. The meeting must be held not later than 3 months after the request is given to the responsible entity.

- (3) To call the meeting the members requesting the meeting may ask the responsible entity under section 173 for a copy of the register of members. Despite paragraph 173(3)(b), the responsible entity must give the members requesting the meeting the copy of the register without charge.
- (4) The responsible entity must pay the reasonable expenses the members incurred because the responsible entity failed to call and arrange to hold the meeting and to make the distribution (if any). The responsible entity must not pay those expenses from the scheme's assets.

**252D Calling of meetings of members by members**

- (1) Members of a registered scheme who hold interests carrying at least 5% of the votes that may be cast at a meeting of the scheme's members may call and arrange to hold a meeting of the scheme's members to consider and vote on a proposed special resolution or a proposed extraordinary resolution. The members calling the meeting must pay the expenses of calling and holding the meeting.
- (2) The meeting must be called in the same way—so far as is possible—in which meetings of the scheme's members may be called by the responsible entity.
- (3) The percentage of the votes carried by interests that members hold is to be worked out as at the midnight before the meeting is called.

**252E Calling of meetings of members by the Court**

- (1) The Court may order a meeting of a registered scheme's members to be called to consider and vote on a proposed special or extraordinary resolution if it is impracticable to call the meeting in any other way.

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- (2) The Court may make the order on application by:
- (a) the responsible entity; or
  - (b) any member of the scheme who would be entitled to vote at the meeting.

Note: For the directions the Court may give for calling, holding or conducting a meeting it has ordered be called, see section 1319.

## Division 2—How to call meetings of members

### 252F Amount of notice of meetings

At least 21 days notice must be given of a meeting of the members of a registered scheme. However, the scheme's constitution may specify a longer minimum period of notice.

### 252G Notice of meetings of members to members, directors and auditors

*Notice to members, directors and auditors individually*

- (1) Written notice of a meeting of a registered scheme's members must be given to:
  - (a) each member of the scheme entitled to vote at the meeting; and
  - (b) each director of the responsible entity; and
  - (c) the auditor of the scheme; and
  - (d) the auditor of the scheme compliance plan.

If an interest is held jointly, notice need only be given to 1 of the members.

*Notice to joint members*

- (2) Unless the scheme's constitution provides otherwise, notice to joint members must be given to the joint member named first in the register of members.

*How notice is given*

- (3) Unless the scheme's constitution provides otherwise, the responsible entity may give notice of the meeting to a member:
  - (a) personally; or

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- (b) by sending it by post to the address for the member in the register of members or an alternative address (if any) nominated by the member; or
- (c) by sending it to the fax number or electronic address (if any) nominated by the member.

Note: A defect in the notice given may not invalidate a meeting (see section 1322).

*When notice by post or fax is given*

- (4) Unless the scheme's constitution provides otherwise, a notice of meeting sent by post is taken to be given 3 days after it is posted. A notice of meeting sent by fax, or other electronic means, is taken to be given on the business day after it is sent.

### **252H Auditors entitled to other communications**

The responsible entity of a registered scheme must give the auditor of the scheme and the auditor of the scheme compliance plan any other communications relating to the meeting that a member of the scheme is entitled to receive.

### **252J Contents of notice of meetings of members**

A notice of a meeting of a registered scheme's members must:

- (a) set out the place, date and time for the meeting (and, if the meeting is to be held in 2 or more places, the technology that will be used to facilitate this); and
- (b) state the general nature of the meeting's business; and
- (c) if a special or extraordinary resolution is to be proposed at the meeting—set out an intention to propose the special or extraordinary resolution and state the resolution; and
- (d) contain a statement setting out the following information:
  - (i) that the member has a right to appoint a proxy
  - (ii) that the proxy does not need to be a member of the registered scheme

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- (iii) that if the member appoints 2 proxies the member may specify the proportion or number of votes the proxy is appointed to exercise.

Note: There may be other requirements for disclosure to members.

**252K Notice of adjourned meetings**

When a meeting is adjourned, new notice of the adjourned meeting must be given if the meeting is adjourned for 1 month or more.

### **Division 3—Members' rights to put resolutions etc. at meetings of members**

#### **252L Members' resolutions**

- (1) The following members of a registered scheme may give the responsible entity notice of a resolution that they propose to move at a meeting of the scheme's members:
  - (a) members with at least 5% of the votes that may be cast on the resolution; or
  - (b) at least 100 members who are entitled to vote at a meeting of the scheme's members.
- (1A) The resolution must be:
  - (a) a special resolution; or
  - (b) an extraordinary resolution; or
  - (c) a resolution to remove the responsible entity of a scheme that is listed and choose a new responsible entity.
- (2) The notice must:
  - (a) be in writing; and
  - (b) set out the wording of the proposed resolution; and
  - (c) be signed by the members giving the notice.
- (3) Separate copies of a document setting out the notice may be used for signing by members if the wording of the notice is identical in each copy.
- (4) The percentage of the votes that members have is to be worked out as at the midnight before the members give the notice.

#### **252M Responsible entity giving notice of members' resolutions**

- (1) If a responsible entity has been given notice of a resolution under section 252L, the resolution is to be considered at the next meeting

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of the scheme's members that occurs more than 2 months after the notice is given.

- (2) The responsible entity must give all the members of the scheme notice of the resolution at the same time, or as soon as practicable afterwards, and in the same way, as it gives notice of a meeting.
- (3) The responsible entity is responsible for the cost of giving members notice of the resolution if the responsible entity receives the notice in time to send it out to members with the notice of meeting.
- (4) The members requesting the meeting are jointly and individually liable for the expenses reasonably incurred by the responsible entity in giving members notice of the resolution if the responsible entity does not receive the members' notice in time to send it out with the notice of meeting. A resolution may be passed at a meeting of the scheme's members that the responsible entity is to meet the expenses out of the scheme's assets.
- (5) The responsible entity need not give notice of the resolution:
  - (a) if it is more than 1,000 words long or defamatory; or
  - (b) if the members making the request are to bear the expenses of sending the notice out—unless the members give the responsible entity a sum reasonably sufficient to meet the expenses that it will reasonably incur in giving the notice.

**252N Members' statements to be distributed**

- (1) Members may request a responsible entity to give to all its members a statement provided by the members making the request about:
  - (a) a resolution that is proposed to be moved at a meeting of the scheme's members; or
  - (b) any other matter that may be properly considered at a meeting of the scheme's members.
- (2) The request must be made by:



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- (a) members with at least 5% of the votes that may be cast on the resolution; or
  - (b) at least 100 members who are entitled to vote at the meeting.
- (2A) The regulations may prescribe a different number of members for the purposes of the application of paragraph (2)(b) to:
- (a) a particular scheme; or
  - (b) a particular class of scheme.
- Without limiting this, the regulations may specify the number as a percentage of the total number of members of the scheme.
- (3) The request must be:
    - (a) in writing; and
    - (b) signed by the members making the request; and
    - (c) given to the responsible entity.
  - (4) Separate copies of a document setting out the request may be used for signing by members if the wording of the request is identical in each copy.
  - (5) The percentage of the votes that members have is to be worked out as at the midnight before the request is given to the responsible entity.
  - (6) After receiving the request, the responsible entity must distribute to all the members of the scheme a copy of the statement at the same time, or as soon as practicable afterwards, and in the same way, as it gives notice of a meeting.
  - (7) The responsible entity is responsible for the cost of making the distribution if the responsible entity receives the statement in time to send it out to members with the notice of meeting.
  - (8) The members making the request are jointly and individually liable for the expenses reasonably incurred by the responsible entity in making the distribution if the responsible entity does not receive the statement in time to send it out with the notice of meeting. A resolution may be passed at a meeting of the scheme's members

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that the responsible entity is to meet the expenses out of the scheme's assets.

- (9) The responsible entity need not comply with the request:
- (a) if the statement is more than 1,000 words long or defamatory; or
  - (b) if the members making the request are responsible for the expenses of the distribution—unless the members give the company a sum reasonably sufficient to meet the expenses that it will reasonably incur in making the distribution.

## **Division 4—Holding meetings of members**

### **252P Time and place for meetings of members**

A meeting of a registered scheme's members must be held at a reasonable time and place.

### **252Q Technology**

A responsible entity of a registered scheme may hold a meeting of the scheme's members at 2 or more venues using any technology that gives the members as a whole a reasonable opportunity to participate.

Note: See section 1322 for the consequences of members not being given a reasonable opportunity to participate.

### **252R Quorum**

- (1) This section applies to a registered scheme subject to the provisions of the scheme's constitution.
- (2) The quorum for a meeting of a registered scheme's members is 2 members and the quorum must be present at all times during the meeting.
- (3) In determining whether a quorum is present, count individuals attending as proxies or body corporate representatives. However, if a member has appointed more than 1 proxy or representative, count only 1 of them. If an individual is attending both as a member and as a proxy or body corporate representative, count them only once.  
Note 1: For rights to appoint proxies, see section 252V.  
Note 2: For body corporate representatives, see section 253B.
- (4) A meeting of the scheme's members that does not have a quorum present within 30 minutes after the time for the start of the meeting set out in the notice of meeting is adjourned to the date, time and

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place the responsible entity specifies. If the responsible entity does not specify 1 or more of those things, the meeting is adjourned to:

- (a) if the date is not specified—the same day in the next week; and
  - (b) if the time is not specified—the same time; and
  - (c) if the place is not specified—the same place.
- (5) If no quorum is present at the resumed meeting within 30 minutes after the time for the start of the meeting, the meeting is dissolved.

**252S Chairing meetings of members**

- (1) The responsible entity may, in writing, appoint an individual to chair a meeting called under section 252A or 252B.
- (2) The members present at a meeting called under section 252A or 252B must elect a member present to chair the meeting (or part of it) if:
  - (a) a chair has not previously been appointed to chair the meeting; or
  - (b) a previously appointed chair is not available, or declines to act, for the meeting (or part of the meeting).
- (3) The members present at a meeting called under section 252C, 252D or 252E must elect a member present to chair the meeting. This is not so if the meeting is called under section 252E and the Court has directed otherwise under section 1319.

**252T Auditors' right to be heard at meetings of members**

- (1) The auditor of a registered scheme and the auditor of the scheme compliance plan are entitled to attend any meeting of the scheme's members.
- (2) An auditor is entitled to be heard at the meeting on any part of the business of the meeting that concerns the auditor in their capacity as auditor.

- (3) An auditor may authorise a person in writing as their representative for the purpose of attending and speaking at any meeting of the scheme's members.

### **252U Adjourned meetings**

- (1) A resolution passed at a meeting resumed after an adjournment is passed on the day it was passed.
- (2) Only unfinished business is to be transacted at a meeting resumed after an adjournment.

## Division 5—Proxies and body corporate representatives

### 252V Who can appoint a proxy

- (1) A member of a registered scheme who is entitled to attend and cast a vote at a meeting of the scheme's members may appoint a person as the member's proxy to attend and vote for the member at the meeting.
- (2) The appointment may specify the proportion or number of votes that the proxy may exercise.
- (3) A member may appoint 1 or 2 proxies. If the member appoints 2 proxies and the appointment does not specify the proportion or number of the member's votes each proxy may exercise, each proxy may exercise half of the votes.
- (4) Disregard any fractions of votes resulting from the application of subsection (2) or (3).

### 252W Rights of proxies

#### *Rights of proxies*

- (1) A proxy appointed to attend and vote for a member has the same rights as the member:
  - (a) to speak at the meeting; and
  - (b) to vote (but only to the extent allowed by the appointment).

#### *Proxy's right to vote*

- (2) A registered scheme's constitution (if any) may provide that a proxy is not entitled to vote on a show of hands.

Note: Even if the proxy is not entitled to vote on a show of hands, they may make or join in the demand for a poll (see section 253L).

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*Effect of member's presence on proxy's authority*

- (3) A registered scheme's constitution (if any) may provide for the effect that a member's presence at a meeting has on the authority of a proxy appointed to attend and vote for the member. However, if the constitution does not make such provision, a proxy's authority to speak and vote for a member at a meeting is suspended while the member is present at the meeting.

**252X Responsible entity sending appointment forms or lists of proxies must send to all members**

If the responsible entity of a registered scheme sends a member a proxy appointment form for a meeting or a list of persons willing to act as proxies at a meeting:

- (a) if the member requested the form or list—the responsible entity must send the form or list to all members who ask for it and who are entitled to appoint a proxy to attend and vote at the meeting; or
- (b) otherwise—the responsible entity must send the form or list to all its members entitled to appoint a proxy to attend and vote at the meeting.

**252Y Appointing a proxy**

- (1) An appointment of a proxy is valid if it is signed by the member of the registered scheme making the appointment and contains the following information:
- (a) the member's name and address
- (b) the scheme's name
- (c) the proxy's name or the name of the office held by the proxy
- (d) the meetings at which the appointment may be used.

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*An appointment may be a standing one*

- (2) A registered scheme's constitution may provide that an appointment is valid even if it contains only some of the information required by subsection (1).
- (3) An undated appointment is taken to have been dated on the day it is given to the responsible entity.
- (4) An appointment may specify the way the proxy is to vote on a particular resolution. If it does:
  - (a) the proxy need not vote on a show of hands, but if the proxy does so, the proxy must vote that way; and
  - (b) if the proxy has 2 or more appointments that specify different ways to vote on the resolution—the proxy must not vote on a show of hands; and
  - (c) if the proxy is the chair—the proxy must vote on a poll, and must vote that way; and
  - (d) if the proxy is not the chair—the proxy need not vote on a poll, but if the proxy does so, the proxy must vote that way.

If a proxy is also a member, this subsection does not affect the way that the person can cast any votes they hold as a member.

Note: The scheme's constitution may provide that a proxy is not entitled to vote on a show of hands (see subsection 252W(2)).

- (5) A person who contravenes subsection (4) is guilty of an offence, but only if their appointment as a proxy resulted from the responsible entity sending to members:
  - (a) a list of persons willing to act as proxies; or
  - (b) a proxy appointment form holding the person out as being willing to act as a proxy.
- (6) An appointment does not have to be witnessed.
- (7) A later appointment revokes an earlier one if both appointments could not be validly exercised at the meeting.



## **252Z Proxy documents**

*Section applies subject to scheme's constitution*

- (1) Subsections (2), (3) and (4) apply to a registered scheme subject to the provisions of the scheme's constitution.

*Documents to be received by responsible entity before meeting*

- (2) For an appointment of a proxy for a meeting of the scheme's members to be effective, the following documents must be received by the responsible entity at least 48 hours before the meeting:
  - (a) the proxy's appointment
  - (b) if the appointment is signed by the appointor's attorney—the authority under which the appointment was signed or a certified copy of the authority.

*Documents received following adjournment of meeting*

- (3) If a meeting of the scheme's members has been adjourned, an appointment and any authority received by the responsible entity at least 48 hours before the resumption of the meeting are effective for the resumed part of the meeting.

*Receipt of documents*

- (3) A responsible entity receives an appointment authority when it is received at any of the following:
  - (a) the responsible entity's registered office
  - (b) a fax number at the responsible entity's registered office
  - (c) a place, fax number or electronic address specified for the purpose in the notice of meeting.

*Ineffective appointments of fax or electronic notification*

- (4) An appointment of a proxy is ineffective if:

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- (a) the responsible entity receives either or both the appointment or authority at a fax number or electronic address; and
- (b) a requirement (if any) in the notice of meeting that:
  - (i) the transmission be verified in a way specified in the notice; or
  - (ii) the proxy produce the appointment and authority (if any) at the meeting;is not complied with.

*Constitution or notice of meeting may provide for different notification period*

- (5) The scheme's constitution or the notice of meeting may reduce the period of 48 hours referred to in subsection (2) or (3).

**253A Validity of proxy vote**

*Proxy vote valid even if member dies, revokes appointment etc.*

- (1) Unless the responsible entity has received written notice of the matter before the start or resumption of the meeting at which a proxy votes, a vote cast by the proxy will be valid even if, before the proxy votes:
  - (a) the appointing member dies; or
  - (b) the member is mentally incapacitated; or
  - (c) the member revokes the proxy's appointment; or
  - (d) the member revokes the authority under which the proxy was appointed by a third party; or
  - (e) the member transfers the interest in respect of which the proxy was given.

This subsection applies to a registered scheme subject to the provisions of the scheme's constitution.

Note: A proxy's authority to vote is suspended while the member is present at the meeting (see subsection 252W(3)).

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*Proxy vote valid even if proxy cannot vote as member*

- (2) A proxy who is not entitled to vote on a resolution as a member may vote as a proxy for another member who can vote if their appointment specifies the way they are to vote on the resolution and they vote that way.

**253B Body corporate representative**

- (1) A body corporate may appoint an individual as a representative to exercise all or any of its powers at a meeting of a registered scheme's members. The appointment may be a standing one.
- (2) The appointment must set out what the representative is appointed to do and may set out restrictions on the representative's powers. If the appointment is to be by reference to a position held, the appointment must identify the position.
- (3) A body corporate may appoint more than 1 representative but only 1 representative may exercise the body's powers at any one time.
- (4) Unless otherwise specified in the appointment, the representative may exercise, on the body corporate's behalf, all of the powers that the body could exercise at a meeting or in voting on a resolution.

## **Division 6—Voting at meetings of members**

### **253C How many votes a member has**

- (1) On a show of hands, each member of a registered scheme has 1 vote.
- (2) On a poll, each member of the scheme has 1 vote for each dollar of the value of the total interests they have in the scheme.

Note 1: For rights to appoint proxies, see section 252V.

Note 2: Unless otherwise specified in the appointment, a body corporate representative has all the powers that a body corporate has as a member (including the power to vote on a show of hands).

### **253D Jointly held interests**

If an interest in a registered scheme is held jointly and more than 1 member votes in respect of that interest, only the vote of the member whose name appears first in the register of members counts.

### **253E Responsible entity and associates cannot vote if interested in resolution**

The responsible entity of a registered scheme and its associates are not entitled to vote their interest on a resolution at a meeting of the scheme's members if they have an interest in the resolution or matter other than as a member. However, if the scheme is listed, the responsible entity and its associates are entitled to vote their interest on resolutions to remove the responsible entity and choose a new responsible entity.

Note: The responsible entity and its associates may vote as proxies if their appointments specify the way they are to vote and they vote that way (see subsection 253A(2)).

### **253F How to work out the value of an interest**

The value of an interest in a registered scheme is:

- (a) if it is quoted on a stock market of a stock exchange—the last sale price on that market on the trading day immediately before the day on which the poll is taken; or
- (b) if it is not quoted on a stock market of a stock exchange and the scheme is liquid and has a withdrawal provision in its constitution—the amount that would be paid for the interest under that provision on the business day immediately before the day on which the poll is taken; or
- (c) in any other case—the amount that the responsible entity determines in writing to be the price that a willing but not anxious buyer would pay for the interest if it was sold on the business day immediately before the day on which the poll is taken.

### **253G Objections to a right to vote**

A challenge to a right to vote at a meeting of members of a registered scheme:

- (a) may only be made at the meeting; and
- (b) must be determined by the chair, whose decision is final.

### **253H Votes need not all be cast in the same way**

On a poll a person voting who is entitled to 2 or more votes:

- (a) need not cast all their votes; and
- (b) may cast their votes in different ways.

Note: For proxy appointments that specify the proxy is to vote on a particular resolution, see subsection 252Y(4).

### **253J How voting is carried out**

- (1) A special or extraordinary resolution put to the vote at a meeting of a registered scheme's members must be decided on a poll.

**The Corporations Law—Section 253K**

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- (2) Any other resolution put to the vote at a meeting of the scheme's members must be decided on a show of hands unless a poll is demanded. The resolution is passed on a poll if it has been passed by at least 50% of the votes cast by members entitled to vote on the resolution.
- (3) On a show of hands, a declaration by the chair is conclusive evidence of the result. Neither the chair nor the minutes need to state the number or proportion of the votes recorded in favour or against.

Note: Even though the chair's declaration is conclusive of the voting results, the members present may demand a poll (see paragraph 253L(3)(c)).

**253K Matters on which a poll may be demanded**

- (1) A poll may be demanded on any resolution.
- (2) A registered scheme's constitution may provide that a poll cannot be demanded on any resolution concerning:
  - (a) the election of the chair of a meeting; or
  - (b) the adjournment of a meeting.
- (3) A demand for a poll may be withdrawn.

**253L When a poll is effectively demanded**

- (1) At a meeting of a registered scheme's members, a poll may be demanded by:
  - (a) at least 5 members present entitled to vote on the resolution; or
  - (b) members present with at least 5% of the votes that may be cast on the resolution on a poll; or
  - (c) the chair.
- (2) A registered scheme's constitution may provide that fewer members or members with a lesser percentage of votes may demand a poll.

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The Corporations Law—Section 253L

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- (3) The poll may be demanded:
  - (a) before a vote is taken; or
  - (b) before the voting results on a show of hands are declared; or
  - (c) immediately after the voting results on a show of hands are declared.
  
- (4) The percentage of votes that members have is to be worked out as at close of business on the day before the poll is demanded.

## Division 7—Minutes and members' access to minutes

### 253M Minutes

- (1) A responsible entity of a registered scheme must keep minute books in which it records within 1 month:
  - (a) proceedings of meetings of the scheme's members; and
  - (b) resolutions of meetings of the scheme's members.
- (2) The responsible entity must ensure that minutes of a meeting are signed within a reasonable time after the meeting by the chair of the meeting or the chair of the next meeting.
- (3) The responsible entity must keep the minute books at:
  - (a) its registered office; or
  - (b) its principal place of business in Australia; or
  - (c) another place approved by ASIC.
- (4) A minute that is so recorded and signed is evidence of the proceeding or resolution to which it relates, unless the contrary is proved.

### 253N Members' access to minutes

- (1) The responsible entity of a registered scheme must ensure that the minute books for the meetings of the scheme's members are open for inspection by members free of charge.
- (2) A member of a registered scheme may ask the responsible entity in writing for a copy of any minutes of a meeting of the scheme's members or an extract of the minutes.
- (3) If the responsible entity does not require the member to pay for the copy, the responsible entity must send it:
  - (a) within 14 days after the member asks for it; or
  - (b) within any longer period that ASIC approves.



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The Corporations Law—Section 253N

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- (4) If the responsible entity requires payment for the copy, the responsible entity must send it:
- (a) within 14 days after the responsible entity receives the payment; or
  - (b) within any longer period that ASIC approves.
- The amount of any payment the responsible entity requires cannot exceed the prescribed amount.

## Chapter 2H—Shares

### Part 2H.1—Issuing and converting shares

#### 254A Power to issue bonus, partly-paid, preference and redeemable preference shares

- (1) A company's power under section 124 to issue shares includes the power to issue:
- (a) bonus shares (shares for whose issue no consideration is payable to the issuing company); and
  - (b) preference shares (including redeemable preference shares); and
  - (c) partly-paid shares (whether or not on the same terms for the amount of calls to be paid or the time for paying calls).

Note 1: Subsections 246C(5) and (6) provide that in certain circumstances the issue of preference shares is taken to be a variation of class rights.

Note 2: Partly-paid shares are dealt with in sections 254M-254N.

Note 3: On the issue of a bonus share there need not be any increase in the company's share capital.

- (2) A company can issue preference shares only if the rights attached to the preference shares with respect to the following matters are set out in the company's constitution (if any) or have been otherwise approved by special resolution of the company:
- (a) repayment of capital
  - (b) participation in surplus assets and profits
  - (c) cumulative and non-cumulative dividends
  - (d) voting
  - (e) priority of payment of capital and dividends in relation to other shares or classes of preference shares.
- (3) Redeemable preference shares are preference shares that are issued on the terms that they are liable to be redeemed. They may be redeemable:

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The Corporations Law—Section 254B

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- (a) at a fixed time or on the happening of a particular event; or
- (b) at the company's option; or
- (c) at the shareholder's option.

Note: Redeemable preference shares are dealt with in sections 254J-254L.

### **254B Terms of issue**

- (1) A company may determine:
  - (a) the terms on which its shares are issued; and
  - (b) the rights and restrictions attaching to the shares.

Note 1: Details of any division of shares into classes or conversion of classes of shares must be given to ASIC by a notice in the prescribed form (see subsection 246F(1)).

Note 2: For public companies, any document or resolution that attaches rights to shares or varies or cancels rights attaching to shares must be lodged with ASIC (see subsection 246F(3)).

Note 3: Sections 246B-246G provide safeguards in cases where class rights are cancelled or varied.

Note 4: The company cannot issue par value shares (see section 254C) or bearer shares (see section 254F).

#### *No liability companies—special terms of issue*

- (2) A share in a no liability company is issued on the following terms:
  - (a) if a no liability company is wound up and a surplus remains, it must be distributed among the parties entitled to it in proportion to the number of shares held by them, irrespective of the amounts paid up on the shares; and
  - (b) a member who is in arrears in payment of a call on a share, but whose share has not been forfeited, is not entitled to participate in the distribution on the basis of holding that share until the amount owing in respect of the call has been fully paid and satisfied.

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*Companies incorporated as no liability companies—special terms of issue*

- (3) If a company:
- (a) either:
    - (i) is a no liability company; or
    - (ii) was initially registered as a no liability company and has changed its status under section 162 to another type of company; and
  - (b) ceases to carry on business within 12 months after its registration and is wound up;
- shares issued for cash rank (to the extent of the capital contributed by subscribing shareholders) in the winding up in priority to shares issued to vendors or promoters, or both, for consideration other than cash.
- (4) The holders of shares issued to vendors or promoters are not entitled to preference on the winding up of a company that:
- (a) is a no liability company; or
  - (b) was initially registered as a no liability company and has changed its status under section 162 to another type of company.

This is so despite anything in the company's constitution or the terms on which the shares are on issue.

**254C No par value shares**

Shares of a company have no par value.

Note: Sections 1444-1449 contain application and transitional provisions that deal with the introduction of no par value shares. See also subsection 169(4).

**254D Pre-emption for existing shareholders on issue of shares in proprietary company (replaceable rule—see section 135)**

- (1) Before issuing shares of a particular class, the directors of a proprietary company must offer them to the existing holders of

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The Corporations Law—Section 254E

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shares of that class. As far as practicable, the number of shares offered to each shareholder must be in proportion to the number of shares of that class that they already hold.

- (2) To make the offer, the directors must give the shareholders a statement setting out the terms of the offer, including:
  - (a) the number of shares offered; and
  - (b) the period for which it will remain open.
- (3) The directors may issue any shares not taken up under the offer under subsection (1) as they see fit.
- (4) The company may by resolution passed at a general meeting authorise the directors to make a particular issue of shares without complying with subsection (1).

#### **254E Court validation of issue**

- (1) On application by a company, a shareholder, a creditor or any other person whose interests have been or may be affected, the Court may make an order validating, or confirming the terms of, a purported issue of shares if:
  - (a) the issue is or may be invalid for any reason; or
  - (b) the terms of the issue are inconsistent with or not authorised by:
    - (i) this Law; or
    - (ii) another law of this jurisdiction; or
    - (iii) the company's constitution (if any).
- (2) On lodgment of a copy of the order with ASIC, the order has effect from the time of the purported issue.

#### **254F Bearer shares and stock must not be issued**

A company does not have the power to:

- (a) issue bearer shares; or
- (b) issue stock or convert shares into stock.

**The Corporations Law—Section 254G**

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Note: Section 1432 contains transitional provisions for the conversion of existing stock into shares.

**254G Conversion of shares**

- (1) A company may:
- (a) convert an ordinary share into a preference share; and
  - (b) convert a preference share into an ordinary share.

Note: The variation of class rights provisions (sections 246B-246G) will apply to the conversion.

- (2) A company can convert ordinary shares into preference shares only if the holders' rights with respect to the following matters are set out in the company's constitution (if any) or have been otherwise approved by special resolution of the company:
- (a) repayment of capital
  - (b) participation in surplus assets and profits
  - (c) cumulative and non-cumulative dividends
  - (d) voting
  - (e) priority of payment of capital and dividends in relation to other shares or classes or preference shares.
- (3) A share that is not a redeemable preference share when issued cannot afterwards be converted into a redeemable preference share.

**254H Resolution to convert shares into larger or smaller number**

- (1) A company may convert all or any of its shares into a larger or smaller number of shares by resolution passed at a general meeting.

Note: The variation of class rights provisions (sections 246B-246G) may apply to the conversion.

- (2) The conversion takes effect on:
- (a) the day the resolution is passed; or
  - (b) a later date specified in the resolution.

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The Corporations Law—Section 254H

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- (3) Any amount unpaid on shares being converted is to be divided equally among the replacement shares.
- (4) The company must lodge a copy of the resolution with ASIC within 1 month after it is passed.

## Part 2H.2—Redemption of redeemable preference shares

### 254J Redemption must be in accordance with terms of issue

- (1) A company may redeem redeemable preference shares only on the terms on which they are on issue. On redemption, the shares are cancelled.

Note: For the power to issue redeemable preference shares see paragraph 254A(1)(b) and subsections 254A(2) and (3).

- (2) This section does not affect the terms on which redeemable preference shares may be cancelled under a reduction of capital or a share buy-back under Part 2J.1.

### 254K Other requirements about redemption

A company may only redeem redeemable preference shares:

- (a) if the shares are fully paid-up; and
- (b) out of profits or the proceeds of a new issue of shares made for the purpose of the redemption.

Note: For a director's duty to prevent insolvent trading on redeeming redeemable preference shares, see section 588G.

### 254L Consequences of contravening section 254J or 254K

- (1) If a company redeems shares in contravention of section 254J or 254K:
  - (a) the contravention does not affect the validity of the redemption or of any contract or transaction connected with it; and
  - (b) the company is not guilty of an offence.
- (2) Any person who is involved in a company's contravention of section 254J or 254K contravenes this subsection.



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The Corporations Law—Section 254L

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Note 1: Subsection (2) is a civil penalty provision (see section 1317E).

Note 2: Section 79 defines *involved*.

- (3) A person commits an offence if they are involved in a company's contravention of section 254J or 254K and the involvement is dishonest.

## Part 2H.3—Partly-paid shares

### 254M Liability on partly-paid shares

*General rule about shareholder's liability for calls*

- (1) If shares in a company are partly-paid, the shareholder is liable to pay calls on the shares in accordance with the terms on which the shares are on issue. This subsection does not apply to a no liability company

Note: The shareholder may also be liable as a contributory under sections 514-529 if the company is wound up.

*No liability companies*

- (2) The acceptance by a person of a share in a no liability company, whether by issue or transfer, does not constitute a contract by the person to pay:
  - (a) calls in respect of the share; or
  - (b) any contribution to the debts and liabilities of the company.

### 254N Calls may be limited to when company is externally-administered

- (1) A limited company may provide by special resolution that the whole or a part of its unpaid share capital may be called up only if the company becomes an externally-administered body corporate.
- (2) The company must lodge with ASIC a copy of the special resolution within 14 days after it is passed.

**254P No liability companies—calls on shares**

*Making calls*

- (1) A call on a share in a no liability company is not effective unless it is made payable at least 14 days after the call is made.

*Notice of call*

- (2) At least 7 days before a call on shares in a no liability company becomes payable, the company must give the holders of the shares notice of:

- (a) the amount of the call;
- (b) the day when it is payable; and
- (c) the place for payment.

The notice must be sent by post. If the notice is not given, the call is not payable.

- (3) A call does not have any effect on a forfeited share that is held by or in trust for the company under subsection 254Q(6). However, when the share is re-issued or sold by the company, the share may be credited as paid up to the amount determined by the company in accordance with its constitution or by resolution.

**254Q No liability companies—forfeiture and sale of shares for failure to meet call**

*Forfeiture and sale of shares*

- (1) A share in a no liability company is immediately forfeited if:
- (a) a call is made on the share; and
  - (b) the call is unpaid at the end of 14 days after it became payable.

Note: The holder of the share may redeem it under section 254R.

- (2) The forfeited share must then be offered for sale by public auction within 6 weeks after the call became payable.

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*Advertisement of sale*

- (3) At least 14 days, and not more than 21 days, before the day of the sale, the sale must be advertised in a daily newspaper circulating generally throughout Australia. The specific number of shares to be offered need not be specified in the advertisement and it is sufficient to give notice of the sale by advertising to the effect that all shares on which a call remains unpaid will be sold.

*Postponement of sale*

- (4) An intended sale of forfeited shares that has been duly advertised may be postponed for not more than 21 days from the advertised date of sale. The date to which the sale is postponed must be advertised in a daily newspaper circulating generally in Australia.
- (5) There may be more than 1 postponement but the sale cannot be postponed to a date more than 90 days from the first date fixed for the intended sale.

*Shares may be offered as credited to a particular amount*

- (6) The share may be sold credited as paid up to the sum of:
- (a) the amount paid upon the share at the time of forfeiture; and
  - (b) the amount of the call; and
  - (c) the amount of any other calls becoming payable on or before the day of the sale;
- if the company in accordance with its constitution or by ordinary resolution so determines.

*Reserve price*

- (7) The directors may fix a reserve price for the share that does not exceed the sum of:
- (a) the amount of the call due and unpaid on the share at the time of forfeiture; and
  - (b) the amount of any other calls that become payable on or before the date of the sale.

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The Corporations Law—Section 254Q

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*Withdrawal from sale*

- (8) The share may be withdrawn from sale if no bid at least equal to the reserve price is made at the sale.

*Disposal of shares withdrawn from sale*

- (9) If:
- (a) no bid for the share is received at the sale; or
  - (b) the share is withdrawn from sale;
- the share must be held by the directors in trust for the company. It must be then disposed of in the manner determined by the company in accordance with its constitution or by resolution. Unless otherwise specifically provided by resolution, the share must first be offered to shareholders for a period of 14 days before being disposed of in any other manner.

*Suspension of voting rights attached to share held in trust*

- (10) At any meeting of the company, no person is entitled to any vote in respect of the shares held by the directors in trust under subsection (9).

*Application of proceeds of sale*

- (11) The proceeds of the sale under subsection (2) or the disposal under subsection (9) must be applied to pay:
- (a) first, the expenses of the sale; and
  - (b) then, any expenses necessarily incurred in respect of the forfeiture; and
  - (c) then, the calls on the share that are due and unpaid.
- The balance (if any) must be paid to the member whose share has been sold. If there is a share certificate that relates to the share, the balance does not have to be paid until the member delivers the certificate to the company.

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*Validity of sale*

- (12) If a sale is not held in time because of error or inadvertence, a late sale is not invalid if it is held as soon as practicable after the discovery of the error or inadvertence.

*Failure to comply an offence*

- (13) If there is failure to comply with subsection (2) or (3), the company and any officer of the company who is involved in the contravention are each guilty of an offence.

**254R No liability companies—redemption of forfeited shares**

- (1) Despite section 254Q, if a person's share has been forfeited, the person may redeem the share, at any time up to or on the last business day before the proposed sale, by paying the company:
- (a) all calls due on the share; and
  - (b) if the company so requires:
    - (i) a portion, calculated on a *pro rata* basis, of all expenses incurred by the company in respect of the forfeiture; and
    - (ii) a portion, calculated on a *pro rata* basis, of all costs and expenses of any proceeding that has been taken in respect of the forfeiture.

On payment, the person is entitled to the share as if the forfeiture had not occurred.

- (2) On the last business day before the proposed sale, the registered office of the company must be open during the hours for which it is by this Law required to be open and accessible to the public.

## **Part 2H.4—Capitalisation of profits**

### **254S Capitalisation of profits**

A company may capitalise profits. The capitalisation need not be accompanied by the issue of shares.

## Part 2H.5—Dividends

### 254T Dividends to be paid out of profits

A dividend may only be paid out of profits of the company.

Note: For a director's duty to prevent insolvent trading on payment of dividends, see section 588G.

### 254U Other provisions about paying dividends (*replaceable rule—see section 135*)

- (1) The directors may determine that a dividend is payable and fix:
  - (a) the amount; and
  - (b) the time for payment; and
  - (c) the method of payment.

The methods of payment may include the payment of cash, the issue of shares, the grant of options and the transfer of assets.

- (2) Interest is not payable on a dividend.

### 254V When does the company incur a debt?

- (1) A company does not incur a debt merely by fixing the amount or time for payment of a dividend. The debt arises only when the time fixed for payment arrives and the decision to pay the dividend may be revoked at any time before then.
- (2) However, if the company has a constitution and it provides for the declaration of dividends, the company incurs a debt when the dividend is declared.



**254W Dividend rights**

*Shares in public companies*

- (1) Each share in a class of shares in a public company has the same dividend rights unless:
  - (a) the company has a constitution and it provides for the shares to have different dividend rights; or
  - (b) different dividend rights are provided for by special resolution of the company.

*Shares in proprietary companies (replaceable rule—see section 135)*

- (2) Subject to the terms on which shares in a proprietary company are on issue, the directors may pay dividends as they see fit.

*No liability companies*

- (3) A person is not entitled to a dividend on a share in a no liability company if a call:
  - (a) has been made on the share; and
  - (b) is due and unpaid.
- (4) Dividends are payable to the shareholders in a no liability company in proportion to the number of shares held by them, irrespective of the amount paid up, or credited as paid up, on the shares. This subsection has effect subject to any provisions in the company's constitution relating to shares that are not ordinary shares.

## Part 2H.6—Notice requirements

### 254X Notice to ASIC of share issue

- (1) Within 1 month after issuing shares, a company must lodge with ASIC a notice in the prescribed form that sets out:
  - (a) the number of shares that were issued; and
  - (b) if the company has different classes of shares—the class to which each of those shares belongs; and
  - (c) the amount (if any) paid, or agreed to be considered as paid, on each of those shares; and
  - (d) the amount unpaid (if any) on each of those shares; and
  - (e) if the company is a public company and the shares were issued for non-cash consideration—the prescribed particulars about the issue of the shares, unless the shares were issued under a written contract and a copy of the contract is lodged with the notice.

Note: The company must lodge information when rights attached to the shares change, or when the shares are divided or converted into new classes (see section 246F).

- (2) If the shares were issued for non-cash consideration under a contract, the company must also lodge with ASIC a certificate stating that all stamp duty payable on the contract under any applicable law relating to stamp duty has been paid. This certificate must be lodged with the subsection (1) notice or at a later time permitted by the regulations or by ASIC.
- (3) The company does not have to lodge a subsection (1) notice about the issue of shares to a person on the registration of the company or on the company changing its type from a company limited by guarantee to a company limited by shares.

Note: Information about shares issued in these situations will come to ASIC under subsections 117(2), 163(3) and 601BC(2).

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The Corporations Law—Section 254Y

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**254Y Notice to ASIC of share cancellation**

Within 1 month after shares are cancelled, the company must lodge with ASIC a notice in the prescribed form that sets out:

- (a) the number of shares cancelled; and
- (b) any amount paid by the company (in cash or otherwise) on the cancellation of the shares; and
- (c) if the shares are cancelled following a share buy-back—the amount paid by the company (in cash or otherwise) on the buy-back; and
- (d) if the company has different classes of shares—the class to which each cancelled share belonged.

Note: Provisions under which shares are cancelled include section 254J (redeemable preference shares), section 256B (capital reductions), subsection 257H(3) (shares a company has bought back), section 258D (forfeited shares), and subsections 258E(2) and (3) (shares returned to a company).

## **Chapter 2J—Transactions affecting share capital**

### **Part 2J.1—Share capital reductions and share buy-backs**

#### **256A Purpose**

This Part states the rules to be followed by a company for reductions in share capital and for share buy-backs. The rules are designed to protect the interests of shareholders and creditors by:

- (a) addressing the risk of these transactions leading to the company's insolvency
- (b) seeking to ensure fairness between the company's shareholders
- (c) requiring the company to disclose all material information.

## **Division 1—Reductions in share capital not otherwise authorised by law**

### **256B Company may make reduction not otherwise authorised**

- (1) A company may reduce its share capital in a way that is not otherwise authorised by law if the reduction:
- (a) is fair and reasonable to the company’s shareholders as a whole; and
  - (b) does not materially prejudice the company’s ability to pay its creditors; and
  - (c) is approved by shareholders under section 256C.

A cancellation of a share for no consideration is a reduction of share capital, but paragraph (b) does not apply to this kind of reduction.

Note 1: One of the ways in which a company might reduce its share capital is cancelling uncalled capital.

Note 2: Sections 258A-258F deal with some of the other situations in which reductions of share capital are authorised. Subsection 254K(2) authorises capital reductions involved in the redemption of redeemable preference shares and subsection 257A(2) authorises reductions involved in share buy-backs.

Note 3: For a director’s duty to prevent insolvent trading on reductions of share capital, see section 588G.

- (2) The reduction is either an equal reduction or a selective reduction. The reduction is an **equal reduction** if:
- (a) it relates only to ordinary shares; and
  - (b) it applies to each holder of ordinary shares in proportion to the number of ordinary shares they hold; and
  - (c) the terms of the reduction are the same for each holder of ordinary shares.

Otherwise, the reduction is a **selective reduction**.

- (3) In applying subsection (2), ignore differences in the terms of the reduction that are:

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- (a) attributable to the fact that shares have different accrued dividend entitlements; or
- (b) attributable to the fact that shares have different amounts unpaid on them; or
- (c) introduced solely to ensure that each shareholder is left with a whole number of shares.

**256C Shareholder approval**

*Ordinary resolution required for equal reduction*

- (1) If the reduction is an equal reduction, it must be approved by a resolution passed at a general meeting of the company.

*Special shareholder approval for selective reduction*

- (2) If the reduction is a selective reduction, it must be approved by either:
  - (a) a special resolution passed at a general meeting of the company, with no votes being cast in favour of the resolution by any person who is to receive consideration as part of the reduction or whose liability to pay amounts unpaid on shares is to be reduced, or by their associates; or
  - (b) a resolution agreed to, at a general meeting, by all ordinary shareholders.

If the reduction involves the cancellation of shares, the reduction must also be approved by a special resolution passed at a meeting of the shareholders whose shares are to be cancelled.

- (3) The company must lodge with ASIC a copy of any resolution under subsection (2) within 14 days after it is passed. The company must not make the reduction until 14 days after lodgment.

*Information to accompany the notice of meeting*

- (4) The company must include with the notice of the meeting a statement setting out all information known to the company that is material to the decision on how to vote on the resolution. However,

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the company does not have to disclose information if it would be unreasonable to require the company to do so because the company had previously disclosed the information to its shareholders.

*Documents to be lodged with ASIC*

- (5) Before the notice of the meeting is sent to shareholders, the company must lodge with ASIC a copy of:
- (a) the notice of the meeting; and
  - (b) any document relating to the reduction that will accompany the notice of the meeting sent to shareholders.

**256D Consequences of failing to comply with section 256B**

- (1) The company must not make the reduction unless it complies with subsection 256B(1).
- (2) If the company contravenes subsection (1):
- (a) the contravention does not affect the validity of the reduction or of any contract or transaction connected with it; and
  - (b) the company is not guilty of an offence.
- (3) Any person who is involved in a company's contravention of subsection (1) contravenes this subsection.
- Note 1: Subsection (3) is a civil penalty provision (see section 1317E).
- Note 2: Section 79 defines *involved*.
- (4) A person commits an offence if they are involved in a company's contravention of section 256B and the involvement is dishonest.

**256E Signposts to other relevant provisions**

The following table lists other provisions of this Law that are relevant to reductions in share capital.

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**Other provisions relevant to reductions in share capital**

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- |   |                               |   |
|---|-------------------------------|---|
| 1 | section 588G<br>section 1317H | <b>liability of directors on insolvency</b><br>Under the combined operation of these sections the directors may have to compensate the company if the company is, or becomes, insolvent when the company reduces its share capital.   |
| 2 | section 1324                  | <b>injunctions to restrain contravention</b><br>Under this section the Court may grant an injunction against conduct that constitutes or would constitute a contravention of this Law.  |
| 4 | sections<br>1001A-1001D       | <b>continuous disclosure provisions</b><br>Under these sections a disclosing entity is required to disclose information about its securities that is material and not generally available.  |
| 5 | Chapter 2E                    | <b>benefits to related parties to be disclosed</b><br>Under this Chapter a financial benefit to a director or other related party that could adversely affect the interests of a public company's members as a whole, must be approved at a general meeting before it can be given. |
| 6 | section 125                   | <b>provisions in constitution</b><br>This section deals with the way in which a company's constitution may restrict the exercise of the company's powers and the consequences of a failure to observe these restrictions.   |
| 7 | sections 246B<br>-246G        | <b>variation of class rights</b><br>These sections deal with the variation of rights attached to a class of shares. This variation may be governed by the provisions of the company's constitution.   |
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## **Division 2—Share buy-backs**

### **257A The company's power to buy back its own shares**

A company may buy back its own shares if:

- (a) the buy-back does not materially prejudice the company's ability to pay its creditors; and
- (b) the company follows the procedures laid down in this Division.

Note 1: If a company has a constitution, it may include provisions in the constitution that preclude the company buying back its own shares or impose restrictions on the exercise of the company's power to buy back its own shares.

Note 2: A company may buy-back redeemable preference shares and may do so on terms other than the terms on which they could be redeemed. For the redemption of redeemable preference shares, see sections 254J-254L.

## The Corporations Law—Section 257B

**257B Buy-back procedure—general**

- (1) The following table specifies the steps required for, and the sections that apply to, the different types of buy-back.

Procedures [and sections applied]	minimum holding	employee share scheme		on-market		equal access scheme		selective buy-back
		within 10/12 limit	over 10/12 limit	within 10/12 limit	over 10/12 limit	within 10/12 limit	over 10/12 limit	
ordinary resolution [257C]	—	—	yes	—	yes	—	yes	—
special/unanimous resolution [257D]	—	—	—	—	—	—	—	yes
lodge offer documents with ASC [257E]	—	—	—	—	—	yes	yes	yes
14 days notice [257F]	—	yes	yes	yes	yes	yes	yes	yes
disclose relevant information when offer made [257G]	—	—	—	—	—	yes	yes	yes
cancel shares [257H]	yes	yes	yes	yes	yes	yes	yes	yes
notify cancellation to ASC [254Y]	yes	yes	yes	yes	yes	yes	yes	yes

Note: Subsections (2) and (3) of this section explain what an equal access scheme is. The 10/12 limit is the 10% in 12 months limit laid down in subsections (4) and (5). Subsections (6) and (7) of this section explain what an on-market buy-back is. See section 9 for definitions of *minimum holding buy-back*, *employee share scheme buy-back* and *selective buy-back*.

*Equal access scheme*

- (2) An equal access scheme is a scheme that satisfies all the following conditions:
- (a) the offers under the scheme relate only to ordinary shares

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- (b) the offers are to be made to every person who holds ordinary shares to buy back the same percentage of their ordinary shares
  - (c) all of those persons have a reasonable opportunity to accept the offers made to them
  - (d) buy-back agreements are not entered into until a specified time for acceptances of offers has closed
  - (e) the terms of all the offers are the same.
- (3) In applying subsection (2), ignore:
- (a) differences in consideration attributable to the fact that the offers relate to shares having different accrued dividend entitlements
  - (b) differences in consideration attributable to the fact that the offers relate to shares on which different amounts remain unpaid
  - (c) differences in the offers introduced solely to ensure that each shareholder is left with a whole number of shares.

*10/12 limit*

- (4) The 10/12 limit for a company proposing to make a buy-back is 10% of the smallest number, at any time during the last 12 months, of votes attaching to voting shares of the company.

*Exceeding the 10/12 limit*

- (5) A proposed buy-back would exceed the 10/12 limit if the number of votes attaching to:
- (a) all the voting shares in the company that have been bought back during the last 12 months; and
  - (b) the voting shares that will be bought back if the proposed buy-back is made;
- would exceed the 10/12 limit.

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*On-market buy-backs*

- (6) A buy-back is an on-market buy-back if it results from an offer made by a listed corporation at an official meeting of a securities exchange in Australia in the ordinary course of trading on a stock market of that exchange.
- (7) A buy-back by a company (whether listed or not) is also an on-market buy-back if it results from an offer made in the ordinary course of trading on a stock market of a body corporate that:
- (a) operates a securities market outside Australia; and
  - (b) ASIC declares in writing to be an approved overseas securities exchange for the purposes of this subsection.
- A buy-back by a listed company is an on-market buy-back under this subsection only if an offer to buy-back those shares is also made on a stock market of a securities exchange in Australia at the same time.
- (8) A declaration under paragraph (7)(b) may be subject to conditions. Notice of the making of the declaration must be published in the *Gazette*.

**257C Buy-back procedure—shareholder approval if the 10/12 limit exceeded**

*Ordinary resolution required*

- (1) If section 257B applies this section to a buy-back, the terms of the buy-back agreement must be approved before it is entered into by a resolution passed at a general meeting of the company, or the agreement must be conditional on such an approval.

*Information to accompany the notice of meeting*

- (2) The company must include with the notice of the meeting a statement setting out all information known to the company that is material to the decision how to vote on the resolution. However, the company does not have to disclose information if it would be

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unreasonable to require the company to do so because the company had previously disclosed the information to its shareholders.

*Documents to be lodged with the ASIC*

- (3) Before the notice of the meeting is sent to shareholders, the company must lodge with ASIC a copy of:
- (a) the notice of the meeting; and
  - (b) any document relating to the buy-back that will accompany the notice of the meeting sent to shareholders.

**257D Buy-back procedure—special shareholder approval for selective buy-back**

*Selective buy-back requires special or unanimous resolution*

- (1) If section 257B applies this section to a buy-back, the terms of the buy-back agreement must be approved before it is entered into by either:
- (a) a special resolution passed at a general meeting of the company, with no votes being cast in favour of the resolution by any person whose shares are proposed to be bought back or by their associates; or
  - (b) a resolution agreed to, at a general meeting, by all ordinary shareholders;
- or the agreement must be conditional on such an approval.

*Information to accompany the notice of meeting*

- (2) The company must include with the notice of the meeting a statement setting out all information known to the company that is material to the decision how to vote on the resolution. However, the company does not have to disclose information if it would be unreasonable to require the company to do so because the company had previously disclosed the information to its shareholders.

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*Documents to be lodged with ASIC*

- (3) Before the notice of the meeting is sent to shareholders, the company must lodge with ASIC a copy of:
  - (a) the notice of the meeting; and
  - (b) any document relating to the buy-back that will accompany the notice of the meeting sent to shareholders.
- (4) ASIC may exempt a company from the operation of this section. The exemption:
  - (a) must be in writing; and
  - (b) must be granted before the buy-back agreement is entered into; and
  - (c) may be granted subject to conditions.

**257E Buy-back procedure—lodgment of offer documents with ASIC**

If section 257B applies this section to a buy-back, the company must lodge with ASIC, before the buy-back agreement is entered into, a copy of:

- (a) a document setting out the terms of the offer; and
- (b) any document that is to accompany the offer.

**257F Notice of intended buy-back**

- (1) If section 257B applies this section to a buy-back, the company must satisfy the lodgment requirement in subsection (2) at least 14 days before:
  - (a) if the buy-back agreement is conditional on the passing of a resolution under subsection 257C(1) or 257D(1)—the resolution is passed; or
  - (b) if it is not—the agreement is entered into.
- (2) The company satisfies the lodgment requirement when it lodges with ASIC:
  - (a) documents under subsection 257C(3) or 257D(3) or section 257E; or

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The Corporations Law—Section 257G

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(b) a notice that the company intends to carry out the buy-back.

Note 1: A company that has to lodge documents under section 257C, 257D or 257E needs to lodge a notice under paragraph (2)(b) of this section only if it wants for some reason to enter into the agreement or pass the resolution less than 14 days after lodging the section 257C, 257D or 257E documents.

Note 2: The company may specify a buy-back under paragraph (2)(b) in any way. It may, for instance, choose to lodge a notice covering buy-backs to be carried out:

- under a particular scheme; or
- as part of particular on-market buy-back activity.

### **257G Buy-back procedure—disclosure of relevant information when offer made**

If section 257B applies this section to a buy-back, the company must include with the offer to buy back shares a statement setting out all information known to the company that is material to the decision whether to accept the offer.

### **257H Acceptance of offer and transfer of shares to the company**

*Effect of acceptance of the buy-back offer on share rights*

- (1) Once a company has entered into an agreement to buy back shares, all rights attaching to the shares are suspended. The suspension is lifted if the agreement is terminated.

*Shares transferred to the company and cancelled*

- (2) A company must not deal in shares it buys back. An agreement entered into in contravention of this subsection is void.
- (3) Immediately after the registration of the transfer to the company of the shares bought back, the shares are cancelled.

Note: ASIC must be notified of the cancellation under section 254Y.

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**257J Signposts to other relevant provisions**

The following table sets out other provisions of this Law that are relevant to buy-backs.

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<b>Other provisions relevant to buy-backs</b>		
	<b>provision</b>	<b>comment</b>
1	section 588G section 1317 H	<b>liability of directors on insolvency</b> The directors may have to compensate the company if the company is, or becomes, insolvent when the company enters into the buy-back agreement.
2	section 1324	<b>injunctions to restrain contravention</b> The Court may grant an injunction against conduct that constitutes, or would constitute, a contravention of this Law.
4	subsection 60 9(4)	<b>application of takeover provisions</b> These sections deal with the application of Chapter 6 to buy-backs.
5	section 259A	<b>consequences of failure to follow procedures—the company and the officers</b> If a company fails to follow the procedure in this Division, the company contravenes this section and the officers who are involved in the contravention are liable to a civil penalty under Part 9.4B and may commit an offence.
6	section 256D	<b>consequences of failure to follow procedures if reduction in share capital involved—the company and the officers</b> If the buy-back involves a reduction in share capital and the company fails to follow the procedures in this Division, the company contravenes this section and the officers who are involved in the contravention are liable to a civil penalty under Part 9.4B and may commit an offence.

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**Other provisions relevant to buy-backs**

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	<b>provision</b>	<b>comment</b>
7	section 256D	<b>consequences of failure to follow procedures if reduction in share capital involved—the transaction</b> This section provides that a failure to follow the procedures for share capital reductions does not affect the validity of the buy-back transaction itself.
8	sections 1001 A-1001D	<b>continuous disclosure provisions</b> A disclosing entity is required to disclose information about its securities that is material and not generally available.
9	Chapter 2E	<b>benefits to related parties to be disclosed</b> Under this Chapter, a financial benefit to a director or other related party may need to be approved at a general meeting before it is given.
10	section 125	<b>provisions in constitution</b> This section deals with the way in which a company's constitution may restrict the exercise of the company's powers and the consequences of a failure to observe these restrictions.
11	sections 246B -246G	<b>variation of class rights</b> These sections deal with the variation of rights attached to a class of shares. This variation may be governed by the provisions of a company's constitution.

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## Division 3—Other share capital reductions

### 258A Unlimited companies

An unlimited company may reduce its share capital in any way.

### 258B Right to occupy or use real property

- (1) If a company has a constitution, under it the company may grant to a shareholder, as a shareholder, a right to occupy or use real property that the company owns or holds under lease, whether the right is a lease or licence or a contractual right.

Note: Before the introduction of strata or unit titles systems, rights to occupy real property were sometimes based on a holding of shares in a company.

- (2) A company may transfer to a person an interest in land in exchange for, or in satisfaction of, a right to occupy or use the land of the kind referred to in subsection (1).

Example: A person has a right to occupy an apartment in a block of units because they hold shares in a company. As part of converting the block of units to strata title, the person surrenders the shares in return for a transfer of strata title over the apartment. The capital reduction involved in the transfer is authorised under this subsection.

### 258C Brokerage or commission

A company may pay brokerage or commission to a person in respect of that person or another person agreeing to take up shares in the company.

### 258D Cancellation of forfeited shares

A company may, by resolution passed at a general meeting, cancel shares that have been forfeited under the terms on which the shares are on issue.

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**258E Other share cancellations**

- (1) Any reduction in share capital involved in:
  - (a) the redemption of redeemable preference shares out of the proceeds of a new issue of shares made for the purpose of the redemption (see section 254K); or
  - (b) a company's buying-back of its own shares under sections 257A to 257J if the shares are paid for out of share capital.is authorised by this section.
- (2) A company may cancel shares returned to it under section 651C, 724(2), 737 or 738 and any reduction in the company's share capital that is involved is authorised by this subsection.
- (3) Any reduction in a company's share capital because of an order under section 1325A is authorised by this subsection.

**258F Reductions because of lost capital**

A company may reduce its share capital by cancelling any paid-up share capital that is lost or is not represented by available assets. This power does not apply if the company also cancels shares.

## Part 2J.2—Self-acquisition and control of shares

### 259A Directly acquiring own shares

A company must not acquire shares (or units of shares) in itself except:

- (a) in buying back shares under section 257A; or
- (b) in acquiring an interest (other than a legal interest) in fully-paid shares in the company if no consideration is given for the acquisition by the company or an entity it controls; or
- (c) under a court order; or
- (d) in circumstances covered by subsection 259B(2) or (3).

### 259B Taking security over own shares or shares in holding company

- (1) A company must not take security over shares (or units of shares) in itself or in a company that controls it, except as permitted by subsection (2) or (3).
- (2) A company may take security over shares in itself under an employee share scheme that has been approved by:
  - (a) a resolution passed at a general meeting of the company; and
  - (b) if the company is a subsidiary of a listed domestic corporation—a resolution passed at a general meeting of the listed domestic corporation; and
  - (c) if paragraph (b) does not apply but the company has a holding company that is a domestic corporation and that is not itself a subsidiary of a domestic corporation—a resolution passed at a general meeting of that holding company.

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*Special exemptions for financial institutions*

- (3) A company's taking security over shares (or units of shares) in itself or in a company that controls it is exempted from subsection (1) if:
  - (a) the company's ordinary business includes providing finance; and
  - (b) the security is taken in the ordinary course of that business and on ordinary commercial terms.
- (4) If a company acquires shares (or units of shares) in itself because it exercises rights under a security permitted by subsection (2) or (3), then, within the following 12 months, the company must cease to hold those shares (or units of shares). ASIC may extend this period of 12 months if the company applies for the extension before the end of the period.
- (5) Any voting rights attached to the shares (or units of shares) cannot be exercised while the company continues to hold them.
- (6) If, at the end of the 12 months (or extended period), the company still holds any of the shares (or units of shares), the company commits an offence for each day while that situation continues.

**259C Issuing or transferring shares to controlled entity**

- (1) The issue or transfer of shares (or units of shares) of a company to an entity it controls is void unless:
  - (a) the issue or transfer is to the entity as a personal representative; or
  - (b) the issue or transfer is to the entity as trustee and neither the company nor any entity it controls has a beneficial interest in the trust, other than a beneficial interest that satisfies these conditions:
    - (i) the interest arises from a security given for the purposes of a transaction entered into in the ordinary course of business in connection with providing finance; and

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- (ii) that transaction was not entered into with an associate of the company or an entity it controls; or
  - (c) the issue to the entity is made as a result of an offer to all the members of the company who hold shares of the class being issued and is made on a basis that does not discriminate unfairly, either directly or indirectly, in favour of the entity; or
  - (d) the transfer to the entity is by a wholly-owned subsidiary of a body corporate and the entity is also a wholly-owned subsidiary of that body corporate.
- (2) ASIC may exempt a company from the operation of this section. The exemption:
- (a) must be in writing; and
  - (b) may be granted subject to conditions.
- (3) If paragraph (1)(c) or (d) applies to an issue or transfer of shares (or units of shares), section 259D applies.

**259D Company controlling entity that holds shares in it**

- (1) If any of the following occur:
- (a) a company obtains control of an entity that holds shares (or units of shares) in the company
  - (b) a company's control over an entity that holds shares (or units of shares) in the company increases
  - (c) a company issues shares (or units of shares) to an entity it controls in the situation covered by paragraph 259C(1)(c)
  - (d) shares (or units of shares) in the company are transferred to an entity it controls in the situation covered by paragraph 259C(1)(d);
- then, within 12 months after it occurs either:
- (e) the entity must cease to hold the shares (or units); or
  - (f) the company must cease to control the entity.
- ASIC may extend this period of 12 months if the company applies for the extension before the end of the period.

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- (2) If this section applies to shares (or units of shares), it also applies to bonus shares issued in respect of those shares (or units of shares). Within the same period that applies to the shares themselves under subsection (1), either:
  - (a) the entity must cease to hold the bonus shares; or
  - (b) the company must cease to control the entity.
- (3) Any voting rights attached to the shares (or units of shares) cannot be exercised while the company continues to control the entity.
- (4) If, at the end of the 12 months (or extended period), the company still controls the entity and the entity still holds the shares (or units of shares), the company commits an offence for each day while that situation continues.
- (5) This section does not apply to shares (or units of shares) if:
  - (a) they are held by the entity as a personal representative; or
  - (b) they are held by the entity as trustee and neither the company nor any entity it controls has a beneficial interest in the trust, other than a beneficial interest that satisfies these conditions:
    - (i) the interest arises from a security given for the purposes of a transaction entered into in the ordinary course of business in connection with providing finance; and
    - (ii) that transaction was not entered into with an associate of the company or an entity it controls.
- (6) A contravention of this section does not affect the validity of any transaction.

**259E When a company controls an entity**

- (1) For the purposes of this Part, a company controls an entity if the company has the capacity to determine the outcome of decisions about the entity's financial and operating policies.
- (2) In determining whether a company has this capacity:
  - (a) the practical influence the company can exert (rather than the rights it can enforce) is the issue to be addressed; and

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- (b) any practice or pattern of behaviour affecting the entity's financial or operating policies is to be taken into account (even if it involves a breach of an agreement or a breach of trust).
- (3) Merely because the company and an unrelated entity jointly have the capacity to determine the outcome of decisions about another entity's financial and operating policies, the company does not control the other entity.
- (4) A company is not to be taken to control an entity merely because of a capacity that it is under a legal obligation to exercise for the benefit of someone other than its shareholders.

Note: This situation could arise, for example, if the company holds shares as a trustee or is performing duties as a liquidator.

**259F Consequences of failing to comply with section 259A or 259B**

- (1) If a company contravenes section 259A or subsection 259B(1):
  - (a) the contravention does not affect the validity of the acquisition or security or of any contract or transaction connected with it; and
  - (b) the company is not guilty of an offence.
- (2) Any person who is involved in a company's contravention of section 259A or subsection 259B(1) contravenes this subsection.

Note 1: Subsection (2) is a civil penalty provision (see section 1317E).

Note 2: Section 79 defines *involved*.

- (3) A person commits an offence if they are involved in a company's contravention of section 259A or subsection 259B(1) and the involvement is dishonest.



## **Part 2J.3—Financial assistance**

### **260A Financial assistance by a company for acquiring shares in the company or a holding company**

- (1) A company may financially assist a person to acquire shares (or units of shares) in the company or a holding company of the company only if:
  - (a) giving the assistance does not materially prejudice:
    - (i) the interests of the company or its shareholders; or
    - (ii) the company's ability to pay its creditors; or
  - (b) the assistance is approved by shareholders under section 260B (that section also requires advance notice to ASIC); or
  - (c) the assistance is exempted under section 260C.
- (2) Without limiting subsection (1), financial assistance may:
  - (a) be given before or after the acquisition of shares (or units of shares); and
  - (b) take the form of paying a dividend.
- (3) Subsection (1) extends to the acquisition of shares (or units of shares) by:
  - (a) issue; or
  - (b) transfer; or
  - (c) any other means.

### **260B Shareholder approval**

#### *Approval by company's own shareholders*

- (1) Shareholder approval for financial assistance by a company must be given by:
  - (a) a special resolution passed at a general meeting of the company, with no votes being cast in favour of the resolution

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by the person acquiring the shares (or units of shares) or by their associates; or

- (b) a resolution agreed to, at a general meeting, by all ordinary shareholders.

*Approval by shareholders of listed holding corporation*

- (2) If the company will be a subsidiary of a listed domestic corporation immediately after the acquisition referred to in section 260A occurs, the financial assistance must also be approved by a special resolution passed at a general meeting of that corporation.

*Approval by shareholders in ultimate Australian holding company*

- (3) If, immediately after the acquisition, the company will have a holding company that:
- (a) is a domestic corporation but not listed; and
  - (b) is not itself a subsidiary of a domestic corporation;
- the financial assistance must also be approved by a special resolution passed at a general meeting of the body corporate that will be the holding company.

*Information to accompany the notice of meeting*

- (4) A company or other body that calls a meeting for the purpose of subsection (1), (2) or (3) must include with the notice of the meeting a statement setting out all the information known to the company or body that is material to the decision on how to vote on the resolution. However, the company or body does not have to disclose information if it would be unreasonable to require the company or body to do so because the company or body had previously disclosed the information to its members.

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*Documents to be lodged with the ASIC before notice of meeting is sent out*

- (5) Before the notice of a meeting for the purpose of subsection (1), (2) or (3) is sent to members of a company or other body, the company or body must lodge with ASIC a copy of:
  - (a) the notice of the meeting; and
  - (b) any document relating to the financial assistance that will accompany the notice of the meeting sent to the members.
- (6) The company must lodge with ASIC, at least 14 days before giving the financial assistance, a notice in the prescribed form stating that the assistance has been approved under this section.

*Lodgment of special resolutions*

- (7) A special resolution passed for the purpose of subsection (1), (2) or (3) must be lodged with ASIC by the company, listed domestic corporation or holding company within 14 days after it is passed.

## **260C Exempted financial assistance**

*General exemptions based on ordinary course of commercial dealing*

- (1) Financial assistance is exempted from section 260A if it is given in the ordinary course of commercial dealing and consists of:
  - (a) acquiring or creating a lien on partly-paid shares in the company for amounts payable to the company on the shares; or
  - (b) entering into an agreement with a person under which the person may make payments to the company on shares by instalments.

*Special exemptions for financial institutions*

- (2) Financial assistance is exempted from section 260A if:

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- (a) the company's ordinary business includes providing finance; and
- (b) the financial assistance is given in the ordinary course of that business and on ordinary commercial terms.

*Special exemptions for subsidiaries of debenture issuers*

- (3) Financial assistance is exempted from section 260A if:
  - (a) the company is a subsidiary of a borrower in relation to debentures; and
  - (b) the financial assistance is a guarantee or other security given by the company for the repayment by the borrower of money that it is or will be liable to repay; and
  - (c) the borrower is a borrower in relation to the debentures because it is or will be liable to repay the money; and
  - (d) the guarantee or security is given by the company in the ordinary course of commercial dealing.

*Special exemption for approved employee share schemes*

- (4) Financial assistance is exempted from section 260A if it is given under an employee share scheme that has been approved by:
  - (a) a resolution passed at a general meeting of the company; and
  - (b) if the company is a subsidiary of a listed domestic corporation—a resolution passed at a general meeting of the listed domestic corporation; and
  - (c) if paragraph (b) does not apply but the company has a holding company that is a domestic corporation and that is not itself a subsidiary of a domestic corporation—a resolution passed at a general meeting of that holding company.

*Other exemptions*

- (5) The following types of financial assistance are exempted from section 260A:

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- (a) a reduction of share capital in accordance with Division 1 of Part 2J.1
- (b) a share buy-back in accordance with Division 2 of Part 2J.1
- (c) assistance given under a court order
- (d) a discharge on ordinary commercial terms of a liability that the company incurred as a result of a transaction entered into on ordinary commercial terms.

**260D Consequences of failing to comply with section 260A**

- (1) If a company provides financial assistance in contravention of section 260A:
  - (a) the contravention does not affect the validity of the financial assistance or of any contract or transaction connected with it; and
  - (b) the company is not guilty of an offence.
- (2) Any person who is involved in a company's contravention of section 260A contravenes this subsection.
  - Note 1: Subsection (2) is a civil penalty provision (see section 1317E).
  - Note 2: Section 79 defines *involved*.
- (3) A person commits an offence if they are involved in a company's contravention of section 260A and the involvement is dishonest.

## **Part 2J.4—Interaction with general directors' duties**

### **260E General duties still apply**

A director is not relieved from any of their duties under this Law (including sections 180, 181, 182, 183 and 184), or their fiduciary duties, in connection with a transaction merely because the transaction is authorised by a provision of this Chapter or is approved by a resolution of members under a provision of this Chapter.

## Chapter 2K—Charges

### Part 2K.1—Preliminary

#### 261 Interpretation and application

(1) In this Chapter, unless the contrary intention appears:

*document of title* means a document:

- (a) used in the ordinary course of business as proof of possession or control, or of the right to possession or control, of property other than land; or
- (b) authorising or purporting to authorise, whether by endorsement or delivery, the possessor of the document to transfer or receive property other than land;

and includes:

- (c) a bill of lading;
- (d) a warehousekeeper's certificate;
- (e) a wharfinger's certificate;
- (f) a warrant or order for the delivery of goods; and
- (g) a document that is, or evidences title to, a marketable security.

*present liability*, in relation to a charge, means a liability that has arisen, being a liability the extent or amount of which is fixed or capable of being ascertained, whether or not the liability is immediately due to be met.

*property*, in relation to a company, means property:

- (a) in the case of a registrable Australian body—within this jurisdiction; or
  - (b) in the case of a foreign company—within Australia or an external Territory; or
  - (c) otherwise—within or outside Australia;
- held by the company, whether or not as trustee.

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**prospective liability**, in relation to a charge, means any liability that may arise in the future, or any other liability, but does not include a present liability.

**Register** means the Australian Register of Company Charges referred to in section 265.

**registrable charge** means a charge in relation to which, by virtue of section 262, the provisions of this Chapter mentioned in subsection 262(1) apply.

- (2) A charge referred to in subsection 263(3) or section 264 shall, until the charge is registered, be treated for the purposes of this Chapter as if it were not a registrable charge but, when the charge is so registered, it has the priority accorded to a registered charge as from the time of registration.
- (3) The registration of a charge referred to in subsection 263(3) or section 264 does not prejudice any priority that would have been accorded to the charge under any other law (whether an Australian law or not) if the charge had not been registered.
- (4) For the purposes of this Chapter, a notice or other document shall be taken to be lodged when it is received at an office of the Commission (in this jurisdiction or elsewhere) by an officer authorised to receive it.



## Part 2K.2—Registration

### 262 Charges required to be registered

- (1) Subject to this section, the provisions of this Chapter relating to the giving of notice in relation to, the registration of, and the priorities of, charges apply in relation to the following charges (whether legal or equitable) on property of a company and do not apply in relation to any other charges:
- (a) a floating charge on the whole or a part of the property, business or undertaking of the company;
  - (b) a charge on uncalled share capital;
  - (c) a charge on a call on shares made but not paid;
  - (d) a charge on a personal chattel, including a personal chattel that is unascertained or is to be acquired in the future, but not including a ship registered in an official register kept under an Australian law relating to title to ships;
  - (e) a charge on goodwill, on a patent or licence under a patent, on a trade mark or service mark or a licence to use a trade mark or service mark, on a copyright or a licence under a copyright or on a registered design or a licence to use a registered design;
  - (f) a charge on a book debt;
  - (g) a charge on a marketable security, not being:
    - (i) a charge created in whole or in part by the deposit of a document of title to the marketable security; or
    - (ii) a mortgage under which the marketable security is registered in the name of the chargee or a person nominated by the chargee;
  - (h) a lien or charge on a crop, a lien or charge on wool or a stock mortgage;
  - (j) a charge on a negotiable instrument other than a marketable security.

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- (2) The provisions of this Chapter mentioned in subsection (1) do not apply in relation to:
- (a) a charge, or a lien over property, arising by operation of law;
  - (b) a pledge of a personal chattel or of a marketable security;
  - (c) a charge created in relation to a negotiable instrument or a document of title to goods, being a charge by way of pledge, deposit, letter of hypothecation or trust receipt;
  - (d) a transfer of goods in the ordinary course of the practice of any profession or the carrying on of any trade or business; or
  - (e) a dealing, in the ordinary course of the practice of any profession or the carrying on of any trade or business, in respect of goods outside Australia.
- (3) The reference in paragraph (1)(d) to a charge on a personal chattel is a reference to a charge on any article capable of complete transfer by delivery, whether at the time of the creation of the charge or at some later time, and includes a reference to a charge on a fixture or a growing crop that is charged separately from the land to which it is affixed or on which it is growing, but does not include a reference to a charge on:
- (a) a document evidencing title to land;
  - (b) a chattel interest in land;
  - (c) a marketable security;
  - (d) a document evidencing a thing in action; or
  - (e) stock or produce on a farm or land that by virtue of a covenant or agreement ought not to be removed from the farm or land where the stock or produce is at the time of the creation of the charge.
- (4) The reference in paragraph (1)(f) to a charge on a book debt is a reference to a charge on a debt due or to become due to the company at some future time on account of or in connection with a profession, trade or business carried on by the company, whether entered in a book or not, and includes a reference to a charge on a future debt of the same nature although not incurred or owing at the time of the creation of the charge, but does not include a reference to a charge on a marketable security, on a negotiable

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instrument or on a debt owing in respect of a mortgage, charge or lease of land.

- (5) The reference in paragraph (1)(h) to a lien or charge on a crop, a lien or charge on wool or a stock mortgage includes a reference to a security (however described) that is registrable under a prescribed law of a State or Territory.
- (6) For the purposes of this section, a company shall be deemed to have deposited a document of title to property with another person (in this subsection referred to as the *chargee*) in a case where the document of title is not in the possession of the company if:
  - (a) the person who holds the document of title acknowledges in writing that the person holds the document of title on behalf of the chargee; or
  - (b) a government, an authority or a body corporate that proposes to issue a document of title in relation to the property agrees, in writing, to deliver the document of title, when issued, to the chargee.
- (7) For the purposes of this section, a charge shall be taken to be a charge on property of a kind to which a particular paragraph of subsection (1) applies even though the instrument of charge also charges other property of the company including other property that is of a kind to which none of the paragraphs of that subsection applies.
- (8) The provisions of this Chapter mentioned in subsection (1) do not apply in relation to a charge on land.
- (9) The provisions of this Chapter mentioned in subsection (1) do not apply in relation to a charge on fixtures given by a charge on the land to which they are affixed.
- (10) The provisions of this Chapter mentioned in subsection (1) do not apply in relation to a charge created by a company in its capacity as legal personal representative of a deceased person or as trustee of the estate of a deceased person.

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- (11) A charge on property of a company is not invalid merely because of the failure to lodge with the Commission, or give to the company or another person, a notice or other document that is required by this Part to be so lodged or given.

**263 Lodgment of notice of charge and copy of instrument**

- (1) Where a company creates a charge, the company shall ensure that there is lodged, within 45 days after the creation of the charge:
- (a) a notice in the prescribed form setting out the following particulars:
    - (i) the name of the company and the date of the creation of the charge;
    - (ii) whether the charge is a fixed charge, a floating charge or both a fixed and floating charge;
    - (iii) if the charge is a floating charge—whether there is any provision in the resolution or instrument creating or evidencing the charge that prohibits or restricts the creation of subsequent charges;
    - (iv) a short description of the liability (whether present or prospective) secured by the charge;
    - (v) a short description of the property charged;
    - (vi) whether the charge is created or evidenced by a resolution, by an instrument or by a deposit or other conduct;
    - (vii) if the charge is constituted by the issue of a debenture or debentures—the name of the trustee (if any) for debenture holders;
    - (viii) if the charge is not constituted by the issue of a debenture or debentures or there is no trustee for debenture holders—the name of the chargee;
    - (ix) such other information as is prescribed;
  - (b) if, pursuant to a resolution or resolutions passed by the company, the company issues a series of debentures constituting a charge to the benefit of which all the holders of debentures in the series are entitled in equal priority, and the

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- charge is evidenced only by the resolution or resolutions and the debentures—a copy of the resolution or of each of the resolutions verified by a statement in writing to be a true copy, and a copy of the first debenture issued in the series and a statement in writing verifying the execution of that first debenture; and
- (c) if, in a case to which paragraph (b) does not apply, the charge was created or evidenced by an instrument or instruments:
- (i) the instrument or each of the instruments; or
  - (ii) a copy of the instrument or of each of the instruments verified by a statement in writing to be a true copy, and a statement in writing verifying the execution of the instrument or of each of the instruments.
- (2) In a case to which paragraph (1)(b) applies:
- (a) the charge shall, for the purposes of subsection (1), be deemed to be created when the first debenture in the series of debentures is issued; and
  - (b) if, after the issue of the first debenture in the series, the company passes a further resolution authorising the issue of debentures in the series, the company shall ensure that a copy of that resolution, verified by a statement in writing to be a true copy of that resolution, is lodged within 45 days after the passing of that resolution.
- (3) A body that applies for registration as a company under Part 5B.1, or for registration under Part 5B.2, shall lodge with the application for registration the documents specified in subsection (4) in relation to any charge on property of the body that would be registrable under this Part if the body were already registered under Part 5B.1, or Part 5B.2, as the case may be.
- (4) The documents required to be lodged under subsection (3) in relation to a charge on property of a body are the following documents:
- (a) a notice in the prescribed form:
    - (i) setting out the name of the body;

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- (ii) if the charge was created by the body—specifying the date of the creation of the charge;
  - (iii) if the charge was a charge existing on property acquired by the body—setting out the date on which the property was so acquired; and
  - (iv) otherwise complying with the requirements of paragraph (1)(a);
- (b) if the charge was created or evidenced as mentioned in paragraph (1)(b):
- (i) in the case of a charge created by the body—a copy of the resolution or of each of the resolutions referred to in that paragraph verified by a statement in writing to be a true copy and a copy of the first debenture issued in the series referred to in that paragraph and a statement in writing verifying the execution of that first debenture; or
  - (ii) in the case of a charge that existed on property acquired by the body—the copies referred to in subparagraph (i) verified by statements in writing to be true copies;
- (c) if the charge was created or evidenced by an instrument or instruments (otherwise than as mentioned in paragraph (1)(b)):
- (i) in the case of a charge created by the body:
    - (A) the instrument or each of the instruments; or
    - (B) a copy of the instrument or of each of the instruments verified by a statement in writing to be a true copy, and a statement in writing verifying the execution of the instrument or of each of the instruments; or
  - (ii) in the case of a charge that existed on property acquired by the body—a copy of the instrument or of each of the instruments verified by a statement in writing to be a true copy;
- (d) if the charge was created or evidenced as mentioned in paragraph (1)(b) and, after the issue of the first debenture in the series, the body passed a further resolution or resolutions authorising the issue of debentures in the series—a copy of

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that resolution or of each of those resolutions verified by a statement in writing to be a true copy.

- (5) A notice in relation to a charge, being a charge in relation to which paragraph (1)(b) or (c) or (4)(b) or (c) applies, shall not be taken to have been lodged under subsection (1) or (3) unless the notice is accompanied by the documents specified in that paragraph.
- (6) Where a notice with respect to an instrument creating a charge has been lodged under subsection (1) or (3), being a charge in respect of an issue of several debentures the holders of which are entitled under the instrument in equal priority to the benefit of the charge, sections 279 to 282(inclusive) have effect as if any charges constituted by those debentures were registered at the time when the charge to which the notice relates was registered.
- (7) Where a payment or discount has been made or allowed, either directly or indirectly, by a company or registrable body to a person in consideration of the person's subscribing or agreeing to subscribe, whether absolutely or conditionally, for debentures, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for debentures, the notice required to be lodged under subsection (1) or (3) shall include particulars as to the amount or rate per centum of the payment or discount.
- (8) Where a company or registrable body issues debentures as security for a debt of the company or registrable body, the company or registrable body shall not thereby be regarded, for the purposes of subsection (7), as having allowed a discount in respect of the debentures.

## **264 Acquisition of property subject to charge**

- (1) Where a company acquires property that is subject to a charge, being a charge that would have been registrable when it was created if it had been created by a company, the company shall, within 45 days after the acquisition of the property:
  - (a) ensure that there is lodged:

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- (i) a notice in the prescribed form in relation to the charge, setting out the name of the company and the date on which the property was so acquired and otherwise complying with the requirements of paragraph 263(1)(a);
  - (ii) if the charge was created or evidenced as mentioned in paragraph 263(1)(a)—a copy of the resolution or of each of the resolutions referred to in that paragraph verified by a statement in writing to be a true copy and a copy of the first debenture issued in the series referred to in that paragraph verified by a statement in writing to be a true copy; and
  - (iii) if the charge was created or evidenced by an instrument or instruments (otherwise than as mentioned in paragraph 263(1)(b)):
    - (A) the instrument or each of the instruments; or
    - (B) a copy of the instrument or of each of the instruments verified by a statement in writing to be a true copy; and
- (b) give to the chargee notice that it has acquired the property and the date on which it was so acquired.
- (2) A notice in relation to a charge, being a charge in relation to which subparagraph (1)(a)(ii) or (iii) applies, shall not be taken to have been lodged under subsection (1) unless it is accompanied by the documents specified in that subparagraph.

**265 Registration of documents relating to charges**

- (1) The Commission shall keep a register to be known as the Australian Register of Company Charges.
- (2) Where a notice in respect of a charge on property of a company that is required by section 263 or 264 to be lodged is lodged (whether during or after the period within which the notice was required to be lodged) and the notice contains all the particulars required by the relevant section to be included in the notice, the Commission shall as soon as practicable cause to be entered in the



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Register the time and date when the notice was lodged and the following particulars in relation to the charge:

- (a) if the charge is a charge created by the company, the date of its creation or, if the charge was a charge existing on property acquired by the company, the date on which the property was so acquired;
  - (b) a short description of the liability (whether present or prospective) secured by the charge;
  - (c) a short description of the property charged;
  - (d) the name of the trustee for debenture holders or, if there is no such trustee, the name of the chargee.
- (3) Subject to subsection (9), where particulars in respect of a charge are entered in the Register in accordance with subsection (2), the charge shall be deemed to be registered, and to have been registered from and including the time and date entered in the Register under that subsection.
- (4) Where:
- (a) a notice in respect of a charge on property of a company is lodged under section 263 or 264 (whether during or after the period within which the notice was required to be lodged); and
  - (b) the notice is not accompanied by a certificate to the effect that all documents accompanying the notice have been duly stamped as required by any applicable law relating to stamp duty;
- the Commission must cause to be entered in the Register the time and date when the notice was lodged and the particulars referred to in paragraphs (2)(a), (b), (c) and (d), but must cause the word “provisional” to be entered in the Register in relation to the entry specifying that time and date.
- (5) Where:
- (a) in accordance with subsection (4), the word “provisional” is entered in the Register in relation to an entry specifying the

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time and date on which a notice in respect of a charge was lodged; and

- (b) within a period of 30 days or such longer period as is prescribed after the notice was lodged, or within such further period as the Commission, if it considers it to be appropriate in a particular case, allows, a certificate to the effect set out in paragraph (4)(b) has been produced to the Commission; the Commission shall delete the word “provisional” that was so entered in relation to the entry relating to that charge, but if such a certificate is not produced within the period, or the further period, referred to in paragraph (b), the Commission shall delete from the Register all the particulars that were entered in relation to the charge.
- (6) Where a document that purports to be a notice in respect of a charge on property of a company for the purposes of section 263 or 264 is lodged (whether during or after the period within which the notice was required to be lodged) and the document contains the name of the company concerned and the particulars referred to in subparagraph 263(1)(a)(vii) or (viii), as the case requires, but does not contain some or all of the other particulars that are required to be included in the notice or is otherwise defective:
- (a) the Commission shall cause to be entered in the Register the time and date when the document was lodged and such of the particulars referred to in paragraphs (2)(a), (b), (c) and (d) as are ascertainable from the document, but shall cause the word “provisional” to be entered in the Register in relation to the entry specifying that time and date; and
  - (b) the Commission shall, by notice in writing to the person who lodged the document, direct the person to ensure that there is lodged, on or before the day specified in the notice, a notice in relation to the charge that complies with the requirements of section 263 or 264, as the case may be, but the giving by the Commission of a direction to the person under this paragraph does not affect any liability that the company may have incurred or may incur by reason of a contravention of section 263 or 264.

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- (7) Where the Commission gives a direction to a person under paragraph (6)(b) in relation to a charge:
- (a) if the direction is complied with on or before the day specified in the notice containing the direction, the Commission shall:
    - (i) delete from the Register the word “provisional” that was inserted pursuant to paragraph (6)(a); and
    - (ii) cause to be entered in the Register in relation to the charge any particulars referred to in subsection (2) that have not previously been entered;
  - (b) if the direction is not complied with on or before that day—the Commission shall delete from the Register all the particulars that were entered in relation to the charge; and
  - (c) if the direction is complied with after that day—the Commission shall cause to be entered in the Register in relation to the charge the time at which and day on which the direction was complied with and the particulars referred to in paragraphs (2)(a), (b), (c) and (d).
- (8) The Commission may enter in the Register in relation to a charge, in addition to the particulars expressly required by this section to be entered, such other particulars as the Commission thinks fit.
- (9) If the word “provisional” is entered in the Register in relation to an entry specifying a time and day in relation to a charge, the charge shall be deemed not to have been registered but:
- (a) where the word “provisional” is deleted from the Register pursuant to subsection (5) or paragraph (7)(a)—the charge shall be deemed to be registered and to have been registered from and including the time and day specified in the Register pursuant to subsection (4) or paragraph (6)(a), as the case may be; or
  - (b) where the particulars in relation to the charge are deleted from the Register pursuant to paragraph (7)(b) and those particulars and a time and day are subsequently entered in the Register in relation to the charge pursuant to paragraph (7)(c)—the charge shall be deemed to be

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registered from and including that last-mentioned time and day.

- (10) Where, pursuant to subsection 263(3), a registrable body lodges notices relating to 2 or more charges on the same property of the registrable body, the time and day that shall be entered in the Register in relation to each of those charges are the time and day when the first notice was lodged.
- (11) Where, in accordance with subsection (10), the time and day that are entered in the Register are the same in relation to 2 or more charges on property of a registrable body, those charges shall, as between themselves, have the respective priorities that they would have had if they had not been registered under this Part.
- (12) Where, pursuant to section 264, a company lodges notices relating to 2 or more charges on the same property acquired by the company (being charges that are not already registered under this Part), the time and day that shall be entered in the Register in relation to each of those charges are the time and day when the first notice was lodged.
- (13) Where, in accordance with subsection (12), the time and day that are entered in the Register are the same in relation to 2 or more charges on property acquired by a company, those charges shall, as between themselves, have the respective priorities that they would have had if they had not been registered under this Part.
- (14) Where a notice is lodged under section 268 (whether during or after the period within which it was required to be lodged), the Commission shall as soon as practicable cause to be entered in the Register the time and day when the notice was so lodged and the particulars set out in the notice.

**265A Standard time for the purposes of section 265**

- (1) The Commission may, by *Gazette* notice, declare a specified standard time to be the standard time for the purposes of section 265 of the Corporations Law.

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- (2) Where a notice is in force under subsection (1) of this section and each corresponding law, a reference in subsection 265(2) or (4), paragraph 265(6)(a) or (7)(c), or subsection 265(10), (12) or (14), to entering the time when a particular event happened is a reference to entering that time as expressed in terms of the standard time specified in the notice.

**266 Certain charges void against liquidator or administrator**

- (1) Where:
- (a) an order is made, or a resolution is passed, for the winding up of a company; or
  - (b) an administrator of a company is appointed under section 436A, 436B or 436C; or
  - (ba) a company executes a deed of company arrangement; a registrable charge on property of the company is void as a security on that property as against the liquidator, the administrator of the company, or the deed's administrator, as the case may be, unless:
    - (c) a notice in respect of the charge was lodged under section 263 or 264, as the case requires:
      - (i) within the relevant period; or
      - (ii) at least 6 months before the critical day;
    - (d) in relation to a charge other than a charge to which subsection 263(3) applies—the period within which a notice in respect of the charge (other than a notice under section 268) is required to be lodged, being the period specified in the relevant section or that period as extended by the Court under subsection (4), has not ended at the start of the critical day and the notice is lodged before the end of that period;
    - (e) in relation to a charge to which subsection 263(3) applies—the period of 45 days after the chargee becomes aware that the registrable body has been registered as a company under Part 5B.1, or registered under Part 5B.2, has not ended at the

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- start of the critical day and the notice is lodged before the end of that period; or
- (f) in relation to a charge to which section 264 applies—the period of 45 days after the chargee becomes aware that the property charged has been acquired by a company has not ended at the start of the critical day and the notice is lodged before the end of that period.
- (2) The reference in paragraph (1)(c) to the relevant period shall be construed as a reference to:
- (a) in relation to a charge to which subsection 263(1) applies—the period of 45 days specified in that subsection, or that period as extended by the Court under subsection (4) of this section;
- (b) in relation to a charge to which subsection 263(3) applies—the period of 45 days after the chargee becomes aware that the registrable body has been registered as a company under Part 5B.1 or registered under Part 5B.2; or
- (c) in relation to a charge to which section 264 applies—the period of 45 days after the chargee becomes aware that the property has been acquired by a company.
- (3) Where, after there has been a variation in the terms of a registrable charge on property of a company having the effect of increasing the amount of the debt or increasing the liabilities (whether present or prospective) secured by the charge:
- (a) an order is made, or a resolution is passed, for the winding up of the company; or
- (b) an administrator of a company is appointed under section 436A, 436B or 436C; or
- (ba) a company executes a deed of company arrangement;
- the registrable charge is void as a security on that property to the extent that it secures the amount of the increase in that debt or liability unless:
- (c) a notice in respect of the variation was lodged under section 268:

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- (i) within the period of 45 days specified in subsection 268(2) or that period as extended by the Court under subsection (4) of this section; or
  - (ii) not later than 6 months before the critical day; or
  - (d) the period of 45 days specified in subsection 268(2), or that period as extended by the Court under subsection (4) of this section, has not ended at the start of the critical day and the notice is lodged before the end of that period.
- (4) The Court, if it is satisfied that the failure to lodge a notice in respect of a charge, or in respect of a variation in the terms of a charge, as required by any provision of this Part:
- (a) was accidental or due to inadvertence or some other sufficient cause; or
  - (b) is not of a nature to prejudice the position of creditors or shareholders;
- or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested and on such terms and conditions as seem to the Court just and expedient, by order, extend the period for such further period as is specified in the order.
- (5) Where:
- (a) a registrable charge (in this subsection referred to as the **later charge**) is created before the end of 45 days after the creation of an unregistered registrable charge (in this subsection referred to as the **earlier charge**);
  - (b) the later charge relates to all or any of the property to which the earlier charge related; and
  - (c) the later charge is given as a security for the same liability as is secured by the earlier charge or any part of that liability;
- the later charge, to the extent to which it is a security for the same liability or part thereof, and so far as it relates to the property comprised in the earlier charge, is void as a security on that property as against a liquidator or administrator of the company, or an administrator of a deed of company arrangement executed by the company, even if a notice in respect of the later charge was

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lodged under section 263 within a period mentioned in paragraph (1)(c) or (d) of this section, unless it is proved to the satisfaction of the Court that the later charge was given in good faith for the purpose of correcting some material error in the earlier charge or under other proper circumstances and not for the purposes of avoiding or evading the provisions of this Part.

- (6) Nothing in subsection (1) or (3) operates to affect the title of a person to property purchased for value from a chargee or from a receiver appointed by a chargee in the exercise of powers conferred by the charge or implied by law if that person purchased the property in good faith and without notice of:
- (a) the filing of an application for an order for the winding up of the company; or
  - (b) the passing of a resolution for the voluntary winding up of the company; or
  - (c) an administrator of the company being appointed under section 436A, 436B or 436C; or
  - (d) the company executing a deed of company arrangement.
- (7) The onus of proving that a person purchased property in good faith and without notice of any of the matters referred to in paragraphs (6)(a), (b), (c) and (d) is on the person asserting that the property was so purchased.
- (8) In this section:
- critical day**, in relation to a company, means:
- (a) if the company is being wound up—the day when the winding up began; or
  - (b) if the company is under administration—the section 513C day in relation to the administration; or
  - (c) if the company has executed a deed of company arrangement—the section 513C day in relation to the administration that ended when the deed was executed.



**267 Charges in favour of certain persons void in certain cases**

(1) Where:

- (a) a company creates a charge on property of the company in favour of a person who is, or in favour of persons at least one of whom is, a relevant person in relation to the charge; and
- (b) within 6 months after the creation of the charge, the chargee purports to take a step in the enforcement of the charge without the Court having, under subsection (3), given leave for the charge to be enforced;

the charge, and any powers purported to be conferred by an instrument creating or evidencing the charge, are, and shall be deemed always to have been, void.

(2) Without limiting the generality of subsection (1), a person who:

- (a) appoints a receiver of property of a company under powers conferred by an instrument creating or evidencing a charge created by the company; or
- (b) whether directly or by an agent, enters into possession or assumes control of property of a company for the purposes of enforcing a charge created by the company;

shall be taken, for the purposes of subsection (1), to take a step in the enforcement of the charge.

(3) On application by the chargee under a charge, the Court may, if it is satisfied that:

- (a) immediately after the creation of the charge, the company that created the charge was solvent; and
- (b) in all the circumstances of the case, it is just and equitable for the Court to do so;

give leave for the charge to be enforced.

(4) Nothing in subsection (1) affects a debt, liability or obligation of a company that would, if that subsection had not been enacted, have been secured by a charge created by the company.

(5) Nothing in subsection (1) operates to affect the title of a person to property (other than the charge concerned or an interest in the

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charge concerned) purchased for value from a chargee under a charge, from an agent of a chargee under a charge, or from a receiver appointed by a chargee under a charge in the exercise of powers conferred by the charge or implied by law, if that person purchased the property in good faith and without notice that the charge was created in favour of a person who is, or in favour of persons at least one of whom is, as the case may be, a relevant person in relation to the charge.

- (6) The onus of proving that a person purchased property in good faith and without notice that a charge was created as mentioned in subsection (5) is on the person asserting that the property was so purchased.

- (7) In this section:

**chargee**, in relation to a charge, means:

- (a) in any case—the holder, or all or any of the holders, of the charge; or
- (b) in the case of a charge that is an agreement to give or execute a charge in favour of a person or persons, whether upon demand or otherwise—that person, or all or any of those persons.

**officer**, in relation to a company, includes, in the case of a registered foreign company, a local agent of the foreign company.

**receiver** includes a receiver and manager.

**relevant person**, in relation to a charge created by a company, means:

- (a) a person who is at the time when the charge is created, or who has been at any time during the period of 6 months ending at that time, an officer of the company; or
- (b) a person associated, in relation to the creation of the charge, with a person of a kind referred to in paragraph (a).

**268 Assignment and variation of charges**

- (1) Where, after a registrable charge on property of a company has been created, a person other than the original chargee becomes the holder of the charge, the person who becomes the holder of the charge shall, within 45 days after he, she or it becomes the holder of the charge:
  - (a) lodge a notice stating that he, she or it has become the holder of the charge; and
  - (b) give the company a copy of the notice.
- (2) Where, after a registrable charge on property of a company has been created, there is a variation in the terms of the charge having the effect of:
  - (a) increasing the amount of the debt or increasing the liabilities (whether present or prospective) secured by the charge; or
  - (b) prohibiting or restricting the creation of subsequent charges on the property;the company shall, within 45 days after the variation occurs, ensure that there is lodged a notice setting out particulars of the variation and accompanied by the instrument (if any) effecting the variation or a certified copy of that instrument.
- (3) Where a charge created by a company secures a debt of an unspecified amount or secures a debt of a specified amount and further advances, a payment or advance made by the chargee to the company in accordance with the terms of the charge shall not be taken, for the purposes of subsection (2), to be a variation in the terms of the charge having the effect of increasing the amount of the charge or the liabilities (whether present or prospective) secured by the charge.
- (4) A reference in this section to the chargee in relation to a charge shall, if the charge is constituted by a debenture and debentures and there is a trustee for debenture holders, be construed as a reference to the trustee for debenture holders.

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- (5) Nothing in section 263 requires the lodgment of a notice under that section in relation to a charge merely because of the fact that the terms of the charge are varied only in a manner mentioned in this section.

**268A Assignment of charges under the *State Bank (Corporatisation) Act 1994* of South Australia**

*Application of section*

- (1) This section applies if:
- (a) after one or more registrable charges on property of a company have been created, a person other than the original chargee becomes the holder of the charges; and
  - (b) the person is the State Bank of South Australia or Bank of South Australia Limited; and
  - (c) the person becomes the holder of the charges as a result of the operation of:
    - (i) section 7 or 23 of the *State Bank (Corporatisation) Act 1994* of South Australia; or
    - (ii) a corresponding provision of a law of another State or of a Territory.

*Lodgment of notice with Commission*

- (2) The person may lodge a notice stating that it has become the holder of the charges.

*Notice to be in a form approved by Commission*

- (3) The notice must be in a form approved by the Commission.

*Time within which notice must be lodged*

- (4) The notice must be lodged within:
  - (a) 6 months after the commencement of the *State Bank (Corporatisation) Act 1994* of South Australia (the ***initial period***); or

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(b) such longer period as the Commission allows.

*When Commission may allow longer period for lodgment of notice*

- (5) The Commission may only allow a longer period under paragraph (4)(b) if:
- (a) the person applies in writing to the Commission within the initial period; and
  - (b) the Commission is satisfied that, having regard to the nature of the charges involved, it would not be practicable for the person to lodge a notice in relation to those charges within the initial period.

*Effect of notice*

- (6) A person who lodges a notice under subsection (2) in respect of one or more charges on property of a company is taken, for the purposes of this Law and the Corporations (Fees) Regulations:
- (a) to have lodged a separate notice in accordance with subsection 268(1) in respect of each of those charges; and
  - (b) to have given a copy of each of those notices to the company in accordance with that subsection.

*Debentures*

- (7) If:
- (a) a charge is constituted by a debenture or debentures; and
  - (b) there is a trustee for debenture holders;
- a reference in this section to the chargee in relation to a charge is a reference to that trustee.

## **269 Satisfaction of, and release of property from, charges**

- (1) Where, with respect to a charge registered under this Part:
- (a) the debt or other liability the payment or discharge of which was secured by the charge has been paid or discharged in whole or in part; or

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- (b) the property charged or part of that property is released from the charge;
- the person who was the holder of the charge at the time when the debt or other liability was so paid or discharged or the property or part of the property was released shall, within 14 days after receipt of a request in writing made by the company on whose property the charge exists, give to the company a memorandum in the prescribed form acknowledging that the debt or other liability has been paid or discharged in whole or in part or that the property or that part of it is no longer subject to the charge, as the case may be.
- (2) The company may lodge the memorandum and, upon the memorandum being lodged, the Commission shall enter in the Register particulars of the matters stated in the memorandum.
- (3) The reference in subsection (1) to the person who was the holder of a charge at the time when the debt or other liability was so paid or discharged or the property or part of the property was released shall, if the charge was constituted by a debenture or debentures and there was a trustee for debenture holders, be construed as a reference to the person who was, at that time, the trustee for debenture holders.

**270 Lodgment of notices, offences etc.**

- (1) Where a notice in respect of a charge on property of a company is required to be lodged under section 263 or 264 or subsection 268(2), the notice may be lodged by the company or by any interested person.
- (2) Where default is made in complying with section 263 or 264 or subsection 268(2) in relation to a registrable charge on property of a company, the company and any officer of the company who is in default each contravene this subsection.
- (3) Where a person who becomes the holder of a registrable charge fails to comply with subsection 268(1), the person and, if the person is a body corporate, any officer of the body corporate who is in default, each contravene this subsection.

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- (4) Where a document required by this Part other than subsection 268(1) to be lodged is lodged by a person other than the company concerned, that person:
- (a) shall, within 7 days after the lodgment of the document, give to the company a copy of the document; and
  - (b) is entitled to recover from the company the amount of any fees properly paid by the person on lodgment of the document.

**271 Company to keep documents relating to charges and register of charges**

- (1) A company shall keep, at the place where the register referred to in subsection (2) is kept, a copy of every document relating to a charge on property of the company that is lodged under this Part or was lodged with a person under a corresponding previous law, and a copy of every document given to the company under this Part or a corresponding previous law.
- (2) A company shall keep a register and shall, upon the creation of a charge (whether registrable or not) on property of the company, or upon the acquisition of property subject to a charge (whether registrable or not), as soon as practicable enter in the register particulars of the charge, giving in each case:
- (a) if the charge is a charge created by the company, the date of its creation or, if the charge was a charge existing on property acquired by the company, the date on which the property was so acquired;
  - (b) a short description of the liability (whether present or prospective) secured by the charge;
  - (c) a short description of the property charged;
  - (d) the name of the trustee for debenture holders or, if there is no such trustee, the name of the chargee; and
  - (e) the name of the person whom the company believes to be the holder of the charge.

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- (3) A register kept by a company pursuant to subsection (2) shall be open for inspection:
  - (a) by any creditor or member of the company—without charge; and
  - (b) by any other person—on payment for each inspection of such amount, not exceeding the prescribed amount, as the company requires or, where the company does not require the payment of an amount, without charge.
- (4) A person may request a company to furnish the person with a copy of the register or any part of the register and, where such a request is made, the company shall send the copy to that person:
  - (a) if the company requires payment of an amount not exceeding the prescribed amount—within 21 days after payment of the amount is received by the company or within such longer period as the Commission approves; or
  - (b) in a case to which paragraph (a) does not apply—within 21 days after the request is made or within such longer period as the Commission approves.
- (5) If default is made in complying with any provision of this section, the company and any officer of the company who is in default are each guilty of an offence.

## 272 Certificates

- (1) Where particulars of a charge are entered in the Register in accordance with this Part, the Commission shall, on request by any person, issue to that person a certificate under the common seal of the Commission setting out those particulars and stating the time and day when a notice in respect of the charge containing those particulars was lodged with the Commission and, if the word “provisional” appears in the Register in relation to the reference to that time and day, stating that fact.
- (2) A certificate issued under subsection (1) is *prima facie* evidence of the matters stated in the certificate.



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- (3) Where particulars of a charge are entered in the Register in accordance with this Part, and the word “provisional” does not appear in the register in relation to the reference to the time and day when a notice in respect of the charge was lodged, the Commission shall, on request by any person, issue to that person a certificate under the common seal of the Commission stating that particulars of the charge are entered in the Register in accordance with this Part.
- (4) A certificate issued under subsection 272(3) of the Corporations Law of this or another jurisdiction is conclusive evidence that the requirements of Part 2K.2 of that Law as to registration (other than the requirements relating to the period after the creation of the charge within which notice in respect of the charge is required to be lodged) have been complied with.

**273 Registration under other legislation relating to charges**

- (1) Where, whether before or after the prescribed time, a notice in relation to a charge is required to be lodged under this Part:
  - (a) the charge need not be registered under a specified law of this jurisdiction; and
  - (b) no provision of a specified law of this jurisdiction relating to priorities applies to or in relation to the charge; and
  - (c) a failure to register the charge under a specified law of this jurisdiction does not affect the validity, or limit the effect, of the charge.
- (2) Where:
  - (a) a transfer, assignment, or giving of security, by a company is registrable under a specified law of this jurisdiction;
  - (b) notice in relation to the transfer, assignment or giving of security is required to be lodged under this Part; and
  - (c) the transfer, assignment or giving of security is registered under this Part;then:

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- (d) the transfer, assignment or giving of security is, subject to paragraph (1)(b), as valid and effectual; and
  - (e) by force of this subsection, the specified provisions (if any) of a law of this jurisdiction have effect, with the prescribed modifications (if any), in relation to the transfer, assignment or giving of security;  
as if it had been duly registered under that specified law.
- (3) Where:
- (a) a crop lien, wool lien, or stock mortgage, given by a company is registrable under a specified law of this jurisdiction;
  - (b) notice in relation to the crop lien, wool lien, or stock mortgage, is required to be lodged under this Part; and
  - (c) the crop lien, wool lien, or stock mortgage, is registered under this Part;
- then:
- (d) the crop lien, wool lien or stock mortgage is, subject to paragraph (1)(b), as valid and effectual; and
  - (e) by force of this subsection, the specified provisions (if any) of a law of this jurisdiction have effect, with the prescribed modifications (if any), in relation to the crop lien, wool lien, or stock mortgage;  
as if it had been duly registered under that specified law.
- (4) Subject to this Chapter, the regulations may provide that specified provisions of a law of this jurisdiction:
- (a) do not apply; or
  - (b) apply, because of the regulations and with the prescribed modifications (if any);
- in relation to specified charges in relation to which notices must be lodged under this Part.
- (5) Nothing in this section applies in relation to a charge given by a company jointly with another person who is not, or other persons at least one of whom is not, a company.

(6) In this section:

*specified* means specified in an application order.

### **274 Power of Court to rectify Register**

Where the Court is satisfied:

- (a) that a particular with respect to a registrable charge on property of a company has been omitted from, or mis-stated in, the Register or a memorandum referred to in section 269; and
- (b) that the omission or mis-statement:
  - (i) was accidental or due to inadvertence or to some other sufficient cause; or
  - (ii) is not of a nature to prejudice the position of creditors or shareholders;or that on other grounds it is just and equitable to grant relief; the Court may, on the application of the company or any person interested and on such terms and conditions as seem to the Court just and expedient, order that the omission or mis-statement be rectified.

### **275 Charges of company existing before 1 January 1991**

- (1) This section applies where a body corporate is taken to be registered as a company according to section 1362CB.
- (2) On and after 1 January 1991, this Chapter (other than this section) applies in relation to the company, with such modifications as the circumstances require, as if:
  - (a) the company had always been a company as defined in section 9;
  - (b) this Law had always been in operation;
  - (c) an act or thing done by or in relation to the company under, or for the purposes of, a previous law of this jurisdiction corresponding to a provision of this Chapter had been done under, or for the purposes of, that provision; and

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- (d) a reference in this Chapter to the Register included a reference to a register of company charges kept under a previous law of this jurisdiction corresponding to section 265.
- (3) Nothing in subsection (2) makes a person guilty of a contravention of this Law in respect of an act or thing done, or an omission made, when the company was not a company as defined in section 9.
- (4) Subsection (5) applies to each charge on property of the company that, immediately before 1 January 1991, was registered under a previous law of this jurisdiction corresponding to this Part.
- (5) At the beginning of 1 January 1991:
  - (a) there are taken to be entered in the Register the time and date, and the particulars, entered in relation to that charge in the Register kept under that corresponding previous law; and
  - (b) the time and date, and the particulars, are taken to have been entered in the Register in accordance with subsection 265(2).

**275A Charges of bodies to which section 1362CJ applies**

- (1) This section applies if a registrable body is taken to have been registered according to section 1362CJ.
- (2) This Chapter (other than this section) applies in relation to the body, with such modifications as the circumstances require, as if:
  - (a) this Law had always been in operation; and
  - (b) the body had been a registered body throughout each period before 1 January 1991 throughout which it was registered under a previous law of this jurisdiction relating to foreign companies within the meaning of that law; and
  - (c) an act or thing done by or in relation to the body under, or for the purposes of, a previous law of this jurisdiction corresponding to a provision of this Chapter had been done under, or for the purposes of, that provision; and
  - (d) a reference in this Chapter to the Register included a reference to a register of company charges kept under a

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previous law of this jurisdiction corresponding to section 265.

- (3) Nothing in subsection (2) makes a person guilty of a contravention of this Law in respect of an act or thing done, or an omission made, before 1 January 1991.
- (4) Subsection (5) applies to each charge on property of the body that, immediately before 1 January 1991, was registered under a previous law of this jurisdiction corresponding to this Part.
- (5) The Commission is taken to have entered in the Register at the beginning of 1 January 1991, in accordance with subsection 265(2), the time and date, and the particulars, entered in relation to the charge under the previous law referred to in subsection (4) of this section.

### **276 Charges of body corporate registered as a company**

If, immediately before the day on which a body corporate was registered as a company under Part 5B.1, or a previous law of this jurisdiction corresponding to a provision of that Part, a charge on property of the company was registered under a law corresponding to this Part and was not also registered under this Part, the Commission is taken to have entered in the Register at the beginning of that day, in accordance with subsection 265(2), the time and date, and the particulars, entered in relation to the charge under that corresponding law.

### **276AA Charges of company transferring jurisdiction**

If, immediately before the day on which a recognised company was registered as a company under section 1362B or a previous law of this jurisdiction corresponding to that section:

- (a) the company was, because of the definition of *company* in section 9 of the Corporations Law of another jurisdiction, a company for the purposes of that section of that Law; and

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- (b) a charge on property of the company was registered under Part 2K.2 of that Law and was not also registered under this Part;

the Commission is taken to have entered in the Register at the beginning of that day, in accordance with subsection 265(2) of this Law, the time and date, and the particulars, entered in relation to the charge under Part 2K.2 of that Law.

**276A Charges of recognised companies and certain foreign companies**

Chapter 2K (except section 276A) of the Corporations Law of another jurisdiction, and the Corporations Regulations of that jurisdiction, so far as they have effect for the purposes of that Chapter, apply in and in relation to this jurisdiction:

- (a) in relation to property (within the meaning of that Chapter) of a body corporate that, because of the definition of *company* in section 9 of that Law, is a company for the purposes of section 9 of that Law; or
- (b) in relation to property in Australia or an external Territory of a foreign company that is registered under Division 2 of Part 5B.2 of that Law.

**277 Power to exempt from compliance with certain requirements of Division**

- (1) The Commission may, by instrument in writing, exempt a person, as specified in the instrument and subject to such conditions (if any) as are specified in the instrument, from compliance with such of the requirements of section 263, 264 or 268 relating to:
  - (a) the particulars to be contained in a notice under the relevant section;
  - (b) the documents (other than the notice) to be lodged under the relevant section; or
  - (c) the verification of any document required to be lodged under the relevant section;as are specified in the instrument.

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- (2) A person who is exempted by the Commission, subject to a condition, from compliance with a requirement of section 263, 264 or 268 shall not contravene the condition.
- (3) Where a person has contravened or failed to comply with a condition to which an exemption under this section is subject, the Court may, on the application of the Commission, order the person to comply with the condition.

## Part 2K.3—Order of priority

### 278 Interpretation

(1) In this Part:

**priority time**, in relation to a registered charge, means:

- (a) except as provided by paragraph (b) or (c)—the time and date appearing in the Register in relation to the charge, being a time and day entered in the Register pursuant to section 265;
- (b) where a notice has been lodged under section 264 in relation to a charge on property, being a charge that, at the time when the notice was lodged, was already registered under Part 2K.2—the earlier or earliest time and day appearing in the Register in relation to the charge, being a time and day entered in the Register pursuant to section 264; and
- (c) to the extent that the charge has effect as varied by a variation notice of which was required to be lodged under subsection 268(2)—the time and day entered in the Register in relation to the charge pursuant to subsection 265(14).

**prior registered charge**, in relation to another registered charge, means a charge the priority time of which is earlier than the priority time of the other charge.

**registered charge** means a charge that is registered under Part 2K.2.

**subsequent registered charge**, in relation to another registered charge, means a charge the priority time of which is later than the priority time of the other registered charge.

**unregistered charge** means a charge that is not registered under Part 2K.2 but does not include a charge that is not a registrable charge.



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- (2) A reference in this Part to a person having notice of a charge includes a reference to a person having constructive notice of the charge.
- (3) Where, by virtue of the definition of *priority time* in subsection (1), a registered charge has 2 or more priority times each of which relates to a particular liability secured by the charge, each of those liabilities shall, for the purposes of this Part, be deemed to be secured by a separate registered charge the priority time of which is the priority time of the first-mentioned registered charge that relates to the liability concerned.

**279 Priorities of charges**

- (1) Subject to this section, sections 280 to 282, inclusive, have effect with respect to the priorities, in relation to each other, of registrable charges on the property of a company.
- (2) The application, in relation to particular registrable charges, of the order of priorities of charges set out in sections 280 to 282, inclusive, is subject to:
  - (a) any consent (express or implied) that varies the priorities in relation to each other of those charges, being a consent given by the holder of one of those charges, being a charge that would otherwise be entitled to priority over the other charge; and
  - (b) any agreement between those chargees that affects the priorities in relation to each other of the charges in relation to which those persons are the chargees.
- (3) The holder of a registered charge, being a floating charge, on property of a company shall be deemed, for the purposes of subsection (2), to have consented to that charge being postponed to a subsequent registered charge, being a fixed charge that is created before the floating charge becomes fixed, on any of that property unless:

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- (a) the creation of the subsequent registered charge contravened a provision of the instrument or resolution creating or evidencing the floating charge; and
  - (b) a notice in respect of the floating charge indicating the existence of the provision referred to in paragraph (a) was lodged with the Commission under section 263, 264 or 268 before the creation of the subsequent registered charge.
- (4) Where a charge relates to property of a kind or kinds to which a particular paragraph or paragraphs of subsection 262(1) applies or apply and also relates to other property, sections 280 to 282, inclusive, apply so as to affect the priority of the charge only in so far as it relates to the first-mentioned property and do not affect the priority of the charge in so far as it relates to the other property.
- (5) Sections 280 to 282, inclusive, do not apply so as to affect the operation of:
- (a) the *Copyright Act 1968*;
  - (b) the *Designs Act 1906*;
  - (c) the *Life Insurance Act 1995*;
  - (d) the *Patents Act 1952*; or
  - (e) the *Trade Marks Act 1955*.

**280 General priority rules in relation to registered charges**

- (1) A registered charge on property of a company has priority over:
- (a) a subsequent registered charge on the property, unless the subsequent registered charge was created before the creation of the prior registered charge and the chargee in relation to the subsequent registered charge proves that the chargee in relation to the prior registered charge had notice of the subsequent registered charge at the time when the prior registered charge was created;
  - (b) an unregistered charge on the property created before the creation of the registered charge, unless the chargee in relation to the unregistered charge proves that the chargee in relation to the registered charge had notice of the

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- unregistered charge at the time when the registered charge was created; and
- (c) an unregistered charge on the property created after the creation of the registered charge.
- (2) A registered charge on property of a company is postponed to:
- (a) a subsequent registered charge on the property, where the subsequent registered charge was created before the creation of the prior registered charge and the chargee in relation to the subsequent registered charge proves that the chargee in relation to the prior registered charge had notice of the subsequent registered charge at the time when the prior registered charge was created; and
- (b) an unregistered charge on the property created before the creation of the registered charge, where the chargee in relation to the unregistered charge proves that the chargee in relation to the registered charge had notice of the unregistered charge at the time when the registered charge was created.

### **281 General priority rule in relation to unregistered charges**

An unregistered charge on property of a company has priority over:

- (a) a registered charge on the property that was created after the creation of the unregistered charge and does not have priority over the unregistered charge under subsection 280(1); and
- (b) another unregistered charge on the property created after the first-mentioned unregistered charge.

### **282 Special priority rules**

- (1) Except as provided by this section, any priority accorded by this Part to a charge over another charge does not extend to any liability that, at the priority time in relation to the first-mentioned charge, is not a present liability.
- (2) Where a registered charge on property of a company secures:

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- (a) a present liability and a prospective liability of an unspecified amount; or
  - (b) a prospective liability of an unspecified amount;  
any priority accorded by this Part to the charge over another charge of which the chargee in relation to the first-mentioned charge does not have actual knowledge extends to the prospective liability, whether the prospective liability became a present liability before or after the registration of the first-mentioned charge.
- (3) Where a registered charge on property of a company secures:
- (a) a present liability and a prospective liability up to a specified maximum amount; or
  - (b) a prospective liability up to a specified maximum amount; and the notice lodged under section 263 or 264 in relation to the charge sets out the nature of the prospective liability and the amount so specified, then any priority accorded by this Part to the charge over another charge extends to any prospective liability secured by the first-mentioned charge to the extent of the maximum amount so specified, whether the prospective liability became a present liability before or after the registration of the first-mentioned charge and notwithstanding that the chargee in relation to the first-mentioned charge had actual knowledge of the other charge at the time when the prospective liability became a present liability.
- (4) Where:
- (a) a registered charge on property of a company secures:
    - (i) a present liability and a prospective liability up to a specified maximum amount; or
    - (ii) a prospective liability up to a specified maximum amount;  
but the notice lodged under section 263 or 264 in relation to the charge does not set out the nature of the prospective liability or the maximum amount so specified; or
  - (b) a registered charge on property of a company secures a prospective liability of an unspecified amount;
- the following paragraphs have effect:
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- (c) any priority accorded by this Part to the charge over another charge of which the chargee in relation to the first-mentioned charge has actual knowledge extends to any prospective liability secured by the first-mentioned charge that had become a present liability at the time when the chargee in relation to the first-mentioned charge first obtained actual knowledge of the other charge;
- (d) any priority accorded by this Part to the charge over another charge of which the chargee in relation to the first-mentioned charge has actual knowledge extends to any prospective liability secured by the first-mentioned charge that became a present liability, as the result of the making of an advance, after the time when the chargee in relation to the first-mentioned charge first obtained actual knowledge of the other charge if, at that time, the terms of the first-mentioned charge required the chargee in relation to that charge to make the advance after that time, and so extends to that prospective liability whether the advance was made before or after the registration of the first-mentioned charge and notwithstanding that the chargee in relation to the first-mentioned charge had actual knowledge of the other charge at the time when the advance was made.

## Chapter 2L—Debentures

### Part 2L.1—Requirement for trust deed and trustee

#### 260FA Requirement for trust deed and trustee

- (1) Before a body:
  - (a) makes an offer of debentures in this jurisdiction that needs disclosure to investors under Chapter 6D, or does not need disclosure to investors under Chapter 6D because of subsection 708(14) (disclosure document exclusion for debenture roll overs); or
  - (b) makes an offer of debentures in this jurisdiction or elsewhere as consideration for the acquisition of securities under an off-market takeover bid; or
  - (c) issues debentures in this jurisdiction or elsewhere under a compromise or arrangement under Part 5.1 approved at a meeting held as a result of an order under subsection 411(1) or (1A);

regardless of where any resulting issue, sale or transfer occurs, the body must enter into a trust deed that complies with section 260FB and appoint a trustee that complies with section 260FC.

Note: For rules about when an offer of debentures will need disclosure to investors under Chapter 6D, see sections 706, 707 and 708.

- (2) The body may revoke the trust deed after it has repaid all amounts payable under the debentures in accordance with the debentures' terms and the trust deed.
- (3) The body must comply with this Chapter.

Note: Sections 168 and 601CZB require a register of debenture holders to be set up and kept.

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**260FB Trust deed**

The trust deed must provide that the following are held in trust by the trustee for the benefit of the debenture holders:

- (a) the right to enforce the borrower's duty to repay
- (b) any charge or security for repayment
- (c) the right to enforce any other duties that the borrower and any guarantor have under:
  - (i) the terms of the debentures; or
  - (ii) the provisions of the trust deed or this Chapter.

Note: For information about the duties that the borrower and any guarantor body have under this Chapter, see sections 260GB to 260HE.

**260FC Who can be a trustee**

*Who can be trustee*

- (1) The trustee must be:
  - (a) the Public Trustee of any State or Territory; or
  - (b) a body corporate authorised by a law of any State or Territory to take in its own name a grant of probate of the will, or letters of administration of the estate, of a deceased person; or
  - (c) a body corporate registered under the *Life Insurance Act 1995*; or
  - (d) an Australian ADI; or
  - (e) a body corporate, all of whose shares are held beneficially by a body corporate or bodies corporate of the kind referred to in paragraph (b), (c) or (d) if that body or those bodies:
    - (i) are liable for all of the liabilities incurred, or to be incurred, by the trustee as trustee; or
    - (ii) have subscribed for and beneficially hold shares in the trustee and there is an uncalled liability of at least \$500,000 in respect of those shares that can only be called up if the trustee becomes an

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externally-administered body corporate (see section 254N); or

(f) a body corporate approved by ASIC (see section 260MB).

Note: Section 260GD provides that if the borrower becomes aware that the trustee cannot be a trustee, the trustee must be replaced.

*Circumstances in which a person cannot be trustee*

- (2) A person may only be appointed or act as trustee (except to the extent provided for by section 260FD) if the appointment or acting will not result in a conflict of interest or duty. This subsection is not intended to affect any rule of law or equity.

**260FD Existing trustee continues to act until new trustee takes office**

An existing trustee continues to act as the trustee until a new trustee is appointed and has taken office as trustee, despite any rule of law or equity to the contrary.

Note: This section applies even if the existing trustee resigns.

**260FE Replacement of trustee**

*Related party of existing trustee may be appointed as a new trustee*

- (1) In addition to any other powers of appointment under the terms of the debentures or provisions of the trust deed, the borrower may appoint a body corporate that is related to the existing trustee as trustee in place of the existing trustee if:
- (a) the body corporate can be a trustee under section 260FC; and
  - (b) the existing trustee consents in writing to the appointment.
- The appointment has effect despite any terms of the debentures or provisions of the trust deed.

*Appointment by Court*

- (2) The Court may:



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- (a) appoint a person who may be a trustee under section 260FC as trustee on the application of the borrower, a debenture holder or ASIC if:
  - (i) a trustee has not been validly appointed; or
  - (ii) the trustee has ceased to exist; or
- (b) terminate the existing trustee's appointment and appoint a person who may be a trustee under section 260FC as trustee in the existing trustee's place on the application of the borrower, the existing trustee, a debenture holder or ASIC if:
  - (i) the existing trustee cannot be trustee under section 260FC; or
  - (ii) the existing trustee fails, or refuses, to act.

## Part 2L.2—Duties of borrower

### 260GA Duties of borrower

A borrower that is required to enter into a trust deed under section 260FA has the duties imposed by this Part.

### 260GB General duties

The borrower must:

- (a) carry on and conduct its business in a proper and efficient manner; and
- (b) provide a copy of the trust deed to:
  - (i) a debenture holder; or
  - (ii) the trustee;if they request a copy; and
- (c) make all of its financial and other records available for inspection by:
  - (i) the trustee; or
  - (ii) an officer or employee of the trustee authorised by the trustee to carry out the inspection; or
  - (iii) a registered company auditor appointed by the trustee to carry out the inspection;and give them any information, explanations or other assistance that they require about matters relating to those records.

Note: The borrower also has a duty to call a meeting of debenture holders in certain circumstances (see section 260KA).

### 260GC Duty to notify ASIC of name of trustee

The borrower must lodge with ASIC a notice of the name of a trustee within 14 days after they are appointed. The notice must be in the prescribed form.

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**260GD Duty to replace trustee**

The borrower must take all reasonable steps to replace the trustee under section 260FE as soon as practicable after the borrower becomes aware that the trustee:

- (a) has ceased to exist; or
- (b) has not been validly appointed; or
- (c) cannot be a trustee under section 260FC; or
- (d) has failed or refused to act as trustee.

**260GE Duty to inform trustee about charges**

If the borrower creates a charge, it must:

- (a) give the trustee written details of the charge within 21 days after it is created; and
- (b) if the total amount to be advanced on the security of the charge is indeterminate and the advances are not merged in a current account with bankers, trade creditors or anyone else—give the trustee written details of the amount of each advance within 7 days after it is made.

Note: If the advances are merged in a current account the borrower must give the trustee the details in the quarterly report (see subsection 260GF(4)).

**260GF Duty to give trustee and ASIC quarterly reports**

*Quarterly reports*

- (1) Within 1 month after the end of each quarter, the borrower must:
  - (a) give the trustee a quarterly report that sets out the information required by subsections (4), (5) and (6); and
  - (b) lodge a copy of the report with ASIC (see section 351).

*First quarter*

- (2) The first quarter is the period of 3 months ending on a day fixed by the borrower, by written notice to the trustee. The day must be less

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than 6 months after the first issue of a debenture under the trust deed.

*Subsequent quarters*

- (3) Each of the subsequent quarters are periods of 3 months. The trustee may allow a particular quarter to be a period of less than 3 months if the trustee is satisfied that special circumstances justify doing so.

*Content of quarterly report*

- (4) The report for a quarter must include details of:
- (a) any failure by the borrower and each guarantor to comply with the terms of the debentures or the provisions of the trust deed or this Chapter during the quarter; and
  - (b) any event that has happened during the quarter that has caused, or could cause, 1 or more of the following:
    - (i) any amount deposited or lent under the debentures to become immediately payable
    - (ii) the debentures to become immediately enforceable
    - (iii) any other right or remedy under the terms of the debenture or provisions of the trust deed to become immediately enforceable; and
  - (c) any circumstances that have occurred during the quarter that materially prejudice:
    - (i) the borrower, any of its subsidiaries, or any of the guarantors; or
    - (ii) any security or charge included in or created by the debentures or the trust deed; and
  - (d) any substantial change in the nature of the business of the borrower, any of its subsidiaries, or any of the guarantors that has occurred during the quarter; and
  - (e) any of the following events that happened in the quarter:
    - (i) the appointment of a guarantor

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- (ii) the cessation of liability of a guarantor body for the payment of the whole or part of the money for which it was liable under the guarantee
- (iii) a change of name of a guarantor (if this happens, the report must also disclose the guarantor's new name); and
- (f) the net amount outstanding on any advances at the end of the quarter if the borrower has created a charge where:
  - (i) the total amount to be advanced on the security of the charge is indeterminate; and
  - (ii) the advances are merged in a current account with bankers, trade creditors or anyone else; and
- (g) any other matters that may materially prejudice any security or the interests of the debenture holders.

Note: Paragraph (f)—the borrower has a duty to inform the trustee about charges as they are created (see section 260GE).

- (5) If the borrower has deposited money with, or lent money to, a related body corporate during the quarter, the report must also include details of:
  - (a) the total of the money deposited with, or lent to, the related body corporate during the quarter (see subsection (7)); and
  - (b) the total amount of money owing to the borrower at the end of the quarter in respect of the deposits or loans to the related body corporate.Disregard any amount that the borrower deposits with an ADI in the normal course of the borrower's business.
- (6) If the borrower has assumed a liability of a related body corporate during the quarter, the report must also include details of the extent of the liability assumed during the quarter and the extent of the liability as at the end of the quarter.
- (7) For the purposes of subsections (5) and (6), the report:
  - (a) must distinguish between deposits, loans and assumptions of liability that are secured and those that are unsecured; and

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- (b) may exclude any deposit, loan or assumption of liability on behalf of the related body corporate if it has:
  - (i) guaranteed the repayment of the debentures of the borrower; and
  - (ii) secured the guarantee by a charge over all of its property in favour of the trustee.

*Formalities*

- (8) The report must:
  - (a) be made in accordance with a resolution of the directors; and
  - (b) specify the date on which the report is made.

**260GG Exceptions**

Sections 260GE and 260GF do not apply in respect of the borrower while:

- (a) it is under external administration; or
- (b) a receiver, or a receiver and manager, of property of the borrower has been appointed and has not ceased to act under that appointment.

**260GH How debentures may be described**

- (1) The borrower may describe or refer to the debentures in:
  - (a) any disclosure in relation to the offer of the debentures; or
  - (b) any other document constituting or relating to the offer of the debentures; or
  - (c) the debentures themselves;only in accordance with the following table:

<b>How debentures may be described</b>		
<b>Item</b>	<b>Description</b>	<b>When description may be used</b>
1	mortgage debenture	only if the circumstances set out in subsection (2) are satisfied

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<b>How debentures may be described</b>		
<b>Item</b>	<b>Description</b>	<b>When description may be used</b>
2	debenture	only if the circumstances set out in subsection (2) or (3) are satisfied
3	unsecured note or unsecured deposit note	in any other case

*When debentures can be called mortgage debentures or debentures*

- (2) The borrower may describe or refer to the debentures as:
- (a) mortgage debentures; or
  - (b) debentures;
- if:
- (c) the repayment of all money that has been, or may be, deposited or lent under the debentures is secured by a first mortgage given to the trustee over land vested in the borrower or in any of the guarantors; and
  - (d) the mortgage has been registered, or is a registrable mortgage that has been lodged for registration, in accordance with the law relating to the registration of mortgages of land in the place where the land is situated; and
  - (e) the total amount of that money and of all other liabilities (if any) secured by the mortgage of that land ranking equally with the liability to repay that money does not exceed 60% of the value of the borrower's or guarantor's interest in that land as shown in the valuation included in the disclosure document for the debentures.

*When debentures can be called debentures*

- (3) The borrower may describe or refer to the debentures as debentures if:
- (a) the repayment of all money that has been, or may be, deposited or lent under the debentures has been secured by a charge in favour of the trustee over the whole or any part of

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- the tangible property of the borrower or of any of the guarantors; and
- (b) the tangible property that constitutes the security for the charge is sufficient and is reasonably likely to be sufficient to meet the liability for the repayment of all such money and all other liabilities that:
- (i) have been or may be incurred; and
  - (ii) rank in priority to, or equally with, that liability.

**260GI Offences for failure to comply with statutory duties**

The borrower commits an offence if it intentionally or recklessly contravenes section 260GB, 260GC, 260GD, 260GE, 260GF or 260KA.



## **Part 2L.3—Duties of guarantor**

### **260HA Duties of guarantor**

If a borrower is required to enter into a trust deed under section 260FA in relation to debentures, a guarantor in respect of the debentures has the duties imposed by this Part.

### **260HB General duties**

The guarantor must:

- (a) carry on and conduct its business in a proper and efficient manner; and
- (b) make all of its financial and other records available for inspection by:
  - (i) the trustee; or
  - (ii) an officer or employee of the trustee authorised by the trustee to carry out the inspection; or
  - (iii) a registered company auditor appointed by the trustee to carry out the inspection;and give them any information, explanations or other assistance that they require about matters relating to those records.

### **260HC Duty to inform trustee about charges**

If the guarantor creates a charge, it must:

- (a) give the trustee written details of the charge within 21 days after it is created; and
- (b) if the total amount to be advanced on the security of the charge is indeterminate, give the trustee written details of:
  - (i) the amount of each advance made within 7 days after it is made; or

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- (ii) where the advances are merged in a current account with bankers, trade creditors or anyone else—the net amount outstanding on the advances at the end of every 3 months.

**260HD Exceptions**

Section 260HC does not apply in respect of the guarantor while:

- (a) it is under external administration; or
- (b) a receiver, or a receiver and manager, of property of the guarantor has been appointed and has not ceased to act under that appointment.

**260HE Offences for failure to comply with statutory duties**

The guarantor commits an offence if it intentionally or recklessly contravenes paragraph 260HB(b) or section 260HC.

## Part 2L.4—Trustee

### 260JA Trustee's duties

The trustee of a trust deed entered into under section 260FA must:

- (a) exercise reasonable diligence to ascertain whether the property of the borrower and of each guarantor that is or should be available (whether by way of security or otherwise) will be sufficient to repay the amount deposited or lent when it becomes due; and
- (b) exercise reasonable diligence to ascertain whether the borrower or any guarantor has committed any breach of:
  - (i) the terms of the debentures; or
  - (ii) the provisions of the trust deed or this Chapter; and
- (c) do everything in its power to ensure that the borrower or a guarantor remedies any breach known to the trustee of:
  - (i) any term of the debentures; or
  - (ii) any provision of the trust deed or this Chapter;unless the trustee is satisfied that the breach will not materially prejudice the debenture holders' interests or any security for the debentures; and
- (d) ensure that the borrower and each guarantor complies with Part 2K to the extent that it applies to the debentures; and
- (e) notify ASIC as soon as practicable if:
  - (i) the borrower has not complied with section 260GE, 260GF or subsection 318(1) or (4); or
  - (ii) a guarantor has not complied with section 260HC; and
- (f) notify ASIC and the borrower as soon as practicable if the trustee discovers that it cannot be a trustee under section 260FC; and
- (g) give the debenture holders a statement explaining the effect of any proposal that the borrower submits to the debenture holders before any meeting that:

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- (i) the Court calls in relation to a scheme under subsection 411(1) or (1A); or
  - (ii) the trustee calls under subsection 260KB(1); and
- (h) comply with any directions given to it at a debenture holders' meeting referred to in section 260KA, 260KB or 260KC unless:
- (i) the trustee is of the opinion that the direction is inconsistent with the terms of the debentures or the provisions of the trust deed or this Law or is otherwise objectionable; and
  - (ii) has either obtained, or is in the process of obtaining, an order from the Court under section 260NA setting aside or varying the direction; and
- (i) apply to the Court for an order under section 260NB if the borrower requests it to do so.

Note 1: Paragraph (g)—Section 411 relates to compromises and arrangements.

Note 2: Section 260JC deals with indemnification in respect of a trustee's liability to the debenture holders.

### **260JB Exemptions and indemnifications of trustee from liability**

- (1) A term of a debenture, provision of a trust deed or a term of a contract with holders of debentures secured by a trust deed, is void in so far as the term or provision would have the effect of:
- (a) exempting a trustee from liability for breach of section 260JA for failure to show the degree of care and diligence required of it as trustee; or
  - (b) indemnifying the trustee against that liability;
- unless the term or provision:
- (c) releases the trustee from liability for something done or omitted to be done before the release is given; or
  - (d) enables a meeting of debenture holders to approve the release of the trustee from liability for something done or omitted to be done before the release is given.
- (2) For the purposes of paragraph (1)(d):

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- (a) a release is approved if the debenture holders who vote for the resolution hold 75% of the nominal value of the debentures held by all the debenture holders who attend the meeting and vote on the resolution; and
- (b) a debenture holder attends the meeting and votes on the resolution if:
  - (i) they attend the meeting in person and vote on the resolution; or
  - (ii) if proxies are permitted—they are represented at the meeting by a proxy and the proxy votes on the resolution.

### **260JC Indemnity**

The trustee is not liable for anything done or omitted to be done in accordance with a direction given to it by the debenture holders at any meeting called under section 260KA, 260KB or 260KC.

## Part 2L.5—Meetings of debenture holders

### 260KA Borrower's duty to call meeting

#### *Duty to call meeting*

- (1) The borrower must call a meeting of debenture holders if:
  - (a) debenture holders who together hold 10% or more of the nominal value of the issued debentures to which the trust relates direct the borrower to do so; and
  - (b) the direction is given to the borrower in writing at its registered office; and
  - (c) the purpose of the meeting is to:
    - (i) consider the financial statements that were laid before the last AGM of the borrower; or
    - (ii) give the trustee directions in relation to the exercise of any of its powers.

Note: The trustee usually must comply with any directions given to it by the debenture holders at the meeting (see paragraph 260JA(h)).

#### *Duty to give notification of meeting*

- (2) If the borrower is required to call a meeting, it must give notice of the time and place of the meeting to:
  - (a) the trustee; and
  - (b) the borrower's auditor; and
  - (c) each of the debenture holders whose names are entered on the register of debenture holders.Notice to joint holders of a debenture must be given to the joint holder named first in the register of debenture holders.
- (3) The borrower may give the notice to a debenture holder:
  - (a) personally; or

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- (b) by sending it by post to the address for the debenture holder in the register of debenture holders; or
- (c) by sending it to the fax number or electronic address (if any) nominated by the debenture holder; or
- (d) by any other means that the trust deed or the terms of the debentures permit.

Note: A defect in the notice may not invalidate a meeting (see section 1322).

*When notice by post or fax is given*

- (4) A notice of meeting sent to a debenture holder is taken to be given:
  - (a) 3 days after it is posted, if it is posted; or
  - (b) on the business day after it is sent, if it is sent by fax or other electronic means;unless the trust deed or the terms of the debentures provide otherwise.

### **260KB Trustee's power to call meeting**

*Trustee may call meeting in event of breach*

- (1) If the borrower or a guarantor fails to remedy any breach of the terms of the debentures or provisions of the trust deed or this Chapter when required by the trustee, the trustee may:
  - (a) call a meeting of debenture holders; and
  - (b) inform the debenture holders of the failure at the meeting; and
  - (c) submit proposals for protection of the debenture holders' interests to the meeting; and
  - (d) ask for directions from the debenture holders in relation to the matter.

*Trustee may appoint person to chair meeting*

- (2) The trustee may appoint a person to chair a meeting of debenture holders called under subsection (1). If the trustee does not exercise

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this power, the debenture holders present at the meeting may appoint a person to chair the meeting.

**260KC Court may order meeting**

- (1) Without limiting section 260NA or 260NB, the Court may make an order under either of those sections for a meeting of all or any of the debenture holders to be held to give directions to the trustee. The order may direct the trustee to:
  - (a) place before the debenture holders any information concerning their interests; and
  - (b) place before the debenture holders any proposals to protect their interests that the Court directs or the trustee considers appropriate; and
  - (c) obtain the debenture holders' directions concerning the protection of their interests.
- (2) The meeting is to be held and conducted in the manner the Court directs. The trustee may appoint a person to chair the meeting. If the trustee does not exercise this power, the debenture holders present at the meeting may appoint a person to chair the meeting.



## **Part 2L.6—Civil liability**

### **260L Civil liability for contravening this Chapter**

- (1) A person who suffers loss or damage because a person contravenes a provision of this Chapter may recover the amount of the loss or damage from:
  - (a) the person who contravened the provision; or
  - (b) a person involved in the contravention.This is so even if the person did not commit, and was not involved in, the contravention.
- (2) An action under subsection (1) may begin at any time within 6 years after the day on which the cause of action arose.
- (3) This Part does not affect any liability that a person has under any other law.

## Part 2L.7—ASIC powers

### 260MA ASIC's power to exempt and modify

- (1) ASIC may:
  - (a) exempt a person from a provision of this Chapter; or
  - (b) declare that this Chapter applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.
- (2) The exemption or declaration may do all or any of the following:
  - (a) apply to all or specified provisions of this Chapter
  - (b) apply to all persons, specified persons, or a specified class of persons
  - (c) relate to all debentures, specified debentures or a specified class of debentures
  - (d) relate to any other matter generally or as specified.
- (3) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.
- (4) The exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*.
- (5) For the purposes of this section, the *provisions of this Chapter* include:
  - (a) regulations made for the purposes of this Chapter; and
  - (b) definitions in this Law or the regulations as they apply to references in:
    - (i) this Chapter; or
    - (ii) regulations made for the purposes of this Chapter; and
  - (c) Division 12 of Part 11.2.

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**260MB ASIC may approve body corporate to be trustee**

- (1) ASIC may approve a body corporate in writing to be a trustee for the purposes of paragraph 260FC(1)(f). The approval may allow the body corporate to act as trustee:
  - (a) in any circumstances; or
  - (b) in relation to a particular borrower or particular class of borrower; or
  - (c) in relation to a particular trust deed;and may be given subject to conditions.
- (2) ASIC must publish notice of the approval in the *Gazette*.

## Part 2L.8—Court

### 260NA General Court power to give directions and determine questions

If the trustee applies to the Court for any direction in relation to the performance of the trustee's functions or to determine any question in relation to the interests of the debenture holders, the Court may give any direction and make any declaration or determination in relation to the matter that the Court considers appropriate. The Court may also make ancillary or consequential orders.

Note: Under this section, the Court may order a meeting of debenture holders to be held, see section 260KC.

### 260NB Specific Court powers

- (1) If the trustee or ASIC applies to the Court, the Court may make any or all of the following orders:
  - (a) an order staying an action or other civil proceedings before a court by or against the borrower or a guarantor body
  - (b) an order restraining the borrower from paying any money to the debenture holders or any holders of any other class of debentures
  - (c) an order that any security for the debentures be enforceable immediately or at the time the Court directs (even if the debentures are irredeemable or redeemable only on the happening of a contingency)
  - (d) an order appointing a receiver of any property constituting security for the debentures
  - (e) an order restricting advertising by the borrower for deposits or loans
  - (f) an order restricting borrowing by the borrower

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- (g) any other order that the Court considers appropriate to protect the interests of existing or prospective debenture holders.
- (2) In deciding whether to make an order under subsection (1), the Court must have regard to:
- (a) the ability of the borrower and each guarantor to repay the amount deposited or lent as and when it becomes due; and
  - (b) any contravention of section 260MA by the borrower; and
  - (c) the interests of the borrower's members and creditors; and
  - (d) the interests of the members of each of the guarantors.

Note: The Court may order a meeting of debenture holders to be held (see section 260KC).

## **Part 2L.9—Location of other debenture provisions**

### **260P Signpost to other debenture provisions**

There are other rules relating to debentures in paragraph 124(1)(b) and section 563AAA.

## Chapter 2M—Financial reports and audit

### Part 2M.1—Overview

#### 285 Overview of obligations under this Chapter

*Obligations under this Chapter*

- (1) Under this Chapter, all companies, registered schemes and disclosing entities must keep financial records (see sections 286-291)—and some must prepare financial reports (see sections 292-323D). All those that have to prepare financial reports have to prepare them annually; disclosing entities have to prepare half-year financial reports as well. The following table sets out what is involved in annual financial reporting:

<b>Annual financial reporting</b>			
	<b>steps</b>	<b>sections</b>	<b>comments</b>
1	prepare financial report	s. 295	The financial report includes: <ul style="list-style-type: none"><li>• financial statements</li><li>• disclosures and notes</li><li>• directors' declaration.</li></ul>
2	prepare directors' report	s. 298	The report has both a general component (s. 299) and a specific component (s. 300).

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<b>Annual financial reporting</b>			
<b>steps</b>	<b>sections</b>	<b>comments</b>	
3	have the financial report audited and obtain auditor's report	s. 301, 307, 308	A small proprietary company preparing a financial report in response to a shareholder direction under s. 293 only has to have an audit if the direction asks for it. Under s. 312, officers must assist the auditor in the conduct of the audit. ASIC may use its exemption powers under s. 340 and 341 to relieve large proprietary companies from the audit requirements in appropriate cases (s. 342(2) and (3)).
4	send the financial report, directors' report and auditor's report to members	s. 314	A concise financial report may be sent to members instead of the full financial statements (s. 314(1)-(2)). For deadline see s. 315(1)-(4).
5	lodge the financial report, directors' report and auditor's report with ASIC	s. 319	For deadline see s. 319(3). Companies that have the benefit of the grandfathering in s. 319(4) do not have to lodge.



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<b>Annual financial reporting</b>		
<b>steps</b>	<b>sections</b>	<b>comments</b>
6 [public companies only] lay financial report, directors' report and auditor's report before AGM	s. 317	For the AGM deadline see s. 250N.

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*Application to disclosing entities*

- (2) This Chapter covers all disclosing entities incorporated or formed in this jurisdiction (whether or not they are companies or registered schemes).

*Application to registered schemes*

- (3) For the purposes of applying this Chapter to a registered scheme:
- (a) the scheme's responsible entity is responsible for the performance of obligations in respect of the scheme; and
  - (b) the directors and officers of the responsible entity are to be taken to be the directors and officers of the scheme; and
  - (c) the debts incurred in operating the scheme are to be taken to be the debts of the scheme.

## Part 2M.2—Financial records

### 286 Obligation to keep financial records

- (1) A company, registered scheme or disclosing entity must keep written financial records that:
  - (a) correctly record and explain its transactions and financial position and performance; and
  - (b) would enable true and fair financial statements to be prepared and audited.

The obligation to keep financial records of transactions extends to transactions undertaken as trustee.

Note: Section 9 defines *financial records*.

*Period for which records must be retained*

- (2) The financial records must be retained for 7 years after the transactions covered by the records are completed.

### 287 Language requirements

- (1) The financial records may be kept in any language.
- (2) An English translation of financial records not kept in English must be made available within a reasonable time to a person who:
  - (a) is entitled to inspect the records; and
  - (b) asks for the English translation.

### 288 Physical format

If financial records are kept in electronic form, they must be convertible into hard copy. Hard copy must be made available within a reasonable time to a person who is entitled to inspect the records.

## **289 Place where records are kept**

- (1) A company, registered scheme or disclosing entity may decide where to keep the financial records.

### *Records kept outside Australia*

- (2) If financial records about particular matters are kept outside Australia, sufficient written information about those matters must be kept in Australia to enable true and fair financial statements to be prepared. The company, registered scheme or disclosing entity must give ASIC written notice in the prescribed form of the place where the information is kept.
- (3) ASIC may direct a company, registered scheme or disclosing entity to produce specified financial records that are kept outside Australia.
- (4) The direction must:
  - (a) be in writing; and
  - (b) specify a place in Australia where the records are to be produced (the place must be reasonable in the circumstances); and
  - (c) specify a day (at least 14 days after the direction is given) by which the records are to be produced.

## **290 Director access**

### *Personal access*

- (1) A director of a company, registered scheme or disclosing entity has a right of access to the financial records at all reasonable times.

### *Court order for inspection on director's behalf*

- (2) On application by a director, the Court may authorise a person to inspect the financial records on the director's behalf.

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- (3) A person authorised to inspect records may make copies of the records unless the Court orders otherwise.
- (4) The Court may make any other orders it consider appropriate, including either or both of the following:
  - (a) an order limiting the use that a person who inspects the records may make of information obtained during the inspection
  - (b) an order limiting the right of a person who inspects the records to make copies in accordance with subsection (3).

**291 Signposts to other relevant provisions**

The following table sets out other provisions that are relevant to access to financial records.

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<b>Other provisions relevant to access to financial records</b>		
		<b>members</b>
1	section 247A	A member may apply to the Court for an order to inspect the records.
		<b>auditor</b>
2	section 310	The auditor has a right of access to the records.
		<b>controllers</b>
3	section 431	A controller of a corporation's property (for example, a receiver or receiver and manager) has a right of access to the records.
		<b>ASIC</b>
4	sections 28 to 39 of the <i>Australian Securities Commission Act 1989</i>	ASIC has power to inspect the records. It also has power under subsection 289(3) of this Law to call for the production of financial records kept outside Australia.

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## **Part 2M.3—Financial reporting**

### **Division 1—Annual financial reports and directors' reports**

#### **292 Who has to prepare annual financial reports and directors' reports**

- (1) A financial report and a directors' report must be prepared for each financial year by:
- (a) all disclosing entities; and
  - (b) all public companies; and
  - (c) all large proprietary companies; and
  - (d) all registered schemes.

Note: This Chapter only applies to disclosing entities incorporated or formed in Australia (see subsection 285(2)).

- (2) A small proprietary company has to prepare the financial report and directors' report only if:
- (a) it is directed to do so under section 293 or 294; or
  - (b) it was controlled by a foreign company for all or part of the year and it is not consolidated for that period in financial statements for that year lodged with ASIC by:
    - (i) a registered foreign company; or
    - (ii) a company, registered scheme or disclosing entity.

The rest of this Part does not apply to any other small proprietary company.

#### **293 Small proprietary company—shareholder direction**

- (1) Shareholders with at least 5% of the votes in a small proprietary company may give the company a direction to:
- (a) prepare a financial report and directors' report for a financial year; and

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- (b) send them to all shareholders.
- (2) The direction must be:
  - (a) signed by the shareholders giving the direction; and
  - (b) made no later than 12 months after the end of the financial year concerned.
- (3) The direction may specify all or any of the following:
  - (a) that the financial report does not have to comply with some or all of the accounting standards
  - (b) that a directors' report or a part of that report need not be prepared
  - (c) that the financial report is to be audited.

**294 Small proprietary company—ASIC direction**

- (1) ASIC may give a small proprietary company a direction to comply with requirements of this Division and Divisions 3, 4, 5 and 6 for a financial year.
- (2) The direction may be general or may specify the particular requirements that the company is to comply with.
- (3) The direction must specify the date by which the documents have to be prepared, sent or lodged. The date must be a reasonable one in view of the nature of the direction.
- (4) The direction must:
  - (a) be made in writing; and
  - (b) specify the financial year concerned; and
  - (c) be made no later than 6 years after the end of that financial year.

**295 Contents of annual financial report**

*Basic contents*

- (1) The financial report for a financial year consists of:
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- (a) the financial statements for the year; and
- (b) the notes to the financial statements; and
- (c) the directors' declaration about the statements and notes.

*Financial statements*

- (2) The financial statements for the year are:
  - (a) a profit and loss statement for the year; and
  - (b) a balance sheet as at the end of the year; and
  - (c) a statement of cash flows for the year; and
  - (d) if required by the accounting standards—a consolidated profit and loss statement, balance sheet and statement of cash flows.

*Notes to financial statements*

- (3) The notes to the financial statements are:
  - (a) disclosures required by the regulations; and
  - (b) notes required by the accounting standards; and
  - (c) any other information necessary to give a true and fair view (see section 297).

*Directors' declaration*

- (4) The directors' declaration is a declaration by the directors:
  - (a) that the financial statements, and the notes referred to in paragraph (3)(b), comply with the accounting standards; and
  - (b) that the financial statements and notes give a true and fair view (see section 297); and
  - (c) whether, in the directors' opinion, there are reasonable grounds to believe that the company, registered scheme or disclosing entity will be able to pay its debts as and when they become due and payable; and
  - (d) whether, in the directors' opinion, the financial statement and notes are in accordance with this law, including:
    - (i) section 296 (compliance with accounting standards); and

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(ii) section 297 (true and fair view).

Note: See paragraph 285(3)(c) for the reference to the debts of a registered scheme.

- (5) The declaration must:
- (a) be made in accordance with a resolution of the directors; and
  - (b) specify the date on which the declaration is made; and
  - (c) be signed by a director.

**296 Compliance with accounting standards and regulations**

- (1) The financial report for a financial year must comply with the accounting standards. However, a small proprietary company's report does not have to comply with particular accounting standards if:
- (a) the report is prepared in response to a shareholder direction under section 293; and
  - (b) the direction specifies that the report does not have to comply with those accounting standards.
- (2) The financial report must comply with any further requirements in the regulations.

**297 True and fair view**

The financial statements and notes for a financial year must give a true and fair view of:

- (a) the financial position and performance of the company, registered scheme or disclosing entity; and
- (b) if consolidated financial statements are required—the financial position and performance of the consolidated entity.

This section does not affect the obligation under section 296 for a financial report to comply with accounting standards.

Note: If the financial statements and notes prepared in compliance with the accounting standards would not give a true and fair view, additional information must be included in the notes to the financial statements under paragraph 295(3)(c).



## **298 Annual directors' report**

- (1) The company, registered scheme or disclosing entity must prepare a directors' report for each financial year. The report must include:
  - (a) the general information required by section 299; and
  - (b) the specific information required by section 300.
- (2) The report must:
  - (a) be made in accordance with a resolution of the directors; and
  - (b) specify the date on which the report is made; and
  - (c) be signed by a director.
- (3) A small proprietary company does not have to comply with subsection (1) for a financial year if:
  - (a) it is preparing financial statements for that year in response to a shareholder direction under section 293; and
  - (b) the direction specified that a directors' report need not be prepared.

## **299 Annual directors' report—general information**

### *General information about operations and activities*

- (1) The directors' report for a financial year must:
  - (a) contain a review of operations during the year of the entity reported on and the results of those operations; and
  - (b) give details of any significant changes in the entity's state of affairs during the year; and
  - (c) state the entity's principal activities during the year and any significant changes in the nature of those activities during the year; and
  - (d) give details of any matter or circumstance that has arisen since the end of the year that has significantly affected, or may significantly affect:
    - (i) the entity's operations in future financial years; or
    - (ii) the results of those operations in future financial years;or

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- (iii) the entity's state of affairs in future financial years; and
  - (e) refer to likely developments in the entity's operations in future financial years and the expected results of those operations; and
  - (f) if the entity's operations are subject to any particular and significant environmental regulation under a law of the Commonwealth or of a State or Territory—details of the entity's performance in relation to environmental regulation.
- (2) The entity reported on is:
- (a) the company, registered scheme or disclosing entity (if consolidated financial statements are not required); or
  - (b) the consolidated entity (if consolidated financial statements are required).

*Prejudicial information need not be disclosed*

- (3) The report may omit material that would otherwise be included under paragraph (1)(e) if it is likely to result in unreasonable prejudice to:
- (a) the company, registered scheme or disclosing entity; or
  - (b) if consolidated financial statements are required—the consolidated entity or any entity (including the company, registered scheme or disclosing entity) that is part of the consolidated entity.

If material is omitted, the report must say so.

**300 Annual directors' report—specific information**

- (1) The directors' report for a financial year must include details of:
- (a) dividends or distributions paid to members during the year; and
  - (b) dividends or distributions recommended or declared for payment to members, but not paid, during the year; and
  - (c) the name of each person who has been a director of the company, registered scheme or disclosing entity at any time

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during or since the end of the year and the period for which they were a director; and

- (d) options that are:
  - (i) granted over unissued shares or unissued interests during or since the end of the year; and
  - (ii) granted to any of the directors or any of the 5 most highly remunerated officers of the company; and
  - (iii) granted to them as part of their remuneration; (see subsections (3), (4) and (5)); and
- (e) unissued shares or interests under option as at the day the report is made (see subsections (3) and (6)); and
- (f) shares or interests issued during or since the end of the year as a result of the exercise of an option over unissued shares or interests (see subsections (3) and (7)); and
- (g) indemnities given and insurance premiums paid during or since the end of the year for a person who is or has been an officer or auditor (see subsections (8) and (9)).

Public companies, listed companies and registered schemes must include additional information under subsections (10), (11), (12) and (13).

- (2) Details do not have to be included in the directors' report under this section if they are included in the company's financial report for the financial year.
- (3) Paragraphs (1)(d), (e) and (f) cover:
  - (a) options over unissued shares and interests of the company, registered scheme or disclosing entity; and
  - (b) if consolidated financial statements are required—options over unissued shares and interests of any controlled entity that is a company, registered scheme or disclosing entity.

*Options details*

- (5) The details of an option granted are:
  - (a) the company, registered scheme or disclosing entity granting the option; and

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- (b) the name of the person to whom the option is granted; and
  - (c) the number and class of shares or interests over which the option is granted.
- (6) The details of unissued shares or interests under option are:
- (a) the company, registered scheme or disclosing entity that will issue shares or interests when the options are exercised; and
  - (b) the number and classes of those shares or interests; and
  - (c) the issue price, or the method of determining the issue price, of those shares or interests; and
  - (d) the expiry date of the options; and
  - (e) any rights that option holders have under the options to participate in any share issue or interest issue of the company, registered scheme or disclosing entity or of any other body corporate or registered scheme.

*Shares or interests issued as a result of exercise of option*

- (7) The details of shares or interests issued as a result of the exercise of an option are:
- (a) the company, registered scheme or disclosing entity issuing the shares or interests; and
  - (b) the number of shares or interests issued; and
  - (c) if the company, registered scheme or disclosing entity has different classes of shares or interests—the class to which each of those shares or interests belongs; and
  - (d) the amount unpaid on each of those shares or interests; and
  - (e) the amount paid, or agreed to be considered as paid, on each of those shares or interests.

*Indemnities and insurance premiums for officers or auditors*

- (8) The report for a company must include details of:
- (a) any indemnity that is given to a current or former officer or auditor against a liability and that is covered by subsection 199A(2) or (3), or any relevant agreement under

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which an officer or auditor may be given an indemnity of that kind; and

- (b) any premium that is paid, or agreed to be paid, for insurance against a current or former officer's or auditor's liability for legal costs.

Note: Sections 199A and 199B contain general prohibitions against giving certain indemnities and paying certain insurance premiums. This subsection requires transactions that are exceptions to these prohibitions to be reported.

- (9) The details required under subsection (8) are:

- (a) for an officer—their name or the class of officer to which they belong or belonged; and
- (b) for an auditor—their name; and
- (c) the nature of the liability; and
- (d) for an indemnity given—the amount the company paid and any other action the company took to indemnify the officer or auditor; and
- (e) for an agreement to indemnify—the amount that the relevant agreement requires the company to pay and any other action the relevant agreement requires the company to take to indemnify the officer or auditor; and
- (f) for an insurance premium—the amount of the premium.

The report need not give details of the nature of the liability covered by, or the amount of the premium payable under, a contract of insurance to the extent that disclosure of those details is prohibited by the insurance contract.

*Special rules for public companies*

- (10) The report for a public company that is not a wholly-owned subsidiary of another company or of a recognised company must also include details of:
  - (a) each director's qualifications, experience and special responsibilities; and
  - (b) the number of meetings of the board of directors held during the year and each director's attendance at those meetings; and

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- (c) the number of meetings of each board committee held during the year and each director's attendance at those meetings.

*Special rules for listed companies*

- (11) The report for a listed company must also include the following details for each director:
  - (a) their relevant interests in shares of the company or a related body corporate
  - (b) their relevant interests in debentures of, or interests in a registered scheme made available by, the company or a related body corporate
  - (c) their rights or options over shares in, debentures of or interests in a registered scheme made available by, the company or a related body corporate
  - (d) contracts:
    - (i) to which the director is a party or under which the director is entitled to a benefit; and
    - (ii) that confer a right to call for or deliver shares in, or debentures of or interests in a registered scheme made available by the company or a related body corporate.

Note: Directors must also disclose interests of these kinds to the ASX under section 205G as they are acquired.

*Special rules for listed registered schemes*

- (12) The report for a registered scheme whose interests are quoted on a stock market of a securities exchange must also include the following details for each director of the company that is the responsible entity for the scheme:
  - (a) their relevant interests in interests in the scheme
  - (b) their rights or options over interests in the scheme
  - (c) contracts to which the director is a party or under which the director is entitled to a benefit and that confer a right to call for or deliver interests in the scheme.

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*Special rules for registered schemes*

- (13) The report for a registered scheme must also include details of:
- (a) the fees paid to the responsible entity and its associates out of scheme property during the financial year; and
  - (b) the number of interests in the scheme held by the responsible entity or its associates as at the end of the financial year; and
  - (c) interests in the scheme issued during the financial year; and
  - (d) withdrawals from the scheme during the financial year; and
  - (e) the value of the scheme's assets as at the end of the financial year, and the basis for the valuation; and
  - (f) the number of interests in the scheme as at the end of the financial year.

*Proceedings on behalf of a company*

- (14) The report for a company must also include the following details of any application for leave under section 237 made in respect of the company:
- (a) the applicant's name; and
  - (b) a statement whether leave was granted.
- (15) The report for a company must also include the following details of any proceedings that a person has brought or intervened in on behalf of the company with leave under section 237:
- (a) the person's name
  - (b) the names of the parties to the proceedings
  - (c) sufficient information to enable members to understand the nature and status of the proceedings (including the cause of action and any orders made by the court).

**300A Annual directors' report—specific information to be provided by listed companies**

- (1) The directors' report for a financial year for a company must also include:

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- (a) discussion of broad policy for determining the nature and amount of emoluments of board members and senior executives of the company; and
  - (b) discussion of the relationship between such policy and the company's performance; and
  - (c) details of the nature and amount of each element of the emolument of each director and each of the 5 named officers of the company receiving the highest emolument.
- (2) This section applies only to a company that is:
- (a) incorporated in Australia; and
  - (b) included in an official list of the Exchange.
- (3) This section applies despite anything in the company's constitution.

**301 Audit of annual financial report**

- (1) A company, registered scheme or disclosing entity must have the financial report for a financial year audited in accordance with Division 3 and obtain an auditor's report.
- (2) A small proprietary company's financial report for a financial year does not have to be audited if:
  - (a) the report is prepared in response to a direction under section 293; and
  - (b) the direction did not ask for the financial report to be audited.



## **Division 2—Half-year financial report and directors' report**

### **302 Disclosing entity must prepare half-year financial report and directors' report**

A disclosing entity must:

- (a) prepare a financial report and directors' report for each half-year; and
- (b) have the financial report audited or reviewed in accordance with Division 3 and obtain an auditor's report; and
- (c) lodge the financial report, the directors' report and the auditor's report on the financial report with ASIC;

unless the entity is not a disclosing entity when lodgment is due.

Note 1: This Chapter only applies to disclosing entities incorporated or formed in Australia (see subsection 285(2)).

Note 2: See section 320 for the time for lodgment with ASIC.

Note 3: Subsection 318(4) requires disclosing entities that are borrowers in relation to debentures to also report to the trustee for debenture holders.

### **303 Contents of half-year financial report**

#### *Basic contents*

- (1) The financial report for a half-year consists of:
  - (a) the financial statements for the half-year; and
  - (b) the notes to the financial statements; and
  - (c) the directors' declaration about the statements and notes.

#### *Financial statements*

- (2) The financial statements for the half-year are:
  - (a) except where paragraph (b) applies:
    - (i) a profit and loss statement for the half-year; and

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- (ii) a balance sheet as at the end of the half-year; and
- (iii) a statement of cash flows for the half-year; and
- (b) if required by the accounting standards—a consolidated profit and loss statement, balance sheet and statement of cash flows.

*Notes to financial statements*

- (3) The notes to the financial statements are:
  - (a) disclosures required by the regulations; and
  - (b) notes required by the accounting standards; and
  - (c) any other information necessary to give a true and fair view (see section 305).

*Directors' declaration*

- (4) The directors' declaration is a declaration by the directors:
  - (a) that the financial statements, and the notes referred to in paragraph (3)(b), comply with the accounting standards; and
  - (b) that the financial statements and notes give a true and fair view (see section 305); and
  - (c) whether, in the directors' opinion, there are reasonable grounds to believe that the disclosing entity will be able to pay its debts as and when they become due and payable.

Note: See paragraph 285(3)(c) for the reference to the debts of a disclosing entity that is a registered scheme.

- (5) The declaration must:
  - (a) be made in accordance with a resolution of the directors; and
  - (b) specify the day on which the declaration is made; and
  - (c) be signed by a director.

### **304 Compliance with accounting standards and regulations**

The financial report for a half-year must comply with the accounting standards and any further requirements in the regulations.

### **305 True and fair view**

The financial statements and notes for a half-year must give a true and fair view of:

- (a) the financial position and performance of the disclosing entity; or
- (b) if consolidated financial statements are required—the financial position and performance of the consolidated entity.

This section does not affect the obligation under section 304 for financial reports to comply with accounting standards.

Note: If the financial statements prepared in compliance with the accounting standards would not give a true and fair view, additional information must be included in the notes to the financial statements under paragraph 303(3)(c).

### **306 Half-year directors' report**

The directors of the disclosing entity must prepare a directors' report for each half-year that consists of:

- (a) a review of the entity's operations during the half-year and the results of those operations; and
- (b) the name of each person who has been a director of the disclosing entity at any time during or since the end of the half-year and the period for which they were a director.

If consolidated financial statements are required, the review under paragraph (a) must cover the consolidated entity.

## Division 3—Audit and auditor's report

### 307 Audit

An auditor who conducts an audit of the financial report for a financial year or half-year must form an opinion about:

- (a) whether the financial report is in accordance with this Law, including:
  - (i) section 296 or 304 (compliance with accounting standards); and
  - (ii) section 297 or 305 (true and fair view); and
- (b) whether the auditor has been given all information, explanation and assistance necessary for the conduct of the audit; and
- (c) whether the company, registered scheme or disclosing entity has kept financial records sufficient to enable a financial report to be prepared and audited; and
- (d) whether the company, registered scheme or disclosing entity has kept other records and registers as required by this Law.

### 308 Auditor's report on annual financial report

- (1) An auditor who audits the financial report for a financial year must report to members on whether the auditor is of the opinion that the financial report is in accordance with this Law, including:
  - (a) section 296 (compliance with accounting standards); and
  - (b) section 297 (true and fair view).

If not of that opinion, the auditor's report must say why.

- (2) If the auditor is of the opinion that the financial report does not comply with an accounting standard, the auditor's report must, to the extent it is practicable to do so, quantify the effect that non-compliance has on the financial report. If it is not practicable to quantify the effect fully, the report must say why.
- (3) The auditor's report must describe:

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- (a) any defect or irregularity in the financial report; and
  - (b) any deficiency, failure or shortcoming in respect of the matters referred to in paragraph 307(b), (c) or (d).
- (4) The report must specify the date on which it is made.

### **309 Auditor's report on half-year financial report**

#### *Audit of financial report*

- (1) An auditor who audits the financial report for a half-year must report to members on whether the auditor is of the opinion that the financial report is in accordance with this Law, including:
- (a) section 304 (compliance with accounting standards); and
  - (b) section 305 (true and fair view).

If not of that opinion, the auditor's report must say why.

- (2) If the auditor is of the opinion that the financial report does not comply with an accounting standard, the auditor's report must, to the extent that it is practicable to do so, quantify the effect that non-compliance has on the financial report. If it is not practicable to quantify the effect fully, the report must say why.
- (3) The auditor's report must describe:
- (a) any defect or irregularity in the financial report; and
  - (b) any deficiency, failure or shortcoming in respect of the matters referred to in paragraph 307(b), (c) or (d).

#### *Review of financial report*

- (4) An auditor who reviews the financial report for a half-year must report to members on whether the auditor became aware of any matter in the course of the review that makes the auditor believe that the financial report does not comply with Division 2.
- (5) A report under subsection (4) must:
- (a) describe any matter referred to in subsection (4); and

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- (b) say why that matter makes the auditor believe that the financial report does not comply with Division 2.

*Report to specify day made*

- (6) A report under subsection (1) or (4) must specify the date on which it is made.

### 310 Auditor's power to obtain information

The auditor:

- (a) has a right of access at all reasonable times to the books of the company, registered scheme or disclosing entity; and
- (b) may require any officer to give the auditor information, explanations or other assistance for the purposes of the audit or review.

A request under paragraph (b) must be a reasonable one.

### 311 Reporting to ASIC

The auditor conducting an audit or review must, as soon as possible, notify ASIC in writing if the auditor:

- (a) has reasonable grounds to suspect that a contravention of this Law has occurred; and
- (b) believes that the contravention has not been or will not be adequately dealt with by commenting on it in the auditor's report or bringing it to the attention of the directors.

Note: Section 1289 gives an auditor qualified privilege for a notification to ASIC under this section.

### 312 Assisting auditor

An officer of a company, registered scheme or disclosing entity must:

- (a) allow the auditor access to the books of the company, scheme or entity; and

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- (b) give the auditor any information, explanation or assistance required under section 310.

Note: Books include registers and documents generally (not only the accounting “books”): see the definition of *books* in section 9.

### **313 Special provisions on audit of debenture issuers and guarantors**

*Auditor to give trustee for debenture holders copies of reports, certificates etc.*

- (1) The auditor of a borrower in relation to debentures must give the trustee for debenture holders:
  - (a) a copy of any report, certificate or other document that the auditor must give the borrower or its members under this Law, the debentures or the trust deed; and
  - (b) a copy of any document that accompanies it.

The copies must be given within 7 days after the auditor gives the originals to the borrower or its members.

*Auditor to report on matters prejudicial to debenture holders' interests*

- (2) The auditor of a borrower, or guarantor, in relation to debentures must give the borrower or guarantor a written report about any matter that:
  - (a) the auditor became aware of in conducting the audit or review; and
  - (b) in the auditor's opinion, is or is likely to be prejudicial to the interests of debenture holders; and
  - (c) in the auditor's opinion, is relevant to the exercise of the powers of the trustee for debenture holders, or the performance of the trustee's duties, under this Law or the trust deed.

The auditor must give a copy of the report to the trustee for debenture holders. The report and the copy must be given within 7 days after the auditor becomes aware of the matter.

## Division 4—Annual financial reporting to members

### 314 Annual financial reporting to members

*Full or concise report to members*

- (1) A company, registered scheme or disclosing entity must report to members for a financial year by either:
  - (a) sending members copies of:
    - (i) the financial report for the year; and
    - (ii) the directors' report for the year (see sections 298-300); and
    - (iii) the auditor's report on the financial report; or
  - (b) sending members a concise report for the year that complies with subsection (2).

*Concise report*

- (2) A concise report for a financial year consists of:
  - (a) a concise financial report for the year drawn up in accordance with accounting standards made for the purposes of this paragraph; and
  - (b) the directors' report for the year (see sections 298-300); and
  - (c) a statement by the auditor:
    - (i) that the financial report has been audited; and
    - (ii) whether, in the auditor's opinion, the concise financial report complies with the accounting standards made for the purposes of paragraph (a); and
  - (d) a copy of any qualification in, and of any statements included in the emphasis of matter section of, the auditor's report on the financial report; and
  - (e) a statement that the report is a concise report and that the full financial report and auditor's report will be sent to the member free of charge if the member asks for them.



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- (3) If the accounting standards made for the purposes of paragraph (2)(a) require a discussion and analysis to be included in a concise financial report:
- (a) the auditor must report on whether the discussion and analysis complies with the requirements that the accounting standards lay down for the discussion and analysis; and
  - (b) the auditor does not otherwise need to audit the statements made in the discussion and analysis.

### **315 Deadline for reporting to members**

*Public companies and disclosing entities that are not registered schemes*

- (1) A public company, or a disclosing entity that is not a registered scheme, must report to members under section 314 by the earlier of:
- (a) 21 days before the next AGM after the end of the financial year; or
  - (b) 4 months after the end of the financial year.

Note: For the deadline for holding an AGM, see section 250N.

*Small proprietary companies (shareholder direction under section 293)*

- (2) If a shareholder direction is given to a small proprietary company under section 293 after the end of the financial year, the company must report to members under section 314 by the later of:
- (a) 2 months after the date on which the direction is given; and
  - (b) 4 months after the end of the financial year.

*Registered schemes*

- (3) A registered scheme must report to members under section 314 within 3 months after the end of the financial year.

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*Other proprietary companies*

- (4) A proprietary company that is not covered by subsection (1) or (2) must report to members under section 314 within 4 months after the end of the financial year.

**316 Member's choices for annual financial information**

- (1) A member may request the company, registered scheme or disclosing entity:
- (a) not to send them the material required by section 314; or
  - (b) to send them a full financial report and the directors' report and auditor's report.

A request may be a standing request or for a particular financial year. The member is not entitled to a report for a financial year earlier than the one before the financial year in which the request is made.

- (2) The time for complying with a request under paragraph (1)(b) is:
- (a) 7 days after the request is received; or
  - (b) the deadline for reporting under section 315;
- whichever is later.
- (3) A full financial report, directors' report and auditor's report are to be sent free of charge unless the member has already received a copy of them free of charge.

**317 Consideration of reports at AGM**

The directors of a public company that is required to hold an AGM must lay before the AGM:

- (a) the financial report; and
- (b) the directors' report; and
- (c) the auditor's report;

for the last financial year that ended before the AGM.

Note 1: If the company's first AGM is held before the end of its first financial year, there will be no reports to lay before the meeting.

Note 2: A public company that has only 1 member is not required to hold an AGM (see section 250N).

### **318 Additional reporting by debenture issuers**

- (1) A company or disclosing entity that was a borrower in relation to debentures at the end of a financial year must give a copy of the annual financial report, directors' report and auditor's report to the trustee for debenture holders by the deadline for the financial year set by section 315.
- (2) A debenture holder may ask the company or disclosing entity that issued the debenture for copies of:
  - (a) the last reports sent to members under section 314; or
  - (b) the full financial report and the directors' report and auditor's report for the last financial year.
- (3) The company or entity must give the debenture holder the copies as soon as practicable after the request and free of charge.
- (4) A disclosing entity that was a borrower in relation to debentures at the end of a half-year must give a copy of the half-year financial report, directors' report and auditor's report to the trustee for debenture holders within 75 days after the end of the half-year.

## Division 5—Lodging reports with ASIC

### 319 Lodgment of annual reports with ASIC

- (1) A company, registered scheme or disclosing entity that has to prepare or obtain a report for a financial year under Division 1 must lodge the report with ASIC. This obligation extends to a concise report sent to members under section 314.
- (2) Subsection (1) does not apply to a small proprietary company that prepares a report in response to a shareholder direction under section 293 or an ASIC direction under section 294.
- (3) The time for lodgment is:
  - (a) within 3 months after the end of the financial year for a disclosing entity or registered scheme; and
  - (b) within 4 months after the end of the financial year for anyone else.
- (4) Subsection (1) does not apply to a large proprietary company that is not a disclosing entity if:
  - (a) the company was an exempt proprietary company on 30 June 1994; and
  - (b) the company has continued to meet the definition of *exempt proprietary company* (as in force at 30 June 1994) at all times since that date; and
  - (c) the company was a large proprietary company at the end of the first financial year that ended after 9 December 1995; and
  - (d) the company's financial statements and financial reports for the financial year ending during 1993 and each later financial year have been audited before the deadline for reporting to members for that year; and
  - (e) within 4 months after the end of the first financial year that ended after 9 December 1995, the company lodged with ASIC a notice that the company wanted subsection 317B(3),

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as in force at that time, to apply to the company. (ASIC may extend this period.)

Note: 9 December 1995 is the day on which the *First Corporate Law Simplification Act 1995* commenced.

(5) A company that has the benefit of subsection (4) must lodge with ASIC notice of any of the following events:

- (a) the resignation or retirement of the company's auditor
- (b) the appointment of a new auditor (including details of the new auditor).

The notice must be lodged within 14 days after the resignation, retirement or appointment.

(6) For the purposes of paragraph (4)(d), the deadline for reporting to members is:

- (a) for a financial year to which this Part applies—the deadline for reporting to members under section 315; and
- (b) for an earlier financial year—the deadline for that year within the meaning of this Law as in force immediately before the commencement of this Part.

### **320 Lodgment of half-year reports with ASIC**

A disclosing entity that has to prepare or obtain a report for a half-year under Division 2 must lodge the report with ASIC within 75 days after the end of the half-year.

### **321 ASC power to require lodgment**

- (1) ASIC may give a company, registered scheme or disclosing entity a direction to lodge with ASIC a copy of reports prepared or obtained by it under Division 1 or 2.
- (2) The direction must:
  - (a) be made in writing; and
  - (b) specify the period or periods concerned; and

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- (c) be made no later than 6 years after the end of the period or periods; and
- (d) specify the date by which the documents have to be lodged. The date specified under paragraph (d) must be at least 14 days after the date on which the direction is given.

**322 Relodgment if financial statements or directors' reports amended after lodgment**

- (1) If a financial report or directors' report is amended after it is lodged with ASIC, the company, registered scheme or disclosing entity must:
  - (a) lodge the amended report with ASIC within 14 days after the amendment; and
  - (b) give a copy of the amended report free of charge to any member who asks for it.
- (2) If the amendment is a material one, the company, registered scheme or disclosing entity must also notify members as soon as practicable of:
  - (a) the nature of the amendment; and
  - (b) their right to obtain a copy of the amended report under subsection (1).

## **Division 6—Special provisions about consolidated financial statements**

### **323 Directors and officers of controlled entity to give information**

If a company, registered scheme or disclosing entity has to prepare consolidated financial statements, a director or officer of a controlled entity must give the company, registered scheme or disclosing entity all information requested that is necessary to prepare the consolidated financial statements and the notes to those statements.

#### **323A Auditor's power to obtain information from controlled entity**

- (1) An auditor who audits or reviews a financial report that includes consolidated financial statements:
  - (a) has a right of access at all reasonable times to the books of any controlled entity; and
  - (b) may require any officer of the entity to give the auditor information, explanations or other assistance for the purposes of the audit or review.

A request under paragraph (b) must be a reasonable one.

- (2) The information, explanations or other assistance required under paragraph (1)(b) is to be given at the expense of the company, registered scheme or disclosing entity whose financial report is being audited or reviewed.

#### **323B Controlled entity to assist auditor**

If a company, registered scheme or disclosing entity has to prepare a financial report that includes consolidated financial statements, an officer or auditor of a controlled entity must:

- (a) allow the auditor for the company, scheme or entity access to the controlled entity's books; and

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- (b) give the auditor any information, explanation or assistance required under section 323A.

**323C Application of Division to entity that has ceased to be controlled**

Sections 323, 323A and 323B apply to the preparation or audit of a financial report that covers a controlled entity even if the entity is no longer controlled by the company, registered scheme or disclosing entity whose financial report is being prepared or audited.



## **Division 7—Financial years and half-years**

### **323D Financial years and half-years**

#### *First financial year*

- (1) The first financial year for a company, registered scheme or disclosing entity starts on the day on which it is registered or incorporated. It lasts for 12 months or the period (not longer than 18 months) determined by the directors.

#### *Financial years after first year*

- (2) Subject to subsection (4), subsequent financial years must:
  - (a) start at the end of the previous financial year; and
  - (b) be 12 months long.

The directors may determine that the financial year is to be shorter or longer (but not by more than 7 days).

#### *Synchronisation of financial years where consolidated financial statements are required*

- (3) A company, registered scheme or disclosing entity that has to prepare consolidated financial statements must do whatever is necessary to ensure that the financial years of the consolidated entities are synchronised with its own financial years. It must achieve this synchronisation by the end of 12 months after the situation that calls for consolidation arises.
- (4) To facilitate this synchronisation, the financial year for a controlled entity may be extended or shortened. The extended financial year cannot be longer than 18 months.

#### *Half-years*

- (5) A half-year for a company, registered scheme or disclosing entity is the first 6 months of a financial year. The directors may

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determine that the half-year is to be shorter or longer (but not by more than 7 days).

## **Division 8—Disclosure by listed companies of information filed overseas**

### **323DA Listed companies to disclose information filed overseas**

- (1) A company that discloses information to, or as required by:
  - (a) the Securities and Exchange Commission of the United States of America; or
  - (b) the New York Stock Exchange; or
  - (c) a prescribed securities exchange in a foreign country;must disclose that information in English to the Exchange on the next business day after doing so.
- (2) This section applies only to a company that is:
  - (a) incorporated in Australia; and
  - (b) included in an official list of the Exchange.
- (3) This section applies despite anything in the company's constitution.

## Part 2M.4—Appointment and removal of auditors

### Division 1—Companies

#### 324 Qualifications of auditors

- (1) Subject to this section, a person shall not:
- (a) consent to be appointed as auditor of a company;
  - (b) act as auditor of a company; or
  - (c) prepare a report required by this Law to be prepared by a registered company auditor or by an auditor of a company;
- if:
- (d) the person is not a registered company auditor;
  - (e) the person, or a body corporate in which the person has a substantial holding, owes more than \$5,000 to the company, to a related body corporate or to an entity that the company controls; or
  - (f) except where the company is a proprietary company, the person:
    - (i) is an officer of the company;
    - (ii) is a partner, employer or employee of an officer of the company; or
    - (iii) is a partner or employee of an employee of an officer of the company.
- (2) Subject to this section, a firm shall not:
- (a) consent to be appointed as auditor of a company;
  - (b) act as auditor of a company; or
  - (c) prepare a report required by this Law to be prepared by a registered company auditor or by an auditor of a company;
- unless:
- (d) at least 1 member of the firm is a registered company auditor who is ordinarily resident in Australia;

- (e) the business name under which the firm is carrying on business is registered under a law of a State or Territory relating to the registration of business names or a return in the prescribed form has been lodged showing, in relation to each member of the firm, the member's full name and address as at the time when the firm so consents, acts or prepares a report;
  - (f) no member of the firm, and no body corporate in which a member of the firm has a substantial holding, owes more than \$5,000 to the company, to a related body corporate or to an entity that the company controls;
  - (g) except where the company is a proprietary company, no member of the firm is:
    - (i) an officer of the company;
    - (ii) a partner, employer or employee of an officer of the company; or
    - (iii) a partner or employee of an employee of an officer of the company; and
  - (h) except where the company is a proprietary company, no officer of the company receives any remuneration from the firm for acting as a consultant to it on accounting or auditing matters.
- (3) For the purposes of paragraphs (1)(e) and (2)(f), disregard a debt owed by a natural person to a body corporate or entity if:
- (a) the body corporate or entity is:
    - (i) an Australian ADI; or
    - (ii) a body corporate registered under the *Life Insurance Act 1995*; and
  - (b) the debt arose because of a loan that the body corporate or entity made to the person in the ordinary course of its ordinary business; and
  - (c) the person used the amount of the loan to pay the whole or part of the purchase price of premises that the person uses as their principal place of residence.

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- (4) For the purposes of subsections (1) and (2), a person shall be deemed to be an officer of a company if:
- (a) the person is an officer of a related body corporate or of an entity that the company controls; or
  - (b) except where the Commission, if it thinks fit in the circumstances of the case, directs that this paragraph shall not apply in relation to the person in relation to the company—the person has, at any time within the immediately preceding period of 12 months, been an officer or promoter of the company, of a related body corporate or of an entity that the company controlled at that time.
- (5) For the purposes of this section, a person shall not be taken to be an officer of a company by reason only of being or having been the liquidator of that company, of a related body corporate or of an entity that that company controls or has controlled.
- (6) For the purposes of this section, a person is not taken to be an officer of a company merely because of one or more of the following:
- (a) having been appointed as auditor of the company, of a related body corporate or of an entity that the company controls or has controlled;
  - (b) having been appointed, for any purpose relating to taxation, as public officer of a body corporate, an unincorporated body or a trust estate;
  - (c) being or having been authorised to accept, on behalf of the company, a related body corporate or an entity that the company controls or has controlled, service of process or notices.
- (7) The appointment of a firm as auditor of a company shall be deemed to be an appointment of all persons who are members of the firm and are registered company auditors, whether resident in Australia or not, at the date of the appointment.
- (8) Where a firm that has been appointed as auditor of a company is reconstituted by reason of the death, retirement or withdrawal of a

member or members or by reason of the admission of a new member or new members, or both:

- (a) a person who was deemed under subsection (7) to be an auditor of the company and who has so retired or withdrawn from the firm as previously constituted shall be deemed to have resigned as auditor of the company as from the day of his or her retirement or withdrawal but, unless that person was the only member of the firm who was a registered company auditor and, after the retirement or withdrawal of that person, there is no member of the firm who is a registered company auditor, section 329 does not apply to that resignation;
  - (b) a person who is a registered company auditor and who is so admitted to the firm shall be deemed to have been appointed as an auditor of the company as from the day of his or her admission; and
  - (c) the reconstitution of the firm does not affect the appointment of the continuing members of the firm who are registered company auditors as auditors of the company;
- but nothing in this subsection affects the operation of subsection (2).
- (9) Except as provided by subsection (8), the appointment of the members of a firm as auditors of a company that is deemed by subsection (7) to have been made by reason of the appointment of the firm as auditor of the company is not affected by the dissolution of the firm.
  - (10) A report or notice that purports to be made or given by a firm appointed as auditor of a company shall not be taken to be duly made or given unless it is signed in the firm name and in his or her own name by a member of the firm who is a registered company auditor.
  - (11) Without limiting the generality of section 1311, if, in contravention of this section, a firm consents to be appointed, or acts as, auditor of a company or prepares a report required by this Law to be

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prepared by an auditor of a company, each member of the firm is guilty of an offence.

- (12) Where it is, in the opinion of the Commission, impracticable for a proprietary company to obtain the services of a registered company auditor as auditor of the company by reason of the place where the company carries on business, a person who is, in the opinion of the Commission, suitably qualified or experienced and is approved by the Commission for the purposes of this Law in relation to the audit of the company's financial reports may be appointed as auditor of the company, subject to such terms and conditions as are specified in the approval.
- (13) A person appointed in accordance with subsection (12) shall, in relation to the auditing of the company's financial reports (if any), but subject to the terms and conditions of the approval under that subsection, be deemed to be a registered company auditor and the provisions of this Law shall, with the necessary modifications, apply in relation to the person accordingly.
- (14) Where a person approved by the Commission under subsection (12) is acting as auditor of a company, the Commission may at any time, by notice in writing given to the company:
  - (a) amend, revoke or vary the terms and conditions of its approval; or
  - (b) terminate the appointment of that person as auditor of the company.
- (15) A notice under subsection (14) terminating the appointment of a person as auditor of a company takes effect as if, on the date on which the notice is received by the company, the company had received from the person notice of the person's resignation as auditor taking effect from that date.
- (16) A person shall not:
  - (a) if the person has been appointed auditor of a company—knowingly disqualify himself or herself while the appointment continues from acting as auditor of the company; or



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- (b) if the person is a member of a firm that has been appointed auditor of a company—knowingly disqualify the firm while the appointment continues from acting as auditor of the company.

**325 Appointment of auditor by proprietary company**

The directors of a proprietary company may appoint an auditor for the company if an auditor has not been appointed by the company in general meeting.

**327 Appointment of auditors**

- (1A) Only subsections (6) to (10) of this section apply to a proprietary company.
- (1) Within 1 month after the day on which a company is incorporated, the directors of the company shall appoint, unless the company at a general meeting has appointed, a person or persons, a firm or firms, or a person or persons and a firm or firms, as auditor or auditors of the company.
- (2) A person or firm appointed as auditor of a company under subsection (1) holds office, subject to this Part, until the first annual general meeting of the company.
- (3) A company shall:
  - (a) at its first annual general meeting appoint a person or persons, a firm or firms, or a person or persons and a firm or firms, as auditor or auditors of the company; and
  - (b) at each subsequent annual general meeting, if there is a vacancy in the office of auditor of the company, appoint a person or persons, a firm or firms, or a person or persons and a firm or firms, to fill the vacancy.
- (4) A person or firm appointed as auditor under subsection (3) holds office until death or removal or resignation from office in accordance with section 329 or until ceasing to be capable of acting as auditor by reason of subsection 324(1) or (2).

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- (5) Within 1 month after a vacancy, other than a vacancy caused by the removal of an auditor from office, occurs in the office of auditor of the company, if there is no surviving or continuing auditor of the company, the directors shall, unless:
  - (a) the company at a general meeting has appointed a person or persons, a firm or firms, or a person or persons and a firm or firms, to fill the vacancy;  
appoint a person or persons, a firm or firms, or a person or persons and a firm or firms, to fill the vacancy.
- (6) While a vacancy in the office of auditor continues, the surviving or continuing auditor or auditors (if any) may act.
- (7) A company or the directors of a company shall not appoint a person or firm as auditor of the company unless that person or firm has, before the appointment, consented by notice in writing given to the company or to the directors to act as auditor and has not withdrawn his, her or its consent by notice in writing given to the company or to the directors.
- (8) A notice under subsection (7) given by a firm shall be signed in the firm name and in his or her own name by a member of the firm who is a registered company auditor.
- (9) If a company appoints a person or firm as auditor of a company in contravention of subsection (7), the purported appointment does not have any effect and the company and any officer of the company who is in default are each guilty of an offence.
- (10) Where an auditor of a company is removed from office at a general meeting in accordance with section 329:
  - (a) the company may at that meeting (without adjournment), by a resolution passed by a majority of not less than three-quarters of such members of the company as, being entitled so to do, vote in person or, where proxies are allowed, by proxy, forthwith appoint as auditor or auditors a person or persons, a firm or firms, or a person or persons and a firm or firms, to whom or which has been sent a copy of the

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notice of nomination in accordance with subsection 328(3);  
or

- (b) if such a resolution is not passed or, by reason only that such a copy of the notice of nomination has not been sent to a person, could not be passed, the meeting may be adjourned to a day not earlier than 20 days and not later than 30 days after the day of the meeting and the company may, at the adjourned meeting, by ordinary resolution appoint as auditor or auditors a person or persons, a firm or firms, or a person or persons and a firm or firms, notice of whose nomination for appointment as auditor has been received by the company from a member of the company at least 14 clear days before the day to which the meeting is adjourned.
- (11) Where, after the removal from office of an auditor of a company, the company fails to appoint an auditor under subsection (10), the company shall, within the period of 7 days commencing on the day of the failure, give to the Commission notice of the failure, and, subject to subsection (12), the Commission:
- (a) in a case where the company, before the end of that period, gives to the Commission notice of the failure—shall, upon receiving the notice; or
  - (b) in any other case:
    - (i) may, at any time after the end of that period and before the Commission receives from the company notice of the failure; and
    - (ii) if the company, after the end of that period, gives to the Commission notice of the failure—shall, upon receiving the notice;
- appoint as auditor or auditors of the company a person or persons, a firm or firms, or a person or persons and a firm or firms, who or which consents or consent to be so appointed.
- (12) Where, after the removal from office of an auditor of a company, the company fails to appoint an auditor under subsection (10), the Commission shall not appoint an auditor of the company under subsection (11):

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- (a) in any case—if there is another auditor of the company whom the Commission believes to be able to carry out the responsibilities of auditor alone and who agrees to continue as auditor;
  - (c) in a case where, at the end of the period of 7 days commencing on the day of the failure, the company has not given to the Commission notice of the failure—if the Commission has, at any time after the end of that period, already appointed an auditor of the company under subsection (11).
- (13) Subject to subsection (11), if a company does not appoint an auditor when required by this Law to do so, the Commission may, on the application in writing of a member of the company, appoint as auditor or auditors of the company a person or persons, a firm or firms, or a person or persons and a firm or firms, who or which consents or consent to be so appointed.
- (14) A person or firm appointed as auditor of a company under subsection (5), (10), (11) or (13) holds office, subject to this Part, until the next annual general meeting of the company.
- (15) Notwithstanding subsection (4), a person or firm who holds the office of auditor of a company that begins to be controlled by a corporation must, unless the person or firm sooner vacates that office, retire at the annual general meeting of the company next held after it begins to be controlled by the corporation but, subject to this Part, is eligible for re-appointment.
- (16) If a director of a company fails to take all reasonable steps to comply with, or to secure compliance with, subsection (1) or (5), he or she is guilty of an offence.

**328 Nomination of auditors**

- (1) Subject to this section, a company is not entitled to appoint a person or a firm as auditor of the company at its annual general meeting, not being a meeting at which an auditor is removed from

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office, unless notice in writing of his, her or its nomination as auditor was given to the company by a member of the company:

- (a) before the meeting was convened; or
  - (b) not less than 21 days before the meeting.
- (2) If a company purports to appoint a person or firm as auditor of the company in contravention of subsection (1), the purported appointment is of no effect and the company and any officer of the company who is in default are each guilty of an offence.
- (3) Where notice of nomination of a person or firm for appointment as auditor of a company is received by the company, whether for appointment at a meeting or an adjourned meeting referred to in subsection 327(10) or at an annual general meeting, the company shall:
- (a) not less than 7 days before the meeting; or
  - (b) at the time notice of the meeting is given;
- send a copy of the notice of nomination to each person or firm nominated, to each auditor of the company and to each person entitled to receive notice of general meetings of the company.

### **329 Removal and resignation of auditors**

- (1) An auditor of a company may be removed from office by resolution of the company at a general meeting of which notice under subsection (1A) has been given, but not otherwise.
- (1A) Notice of intention to move the resolution must be given to the company at least 2 months before the meeting is to be held. However, if the company calls a meeting after the notice of intention is given under this subsection, the meeting may pass the resolution even though the meeting is held less than 2 months after the notice of intention is given.

Note: Short notice of the meeting cannot be given for this resolution (see subsection 249H(4)).

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- (2) Where notice under subsection (1A) of a resolution to remove an auditor is received by a company, it shall as soon as possible send a copy of the notice to the auditor and lodge a copy of the notice.
- (3) Within 7 days after receiving a copy of the notice, the auditor may make representations in writing, not exceeding a reasonable length, to the company and request that, before the meeting at which the resolution is to be considered, a copy of the representations be sent by the company at its expense to every member of the company to whom notice of the meeting is sent.
- (4) Unless the Commission on the application of the company otherwise orders, the company shall send a copy of the representations in accordance with the auditor's request, and the auditor may, without prejudice to his or her right to be heard orally or, where a firm is the auditor, to have a member of the firm heard orally on its behalf, require that the representations be read out at the meeting.
- (5) An auditor of a company may, by notice in writing given to the company, resign as auditor of the company if:
  - (a) the auditor has, by notice in writing given to the Commission, applied for consent to the resignation and stated the reasons for the application and, at or about the same time as the notice was given to the Commission, notified the company in writing of the application to the Commission; and
  - (b) the consent of the Commission has been given.
- (6) The Commission shall, as soon as practicable after receiving a notice from an auditor under subsection (5), notify the auditor and the company whether it consents to the resignation of the auditor.
- (7) A statement made by an auditor in an application to the Commission under subsection (5) or in answer to an inquiry by the Commission relating to the reasons for the application:
  - (a) is not admissible in evidence in any civil or criminal proceedings against the auditor; and

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- (b) may not be made the ground of a prosecution, action or suit against the auditor;  
and a certificate by the Commission that the statement was made in the application or in the answer to the inquiry by the Commission is conclusive evidence that the statement was so made.
- (8) Subject to subsection (9), the resignation of an auditor takes effect:
- (a) on the day (if any) specified for the purpose in the notice of resignation;
  - (b) on the day on which the Commission gives its consent to the resignation; or
  - (c) on the day (if any) fixed by the Commission for the purpose; whichever last occurs.
- (9) The resignation of an auditor of a proprietary company does not require the consent of the Commission under subsection (5), and takes effect:
- (a) on the day (if any) specified for the purpose in the notice of resignation; or
  - (b) on the day on which the notice is received by the company; whichever is the later.
- (10) Where on the retirement or withdrawal from a firm of a member the firm will no longer be capable, by reason of the provisions of paragraph 324(2)(d) of acting as auditor of a company, the member so retiring or withdrawing shall (if not disqualified from acting as auditor of the company) be deemed to be the auditor of the company until he or she obtains the consent of the Commission to his or her retirement or withdrawal.
- (11) Within 14 days after:
- (a) the removal from office of an auditor of a company; or
  - (b) the receipt of a notice of resignation from an auditor of a company,
- the company shall:
- (c) lodge with the Commission a notice of the removal or resignation in the prescribed form; and

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- (d) where there is a trustee for the holders of debentures of the company—give to the trustee a copy of the notice lodged with the Commission.

**330 Effect of winding up on office of auditor**

An auditor of a company ceases to hold office if:

- (a) a special resolution is passed for the voluntary winding up of the company; or
- (b) in a case to which paragraph (a) does not apply an order is made by the Court for the winding up of the company.

**331 Fees and expenses of auditors**

The reasonable fees and expenses of an auditor of a company are payable by the company.



## **Division 2—Registered schemes**

### **331AA Qualifications of auditors**

- (1) Subject to this section, a person must not:
- (a) consent to be appointed as auditor of a registered scheme; or
  - (b) act as auditor of a registered scheme; or
  - (c) prepare a report required by this Law to be prepared by a registered company auditor or by an auditor of a registered scheme;
- if:
- (d) the person is not a registered company auditor; or
  - (e) the person, or a body corporate in which the person has a substantial holding, owes more than \$5,000 to the scheme's responsible entity, to a related body corporate or to an entity that the responsible entity controls; or
  - (f) the person:
    - (i) is an officer of the responsible entity; or
    - (ii) is a partner, employer or employee of an officer of the responsible entity; or
    - (iii) is a partner or employee of an employee of an officer of the responsible entity.
- (2) Subject to this section, a firm must not:
- (a) consent to be appointed as auditor of a registered scheme; or
  - (b) act as auditor of a registered scheme; or
  - (c) prepare a report required by this Law to be prepared by a registered company auditor or by an auditor of a registered scheme;
- unless:
- (d) at least 1 member of the firm is a registered company auditor who is ordinarily resident in Australia; and
  - (e) the business name under which the firm is carrying on business is registered under a law of a State or Territory

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relating to the registration of business names or a return in the prescribed form has been lodged showing, in relation to each member of the firm, the member's full name and address as at the time when the firm so consents, acts or prepares a report; and

- (f) no member of the firm, and no body corporate in which a member of the firm has a substantial holding, owes more than \$5,000 to the scheme's responsible entity or to an entity that the responsible entity controls; and
  - (g) no member of the firm is:
    - (i) an officer of the responsible entity; or
    - (ii) a partner, employer or employee of an officer of the responsible entity; or
    - (iii) a partner or employee of an employee of an officer of the responsible entity; and
  - (h) no officer of the responsible entity receives any remuneration from the firm for acting as a consultant to it on accounting or auditing matters.
- (3) Subsections 324(3), (4), (5) and (6) apply in relation to a registered scheme as if:
- (a) those subsections were part of this section; and
  - (b) references in those subsections to a company were instead references to the registered scheme's responsible entity.
- (4) Subsections 324(7), (8), (9), (10), (11) and (16) apply in relation to a registered scheme as if:
- (a) those subsections were part of this subsection; and
  - (b) references in those subsections to a company were instead references to the registered scheme.

**331AB Appointment of auditors**

- (1) Within 1 month after the day on which a registered scheme is registered, the responsible entity must appoint a person or persons, a firm or firms, or a person or persons and a firm or firms, as auditor or auditors of the scheme.

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- (2) Within 1 month after a vacancy occurs in the office of auditor of a registered scheme, if there is no surviving or continuing auditor of the scheme, the responsible entity must appoint a person or persons, a firm or firms, or a person or persons and a firm or firms, to fill the vacancy.
- (3) While a vacancy in the office of auditor of a registered scheme continues, the surviving or continuing auditor or auditors (if any) may act.
- (4) The responsible entity of a registered scheme must not appoint a person or firm as auditor of the scheme unless that person or firm has, before the appointment, consented to act as auditor by notice in writing given to the responsible entity and has not withdrawn that consent by notice in writing given to the responsible entity.
- (5) A notice given by a firm under subsection (4) is to be signed by a member of the firm who is a registered company auditor:
  - (a) in the firm's name; and
  - (b) in the member's name.
- (6) If the responsible entity of a registered scheme appoints a person or firm as auditor of the scheme in contravention of subsection (4), the purported appointment does not have any effect and the responsible entity, and any officer of the responsible entity who is in default, are each guilty of an offence.
- (7) If the responsible entity of a registered scheme does not appoint an auditor when required by this Law to do so, ASIC may, on application in writing by a member of the scheme, appoint as auditor or auditors of the scheme a person or persons, a firm or firms, or a person or persons and a firm or firms. An appointment can only be made with the consent of the person or firm concerned.
- (8) If a director of the responsible entity of a registered scheme fails to take all reasonable steps to secure compliance with subsection (1) or (2), the director is guilty of an offence.

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**331AC Removal and resignation of auditors**

- (1) The responsible entity of a registered scheme may, with ASIC's consent, remove the auditor of the scheme from office.
- (2) An auditor of a registered scheme may, by notice in writing given to the responsible entity, resign as auditor of the scheme if:
  - (a) the auditor:
    - (i) has, by notice in writing given to ASIC, applied for consent to the resignation and stated the reasons for the application; and
    - (ii) has, at or about the same time as giving the notice to ASIC, given the responsible entity notice in writing of the application to ASIC; and
  - (b) ASIC has given its consent.
- (3) As soon as practicable after ASIC receives a notice from an auditor under subsection (2), ASIC must notify the auditor, and the responsible entity of the registered scheme, whether it consents to the resignation.
- (4) A statement made by an auditor in an application to ASIC under subsection (2) or in answer to an inquiry by ASIC relating to the reasons for the application:
  - (a) is not admissible in evidence in any civil or criminal proceedings against the auditor; and
  - (b) must not be made the ground of a prosecution, action or suit against the auditor.

A certificate by ASIC that the statement was made in the application or in answer to the inquiry by ASIC is conclusive evidence that the statement was so made.
- (5) The resignation of an auditor takes effect:
  - (a) on the day (if any) specified for the purpose in the notice of resignation; or
  - (b) on the day on which ASIC gives its consent to the resignation; or

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- (c) on the day (if any) fixed by ASIC for the purpose;  
whichever occurs last.
- (6) If, on the retirement or withdrawal of a member of a firm, the firm will no longer be capable of acting as auditor of a registered scheme because of paragraph 331AA(2)(d), the member is (if not disqualified from acting as auditor of the scheme) taken to be the auditor of the scheme until he or she obtains the consent of ASIC to his or her retirement or withdrawal.
- (7) Within 14 days after:
- (a) the removal from office of an auditor of a registered scheme;  
or
  - (b) the receipt of a notice of resignation from an auditor of a registered scheme;
- the responsible entity must lodge with ASIC a notice of the removal or resignation in the prescribed form.

**331AD Effect of winding up an office of auditor**

An auditor of a registered scheme ceases to hold office if:

- (a) the scheme's constitution provides that the scheme is to be wound up at a specified time, in specified circumstances or on the happening of a specified event, and that time is reached, those circumstances occur or that event occurs; or
- (b) the members pass a resolution directing the responsible entity to wind up the scheme; or
- (c) the Court makes an order directing the responsible entity to wind up the scheme; or
- (d) the members pass a resolution to remove the responsible entity but do not, at the same meeting, pass a resolution choosing a company to be the new responsible entity that consents to becoming the scheme's responsible entity.

**331AE Fees and expenses of auditors**

The reasonable fees and expenses of an auditor of a registered scheme are payable by the responsible entity.

## **Part 2M.5—Accounting standards**

### **334 Accounting standards**

*AASB's power to make accounting standards*

- (1) The AASB may make accounting standards for the purposes of this Law. The standards must be in writing and must not be inconsistent with this law or the Regulations.
- (2) Section 46A of the *Acts Interpretation Act 1901* of the Commonwealth applies to a standard made under subsection (1) as if it were a disallowable instrument for the purposes of that section.
- (4) An accounting standard applies to:
  - (a) periods ending after the commencement of the standard; or
  - (b) periods ending, or starting, on or after a later date specified in the standard.
- (5) A company, registered scheme or disclosing entity may elect to apply the accounting standard to an earlier period unless the standard says otherwise. The election must be made in writing by the directors.

### **335 Equity accounting**

This Chapter (and, in particular, the provisions on consolidation of financial statements) does not prevent accounting standards from incorporating equity accounting principles.

### **337 Interpretation of accounting standards**

In interpreting an accounting standard, unless the contrary intention appears:

- (a) expressions used in the standard have the same meaning as they have in this Chapter; and

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- (b) the provisions of Part 1.2 apply as if the standard's provisions were provisions of this Chapter.

**338 Severing invalid provisions**

If an accounting standard would otherwise have been interpreted as being inconsistent with this Law, the standard is nevertheless to be valid to the extent to which it is not inconsistent with this Law.

**339 Evidence of text of accounting standard**

- (1) This section applies to a document that purports to be published by or on behalf of the AASB or ASIC and to set out the text of:
- (a) a specified standard as in force at a specified time under section 334; or
  - (b) a specified provision of a standard of that kind.
- It also applies to a copy of a document of that kind.
- (2) In the absence of evidence to the contrary, a document to which this section applies is proof in proceedings under the Corporations Law of this jurisdiction that:
- (a) the specified standard was in force at that time under that section; and
  - (b) the text set out in the document is the text of the standard referred to in paragraph (1)(a) or the provision referred to in paragraph (1)(b).



## **Part 2M.6—Exemptions and modifications**

### **340 ASIC’s power to make specific exemption orders**

- (1) On an application made in accordance with subsection (3) in relation to a company, registered scheme or disclosing entity, ASIC may make an order in writing relieving any of the following from all or specified requirements of Parts 2M.2, 2M.3 and 2M.4:
  - (a) the directors
  - (b) the company, scheme or entity
  - (c) the auditor.

Note: For the criteria for making orders under this section, see section 342.

- (2) The order may:
  - (a) be expressed to be subject to conditions; and
  - (b) be indefinite or limited to a specified period.
- (3) The application must be:
  - (a) authorised by a resolution of the directors; and
  - (b) in writing and signed by a director; and
  - (c) lodged with ASIC.
- (4) ASIC must give the applicant written notice of the making, revocation or suspension of the order.

### **341 ASIC’s power to make class orders**

- (1) ASIC may make an order in writing in respect of a specified class of companies, registered schemes or disclosing entities, relieving any of the following from all or specified requirements of Parts 2M.2, 2M.3 and 2M.4:
  - (a) directors
  - (b) the companies, registered schemes or disclosing entities themselves

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- (c) auditors of the companies, registered schemes or disclosing entities.

Note: For the criteria for making orders under this section, see section 342.

- (2) The order may:
  - (a) be expressed to be subject to conditions; and
  - (b) be indefinite or limited to a specified period.
- (3) Notice of the making, revocation or suspension of the order must be published in the *Gazette*.

### 342 Criteria for specific exemption orders and class orders

- (1) To make an order under section 340 or 341, ASIC must be satisfied that complying with the relevant requirements of Parts 2M.2, 2M.3 and 2M.4 would:
  - (a) make the financial report or other reports misleading; or
  - (b) be inappropriate in the circumstances; or
  - (c) impose unreasonable burdens.
- (2) In deciding for the purposes of subsection (1) whether the audit requirements for a proprietary company, or a class of proprietary companies, would impose an unreasonable burden on the company or companies, ASIC is to have regard to:
  - (a) the expected costs of complying with the audit requirements; and
  - (b) the expected benefits of having the company or companies comply with the audit requirements; and
  - (c) any practical difficulties that the company or companies face in complying effectively with the audit requirements (in particular, any difficulties that arise because a financial year is the first one for which the audit requirements apply or because the company or companies are likely to move frequently between the small and large proprietary company categories from one financial year to another); and
  - (d) any unusual aspects of the operation of the company or companies during the financial year concerned; and

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- (e) any other matters that ASIC considers relevant.
- (3) In assessing expected benefits under subsection (2), ASIC is to take account of:
  - (a) the number of creditors and potential creditors; and
  - (b) the position of creditors and potential creditors (in particular, their ability to independently obtain financial information about the company or companies); and
  - (c) the nature and extent of the liabilities of the company or companies.

### **343 Modification by regulations**

The regulations may modify the operation of this Chapter in relation to:

- (a) a specified company, registered scheme or disclosing entity; or
- (b) all companies, registered schemes or disclosing entities of a specified kind.

## Part 2M.7—Sanctions for contraventions of Chapter

### 344 Contravention of Part 2M.2 or 2M.3

- (1) A director of a company, registered scheme or disclosing entity contravenes this section if they fail to take all reasonable steps to comply with, or to secure compliance with, Part 2M.2 or 2M.3.

Note: This section is a civil penalty provision (see section 1317E).

- (2) Subsection (1) does not apply to section 310, 312, 323A or 323B.
- (3) This section does not affect the application of the provisions of Part 2M.2 or 2M.3 to a director as an officer.  
a person commits an offence if they contravene subsection (1) and the contravention is dishonest

## **Chapter 2N—Annual return and lodgments with ASIC**

### **Part 2N.1—Annual returns**

#### **345 Deadline for lodging annual return**

*Companies*

- (1) A company must lodge an annual return with ASIC by 31 January each year, unless ASIC and the company agree to a different lodgment date (see subsection (3)).

*Responsible entities of registered schemes*

- (2) The responsible entity of a registered scheme must lodge an annual return for the scheme with ASIC. The return for a scheme must be lodged within 3 months after the end of the scheme's financial year unless ASIC and the responsible entity agree to a different lodgment date (see subsection (3)).

*Agreed lodgment date*

- (3) ASIC and the company or ASIC and the responsible entity may agree to a different lodgment date. The agreement must be in writing and may cover 1 or more years. The annual return must be lodged by the agreed date.

*Company's obligation to lodge some notices ceases on lodgment of annual return*

- (4) A company's obligation to lodge a notice under section 142, 146, 242 or 254X, ceases when:
  - (a) the company lodges an annual return; and
  - (b) the annual return sets out the information required by the notice.

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This subsection does not affect the company's liability for late lodgment fees incurred before the annual return is lodged or continuing offences committed before that time.

Note: ASIC has a practice of sending out partly completed annual returns. The partly completed return may be used to comply with the obligation to lodge an annual return by correcting any information in it that is not accurate, completing the rest and lodging it with ASIC.

**346 Solvency resolution—companies**

- (1) Within 1 month before the annual return is lodged, the directors of a company must resolve whether, in their opinion, there are reasonable grounds to believe that the company will be able to pay its debts as and when they become due and payable.
- (2) Subsection (1) does not apply to a company that has lodged a financial report of the company with ASIC under Chapter 2M within 12 months before the annual return is lodged.

**347 Lodging annual return with ASIC**

An annual return may be lodged with ASIC:

- (a) in writing in the form approved by ASIC and signed in accordance with section 351; or
- (b) electronically in accordance with section 352.

**348 Contents of annual return—companies**

A company's annual return must contain the information set out in the following table, current as at the date when the annual return is signed or authenticated. It must also contain any other information required by the regulations.

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**Contents of annual return—companies** [operative table]

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1	ACN
2	name
3	address of registered office

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<b>Contents of annual return—companies</b>		[operative table]
4	address of principal place of business	
5	each director and company secretary	<ul style="list-style-type: none"><li>• name and address</li><li>• date and place of birth.</li></ul> <p><i>The address must be the person's usual residential address. However, if the person is entitled to have an alternative address under subsection 242AA(2), the annual return may contain that address.</i></p>
6	issued shares	<p>The classes into which the shares are divided and for each class of share issued:</p> <ul style="list-style-type: none"><li>• the number of shares in the class</li><li>• the total amount paid up for the class</li><li>• the total amount unpaid for the class.</li></ul>
7	options granted	<p>The number of unissued shares in each class that are subject to options.</p>
8	all members (if company has 20 or fewer members) OR the top 20 members in each class (if company has more than 20 members) <i>The requirement to list the top 20 members does not apply to a company limited only by guarantee.</i>	<ul style="list-style-type: none"><li>• the names and addresses of the members</li></ul> <p>If the company has a share capital:</p> <ul style="list-style-type: none"><li>• the total number of shares in each class held by each of them</li><li>• whether or not the shares are fully paid</li><li>• unless the company is a listed corporation—whether or not the shares are beneficially owned.</li></ul> <p><i>If 2 or more members in the top 20 members in a class of shares each hold the same number of shares, the company must include the details set out above for each of them.</i></p>

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<b>Contents of annual return—companies</b>		[operative table]
9	company solvency <i>Not necessary if company lodged a financial report with ASC within last 12 months.</i>	Statement whether the directors have resolved within the last month under section 346 that, in their opinion, there are reasonable grounds to believe that the company will be able to pay its debts as and when they become due and payable.
10	ultimate holding company	<ul style="list-style-type: none"><li>• name</li></ul> either: <ul style="list-style-type: none"><li>• its ACN or ARBN if registered in Australia</li></ul> OR <ul style="list-style-type: none"><li>• the place at which it was incorporated or formed if not registered in Australia.</li></ul>

Note: If the details referred to in items 3, 4, 5 and 6 change after the annual return is lodged, the company must notify ASIC of the change (see section 142 (registered office), section 146 (principal place of business), section 242 (director and company secretary) and section 254X (issued shares)).

### 349 Contents of annual return—registered schemes

An annual return for a registered scheme must contain the information set out in the following table, current as at the date when the annual return is signed or authenticated. It must also contain any other information required by the regulations.

<b>Contents of annual return—registered schemes</b>		[operative table]
1	registration number of scheme	
2	name of scheme	
3	name and ACN of the responsible entity	



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<b>Contents of annual return—registered schemes</b>		[operative table]
4	issued interests in a managed investment scheme <i>Only if the scheme is a unit trust.</i>	The classes into which the interests are divided and for each class of interest issued: <ul style="list-style-type: none"><li>• the number of interests in the class</li><li>• the total amount paid up for the class</li><li>• the total amount unpaid for the class.</li></ul>
5	issued interests in a managed investment scheme <i>Only if 4 does not apply.</i>	<ul style="list-style-type: none"><li>• a description of the nature of the interests (for example, interest in a limited partnership, right to participate in a timesharing scheme)</li><li>• the number of those interests</li><li>• the total amount paid for those interests</li><li>• the total amount unpaid for those interests.</li></ul>
6	options granted	<ul style="list-style-type: none"><li>• the number of unissued managed investment interests that are subject to options</li><li>• for each of the classes of interests that is subject to options—the average exercise price.</li></ul>
7	all interest holders (if scheme has 20 or fewer interest holders) OR the top 20 interest holders in each class (if scheme has more than 20 interest holders)	<ul style="list-style-type: none"><li>• the names and addresses of the interest holders</li><li>• the total number of interests in each class held by each of them</li><li>• whether or not the interests are fully paid.</li></ul> <i>If 2 or more interest holders in the top 20 interest holders in a class each hold the same number of interests, the responsible entity must include the details set out above for each of them.</i>

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## Part 2N.2—Lodgments with ASIC

### 350 Forms for documents to be lodged with ASIC

A document that this Law requires to be lodged with ASIC in a prescribed form must be:

- (a) if a form for the document is prescribed in the regulations—in the prescribed form; or
- (b) if a form for the document is not prescribed in regulations but ASIC has approved a form for the document—in the approved form.

### 351 Signing documents lodged with ASIC

- (1) A document lodged with ASIC in writing by, or on behalf of, a corporation or a registered scheme must be signed by a director or secretary of the corporation or of the responsible entity of the registered scheme. If the corporation is a foreign company, it may be signed by:
  - (a) its local agent; or
  - (b) if the local agent is a corporation—a director or secretary of the agent.
- (2) An individual who lodges a document with ASIC in writing must sign it.
- (3) The person's name must be printed next to the signature.

### 352 Documents lodged with ASIC electronically

- (1) A document may be lodged with ASIC electronically only if:
  - (a) ASIC and the person seeking to lodge it (either on their own behalf or as agent) have agreed, in writing, that it may be lodged electronically; or

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(b) ASIC has approved, in writing, the electronic lodgment of documents of that kind.

The document is taken to be lodged with ASIC if it is lodged in accordance with the agreement or approval (including any requirements of the agreement or approval as to authentication).

- (2) Any agreement or approval must provide for a signed copy of the document to be held by the person lodging the document and for the person to make the signed copy of the document available to the ASIC if required.

## Chapter 5—External administration

### Part 5.1—Arrangements and reconstructions

#### 410 Interpretation

A reference in this Part, in relation to a Part 5.1 body, to the directors is a reference to the directors of the body or any one or more of them.

#### 411 Administration of compromises etc.

- (1) Where a compromise or arrangement is proposed between a Part 5.1 body and its creditors or any class of them or between a Part 5.1 body and its members or any class of them, the Court may, on the application in a summary way of the body or of any creditor or member of the body, or, in the case of a body being wound up, of the liquidator, order a meeting or meetings of the creditors or class of creditors or of the members of the body or class of members to be convened in such manner, and to be held in such place or places (in this jurisdiction or elsewhere), as the Court directs and, where the Court makes such an order, the Court may approve the explanatory statement required by paragraph 412(1)(a) to accompany notices of the meeting or meetings.

(1A) Where:

- (a) a compromise or arrangement is proposed:
- (i) between 30 or more Part 5.1 bodies that are wholly-owned subsidiaries of a holding company and the creditors or a class of the creditors of each of those subsidiaries; and
  - (ii) between the holding company and the creditors or a class of the creditors of the holding company; and
- (b) the proposed compromise or arrangement in relation to each subsidiary includes a term that orders will be sought under

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section 413 transferring the whole of the undertaking and of the property and liabilities of the subsidiary to the holding company; and

- (c) the Court is satisfied, on the application in a summary way:
  - (i) of the holding company or of a creditor of the holding company; or
  - (ii) if the holding company is being wound up—of the liquidator;

that the number of meetings that would be required between creditors in order to consider the proposed compromises or arrangements would be so great as to result in a significant impediment to the timely and effective consideration by those creditors of the terms of the compromises or arrangements;

the Court may order a meeting or meetings, on a consolidated basis, of the creditors of the holding company and of each of the subsidiaries or of such class or classes of those creditors as the Court determines and, where the Court makes such an order, the Court may approve the explanatory statement required by paragraph 412(1)(a) to accompany notices of the meeting or meetings.

(1B) Where:

- (a) there are fewer than 30 wholly-owned subsidiaries of the holding company but the matters referred to in paragraphs (1A)(b) and (c) are satisfied; and
- (b) the Court considers that circumstances exist that would justify its doing so;

the Court may make an order under subsection (1A) in relation to the proposed compromise or arrangement.

(1C) Where an order is made under subsection (1A) in relation to a proposed compromise or arrangement, the succeeding provisions of this Part apply to the compromise or arrangement as if:

- (a) references in this Part to a company included references to all of the Part 5.1 bodies to which the order relates; and

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- (b) references in this Part to creditors of a company included references to the creditors of all the Part 5.1 bodies to which the order relates; and
  - (c) references in this Part to a class of the creditors of a company were references to the relevant class of creditors of all of the Part 5.1 bodies to which the order relates.
- (2) The Court shall not make an order pursuant to an application under subsection (1) or (1A) unless:
- (a) 14 days notice of the hearing of the application, or such lesser period of notice as the Court or the Commission permits, has been given to the Commission; and
  - (b) the Court is satisfied that the Commission has had a reasonable opportunity:
    - (i) to examine the terms of the proposed compromise or arrangement to which the application relates and a draft explanatory statement relating to the proposed compromise or arrangement; and
    - (ii) to make submissions to the Court in relation to the proposed compromise or arrangement and the draft explanatory statement.
- (3) In subsection (2), ***draft explanatory statement***, in relation to a proposed compromise or arrangement between a body and its creditors or any class of them or between a body and its members or any class of them, means a statement:
- (a) explaining the effect of the proposed compromise or arrangement and, in particular, stating any material interests of the directors of the body, whether as directors, as members or creditors of the body or otherwise, and the effect on those interests of the proposed compromise or arrangement in so far as that effect is different from the effect on the like interests of other persons; and
  - (b) setting out such information as is prescribed and any other information that is material to the making of a decision by a creditor or member of the body whether or not to agree to the proposed compromise or arrangement, being information that

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is within the knowledge of the directors of the body and has not previously been disclosed to the creditors or members of the body.

- (3A) In considering whether to make an order under subsection (1) or (1A) for a meeting to be held in another jurisdiction, the Court must have regard to where the creditors or members, or the creditors or members included in the class concerned, as the case requires, reside.
- (4) A compromise or arrangement is binding on the creditors, or on a class of creditors, or on the members, or on a class of members, as the case may be, of the body and on the body or, if the body is in the course of being wound up, on the liquidator and contributories of the body, if, and only if:
- (a) at a meeting convened in accordance with an order of the Court under subsection (1) or (1A):
    - (i) in the case of a compromise or arrangement between a body and its creditors or a class of creditors—the compromise or arrangement is agreed to by a majority in number of the creditors, or of the creditors included in that class of creditors, present and voting, either in person or by proxy, being a majority whose debts or claims against the company amount in the aggregate to at least 75% of the total amount of the debts and claims of the creditors present and voting in person or by proxy, or of the creditors included in that class present and voting in person or by proxy, as the case may be; and
    - (ii) in the case of a compromise or arrangement between a body and its members or a class of members—a resolution in favour of the compromise or arrangement is:
      - (A) passed by a majority in number of the members, or members in that class, present and voting (either in person or by proxy); and
      - (B) if the body has a share capital—passed by 75% of the votes cast on the resolution; and
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- (b) it is approved by order of the Court.
- (5) Where the Court orders 2 or more meetings of creditors or of a class of creditors, or 2 or more meetings of members or of a class of members, to be held in relation to the proposed compromise or arrangement:
  - (a) in the case of meetings of creditors—the meetings shall, for the purposes of subsection (4), be deemed together to constitute a single meeting and the votes in favour of the proposed compromise or arrangement cast at each of the meetings shall be aggregated, and the votes against the proposed compromise or arrangement cast at each of the meetings shall be aggregated, accordingly; or
  - (b) in the case of meetings of members—the meetings shall, for the purposes of subsection (4), be deemed together to constitute a single meeting and the votes in favour of the proposed compromise or arrangement cast at each of the meetings shall be aggregated, and the votes against the proposed compromise or arrangement cast at each of the meetings shall be aggregated, accordingly.
- (6) The Court may grant its approval to a compromise or arrangement subject to such alterations or conditions as it thinks just.
- (7) Except with the leave of the Court, a person shall not be appointed to administer, and shall not administer, a compromise or arrangement approved under this Law between a body and its creditors or any class of them or between a body and its members or any class of them, whether by the terms of that compromise or arrangement or pursuant to a power given by the terms of a compromise or arrangement, if the person:
  - (a) is a mortgagee of any property of the body;
  - (b) is an auditor or an officer of the body;
  - (c) is an officer of a body corporate that is a mortgagee of property of the body;
  - (d) is not a registered liquidator;
  - (e) is an officer of a body corporate related to the body; or



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- (f) unless the Commission directs in writing that this paragraph does not apply in relation to the person in relation to the body—has at any time within the last 12 months been an officer or promoter of the body or of a related body corporate.
- (8) Paragraph (7)(d) does not apply in relation to a body corporate authorised by or under a law of this jurisdiction to administer the compromise or arrangement concerned.
- (8A) Subsection (7) does not disqualify a person from administering a compromise or arrangement under an appointment validly made before the commencement of this section.
- (9) Where a person is or persons are appointed by, or under a power given by, the terms of a compromise or arrangement, to administer the compromise or arrangement:
  - (a) section 425, subsections 427(2) and (4) and sections 428, 432 and 434 apply in relation to that person or those persons as if:
    - (i) the appointment of the person or persons to administer the compromise or arrangement were an appointment of the person or persons as a receiver and manager, or as receivers and managers, of property of the body; and
    - (ii) a reference in any of those sections or subsections to a receiver, or to a receiver of property, of a corporation were a reference to that person or to those persons; and
  - (b) section 536 applies in relation to that person or those persons as if:
    - (i) the appointment of the person or persons to administer the compromise or arrangement were an appointment of the person or persons as a liquidator of the body; and
    - (ii) a reference in that section to a liquidator were a reference to that person or to those persons.
- (10) An order of the Court made for the purposes of paragraph (4)(b) does not have any effect until an office copy of the order is lodged with the Commission, and upon being so lodged, the order takes effect, or shall be deemed to have taken effect, on and from the

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date of lodgment or such earlier date as the Court determines and specifies in the order.

- (11) Subject to subsection (12), a copy of every order of the Court made for the purposes of paragraph (4)(b) shall be annexed to every copy of the constitution of the body issued after the order has been made.
- (12) The Court may, by order, exempt a body from compliance with subsection (11) or determine the period during which the body shall comply with that subsection.
- (13) Where a compromise or arrangement referred to in subsection (1) or (1A) (whether or not for the purposes of or in connection with a scheme for the reconstruction of a body or bodies or the amalgamation of any 2 or more bodies) has been proposed, the directors of the body shall:
  - (a) if a meeting of the members of the body by resolution so directs—instruct such accountants or solicitors or both as are named in the resolution to report on the proposals and send their report or reports to the directors as soon as practicable; and
  - (b) if a report or reports is or are obtained pursuant to paragraph (a)—make the report or reports available at the registered office of the body for inspection by the shareholders and creditors of the body at least 7 days before the day of the meeting ordered by the Court to be convened as provided in subsection (1) or (1A), as the case may be.
- (14) If default is made in complying with subsection (11), the body contravenes this subsection.
- (15) If default is made in complying with subsection (13), each director of the body contravenes this subsection.
- (16) Where no order has been made or resolution passed for the winding up of a Part 5.1 body and a compromise or arrangement has been proposed between the body and its creditors or any class of them, the Court may, in addition to exercising any of its other

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powers, on the application in a summary way of the body or of any member or creditor of the body, restrain further proceedings in any action or other civil proceeding against the body except by leave of the Court and subject to such terms as the Court imposes.

- (17) The Court shall not approve a compromise or arrangement under this section unless:
- (a) it is satisfied that the compromise or arrangement has not been proposed for the purpose of enabling any person to avoid the operation of any of the provisions of Chapter 6; or
  - (b) there is produced to the Court a statement in writing by the Commission stating that the Commission has no objection to the compromise or arrangement;
- but the Court need not approve a compromise or arrangement merely because a statement by the Commission stating that the Commission has no objection to the compromise or arrangement has been produced to the Court as mentioned in paragraph (b).

**412 Information as to compromise with creditors**

- (1) Where a meeting is convened under section 411, the body shall:
- (a) with every notice convening the meeting that is sent to a creditor or member, send a statement (in this section called the *explanatory statement*):
    - (i) explaining the effect of the compromise or arrangement and, in particular, stating any material interests of the directors, whether as directors, as members or creditors of the body or otherwise, and the effect on those interests of the compromise or arrangement in so far as that effect is different from the effect on the like interests of other persons; and
    - (ii) setting out such information as is prescribed and any other information that is material to the making of a decision by a creditor or member whether or not to agree to the compromise or arrangement, being information that is within the knowledge of the directors

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and has not previously been disclosed to the creditors or members; and

- (b) in every notice convening the meeting that is given by advertisement, include either a copy of the explanatory statement or a notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of the explanatory statement.
- (2) In the case of a creditor whose debt does not exceed \$200, paragraph (1)(a) does not apply unless the Court otherwise orders but the notice convening the meeting that is sent to such a creditor shall specify a place at which a copy of the explanatory statement can be obtained on request and, where the creditor makes such a request, the body shall as soon as practicable comply with the request.
  - (3) Where the compromise or arrangement affects the rights of debenture holders, the explanatory statement shall specify any material interests of the trustees for the debenture holders, whether as such trustees, as members or creditors of the body or otherwise, and the effect on those interests of the compromise or arrangement in so far as that effect is different from the effect on the like interests of other persons.
  - (4) Where a notice given by advertisement includes a notification that copies of the explanatory statement can be obtained in a particular manner, every creditor or member entitled to attend the meeting shall, on making application in that matter, be furnished by the body free of charge with a copy of the explanatory statement.
  - (5) Each person who is a director or trustee for debenture holders shall give notice to the body of such matters relating to the person as are required to be included in the explanatory statement.
  - (6) In the case of a compromise or arrangement that is not, or does not include, a compromise or arrangement between a Part 5.1 body and its creditors or any class of them, the body shall not send out an explanatory statement pursuant to subsection (1) unless a copy of that statement has been registered by the Commission.

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- (7) Where an explanatory statement sent out under subsection (1) is not required by subsection (6) to be registered by the Commission, the Court shall not make an order approving the compromise or arrangement unless it is satisfied that the Commission has had a reasonable opportunity to examine the explanatory statement and to make submissions to the Court in relation to that statement.
- (8) Where a copy of an explanatory statement is lodged with the Commission for registration under subsection (6), the Commission shall not register the copy of the statement unless the statement appears to comply with this Law and the Commission is of the opinion that the statement does not contain any matter that is false in a material particular or materially misleading in the form or context in which it appears.
- (9) Where a body contravenes this section, a person involved in the contravention contravenes this subsection.
- (10) It is a defence to a prosecution for a contravention of this section if it is proved that the contravention was due to the failure of a person (other than the defendant), being a director of the body or a trustee for debenture holders of the body, to supply for the purposes of the explanatory statement particulars of the person's interests.

**413 Provisions for facilitating reconstruction and amalgamation of Part 5.1 bodies**

- (1) Where an application is made to the Court under this Part for the approval of a compromise or arrangement and it is shown to the Court that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of a Part 5.1 body or Part 5.1 bodies or the amalgamation of 2 or more Part 5.1 bodies and that, under the scheme, the whole or any part of the undertaking or of the property of a body concerned in the scheme (in this section called the *transferor body*) is to be transferred to a company (in this section called the *transferee company*), the Court may, either by the order approving the compromise or arrangement or by a later order, provide for all or any of the following matters:

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- (a) the transfer to the transferee company of the whole or a part of the undertaking and of the property or liabilities of the transferor body;
  - (b) the allotting or appropriation by the transferee company of shares, debentures, policies or other interests in that company that, under the compromise or arrangement, are to be allotted or appropriated by that company to or for any person;
  - (c) the continuation by or against the transferee company of any legal proceedings pending by or against the transferor body;
  - (d) if the transferor body is a company—the deregistration by ASIC, without winding up, of the transferor body;
  - (e) the provision to be made for any persons who, within such time and in such manner as the Court directs, dissent from the compromise or arrangement;
  - (f) the transfer or allotment of any interest in property to any person concerned in the compromise or arrangement;
  - (g) such incidental, consequential and supplemental matters as are necessary to ensure that the reconstruction or amalgamation is fully and effectively carried out.
- (2) Where an order made under this section provides for the transfer of property or liabilities, then, by virtue of the order, that property shall be transferred to and vest in, and those liabilities shall be transferred to and become the liabilities of, the transferee company, free, in the case of any particular property if the order so directs, from any charge that is, by virtue of the compromise or arrangement, to cease to have effect.
- (3) Where an order is made under this section, each body to which the order relates shall, within 14 days after the making of the order, lodge with the Commission an office copy of the order.
- (4) In this section:
- liabilities** includes duties of any description, including duties that are of a personal character or are incapable under the general law of being assigned or performed vicariously.

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*property* includes rights and powers of any description, including rights and powers that are of a personal character and are incapable under the general law of being assigned or performed vicariously.

**414 Acquisition of shares of shareholders dissenting from scheme or contract approved by majority**

(1) In this section:

*dissenting shareholder*, in relation to a scheme or contract, means a shareholder who has not assented to the scheme or contract or who has failed to transfer his, her or its shares in accordance with the scheme or contract.

*excluded shares*, in relation to a scheme or contract involving a transfer to a person of shares in a class of shares in a company, means shares in that class that, when the offer relating to the scheme or contract is made, are held by:

- (a) in any case—the person or a nominee of the person; or
- (b) if the person is a body corporate—a subsidiary of the body.

(2) Where a scheme or contract (not being a scheme or contract arising out of the making of offers under a takeover bid) involving a transfer of shares in a class of shares in a company (in this section called the *transferor company*) to a person (in this section called the *transferee*) has, within 4 months after the making of the offer relating to the scheme or contract by the transferee, been approved by members holding shares in that class carrying at least 90% of the votes attached to shares in that class (other than excluded shares), the transferee may, within 2 months after the offer has been so approved, give notice as prescribed to a dissenting shareholder that the transferee wishes to acquire the shares held by that shareholder.

(3) Where such a notice is given, then, unless the Court orders otherwise on an application by a dissenting shareholder made within one month after the day on which the notice was given or within 14 days after a statement is supplied under subsection (7) to a dissenting shareholder, whichever is the later, the transferee is

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entitled and bound, subject to this section, to acquire those shares on the terms on which, under the scheme or contract, the shares of the approving shareholders are to be transferred to the transferee.

- (4) Where alternative terms were offered to the approving shareholders, the dissenting shareholder is entitled to elect not later than the end of one month after the date on which the notice is given under subsection (2) or 14 days after a statement is supplied under subsection (7), whichever is the later, which of those terms he, she or it prefers and, if he, she or it fails to make the election within the time allowed by this subsection, the transferee may, unless the Court otherwise orders, determine which of those terms is to apply to the acquisition of the shares of the dissenting shareholder.
- (5) Despite subsections (3) and (4), if the number of votes attached to the excluded shares is more than 10% of the votes attached to the excluded shares and the shares (other than excluded shares) to be transferred under the scheme or contract, those subsections do not apply unless:
  - (a) the transferee offers the same terms to all holders of the shares (other than excluded shares) to be transferred under the scheme or contract; and
  - (b) the holders who approve the scheme or contract hold shares to which are attached at least 90% of the votes attached to the shares (other than excluded shares) to be transferred under the scheme or contract and are also at least 75% in number of the holders of those shares.
- (6) For the purposes of paragraph (5)(b), 2 or more persons registered as holding shares jointly shall be counted as one person.
- (7) When a notice is given under subsection (2), the dissenting shareholder may, by written notice given to the transferee within one month after the day on which the notice was given under subsection (2), ask for a statement in writing of the names and addresses of all other dissenting shareholders as shown in the register of members.



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- (8) Where a notice is given under subsection (7), the transferee shall comply with it.
- (9) Where, under a scheme or contract referred to in subsection (2), the transferee becomes beneficially entitled to shares in the transferor company which, together with any other shares in the transferor company to which the transferee or, where the transferee is a body corporate, a body corporate related to the transferee is beneficially entitled, have attached to them at least 90% of the votes attached to the shares included in the class of shares concerned, then:
- (a) the transferee shall, within one month after the date on which he, she or it becomes beneficially entitled to those shares (unless in relation to the scheme or contract he, she or it has already complied with this requirement), give notice of the fact as prescribed to the holders of the remaining shares included in that class who, when the notice was given, had not assented to the scheme or contract or been given notice by the transferee under subsection (2); and
  - (b) such a holder may, within 3 months after the giving of the notice to him, her or it by notice to the transferee, require the transferee to acquire his, her or its share and, where alternative terms were offered to the approving shareholders, elect which of those terms he, she or it will accept.
- (10) Where a shareholder gives notice under paragraph (9)(b) with respect to his, her or its shares, the transferee is entitled and bound to acquire those shares:
- (a) on the terms on which under the scheme or contract the shares of the approving shareholders were transferred to him, her or it and, where alternative terms were offered to those shareholders, on the terms for which the shareholder has elected, or where he, she or it has not so elected, for whichever of the terms the transferee determines; or
  - (b) on such other terms as are agreed or as the Court, on the application of the transferee or of the shareholder, thinks fit to order.

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- (11) Subsections (12) and (13) apply where a notice has been given under subsection (1) unless the Court, on an application made by the dissenting shareholder, orders to the contrary.
- (12) The transferee shall, within 14 days after:
- (a) the end of one month after the day on which the notice was given;
  - (b) the end of 14 days after a statement under subsection (7) is supplied; or
  - (c) if an application has been made to the Court by a dissenting shareholder—the application is disposed of;
- whichever last happens:
- (d) send a copy of the notice to the transferor company together with an instrument of transfer that relates to the shares that the transferee is entitled to acquire under this section and is executed, on the shareholder's behalf, by a person appointed by the transferee and, on the transferee's own behalf, by the transferee; and
  - (e) pay, allot or transfer to the transferor company the consideration for the shares.
- (13) When the transferee has complied with subsection (12), the transferor company shall register the transferee as the holder of the shares.
- (14) All sums received by the transferor company under this section shall be paid into a separate bank account and those sums, and any other consideration so received, shall be held by that company in trust for the several persons entitled to the shares in respect of which they were respectively received.
- (15) Where a sum or other property received by a company under this section or a corresponding previous law has been held in trust by the company for a person for at least 2 years (whether or not that period began before the commencement of this Part), the company shall, before the end of 10 years after the day on which the sum was paid, or the consideration was allotted or transferred, to the company, pay the sum or transfer the consideration, and any

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accretions to it and any property that may become substituted for it or for part of it, to the Commission to be dealt with under Part 9.7.

**415 Notification of appointment of scheme manager and power of Court to require report**

- (1) Within 14 days after being appointed to administer a compromise or arrangement approved under this Part, a person shall lodge a notice in writing of the appointment.
- (2) Where an application is made to the Court under this Part in relation to a proposed compromise or arrangement, the Court may:
  - (a) before making any order on the application, require the Commission or another person specified by the Court to give to the Court a report as to the terms of the compromise or arrangement or of the scheme for the purposes of or in connection with which the compromise or arrangement has been proposed, the conduct of the officers of the body or bodies concerned and any other matters that, in the opinion of the Commission or that person, ought to be brought to the attention of the Court;
  - (b) in deciding the application, have regard to anything contained in the report; and
  - (c) make such order or orders as to the payment of the costs of preparing and giving the report as the Court thinks fit.

**415A Enforcement of orders made in other jurisdictions**

- (1) Where:
  - (a) the Federal Court makes an order under subsection 411(1) or (1A) of the Corporations Law of another jurisdiction; or
  - (b) the Supreme Court of another jurisdiction makes an order under subsection 411(1) or (1A) of the Corporations Law of any jurisdiction; or
  - (c) the Supreme Court of this jurisdiction makes an order under subsection 411(1) or (1A) of the Corporations Law of another jurisdiction;

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the order has effect, and may be enforced in all respects, in this jurisdiction as if it were an order made under subsection 411(1) or (1A) of this Law, in relation to a Part 5.1 body, by:

- (d) if paragraph (a) applies—the Federal Court; or
  - (e) if paragraph (b) or (c) applies—the Supreme Court of this jurisdiction.
- (2) A compromise or arrangement that is binding on the creditors, or a class of creditors, of a body corporate because of subsection 411(4) of the Corporations Law of another jurisdiction is also binding on the creditors of the body, or the creditors in that class, whose debts are recoverable by action in a court of this jurisdiction.

## **Part 5.2—Receivers, and other controllers, of property of corporations**

### **416 Interpretation**

In this Part, unless the contrary intention appears:

*officer*, in relation to a registered foreign company, includes a local agent of the foreign company.

*property*, in relation to a corporation, means property:

- (a) in the case of a company—within or outside Australia; or
- (b) in the case of a registered foreign company—within Australia or an external Territory; or
- (c) otherwise—within this jurisdiction.

*receiver*, in relation to property of a corporation, includes a receiver and manager.

### **417 Application of Part**

Except so far as the contrary intention appears in this Part or Part 11.2, this Part applies in relation to a receiver of property of a corporation who is appointed after the commencement of this section, even if the appointment arose out of a transaction entered into, or an act or thing done, before that commencement.

### **418 Persons not to act as receivers**

- (1) A person is not qualified to be appointed, and shall not act, as receiver of property of a corporation if the person:
  - (a) is a mortgagee of property of the corporation;
  - (b) is an auditor or an officer of the corporation;
  - (c) is an officer of a body corporate that is a mortgagee of property of the corporation;

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- (d) is not a registered liquidator;
  - (e) is an officer of a body corporate related to the corporation; or
  - (f) unless the Commission directs in writing that this paragraph does not apply in relation to the person in relation to the corporation—has at any time within the last 12 months been an officer or promoter of the corporation or of a related body corporate.
- (2) In subsection (1):
- officer*, in relation to a body corporate, does not include a receiver, appointed under an instrument whether before or after the commencement of this section, of property of the body.
- (3) Paragraph (1)(d) does not apply in relation to a body corporate authorised by or under a law of the Commonwealth, of a State or of a Territory to act as receiver of property of the corporation concerned.

Note: See section 1362CF for appointments made before the introduction of the Corporations Law.

**418A Court may declare whether controller is validly acting**

- (1) Where there is doubt, on a specific ground, about:
- (a) whether a purported appointment of a person, after the commencement of this section, as receiver of property of a corporation is valid; or
  - (b) whether a person who has entered into possession, or assumed control, of property of a corporation after the commencement of this section did so validly under the terms of a charge on that property;
- the person, the corporation or any of the corporation's creditors may apply to the Court for an order under subsection (2).
- (2) On an application, the Court may make an order declaring whether or not:
- (a) the purported appointment was valid; or

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(b) the person entered into possession, or assumed control, validly under the terms of the charge; as the case may be, on the ground specified in the application or on some other ground.

**419 Liability of controller**

- (1) A receiver, or any other authorised person, who, whether as agent for the corporation concerned or not, enters into possession or assumes control of any property of a corporation for the purpose of enforcing any charge is, notwithstanding any agreement to the contrary, but without prejudice to the person's rights against the corporation or any other person, liable for debts incurred by the person in the course of the receivership, possession or control for services rendered, goods purchased or property hired, leased, used or occupied.
- (2) Subsection (1) does not constitute the person entitled to the charge a mortgagee in possession.
- (3) Where:
  - (a) a person (in this subsection called the *controller*) enters into possession or assumes control of property of a corporation;
  - (b) the controller purports to have been properly appointed as a receiver in respect of that property under a power contained in an instrument, but has not been properly so appointed; and
  - (c) civil proceedings in an Australian court arise out of an act alleged to have been done by the controller;the court may, if it is satisfied that the controller believed on reasonable grounds that the controller had been properly so appointed, order that:
  - (d) the controller be relieved in whole or in part of a liability that the controller has incurred but would not have incurred if the controller had been properly so appointed; and
  - (e) a person who purported to appoint the controller as receiver be liable in respect of an act, matter or thing in so far as the

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controller has been relieved under paragraph (d) of liability in respect of that act, matter or thing.

**419A Liability of controller under pre-existing agreement about property used by corporation**

- (1) This section applies if:
  - (a) under an agreement made before the control day in relation to a controller of property of a corporation, the corporation continues after that day to use or occupy, or to be in possession of, property (*the third party property*) of which someone else is the owner or lessor; and
  - (b) the controller is controller of the third party property.
- (2) Subject to subsections (4) and (7), the controller is liable for so much of the rent or other amounts payable by the corporation under the agreement as is attributable to a period:
  - (a) that begins more than 7 days after the control day; and
  - (b) throughout which:
    - (i) the corporation continues to use or occupy, or to be in possession of, the third party property; and
    - (ii) the controller is controller of the third party property.
- (3) Within 7 days after the control day, the controller may give to the owner or lessor a notice that specifies the third party property and states that the controller does not propose to exercise rights in relation to that property as controller of the property, whether on behalf of the corporation or anyone else.
- (4) Despite subsection (2), the controller is not liable for so much of the rent or other amounts payable by the corporation under the agreement as is attributable to a period during which a notice under subsection (3) is in force, but such a notice does not affect a liability of the corporation.
- (5) A notice under subsection (3) ceases to have effect if:
  - (a) the controller revokes it by writing given to the owner or lessor; or



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- (b) the controller exercises, or purports to exercise, a right in relation to the third party property as controller of the property, whether on behalf of the corporation or anyone else.
- (6) For the purposes of subsection (5), the controller does not exercise, or purport to exercise, a right as mentioned in paragraph (5)(b) merely because the controller continues to be in possession, or to have control, of the third party property, unless the controller:
  - (a) also uses the property; or
  - (b) asserts a right, as against the owner or lessor, so to continue.
- (7) Subsection (2) does not apply in so far as a court, by order, excuses the controller from liability, but an order does not affect a liability of the corporation.
- (8) The controller is not taken because of subsection (2):
  - (a) to have adopted the agreement; or
  - (b) to be liable under the agreement otherwise than as mentioned in subsection (2).

**420 Powers of receiver**

- (1) Subject to this section, a receiver of property of a corporation has power to do, in Australia and elsewhere, all things necessary or convenient to be done for or in connection with, or as incidental to, the attainment of the objectives for which the receiver was appointed.
- (2) Without limiting the generality of subsection (1), but subject to any provision of the court order by which, or the instrument under which, the receiver was appointed, being a provision that limits the receiver's powers in any way, a receiver of property of a corporation has, in addition to any powers conferred by that order or instrument, as the case may be, or by any other law, power, for the purpose of attaining the objectives for which the receiver was appointed:

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- (a) to enter into possession and take control of property of the corporation in accordance with the terms of that order or instrument;
- (b) to lease, let on hire or dispose of property of the corporation;
- (c) to grant options over property of the corporation on such conditions as the receiver thinks fit;
- (d) to borrow money on the security of property of the corporation;
- (e) to insure property of the corporation;
- (f) to repair, renew or enlarge property of the corporation;
- (g) to convert property of the corporation into money;
- (h) to carry on any business of the corporation;
- (j) to take on lease or on hire, or to acquire, any property necessary or convenient in connection with the carrying on of a business of the corporation;
- (k) to execute any document, bring or defend any proceedings or do any other act or thing in the name of and on behalf of the corporation;
- (m) to draw, accept, make and indorse a bill of exchange or promissory note;
- (n) to use a seal of the corporation;
- (o) to engage or discharge employees on behalf of the corporation;
- (p) to appoint a solicitor, accountant or other professionally qualified person to assist the receiver;
- (q) to appoint an agent to do any business that the receiver is unable to do, or that it is unreasonable to expect the receiver to do, in person;
- (r) where a debt or liability is owed to the corporation—to prove the debt or liability in a bankruptcy, insolvency or winding up and, in connection therewith, to receive dividends and to assent to a proposal for a composition or a scheme of arrangement;
- (s) if the receiver was appointed under an instrument that created a charge on uncalled share capital of the corporation:

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- (i) to make a call in the name of the corporation for the payment of money unpaid on the corporation's shares; or
  - (ii) on giving a proper indemnity to a liquidator of the corporation—to make a call in the liquidator's name for the payment of money unpaid on the corporation's shares;
  - (t) to enforce payment of any call that is due and unpaid, whether the calls were made by the receiver or otherwise;
  - (u) to make or defend an application for the winding up of the corporation; and
  - (w) to refer to arbitration any question affecting the corporation.
- (3) The conferring by this section on a receiver of powers in relation to property of a corporation does not affect any rights in relation to that property of any other person other than the corporation.
- (4) In this section, a reference, in relation to a receiver, to property of a corporation is, unless the contrary intention appears, a reference to the property of the corporation in relation to which the receiver was appointed.

**420A Controller's duty of care in exercising power of sale**

- (1) In exercising a power of sale in respect of property of a corporation, a controller must take all reasonable care to sell the property for:
- (a) if, when it is sold, it has a market value—not less than that market value; or
  - (b) otherwise—the best price that is reasonably obtainable, having regard to the circumstances existing when the property is sold.
- (2) Nothing in subsection (1) limits the generality of anything in section 180, 181, 182, 183 or 184.

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**420B Court may authorise managing controller to dispose of property despite prior charge**

- (1) On the application of a managing controller of property of a corporation, the Court may by order authorise the controller to sell, or to dispose of in some other specified way, specified property of the corporation, even though it is subject to a charge (in this section called the *prior charge*) that has priority over a charge (in this section called the *controller's charge*) on that property that the controller is enforcing.
- (2) However, the Court may only make an order if satisfied that:
  - (a) apart from the existence of the prior charge, the controller would have power to sell, or to so dispose of, the property; and
  - (b) the controller has taken all reasonable steps to obtain the consent of the holder of the prior charge to the sale or disposal, but has not obtained that consent; and
  - (c) sale or disposal of the property under the order is in the best interests of the corporation's creditors and of the corporation; and
  - (d) sale or disposal of the property under the order will not unreasonably prejudice the rights or interests of the holder of the prior charge.
- (3) The Court is to have regard to the need to protect adequately the rights and interests of the holder of the prior charge.
- (4) If the property would be sold or disposed of together with other property that is subject to the controller's charge, the Court may have regard to:
  - (a) the amount (if any) by which it is reasonable to expect that the net proceeds of selling or disposing of that other property otherwise than together with the first-mentioned property would be less than so much of the net proceeds of selling or disposing of all the property together as would be attributable to that other property; and

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- (b) the amount (if any) by which it is reasonable to expect that the net proceeds of selling or disposing of the first-mentioned property otherwise than together with the other property would be greater than so much of the net proceeds of selling or disposing of all the property together as would be attributable to the first-mentioned property.
- (5) Nothing in subsection (3) or (4) limits the matters to which the Court may have regard for the purposes of subsection (2).
- (6) An order may be made subject to conditions, for example (but without limitation):
  - (a) a condition that:
    - (i) the net proceeds of the sale or disposal; and
    - (ii) the net proceeds of the sale or disposal of such other property (if any) as is specified in the condition and is subject to the controller's charge;or a specified part of those net proceeds, be applied in payment of specified amounts secured by the prior charge; or
  - (b) a condition that the controller apply a specified amount in payment of specified amounts secured by the prior charge.

**420C Receiver's power to carry on corporation's business during winding up**

- (1) A receiver of property of a corporation that is being wound up may:
  - (a) with the written approval of the corporation's liquidator or with the approval of the Court, carry on the corporation's business either generally or as otherwise specified in the approval; and
  - (b) do whatever is necessarily incidental to carrying on that business under paragraph (a).
- (2) Subsection (1) does not:
  - (a) affect a power that the receiver has otherwise than under that subsection; or

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- (b) empower the receiver to do an act that he or she would not have power to do if the corporation were not being wound up.
- (3) A receiver of property of a corporation who carries on the corporation's business under subsection (1) does so:
  - (a) as agent for the corporation; and
  - (b) in his or her capacity as receiver of property of the corporation.
- (4) The consequences of subsection (3) include, but are not limited to, the following:
  - (a) for the purposes of subsection 419(1), a debt that the receiver incurs in carrying on the business as mentioned in subsection (3) of this section is incurred in the course of the receivership;
  - (b) a debt or liability that the receiver incurs in so carrying on the business is not a cost, charge or expense of the winding up.

**421 Controller's duties in relation to bank accounts and financial records**

- (1) A controller of property of a corporation must:
  - (a) open and maintain an account, with an Australian ADI, bearing:
    - (i) the controller's own name; and
    - (ii) in the case of a receiver of the property—the title "receiver"; and
    - (iii) otherwise—the title "controller"; and
    - (iv) the corporation's name;or 2 or more such accounts; and
  - (b) within 3 business days after money of the corporation comes under the control of the controller, pay that money into such an account that the controller maintains; and

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- (c) ensure that no such account that the controller maintains contains money other than money of the corporation that comes under the control of the controller; and
  - (d) keep such financial records as correctly record and explain all transactions that the controller enters into as the controller.
- (2) Any director, creditor or member of a corporation may, unless the Court otherwise orders, personally or by an agent, inspect records kept by a controller of property of the corporation for the purposes of paragraph (1)(d).

**421A Managing controller to report within 2 months about corporation's affairs**

- (1) A managing controller of property of a corporation must prepare a report about the corporation's affairs that is in the prescribed form and is made up to a day not later than 30 days before the day when it is prepared.
- (2) The managing controller must prepare and lodge the report within 2 months after the control day.
- (3) As soon as practicable, and in any event within 14 days, after lodging the report, the managing controller must cause to be published in a national newspaper, or in each jurisdiction in a daily newspaper that circulates generally in that jurisdiction, a notice stating:
  - (a) that the report has been prepared; and
  - (b) that a person can, on paying the prescribed fee, inspect the report at specified offices of the Commission.
- (4) If, in the managing controller's opinion, it would seriously prejudice:
  - (a) the corporation's interests; or
  - (b) the achievement of the objectives for which the controller was appointed, or entered into possession or assumed control of property of the corporation, as the case requires;

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if particular information that the controller would otherwise include in the report were made available to the public, the controller need not include the information in the report.

- (5) If the managing controller omits information from the report as permitted by subsection (4), the controller must include instead a notice:
- (a) stating that certain information has been omitted from the report; and
  - (b) summarising what the information is about, but without disclosing the information itself.

**422 Reports by receiver**

- (1) If it appears to the receiver of property of a corporation that:
- (a) a past or present officer, or a member, of the corporation may have been guilty of an offence in relation to the corporation; or
  - (b) a person who has taken part in the formation, promotion, administration, management or winding up of the corporation:
    - (i) may have misapplied or retained, or may have become liable or accountable for, any money or property (whether the property is within or outside Australia) of the corporation; or
    - (ii) may have been guilty of any negligence, default, breach of duty or breach of trust in relation to the corporation;
- the receiver shall:
- (c) lodge as soon as practicable a report about the matter; and
  - (d) give to the Commission such information, and such access to and facilities for inspecting and taking copies of any documents, as the Commission requires.
- (2) The receiver may also lodge further reports specifying any other matter that, in the receiver's opinion, it is desirable to bring to the notice of the Commission.



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(3) If it appears to the Court:

- (a) that a past or present officer, or a member, of a corporation in respect of property of which a receiver has been appointed has been guilty of an offence under a law referred to in paragraph (1)(a) in relation to the corporation; or
- (b) that a person who has taken part in the formation, promotion, administration, management or winding up of a corporation in respect of property of which a receiver has been appointed has engaged in conduct referred to in paragraph (1)(b) in relation to the corporation;

and that the receiver has not lodged a report about the matter, the Court may, on the application of a person interested in the appointment of the receiver or of its own motion, direct the receiver to lodge such a report.

### **423 Supervision of controller**

(1) If:

- (a) it appears to the Court or to the Commission that a controller of property of a corporation has not faithfully performed, or is not faithfully performing, the controller's functions or has not observed, or is not observing, a requirement of:
  - (i) in the case of a receiver—the order by which, or the instrument under which, the receiver was appointed; or
  - (ii) otherwise—an instrument under which the controller entered into possession, or took control, of that property; or
  - (iii) in any case—the Court; or
  - (iv) in any case—this Law, the regulations or the rules; or
- (b) a person complains to the Court or to the Commission about an act or omission of a controller of property of a corporation in connection with performing or exercising any of the controller's functions and powers;

the Court or the Commission, as the case may be, may inquire into the matter and, where the Court or Commission so inquires, the Court may take such action as it thinks fit.

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- (2) The Commission may report to the Court any matter that in its opinion is a misfeasance, neglect or omission on the part of a controller of property of a corporation and the Court may order the controller to make good any loss that the estate of the corporation has sustained thereby and may make such other order or orders as it thinks fit.
- (3) The Court may at any time:
  - (a) require a controller of property of a corporation to answer questions about the performance or exercise of any of the controller's functions and powers as controller; or
  - (b) examine a person about the performance or exercise by such a controller of any of the controller's functions and powers as controller; or
  - (c) direct an investigation to be made of such a controller's books.

### **424 Controller may apply to Court**

- (1) A controller of property of a corporation may apply to the Court for directions in relation to any matter arising in connection with the performance or exercise of any of the controller's functions and powers as controller.
- (2) In the case of a receiver of property of a corporation, subsection (1) applies only if the receiver was appointed under a power contained in an instrument.

### **425 Court's power to fix receiver's remuneration**

- (1) The Court may by order fix the amount to be paid by way of remuneration to any person who, under a power contained in an instrument, has been appointed as receiver of property of a corporation.
- (2) The power of the Court to make an order under this section:
  - (a) extends to fixing the remuneration for any period before the making of the order or the application for the order;

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- (b) is exercisable even if the receiver has died, or ceased to act, before the making of the order or the application for the order; and
  - (c) if the receiver has been paid or has retained for the receiver's remuneration for any period before the making of the order any amount in excess of that fixed for that period—extends to requiring the receiver or the receiver's personal representatives to account for the excess or such part of the excess as is specified in the order.
- (3) The power conferred by paragraph (2)(c) shall not be exercised in respect of any period before the making of the application for the order unless, in the opinion of the Court, there are special circumstances making it proper for the power to be so exercised.
  - (4) The Court may from time to time vary or amend an order under this section.
  - (5) An order under this section may be made, varied or amended on the application of:
    - (a) a liquidator of the corporation; or
    - (b) an administrator of the corporation; or
    - (c) an administrator of a deed of company arrangement executed by the corporation; or
    - (d) the Commission.
  - (6) An order under this section may be varied or amended on the application of the receiver concerned.
  - (7) An order under this section may be made, varied or amended only as provided in subsections (5) and (6).

**426 Controller has qualified privilege in certain cases**

A controller of property of a corporation has qualified privilege in respect of:

- (a) a matter contained in a report that the controller lodges under section 421A or 422; or

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- (b) a comment that the controller makes under paragraph 429(2)(c).

**427 Notification of matters relating to controller**

- (1) A person who obtains an order for the appointment of a receiver of property of a corporation, or who appoints such a receiver under a power contained in an instrument, shall:
  - (a) within 7 days after obtaining the order or making the appointment, lodge notice that the order has been obtained, or that the appointment has been made, as the case may be; and
  - (b) within 21 days after obtaining the order or making the appointment, cause notice that the order has been obtained, or that the appointment has been made, as the case may be, to be published in the *Gazette*.
- (1A) A person who appoints another person to enter into possession, or take control, of property of a corporation (whether or not as agent for the corporation) for the purpose of enforcing a charge otherwise than as receiver of that property must:
  - (a) within 7 days after making the appointment, lodge notice of the appointment; and
  - (b) within 21 days after making the appointment, cause notice of the appointment to be published in the *Gazette*.
- (1B) A person who enters into possession, or takes control, as mentioned in subsection (1A) must:
  - (a) within 7 days after so entering into possession or taking control, lodge notice that the person has done so; and
  - (b) within 21 days after so entering into possession or taking control, cause to be published in the *Gazette* notice that the person has done so;unless another person:
  - (c) appointed the first-mentioned person so to enter into possession or take control; and
  - (d) complies with subsection (1A) in relation to the appointment.

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- (2) Within 14 days after becoming a controller of property of a corporation, a person must lodge notice in the prescribed form of the address of the person's office.
- (3) A controller of property of a corporation must, within 14 days after a change in the situation of the controller's office, lodge notice in the prescribed form of the change.
- (4) A person who ceases to be a controller of property of a corporation must:
  - (a) within 7 days after so ceasing, lodge notice that the person has so ceased; and
  - (b) within 21 days after so ceasing, cause notice that the person has so ceased to be published in the *Gazette*.

**428 Statement that receiver appointed or other controller acting**

- (1) Where a receiver of property (whether within or outside this jurisdiction or within or outside Australia) of a corporation has been appointed, the corporation shall set out, in every public document, and in every negotiable instrument, of the corporation, after the name of the corporation where it first appears, a statement that a receiver, or a receiver and manager, as the case requires, has been appointed.
- (2) Where there is a controller (other than a receiver) of property (whether within Australia or elsewhere) of a corporation, the corporation must set out, in every public document, and in every negotiable instrument, of the corporation, after the corporation's name where it first appears, a statement that a controller is acting.

**429 Officers to report to controller about corporation's affairs**

- (1) In this section:

*reporting officer*, in relation to a corporation in respect of property of which a person is controller, means a person who was:

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- (a) in the case of a company or registered Australian corporation—a director or secretary of the company or registered Australian corporation; or
  - (b) in the case of a foreign company—a local agent of the foreign company;
- on the control day.
- (2) Where a person becomes a controller of property of a corporation:
- (a) the person shall serve on the corporation as soon as practicable notice that the person is a controller of property of the corporation;
  - (b) within 14 days after the corporation receives the notice, the reporting officers shall make out and submit to the person a report in the prescribed form about the affairs of the corporation as at the control day; and
  - (c) the person shall, within one month after receipt of the report:
    - (i) lodge a copy of the report and a notice setting out any comments the person sees fit to make relating to the report or, if the person does not see fit to make any comment, a notice stating that the person does not see fit to make any comment;
    - (ii) send to the corporation a copy of the notice lodged in accordance with subparagraph (i); and
    - (iii) if the person became a controller of the property:
      - (A) because of an appointment as receiver of the property that was made by or on behalf of the holder of debentures of the corporation; or
      - (B) by entering into possession, or taking control, of the property for the purpose of enforcing a charge securing such debentures;and there are trustees for the holders of those debentures—send to those trustees a copy of the report and a copy of the notice lodged under subparagraph (i).
- (3) Where notice has been served on a corporation under paragraph (2)(a), the reporting officers may apply to the controller

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or to the Court to extend the period within which the report is to be submitted and:

- (a) if application is made to the controller—if the controller believes that there are special reasons for so doing, the controller may, by notice in writing given to the reporting officers, extend that period until a specified day; and
  - (b) if application is made to the Court—if the Court believes that there are special reasons for so doing, the Court may, by order, extend that period until a specified day.
- (4) As soon as practicable after granting an extension under paragraph (3)(a), the controller shall lodge a copy of the notice.
- (5) As soon as practicable after the Court grants an extension under paragraph (3)(b), the reporting officers shall lodge a copy of the order.
- (6) Subsections (2), (3) and (4) do not apply in a case where a person becomes a controller of property of a corporation:
- (a) to act with an existing controller of property of the corporation; or
  - (b) in place of a controller of such property who has died or ceased to be a controller of such property.
- (6A) However, if subsection (2) applies in a case where a controller of property of a corporation dies, or ceases to be a controller of property of the corporation, before subsection (2) is fully complied with, then:
- (a) the references in paragraphs (2)(b) and (c) to the person; and
  - (b) the references in subsections (3) and (4) to the controller;
- include references to the controller's successor and to any continuing controller.
- (7) Where a corporation is being wound up, this section (including subsection (6A)) and section 430 apply even if the controller and the liquidator are the same person, but with any necessary modifications arising from that fact.

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**430 Controller may require reports**

- (1) A controller of property of a corporation may, by notice given to the person or persons, require one or more persons included in one or more of the following classes of persons to make out as required by the notice, verify by a statement in writing in the prescribed form, and submit to the controller, a report, containing such information as is specified in the notice as to the affairs of the corporation or as to such of those affairs as are specified in the notice, as at a date specified in the notice:
  - (a) persons who are or have been officers of the corporation;
  - (b) where the corporation was incorporated within one year before the control day—persons who have taken part in the formation of the corporation;
  - (c) persons who are employed by the corporation or have been so employed within one year before the control day and are, in the opinion of the controller, capable of giving the information required;
  - (d) persons who are, or have been within one year before the control day, officers of, or employed by, a corporation that is, or within that year was, an officer of the corporation.
- (2) Without limiting the generality of subsection (1), a notice under that subsection may specify the information that the controller requires as to affairs of the corporation by reference to information that this Law requires to be included in any other report, statement or notice under this Law.
- (3) A person making a report and verifying it as required by subsection (1) shall, subject to the regulations, be allowed, and shall be paid by the controller (or the controller's successor) out of the controller's receipts, such costs and expenses incurred in and about the preparation and making of the report and the verification of the report as the controller (or the controller's successor) considers reasonable.
- (4) A person shall comply with a requirement made under subsection (1).



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- (5) A reference in this section to the controller's successor includes a reference to a continuing controller.

**431 Controller may inspect books**

A controller of property of a corporation is entitled to inspect at any reasonable time any books of the corporation that relate to that property and a person shall not fail to allow the controller to inspect such books at such a time.

**432 Lodging controller's accounts**

- (1) A controller of property of a corporation must lodge an account:
- (a) within one month after the end of:
    - (i) 6 months, or such shorter period as the controller determines, after the day when the controller became a controller of property of the corporation; and
    - (ii) each subsequent period of 6 months throughout which the controller is a controller of property of the corporation; and
  - (b) within one month after the controller ceases to be a controller of property of the corporation.
- (1A) An account must be in the prescribed form and show:
- (a) the controller's receipts and payments during:
    - (i) in the case of an account under paragraph (1)(a)—the 6 months or shorter period, as the case requires; or
    - (ii) in the case of an account under paragraph (1)(b)—the period beginning at the end of the period to which the last account related, or on the control day, as the case requires, and ending on the day when the controller so ceased; and
  - (b) except in the case of an account lodged under subparagraph (1)(a)(i)—the respective aggregates of the controller's receipts and payments since the control day; and
  - (c) in the case of:

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- (i) a receiver appointed under a power contained in an instrument; or
  - (ii) anyone else who is in possession, or has control, of property of the corporation for the purpose of enforcing a charge;  
the following:
    - (iii) the amount (if any) owing under that instrument or charge:
      - (A) in the case of an account lodged under subparagraph (1)(a)(i)—at the end of the control day and at the end of the period to which the account relates; or
      - (B) otherwise—at the end of the period to which the account relates;
    - (iv) the controller's estimate of the total value, at the end of the period to which the account relates, of the property of the corporation that is subject to the instrument or charge.
- (2) The Commission may, of its own motion or on the application of the corporation or a creditor of the corporation, cause the accounts lodged in accordance with subsection (1) to be audited by a registered company auditor appointed by the Commission and, for the purpose of the audit, the controller must furnish the auditor with such books and information as the auditor requires.
- (3) Where the Commission causes the accounts to be audited on the request of the corporation or a creditor, the Commission may require the corporation or creditor, as the case may be, to give security for the payment of the cost of the audit.
- (4) The costs of an audit under subsection (2) shall be fixed by the Commission and the Commission may if it thinks fit make an order declaring that, for the purposes of subsection 419(1), those costs shall be deemed to be a debt incurred by the controller as mentioned in subsection 419(1) and, where such an order is made, the controller is liable accordingly.

- (5) A person shall comply with a requirement made under this section.

**433 Payment of certain debts, out of property subject to floating charge, in priority to claims under charge**

- (1) In this section:

*registered body* does not include a registrable local body.

- (2) This section applies where:

- (a) a receiver is appointed on behalf of the holders of any debentures of a company or registered body that are secured by a floating charge, or possession is taken or control is assumed, by or on behalf of the holders of any debentures of a company or registered body, of any property comprised in or subject to a floating charge; and
- (b) at the date of the appointment or of the taking of possession or assumption of control (in this section called the *relevant date*):
- (i) the company or registered body has not commenced to be wound up voluntarily; and
  - (ii) the company or registered body has not been ordered to be wound up by the Court.

- (3) In the case of a company, the receiver or other person taking possession or assuming control of property of the company shall pay, out of the property coming into his, her or its hands, the following debts or amounts in priority to any claim for principal or interest in respect of the debentures:

- (a) first, any amount that in a winding up is payable in priority to unsecured debts pursuant to section 562;
- (b) next, if an auditor of the company had applied to the Commission under subsection 329(6) for consent to his, her or its resignation as auditor and the Commission had refused that consent before the relevant date—the reasonable fees and expenses of the auditor incurred during the period beginning on the day of the refusal and ending on the relevant date;

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- (c) subject to subsections (6) and (7), next, any debt or amount that in a winding up is payable in priority to other unsecured debts pursuant to paragraph 556(1)(e), (g) or (h) or section 560.
- (4) In the case of a registered body, the receiver or other person taking possession or assuming control of property of the registered body shall pay, out of the property of the registered body coming into his, her or its hands, the following debts or amounts in priority to any claim for principal or interest in respect of the debentures:
  - (a) first, any amount that in a winding up is payable in priority to unsecured debts pursuant to section 562;
  - (b) next, any debt or amount that in a winding up is payable in priority to other unsecured debts pursuant to paragraph 556(1)(e), (g) or (h) or section 560.
- (5) The receiver or other person taking possession or assuming control of property shall pay debts and amounts payable pursuant to paragraph (3)(c) or (4)(b) in the same order of priority as is prescribed by Division 6 of Part 5.6 in respect of those debts and amounts.
- (6) In the case of a company, if an auditor of the company had applied to the Commission under subsection 329(6) for consent to his, her or its resignation as auditor and the Commission had, before the relevant date, refused that consent, a receiver shall, when property comes to the receiver's hands, before paying any debt or amount referred to in paragraph (3)(c), make provision out of that property for the reasonable fees and expenses of the auditor incurred after the relevant date but before the date on which the property comes into the receiver's hands, being fees and expenses in respect of which provision has not already been made under this subsection.
- (7) If an auditor of the company applies to the Commission under subsection 329(6) for consent to his, her or its resignation as auditor and, after the relevant date, the Commission refuses that consent, the receiver shall, in relation to property that comes into the receiver's hands after the refusal, before paying any debt or amount referred to in paragraph (3)(c), make provision out of that

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property for the reasonable fees and expenses of the auditor incurred after the refusal and before the date on which the property comes into the receiver's hands, being fees and expenses in respect of which provision has not already been made under this subsection.

- (8) A receiver shall make provision in respect of reasonable fees and expenses of an auditor in respect of a particular period as required by subsection (6) or (7) whether or not the auditor has made a claim for fees and expenses for that period, but where the auditor has not made a claim, the receiver may estimate the reasonable fees and expenses of the auditor for that period and make provision in accordance with the estimate.
- (9) For the purposes of this section the references in Division 6 of Part 5.6 to the relevant date shall be read as references to the date of the appointment of the receiver, or of possession being taken or control being assumed, as the case may be.

**434 Enforcing controller's duty to make returns**

- (1) If a controller of property of a corporation:
  - (a) who has made default in making or lodging any return, account or other document or in giving any notice required by law fails to make good the default within 14 days after the service on the controller, by any member or creditor of the corporation or trustee for debenture holders, of a notice requiring the controller to do so; or
  - (b) who has become a controller of property of the corporation otherwise than by being appointed a receiver of such property by a court and who has, after being required at any time by the liquidator of the corporation so to do, failed to render proper accounts of, and to vouch, the controller's receipts and payments and to pay over to the liquidator the amount properly payable to the liquidator;

the Court may make an order directing the controller to make good the default within such time as is specified in the order.

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- (2) An application under subsection (1) may be made:
- (a) if paragraph (1)(a) applies—by a member or creditor of the corporation or by a trustee for debenture holders; and
  - (b) if paragraph (1)(b) applies—by the liquidator of the corporation.

**434A Court may remove controller for misconduct**

Where, on the application of a corporation, the Court is satisfied that a controller of property of the corporation has been guilty of misconduct in connection with performing or exercising any of the controller's functions and powers, the Court may order that, on and after a specified day, the controller cease to act as receiver or give up possession or control, as the case requires, of property of the corporation.

**434B Court may remove redundant controller**

- (1) The Court may order that, on and after a specified day, a controller of property of a corporation:
- (a) cease to act as receiver, or give up possession or control, as the case requires, of property of the corporation; or
  - (b) act as receiver, or continue in possession or control, as the case requires, only of specified property of the corporation.
- (2) However, the Court may only make an order under subsection (1) if satisfied that the objectives for which the controller was appointed, or entered into possession or took control of property of the corporation, as the case requires, have been achieved, so far as is reasonably practicable, except in relation to any property specified in the order under paragraph (1)(b).
- (3) For the purposes of subsection (2), the Court must have regard to:
- (a) the corporation's interests; and
  - (b) the interests of the holder of the charge that the controller is enforcing; and
  - (c) the interests of the corporation's other creditors; and

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- (d) any other relevant matter.
- (4) The Court may only make an order under subsection (1) on the application of a liquidator appointed for the purposes of winding up the corporation in insolvency.
- (5) An order under subsection (1) may also prohibit the holder of the charge from doing any or all of the following, except with the leave of the Court:
  - (a) appointing a person as receiver of property of the corporation under a power contained in an instrument relating to the charge;
  - (b) entering into possession, or taking control, of such property for the purpose of enforcing the charge;
  - (c) appointing a person so to enter into possession or take control (whether as agent for the chargee or for the corporation).

**434C Effect of sections 434A and 434B**

- (1) Except as expressly provided in section 434A or 434B, an order under that section does not affect a charge on property of a corporation.
- (2) Nothing in section 434A or 434B limits any other power of the Court to remove, or otherwise deal with, a controller of property of a corporation (for example, the Court's powers under section 423).

## **Part 5.3A—Administration of a company's affairs with a view to executing a deed of company arrangement**

### **Division 1—Preliminary**

#### **435A Object of Part**

The object of this Part is to provide for the business, property and affairs of an insolvent company to be administered in a way that:

- (a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or
- (b) if it is not possible for the company or its business to continue in existence—results in a better return for the company's creditors and members than would result from an immediate winding up of the company.

#### **435B Interpretation**

In this Part, unless the contrary intention appears:

*receiver* includes a receiver and manager.

#### **435C When administration begins and ends**

- (1) The administration of a company:
  - (a) begins when an administrator of the company is appointed under section 436A, 436B or 436C; and
  - (b) ends on the happening of whichever event of a kind referred to in subsection (2) or (3) happens first after the administration begins.
- (2) The normal outcome of the administration of a company is that:



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- (a) a deed of company arrangement is executed by both the company and the deed's administrator; or
  - (b) the company's creditors resolve under paragraph 439C(b) that the administration should end; or
  - (c) the company's creditors resolve under paragraph 439C(c) that the company be wound up.
- (3) However, the administration of a company may also end because:
- (a) the Court orders, under section 447A or otherwise, that the administration is to end, for example, because the Court is satisfied that the company is solvent; or
  - (b) the convening period, as fixed by subsection 439A(5), for a meeting of the company's creditors ends:
    - (i) without the meeting being convened in accordance with section 439A; and
    - (ii) without an application being made for the Court to extend under subsection 439A(6) the convening period for the meeting; or
  - (c) an application for the Court to extend under subsection 439A(6) the convening period for such a meeting is finally determined or otherwise disposed of otherwise than by the Court extending the convening period; or
  - (d) the convening period, as extended under subsection 439A(6), for such a meeting ends without the meeting being convened in accordance with section 439A; or
  - (e) such a meeting convened under section 439A ends (whether or not it was earlier adjourned) without a resolution under section 439C being passed at the meeting; or
  - (f) the company contravenes subsection 444B(2) by failing to execute a proposed deed of company arrangement; or
  - (g) the Court appoints a provisional liquidator of the company, or orders that the company be wound up.
- (4) During the administration of a company, the company is taken to be under administration.

## **Division 2—Appointment of administrator and first meeting of creditors**

### **436A Company may appoint administrator if board thinks it is or will become insolvent**

- (1) A company may, by writing, appoint an administrator of the company if the board has resolved to the effect that:
  - (a) in the opinion of the directors voting for the resolution, the company is insolvent, or is likely to become insolvent at some future time; and
  - (b) an administrator of the company should be appointed.
- (2) Subsection (1) does not apply to a company that is already being wound up.

### **436B Liquidator may appoint administrator**

- (1) A liquidator or provisional liquidator of a company may by writing appoint an administrator of the company if he or she thinks that the company is insolvent, or is likely to become insolvent at some future time.
- (2) With the leave of the Court, a liquidator or provisional liquidator of a company may appoint himself or herself under subsection (1).
- (3) Subsection (2) has effect subject to Division 14.

### **436C Chargee may appoint administrator**

- (1) A person who is entitled to enforce a charge on the whole, or substantially the whole, of a company's property may by writing appoint an administrator of the company if the charge has become, and is still, enforceable.

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- (2) Subsection (1) does not apply to a company that is already being wound up.

**436D Company already under administration**

An administrator cannot be appointed under section 436A, 436B or 436C if the company is already under administration.

**436E Purpose and timing of first meeting of creditors**

- (1) The administrator of a company under administration must convene a meeting of the company's creditors in order to determine:
- (a) whether to appoint a committee of creditors; and
  - (b) if so, who are to be the committee's members.
- (2) The meeting must be held within 5 business days after the administration begins.
- (3) The administrator must convene the meeting by:
- (a) giving written notice of the meeting to as many of the company's creditors as reasonably practicable; and
  - (b) causing notice of the meeting to be published:
    - (i) in a national newspaper; or
    - (ii) in each jurisdiction in which the company has its registered office or carries on business, in a daily newspaper that circulates generally in that jurisdiction;at least 2 business days before the meeting.
- (4) At the meeting, the company's creditors may also, by resolution:
- (a) remove the administrator from office; and
  - (b) appoint someone else as administrator of the company.

**436F Functions of committee of creditors**

- (1) The functions of a committee of creditors of a company under administration are:
  - (a) to consult with the administrator about matters relating to the administration; and
  - (b) to receive and consider reports by the administrator.
- (2) A committee cannot give directions to the administrator, except as provided in subsection (3).
- (3) As and when a committee reasonably requires, the administrator must report to the committee about matters relating to the administration.

**436G Membership of committee**

A person can be a member of a committee of creditors of a company under administration if, and only if, he or she is:

- (a) a creditor of the company; or
- (b) the attorney of such a creditor because of a general power of attorney; or
- (c) authorised in writing by such a creditor to be such a member.

## **Division 3—Administrator assumes control of company's affairs**

### **437A Role of administrator**

- (1) While a company is under administration, the administrator:
  - (a) has control of the company's business, property and affairs; and
  - (b) may carry on that business and manage that property and those affairs; and
  - (c) may terminate or dispose of all or part of that business, and may dispose of any of that property; and
  - (d) may perform any function, and exercise any power, that the company or any of its officers could perform or exercise if the company were not under administration.
- (2) Nothing in subsection (1) limits the generality of anything else in it.

### **437B Administrator acts as company's agent**

When performing a function, or exercising a power, as administrator of a company under administration, the administrator is taken to be acting as the company's agent.

### **437C Powers of other officers suspended**

- (1) While a company is under administration, a person (other than the administrator) cannot perform or exercise, and must not purport to perform or exercise, a function or power as an officer of the company, except with the administrator's written approval.
- (2) Subsection (1) does not remove an officer of a company from his or her office.

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- (3) Section 437D does not limit the generality of subsection (1) of this section.
- (4) In this section:
  - officer*, in relation to a company under administration, includes:
    - (a) a receiver who is not also a manager; and
    - (b) a receiver and manager appointed by a court; and
    - (c) a liquidator or provisional liquidator appointed by the Court before the administration began.
- (5) However, a person is not an officer of a company for the purposes of this section merely because he or she is an employee of the company.

**437D Only administrator can deal with company's property**

- (1) This section applies where:
  - (a) a company under administration purports to enter into; or
  - (b) a person purports to enter into, on behalf of a company under administration;a transaction or dealing affecting property of the company.
- (2) The transaction or dealing is void unless:
  - (a) the administrator entered into it on the company's behalf; or
  - (b) the administrator consented to it in writing before it was entered into; or
  - (c) it was entered into under an order of the Court.
- (3) Subsection (2) does not apply to a payment made:
  - (a) by an Australian ADI out of an account kept by the company with the ADI; and
  - (b) in good faith and in the ordinary course of the ADI's banking business; and
  - (c) after the administration began and on or before the day on which:

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- (i) the administrator gives to the ADI (under subsection 450A(3) or otherwise) written notice of the appointment that began the administration; or
  - (ii) the administrator complies with paragraph 450A(1)(b) in relation to that appointment;
- whichever happens first.
- (4) Subsection (2) has effect subject to an order that the Court makes after the purported transaction or dealing.
- (5) If, because of subsection (2), the transaction or dealing is void, or would be void apart from subsection (4), an officer of the company who:
- (a) purported to enter into the transaction or dealing on the company's behalf; or
  - (b) was in any other way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the transaction or dealing;
- contravenes this subsection.

**437E Order for compensation where officer involved in void transaction**

- (1) Where:
- (a) a court finds a person guilty of an offence constituted by a contravention of subsection 437D(5) (including such an offence that is taken to have been committed because of section 5 of the *Crimes Act 1914* or that section as it applies as a law of this jurisdiction); and
  - (b) the court is satisfied that the company or another person has suffered loss or damage because of the act or omission constituting the offence;
- the court may (whether or not it imposes a penalty) order the first-mentioned person to pay compensation to the company or other person, as the case may be, of such amount as the order specifies.

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Note: Section 73A defines when a court is taken to find a person guilty of an offence.

- (2) An order under subsection (1) may be enforced as if it were a judgment of the court.
- (3) The power of a court under section 1318 to relieve a person from liability as mentioned in that section extends to relieving a person from liability to be ordered under this section to pay compensation.

**437F Effect of administration on company's members**

A transfer of shares in a company, or an alteration in the status of members of a company, that is made during the administration of the company is void except so far as the Court otherwise orders.



## **Division 4—Administrator investigates company's affairs**

### **438A Administrator to investigate affairs and consider possible courses of action**

As soon as practicable after the administration of a company begins, the administrator must:

- (a) investigate the company's business, property, affairs and financial circumstances; and
- (b) form an opinion about each of the following matters:
  - (i) whether it would be in the interests of the company's creditors for the company to execute a deed of company arrangement;
  - (ii) whether it would be in the creditors' interests for the administration to end;
  - (iii) whether it would be in the creditors' interests for the company to be wound up.

### **438B Directors to help administrator**

- (1) As soon as practicable after the administration of a company begins, each director must:
  - (a) deliver to the administrator all books in the director's possession that relate to the company, other than books that the director is entitled, as against the company and the administrator, to retain; and
  - (b) if the director knows where other books relating to the company are—tell the administrator where those books are.
- (2) Within 7 days after the administration of a company begins or such longer period as the administrator allows, the directors must give to the administrator a statement about the company's business, property, affairs and financial circumstances.
- (3) A director of a company under administration must:

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- (a) attend on the administrator at such times; and
  - (b) give the administrator such information about the company's business, property, affairs and financial circumstances; as the administrator reasonably requires.
- (4) A person must not, without reasonable excuse, fail to comply with subsection (1), (2) or (3).

**438C Administrator's rights to company's books**

- (1) A person is not entitled, as against the administrator of a company under administration:
- (a) to retain possession of books of the company; or
  - (b) to claim or enforce a lien on such books; but such a lien is not otherwise prejudiced.
- (2) Paragraph (1)(a) does not apply in relation to books of which a secured creditor of the company is entitled to possession otherwise than because of a lien, but the administrator is entitled to inspect, and make copies of, such books at any reasonable time.
- (3) The administrator of a company under administration may give to a person a written notice requiring the person to deliver to the administrator, as specified in the notice, books so specified that are in the person's possession.
- (4) A notice under subsection (3) must specify a period of at least 3 business days as the period within which the notice must be complied with.
- (5) A person must comply with a notice under subsection (3) except so far as the person is entitled, as against the company and the administrator, to retain possession of the books.

**438D Reports by administrator**

- (1) If it appears to the administrator of a company under administration that:
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- (a) a past or present officer, or a member, of the company may have been guilty of an offence in relation to the company; or
  - (b) a person who has taken part in the formation, promotion, administration, management or winding up of the company:
    - (i) may have misapplied or retained, or may have become liable or accountable for, money or property (in Australia or elsewhere) of the company; or
    - (ii) may have been guilty of negligence, default, breach of duty or breach of trust in relation to the company;
- the administrator must:
- (c) lodge a report about the matter as soon as practicable; and
  - (d) give the Commission such information, and such access to and facilities for inspecting and taking copies of documents, as the Commission requires.
- (2) The administrator may also lodge further reports specifying any other matter that, in his or her opinion, it is desirable to bring to the Commission's notice.
- (3) If it appears to the Court:
- (a) that a past or present officer, or a member, of a company under administration has been guilty of an offence in relation to the company; or
  - (b) that a person who has taken part in the formation, promotion, administration, management or winding up of a company under administration has engaged in conduct of a kind referred to in paragraph (1)(b) in relation to the company;
- and that the administrator has not lodged a report about the matter, the Court may, on the application of an interested person or of its own motion, direct the administrator to lodge such a report.

## **Division 5—Meeting of creditors decides company's future**

### **439A Administrator to convene meeting and inform creditors**

- (1) The administrator of a company under administration must convene a meeting of the company's creditors within the convening period as fixed by subsection (5) or extended under subsection (6).

Note: For body corporate representatives' powers at a meeting of the company's creditors, see section 250D.

- (2) The meeting must be held within 5 business days after the end of the convening period.
- (3) The administrator must convene the meeting by:
  - (a) giving written notice of the meeting to as many of the company's creditors as reasonably practicable; and
  - (b) causing notice of the meeting to be published:
    - (i) in a national newspaper; or
    - (ii) in each jurisdiction in which the company has its registered office or carries on business, in a daily newspaper that circulates generally in that jurisdiction; at least 5 business days before the meeting.
- (4) The notice given to a creditor under paragraph (3)(a) must be accompanied by a copy of:
  - (a) a report by the administrator about the company's business, property, affairs and financial circumstances; and
  - (b) a statement setting out the administrator's opinion about each of the following matters:
    - (i) whether it would be in the creditors' interests for the company to execute a deed of company arrangement;
    - (ii) whether it would be in the creditors' interests for the administration to end;

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- (iii) whether it would be in the creditors' interests for the company to be wound up;  
and his or her reasons for those opinions; and
  - (c) if a deed of company arrangement is proposed—a statement setting out details of the proposed deed.
- (5) The convening period is:
- (a) if the administration begins on a day that is in December, or is less than 28 days before Good Friday—the period of 28 days beginning on that day; or
  - (b) otherwise—the period of 21 days beginning on the day when the administration begins.
- (6) The Court may extend the convening period on an application made within the period referred to in paragraph (5)(a) or (b), as the case requires.

#### **439B Conduct of meeting**

- (1) At a meeting convened under section 439A, the administrator is to preside.
- (2) A meeting convened under section 439A may be adjourned from time to time, but cannot be adjourned to a day that is more than 60 days after the first day on which the meeting was held, even if no resolution under section 439C has been passed at the meeting.

#### **439C What creditors may decide**

At a meeting convened under section 439A, the creditors may resolve:

- (a) that the company execute a deed of company arrangement specified in the resolution (even if it differs from the proposed deed (if any) details of which accompanied the notice of meeting); or
- (b) that the administration should end; or
- (c) that the company be wound up.

## **Division 6—Protection of company's property during administration**

### **440A Winding up company**

- (1) A company under administration cannot be wound up voluntarily, except as provided by section 446A.
- (2) The Court is to adjourn the hearing of an application for an order to wind up a company if the company is under administration and the Court is satisfied that it is in the interests of the company's creditors for the company to continue under administration rather than be wound up.
- (3) The Court is not to appoint a provisional liquidator of a company if the company is under administration and the Court is satisfied that it is in the interests of the company's creditors for the company to continue under administration rather than have a provisional liquidator appointed.

### **440B Charge unenforceable**

During the administration of a company, a person cannot enforce a charge on property of the company, except:

- (a) with the administrator's written consent; or
- (b) with the leave of the Court.

### **440C Owner or lessor cannot recover property used by company**

During the administration of a company, the owner or lessor of property that is used or occupied by, or is in the possession of, the company cannot take possession of the property or otherwise recover it, except:

- (a) with the administrator's written consent; or
- (b) with the leave of the Court.

#### **440D Stay of proceedings**

- (1) During the administration of a company, a proceeding in a court against the company or in relation to any of its property cannot be begun or proceeded with, except:
  - (a) with the administrator's written consent; or
  - (b) with the leave of the Court and in accordance with such terms (if any) as the Court imposes.
- (2) Subsection (1) does not apply to:
  - (a) a criminal proceeding; or
  - (b) a prescribed proceeding.

#### **440E Administrator not liable in damages for refusing consent**

A company's administrator is not liable to an action or other proceeding for damages in respect of a refusal to give an approval or consent for the purposes of this Division.

#### **440F Suspension of enforcement process**

During the administration of a company, no enforcement process in relation to property of the company can be begun or proceeded with, except:

- (a) with the leave of the Court; and
- (b) in accordance with such terms (if any) as the Court imposes.

#### **440G Duties of court officer in relation to property of company**

- (1) This section applies where an officer of a court (in this section called the *court officer*), being:
  - (a) a sheriff; or
  - (b) the registrar or other appropriate officer of the court;receives written notice of the fact that a company is under administration.

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- (2) During the administration, the court officer cannot:
  - (a) take action to sell property of the company under a process of execution; or
  - (b) pay to a person (other than the administrator):
    - (i) proceeds of selling property of the company (at any time) under a process of execution; or
    - (ii) money of the company seized (at any time) under a process of execution; or
    - (iii) money paid (at any time) to avoid seizure or sale of property of the company under a process of execution; or
  - (c) take action in relation to the attachment of a debt due to the company; or
  - (d) pay to a person (other than the administrator) money received because of the attachment of such a debt.
- (3) The court officer must deliver to the administrator any property of the company that is in the court officer's possession under a process of execution (whenever begun).
- (4) The court officer must pay to the administrator all proceeds or money of a kind referred to in paragraph (2)(b) or (d) that:
  - (a) are in the court officer's possession; or
  - (b) have been paid into the court and have not since been paid out.
- (5) The costs of the execution or attachment are a first charge on property delivered under subsection (3) or proceeds or money paid under subsection (4).
- (6) In order to give effect to a charge under subsection (5) on proceeds or money, the court officer may retain, on behalf of the person entitled to the charge, so much of the proceeds or money as the court officer thinks necessary.



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- (7) The Court may, if it is satisfied that it is appropriate to do so, permit the court officer to take action, or to make a payment, that subsection (2) would otherwise prevent.
- (8) A person who buys property in good faith under a sale under a process of execution gets a good title to the property as against the company and the administrator, despite anything else in this section.

**440H *Lis pendens* taken to exist**

- (1) This section has effect only for the purposes of a law about the effect of a *lis pendens* on purchasers or mortgagees.
- (2) During the administration of a company, an application to wind up the company is taken to be pending.
- (3) An application that is taken because of subsection (2) to be pending constitutes a *lis pendens*.

**440J Administration not to trigger liability of director or relative under guarantee of company's liability**

- (1) During the administration of a company:
  - (a) a guarantee of a liability of the company cannot be enforced, as against:
    - (i) a director of the company who is a natural person; or
    - (ii) a spouse, de facto spouse or relative of such a director; and
  - (b) without limiting paragraph (a), a proceeding in relation to such a guarantee cannot be begun against such a director, spouse, de facto spouse or relative; except with the leave of the Court and in accordance with such terms (if any) as the Court imposes.
- (2) While subsection (1) prevents a person (*the creditor*) from:

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- (a) enforcing as against another person (*the guarantor*) a guarantee of a liability of a company; or
- (b) beginning a proceeding against another person (*the guarantor*) in relation to such a guarantee;

section 1323 applies in relation to the creditor and the guarantor as if:

- (c) a civil proceeding against the guarantor had begun under this Law; and
- (d) the creditor were the only person of a kind referred to in that section as an aggrieved person.

Note: Under section 1323 the Court can make a range of orders to ensure that a person can meet the person's liabilities.

- (3) The effect that section 1323 has because of a particular application of subsection (2) is additional to, and does not prejudice, the effect the section otherwise has.
- (4) In this section:

*guarantee*, in relation to a liability of a company, includes a relevant agreement (as defined in section 9) because of which a person other than the company has incurred, or may incur, whether jointly with the company or otherwise, a liability in respect of the liability of the company.

*liability* means a debt, liability or other obligation.

## **Division 7—Rights of chargee, owner or lessor**

### **441A Where chargee acts before or during decision period**

- (1) This section applies where:
  - (a) the whole, or substantially the whole, of the property of a company under administration is subject to a charge; and
  - (b) before or during the decision period, the chargee enforced the charge in relation to all property of the company subject to the charge, whether or not the charge was enforced in the same way in relation to all that property.
  
- (2) This section also applies where:
  - (a) a company is under administration; and
  - (b) the same person is the chargee in relation to each of 2 or more charges on property of the company; and
  - (c) the property of the company (in this subsection called the ***charged property***) subject to the respective charges together constitutes the whole, or substantially the whole, of the company's property; and
  - (d) before or during the decision period, the chargee enforced the charges in relation to all the charged property:
    - (i) whether or not the charges were enforced in the same way in relation to all the charged property; and
    - (ii) whether or not any of the charges was enforced in the same way in relation to all the property of the company subject to that charge; and
    - (iii) in so far as the charges were enforced in relation to property of the company in a way referred to in paragraph (a), (b) or (d) of the definition of ***enforce*** in section 9—whether or not the same person was appointed in respect of all of the last-mentioned property.

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- (3) Nothing in section 437C or 440B, or in an order under subsection 444F(2), prevents any of the following from enforcing the charge, or any of the charges:
- (a) the chargee;
  - (b) a receiver or person appointed as mentioned in paragraph (a), (b) or (d) of the definition of *enforce* in section 9 as that definition applies in relation to the charge, or any of the charges (even if appointed after the decision period).
- (4) Section 437D does not apply in relation to a transaction or dealing that affects property of the company and is entered into by:
- (a) the chargee; or
  - (b) a receiver or person of a kind referred to in paragraph (3)(b) of this section;
- in the performance or exercise of a function or power as chargee, or as such a receiver or person, as the case may be.

**441B Where enforcement of charge begins before administration**

- (1) This section applies if, before the beginning of the administration of a company, a chargee, receiver or other person:
- (a) entered into possession, or assumed control, of property of the company; or
  - (b) entered into an agreement to sell such property; or
  - (c) made arrangements for such property to be offered for sale by public auction; or
  - (d) publicly invited tenders for the purchase of such property; or
  - (e) exercised any other power in relation to such property;
- for the purpose of enforcing a charge on that property.
- (2) Nothing in section 437C or 440B prevents the chargee, receiver or other person from enforcing the charge in relation to that property.
- (3) Section 437D does not apply in relation to a transaction or dealing that affects that property and is entered into:
- (a) in the exercise of a power of the chargee as chargee; or

(b) in the performance or exercise of a function or power of the receiver or other person;  
as the case may be.

#### **441C Charge on perishable property**

- (1) This section applies where perishable property of a company under administration is subject to a charge.
- (2) Nothing in section 437C or 440B prevents:
  - (a) the chargee; or
  - (b) a receiver or person appointed (at any time) as mentioned in paragraph (a), (b) or (d) of the definition of *enforce* in section 9;from enforcing the charge, so far as it is a charge on perishable property.
- (3) Section 437D does not apply in relation to a transaction or dealing that affects perishable property of the company and is entered into by:
  - (a) the chargee; or
  - (b) a receiver or person appointed (at any time) as mentioned in paragraph (a), (b) or (d) of the definition of *enforce* in section 9;in the performance or exercise of a function or power as chargee, or as such a receiver or person, as the case may be.

#### **441D Court may limit powers of chargee, etc. in relation to charged property**

- (1) This section applies if:
  - (a) for the purpose of enforcing a charge on property of a company, the chargee, or a receiver or other person, does an act of a kind referred to in a paragraph of subsection 441B(1); and

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- (b) the company is under administration when the chargee, receiver or other person does the act, or the company later begins to be under administration;  
but does not apply in a case where section 441A applies.
- (2) On application by the administrator, the Court may order the chargee, receiver or other person not to perform specified functions, or exercise specified powers, except as permitted by the order.
- (3) The Court may only make an order if satisfied that what the administrator proposes to do during the administration will adequately protect the chargee's interests.
- (4) An order may only be made, and only has effect, during the administration.
- (5) An order has effect despite sections 441B and 441C.

**441E Giving a notice under a charge**

Nothing in section 437C or 440B prevents a person from giving a notice under the provisions of a charge.

**441F Where recovery of property begins before administration**

- (1) This section applies if, before the beginning of the administration of a company, a receiver or other person:
  - (a) entered into possession, or assumed control, of property used or occupied by, or in the possession of, the company; or
  - (b) exercised any other power in relation to such property; for the purpose of enforcing a right of the owner or lessor of the property to take possession of the property or otherwise recover it.
- (2) Nothing in section 437C or 440C prevents the receiver or other person from performing a function, or exercising a power, in relation to the property.

- (3) Section 437D does not apply in relation to a transaction or dealing that affects the property and is entered into in the performance or exercise of a function or power of the receiver or other person.

**441G Recovering perishable property**

- (1) Nothing in section 437C or 440C prevents a person from taking possession of, or otherwise recovering, perishable property.
- (2) Section 437D does not apply in relation to a transaction or dealing that affects perishable property and is entered into for the purpose of enforcing a right of the owner or lessor of the property to take possession of the property or otherwise recover it.

**441H Court may limit powers of receiver etc. in relation to property used by company**

- (1) This section applies if:
- (a) for the purpose of enforcing a right of the owner or lessor of property used or occupied by, or in the possession of, a company to take possession of the property or otherwise recover it, a person:
    - (i) enters into possession, or assumes control, of the property; or
    - (ii) exercises any other power in relation to the property; and
  - (b) the company is under administration when the person does so, or the company later begins to be under administration.
- (2) On application by the administrator, the Court may order the person not to perform specified functions, or exercise specified powers, in relation to the property, except as permitted by the order.
- (3) The Court may only make an order if satisfied that what the administrator proposes to do during the administration will adequately protect the interests of the owner or lessor.

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- (4) An order may only be made, and only has effect, during the administration.
- (5) An order has effect despite sections 441F and 441G.

**441J Giving a notice under an agreement about property**

Nothing in section 437C or 440C prevents a person from giving a notice to a company under an agreement relating to property that is used or occupied by, or is in the possession of, the company.

**441K Effect of Division**

Except as expressly provided, nothing in this Division limits the generality of anything else in it.



## **Division 8—Powers of administrator**

### **442A Additional powers of administrator**

Without limiting section 437A, the administrator of a company under administration has power to do any of the following:

- (a) remove from office a director of the company;
- (b) appoint a person as such a director, whether to fill a vacancy or not;
- (c) execute a document, bring or defend proceedings, or do anything else, in the company's name and on its behalf;
- (d) whatever else is necessary for the purposes of this Part.

### **442B Dealing with property subject to a floating charge that has crystallised**

- (1) This section applies where a charge on property of a company under administration was a floating charge when created but has since become a fixed or specific charge.
- (2) Subject to sections 442C and 442D, the administrator may deal with any of that property as if the charge were still a floating charge.

### **442C When administrator may dispose of encumbered property**

- (1) The administrator of a company under administration or of a deed of company arrangement must not dispose of:
  - (a) property of the company that is subject to a charge; or
  - (b) property that is used or occupied by, or is in the possession of, the company but of which someone else is the owner or lessor.
- (2) Subsection (1) does not prevent a disposal:
  - (a) in the ordinary course of the company's business; or

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- (b) with the written consent of the chargee, owner or lessor, as the case may be; or
  - (c) with the leave of the Court.
- (3) The Court may only give leave under paragraph (2)(c) if satisfied that arrangements have been made to protect adequately the interests of the chargee, owner or lessor, as the case may be.

**442D Administrator's powers subject to powers of chargee, receiver etc.**

- (1) Where section 441A applies, the administrator's functions and powers are subject to the functions and powers of a person as:
- (a) the chargee; or
  - (b) a receiver or person of a kind referred to in paragraph 441A(3)(b) (even if appointed after the decision period).
- (2) Where section 441C applies, then, so far as concerns perishable property of the company, the administrator's functions and powers are subject to the functions and powers of a person as:
- (a) the chargee; or
  - (b) a receiver or person appointed (at any time) as mentioned in paragraph (a), (b) or (d) of the definition of *enforce* in section 9.
- (3) Where section 441B, 441F or 441G applies, then, so far as concerns the property referred to in subsection 441B(1), 441F(1) or 441G(1), the administrator's functions and powers are subject to the functions and powers of the chargee, receiver or other person.

**442E Administrator has qualified privilege**

A person who is or has been the administrator of a company under administration has qualified privilege in respect of a statement that he or she has made, whether orally or in writing, in the course of

performing or exercising any of his or her functions and powers as administrator of the company.

**442F Protection of persons dealing with administrator**

- (1) Sections 128 and 129 apply in relation to a company under administration as if:
  - (a) a reference in those sections to the company, or to an officer of the company, included a reference to the administrator; and
  - (b) a reference in those sections to an assumption referred to in section 129 included a reference to an assumption that the administrator is:
    - (i) acting within his or her functions and powers as administrator; and
    - (ii) in particular, is complying with this Law.
- (2) The effect that sections 128 and 129 have because of subsection (1) of this section is additional to, and does not prejudice, the effect that sections 128 and 129 otherwise have in relation to a company under administration.

## **Division 9—Administrator's liability and indemnity for debts of administration**

### **Subdivision A—Liability**

#### **443A General debts**

- (1) The administrator of a company under administration is liable for debts he or she incurs, in the performance or exercise, or purported performance or exercise, of any of his or her functions and powers as administrator, for:
  - (a) services rendered; or
  - (b) goods bought; or
  - (c) property hired, leased, used or occupied.
- (2) Subsection (1) has effect despite any agreement to the contrary, but without prejudice to the administrator's rights against the company or anyone else.

#### **443B Payments for property used or occupied by, or in the possession of, the company**

- (1) This section applies if, under an agreement made before the administration of a company began, the company continues to use or occupy, or to be in possession of, property of which someone else is the owner or lessor.
- (2) Subject to this section, the administrator is liable for so much of the rent or other amounts payable by the company under the agreement as is attributable to a period:
  - (a) that begins more than 7 days after the administration began; and
  - (b) throughout which:
    - (i) the company continues to use or occupy, or to be in possession of, the property; and

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- (ii) the administration continues.
- (3) Within 7 days after the beginning of the administration, the administrator may give to the owner or lessor a notice that specifies the property and states that the company does not propose to exercise rights in relation to the property.
- (4) Despite subsection (2), the administrator is not liable for so much of the rent or other amounts payable by the company under the agreement as is attributable to a period during which a notice under subsection (3) is in force, but such a notice does not affect a liability of the company.
- (5) A notice under subsection (3) ceases to have effect if:
  - (a) the administrator revokes it by writing given to the owner or lessor; or
  - (b) the company exercises, or purports to exercise, a right in relation to the property.
- (6) For the purposes of subsection (5), the company does not exercise, or purport to exercise, a right in relation to the property merely because the company continues to occupy, or to be in possession of, the property, unless the company:
  - (a) also uses the property; or
  - (b) asserts a right, as against the owner or lessor, so to continue.
- (7) Subsection (2) does not apply in relation to so much of a period as elapses after:
  - (a) a receiver of the property is appointed; or
  - (b) a chargee appoints an agent, under the provisions of a charge on the property, to enter into possession, or to assume control, of the property; or
  - (c) a chargee takes possession, or assumes control, of the property under the provisions of a charge on the property;but this subsection does not affect a liability of the company.

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- (8) Subsection (2) does not apply in so far as a court, by order, excuses the administrator from liability, but an order does not affect a liability of the company.
- (9) The administrator is not taken because of subsection (2):
  - (a) to have adopted the agreement; or
  - (b) to be liable under the agreement otherwise than as mentioned in subsection (2).

**443BA Certain taxation liabilities**

- (1) The administrator of a company is liable to pay to the Commissioner of Taxation:
  - (a) each amount payable under a remittance provision because of a deduction made by the administrator; and
  - (b) without limiting paragraph (a), so much of each amount payable under a remittance provision because of a deduction made by the company during the administration as equals so much of the deduction as is attributable to a period throughout which the administration continued; even if the amount became payable after the end of the administration.
- (2) In this section:

**remittance provision** means any of the following provisions of the *Income Tax Assessment Act 1936*:

  - (a) section 221F (except subsection 221F(12)) or section 221G (except subsection 221G(4A));
  - (b) subsection 221YHDC(2);
  - (c) subsection 221YHZD(1) or (1A);
  - (d) subsection 221YN(1);

and any of the provisions of Subdivision 16-B in Schedule 1 to the *Taxation Administration Act 1953*.

*unpaid amount*, in relation to an estimate, has the same meaning as in Division 8 of Part VI of the *Income Tax Assessment Act 1936*.

### **443C Administrator not otherwise liable for company's debts**

The administrator of a company under administration is not liable for the company's debts except under this Subdivision.

### **Subdivision B—Indemnity**

#### **443D Right of indemnity**

The administrator of a company under administration is entitled to be indemnified out of the company's property for:

- (a) debts for which the administrator is liable under Subdivision A or a remittance provision as defined in subsection 443BA(3); and
- (b) his or her remuneration as fixed under section 449E.

#### **443E Right of indemnity has priority over other debts**

- (1) Subject to section 556, a right of indemnity under section 443D has priority over:
  - (a) all the company's unsecured debts; and
  - (b) subject to subsections (2) and (3) of this section, debts of the company secured by a floating charge on property of the company.
- (2) Where:
  - (a) debts of a company under administration are secured by a floating charge on property of the company; and
  - (b) before the beginning of the administration, the chargee:
    - (i) appointed a receiver of property of the company under a power contained in an instrument relating to the charge; or

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- (ii) obtained an order for the appointment of a receiver of property of the company for the purpose of enforcing the charge; or
  - (iii) entered into possession, or assumed control, of property of the company for that purpose; or
  - (iv) appointed a person so to enter into possession or assume control (whether as agent for the chargee or for the company); and
- (c) the receiver or person is still in office, or the chargee is still in possession or control of the property;
- the right of indemnity of the administrator under section 443D does not have priority over those debts, except so far as the chargee agrees.

(3) Where:

- (a) debts of a company under administration are secured by a floating charge on property of the company; and
- (b) during the administration, the chargee, consistently with this Part:
  - (i) appoints a receiver of property of the company under a power contained in an instrument relating to the charge; or
  - (ii) obtains an order for the appointment of a receiver of property of the company for the purpose of enforcing the charge; or
  - (iii) enters into possession, or assumes control, of property of the company for that purpose; or
  - (iv) appoints a person so to enter into possession or assume control (whether as agent for the chargee or for the company);

the right of indemnity of the administrator under section 443D has priority over those debts only in so far as it is a right of indemnity for debts incurred, or remuneration accruing, before written notice of the appointment, or of the entering into possession or assuming of control, as the case may be, was given to the administrator.



**443F Lien to secure indemnity**

- (1) To secure a right of indemnity under section 443D, the administrator has a lien on the company's property.
- (2) A lien under subsection (1) has priority over a charge only in so far as the right of indemnity under section 443D has priority over debts secured by the charge.

## **Division 10—Execution and effect of deed of company arrangement**

### **444A Effect of creditors' resolution**

- (1) This section applies where, at a meeting convened under section 439A, a company's creditors resolve that the company execute a deed of company arrangement.
- (2) The administrator of the company is to be the administrator of the deed, unless the creditors, by resolution passed at the meeting, appoint someone else to be administrator of the deed.
- (3) The administrator of the deed must prepare an instrument setting out the terms of the deed.
- (4) The instrument must also specify the following:
  - (a) the administrator of the deed;
  - (b) the property of the company (whether or not already owned by the company when it executes the deed) that is to be available to pay creditors' claims;
  - (c) the nature and duration of any moratorium period for which the deed provides;
  - (d) to what extent the company is to be released from its debts;
  - (e) the conditions (if any) for the deed to come into operation;
  - (f) the conditions (if any) for the deed to continue in operation;
  - (g) the circumstances in which the deed terminates;
  - (h) the order in which proceeds of realising the property referred to in paragraph (b) are to be distributed among creditors bound by the deed;
  - (i) the day (not later than the day when the administration began) on or before which claims must have arisen if they are to be admissible under the deed.

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- (5) The instrument is taken to include the prescribed provisions, except so far as it provides otherwise.

**444B Execution of deed**

- (1) This section applies where an instrument is prepared under section 444A.
- (2) The company must execute the instrument within:
  - (a) 21 days after the end of the meeting of creditors; or
  - (b) such further period as the Court allows on an application made within those 21 days.
- (3) The board of the company may, by resolution, authorise the instrument to be executed by or on behalf of the company.
- (4) Subsection (3) has effect despite section 437C, but does not limit the functions and powers of the administrator of the company.
- (5) The administrator of the deed must execute the instrument before, or as soon as practicable after, the company executes it.
- (6) When executed by both the company and the deed's administrator, the instrument becomes a deed of company arrangement.
- (7) Division 12 provides for consequences of the company contravening subsection (2).

**444C Creditor etc. not to act inconsistently with deed before its execution**

- (1) Where, at a meeting convened under section 439A, a company's creditors resolve that the company execute a deed of company arrangement, this section applies until:
  - (a) the deed is executed by both the company and the deed's administrator; or
  - (b) the period within which subsection 444B(2) requires the company to execute the deed ends;

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whichever happens sooner.

- (2) In so far as a person would be bound by the deed if it had already been so executed, the person:
  - (a) must not do anything inconsistent with the deed, except with the leave of the Court; and
  - (b) is subject to section 444E.

**444D Effect of deed on creditors**

- (1) A deed of company arrangement binds all creditors of the company, so far as concerns claims arising on or before the day specified in the deed under paragraph 444A(4)(i).
- (2) Subsection (1) does not prevent a secured creditor from realising or otherwise dealing with the security, except so far as:
  - (a) the deed so provides in relation to a secured creditor who voted in favour of the resolution of creditors because of which the company executed the deed; or
  - (b) the Court orders under subsection 444F(2).
- (3) Subsection (1) does not affect a right that an owner or lessor of property has in relation to that property, except so far as:
  - (a) the deed so provides in relation to an owner or lessor of property who voted in favour of the resolution of creditors because of which the company executed the deed; or
  - (b) the Court orders under subsection 444F(4).

**444E Protection of company's property from persons bound by deed**

- (1) Until a deed of company arrangement terminates, this section applies to a person bound by the deed.
- (2) The person cannot:
  - (a) make an application for an order to wind up the company; or
  - (b) proceed with such an application made before the deed became binding on the person.

- (3) The person cannot:
- (a) begin or proceed with a proceeding against the company or in relation to any of its property; or
  - (b) begin or proceed with enforcement process in relation to property of the company;
- except:
- (c) with the leave of the Court; and
  - (d) in accordance with such terms (if any) as the Court imposes.
- (4) In subsection (3):
- property*, in relation to the company, includes property used or occupied by, or in the possession of, the company.

**444F Court may limit rights of secured creditor or owner or lessor**

- (1) This section applies where:
- (a) it is proposed that a company execute a deed of company arrangement; or
  - (b) a company has executed such a deed.
- (2) Subject to subsection 441A(3), the Court may order a secured creditor of the company not to realise or otherwise deal with the security, except as permitted by the order.
- (3) The Court may only make an order under subsection (2) if satisfied that:
- (a) for the creditor to realise or otherwise deal with the security would have a material adverse effect on achieving the purposes of the deed; and
  - (b) having regard to:
    - (i) the terms of the deed; and
    - (ii) the terms of the order; and
    - (iii) any other relevant matter;the creditor's interests will be adequately protected.

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- (4) The Court may order the owner or lessor of property that is used or occupied by, or is in the possession of, the company not to take possession of the property or otherwise recover it.
- (5) The Court may only make an order under subsection (4) if satisfied that:
  - (a) for the owner or lessor to take possession of the property or otherwise recover it would have a material adverse effect on achieving the purposes of the deed; and
  - (b) having regard to:
    - (i) the terms of the deed; and
    - (ii) the terms of the order; and
    - (iii) any other relevant matter;the interests of the owner or lessor will be adequately protected.
- (6) An order under this section may be made subject to conditions.
- (7) An order under this section may only be made on the application of:
  - (a) if paragraph (1)(a) applies—the administrator of the company; or
  - (b) if paragraph (1)(b) applies—the deed's administrator.

**444G Effect of deed on company, officers and members**

A deed of company arrangement also binds:

- (a) the company; and
- (b) its officers and members; and
- (c) the deed's administrator.

**444H Extent of release of company's debts**

A deed of company arrangement releases the company from a debt only in so far as:

- (a) the deed provides for the release; and

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(b) the creditor concerned is bound by the deed.

## Division 11—Variation, termination and avoidance of deed

### 445A Variation of deed by creditors

A deed of company arrangement may be varied by a resolution passed at a meeting of the company's creditors convened under section 445F, but only if the variation is not materially different from a proposed variation set out in the notice of the meeting.

### 445B Court may cancel variation

- (1) Where a deed of company arrangement is varied under section 445A, a creditor of the company may apply to the Court for an order cancelling the variation.
- (2) On an application, the Court:
  - (a) may make an order cancelling the variation, or confirming it, either wholly or in part, on such conditions (if any) as the order specifies; and
  - (b) may make such other orders as it thinks appropriate.

### 445C When deed terminates

A deed of company arrangement terminates when:

- (a) the Court makes under section 445D an order terminating the deed; or
  - (b) the company's creditors pass a resolution terminating the deed at a meeting that was convened under section 445F by a notice setting out the proposed resolution; or
  - (c) if the deed specifies circumstances in which it is to terminate—those circumstances exist;
- whichever happens first.



### **445D When Court may terminate deed**

- (1) The Court may make an order terminating a deed of company arrangement if satisfied that:
  - (a) information about the company's business, property, affairs or financial circumstances that:
    - (i) was false or misleading; and
    - (ii) can reasonably be expected to have been material to creditors of the company in deciding whether to vote in favour of the resolution that the company execute the deed;  
was given to the administrator of the company or to such creditors; or
  - (b) such information was contained in a report or statement under subsection 439A(4) that accompanied a notice of the meeting at which the resolution was passed; or
  - (c) there was an omission from such a report or statement and the omission can reasonably be expected to have been material to such creditors in so deciding; or
  - (d) there has been a material contravention of the deed by a person bound by the deed; or
  - (e) effect cannot be given to the deed without injustice or undue delay; or
  - (f) the deed or a provision of it is, an act or omission done or made under the deed was, or an act or omission proposed to be so done or made would be:
    - (i) oppressive or unfairly prejudicial to, or unfairly discriminatory against, one or more such creditors; or
    - (ii) contrary to the interests of the creditors of the company as a whole; or
  - (g) the deed should be terminated for some other reason.
- (2) An order may be made on the application of:
  - (a) a creditor of the company; or
  - (b) the company; or

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(c) any other interested person.

**445E Creditors may terminate deed and resolve that company be wound up**

Where:

- (a) at a meeting convened under section 445F, the company's creditors pass a resolution terminating the deed; and
- (b) the notice of the meeting set out a proposed resolution that the company be wound up;

the creditors may also resolve at the meeting that the company be wound up.

**445F Meeting of creditors to consider proposed variation or termination of deed**

- (1) The administrator of a deed of company arrangement:
  - (a) may at any time convene a meeting of the company's creditors; and
  - (b) must convene such a meeting if so requested in writing by creditors the value of whose claims against the company is not less than 10% of the value of all the creditors' claims against the company.
- (2) A meeting under this section must be convened by the deed's administrator:
  - (a) giving written notice of the meeting to as many of the company's creditors as reasonable practicable; and
  - (b) causing notice of the meeting to be published:
    - (i) in a national newspaper; or
    - (ii) in each jurisdiction in which the company has its registered office or carries on business, in a daily newspaper that circulates generally in that jurisdiction; at least 5 business days before the meeting.
- (3) The notice given to a creditor under paragraph (2)(a) must:

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- (a) set out each resolution (if any) under section 445A or paragraph 445C(b) that the deed's administrator proposes that the meeting vote on; and
  - (b) if the meeting is convened under paragraph (1)(b) of this section—set out each proposed resolution under section 445A or paragraph 445C(b) that is set out in the request.
- (4) At a meeting convened under this section, the deed's administrator is to preside.
- (5) A meeting convened under this section may be adjourned from time to time.

**445G When Court may void or validate deed**

- (1) Where there is doubt, on a specific ground, whether a deed of company arrangement was entered into in accordance with this Part or complies with this Part, the administrator of the deed, a member or creditor of the company, or the Commission, may apply to the Court for an order under this section.
- (2) On an application, the Court may make an order declaring the deed, or a provision of it, to be void or not to be void, as the case requires, on the ground specified in the application or some other ground.
- (3) On an application, the Court may declare the deed, or a provision of it, to be valid, despite a contravention of a provision of this Part, if the Court is satisfied that:
  - (a) the provision was substantially complied with; and
  - (b) no injustice will result for anyone bound by the deed if the contravention is disregarded.
- (4) Where the Court declares a provision of a deed of company arrangement to be void, the Court may by order vary the deed, but only with the consent of the deed's administrator.

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**445H Effect of termination or avoidance**

The termination or avoidance, in whole or in part, of a deed of company arrangement does not affect the previous operation of the deed.

## **Division 12—Transition to creditors' voluntary winding up**

### **446A Administrator becomes liquidator in certain cases**

- (1) This section applies if:
    - (a) the creditors of a company under administration resolve at a particular time under paragraph 439C(c) that the company be wound up; or
    - (b) a company under administration contravenes subsection 444B(2) at a particular time; or
    - (c) at a meeting convened under section 445F, a company's creditors:
      - (i) pass a resolution terminating a deed of company arrangement executed by the company; and
      - (ii) also resolve at a particular time under section 445E that the company be wound up.
  - (2) The company is taken:
    - (a) to have passed, at the time referred to in paragraph (1)(a) or (b) or subparagraph (1)(c)(ii), as the case may be, a special resolution under section 491 that the company be wound up voluntarily; and
    - (b) to have done so without a declaration having been made and lodged under section 494.
  - (3) Section 497 is taken to have been complied with in relation to the winding up.
  - (4) For the purposes of subsection 499(1):
    - (a) the company is taken to have nominated:
      - (i) if paragraph (1)(a) or (b) of this section applies—the administrator of the company; or
      - (ii) if paragraph (1)(c) of this section applies—the administrator of the deed;to be liquidator for the purposes of the winding up; and
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- (b) the creditors are taken not to have so nominated anyone.
- (5) The liquidator must:
  - (a) within 7 days after the day on which the company is taken to have passed the resolution, lodge a written notice stating that the company is taken because of this section to have passed such a resolution and specifying that day; and
  - (b) cause a notice of that kind to be published, within 21 days after that day:
    - (i) in a national newspaper; or
    - (ii) in each jurisdiction in which the company has its registered office or carries on business, in a daily newspaper that circulates generally in that jurisdiction.
- (6) Section 482 applies in relation to the winding up as if it were a winding up in insolvency or by the Court.

Note: Section 482 empowers the Court to stay or terminate a winding up and give consequential directions.
- (7) An application under section 482 as applying because of subsection (6) may be made:
  - (a) despite subsection 499(4), by the company pursuant to a resolution of the board; or
  - (b) by the liquidator; or
  - (c) by a creditor; or
  - (d) by a contributory.

**446B Regulations may provide for transition in other cases**

- (1) The regulations may prescribe cases where:
  - (a) a company under administration; or
  - (b) a company that has executed a deed of company arrangement (even if the deed has terminated);is taken to have passed a special resolution under section 491 that the company be wound up voluntarily.

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- (2) The regulations may provide for Part 5.5 to apply with prescribed modifications in cases prescribed for the purposes of subsection (1).
- (3) Without limiting subsection (2), the regulations may provide, in relation to such cases, for matters of a kind provided for by any of subsections 446A(2) to (7), inclusive.
- (4) Regulations in force for the purposes of this section have effect accordingly.

## **Division 13—Powers of Court**

### **447A General power to make orders**

- (1) The Court may make such order as it thinks appropriate about how this Part is to operate in relation to a particular company.
- (2) For example, if the Court is satisfied that the administration of a company should end:
  - (a) because the company is solvent; or
  - (b) because provisions of this Part are being abused; or
  - (c) for some other reason;the Court may order under subsection (1) that the administration is to end.
- (3) An order may be made subject to conditions.
- (4) An order may be made on the application of:
  - (a) the company; or
  - (b) a creditor of the company; or
  - (c) in the case of a company under administration—the administrator of the company; or
  - (d) in the case of a company that has executed a deed of company arrangement—the deed's administrator; or
  - (e) the Commission; or
  - (f) any other interested person.

### **447B Orders to protect creditors during administration**

- (1) On the application of the Commission, the Court may make such order as it thinks necessary to protect the interests of a company's creditors while the company is under administration.



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- (2) On the application of a creditor of a company, the Court may make such order as it thinks necessary to protect the creditor's interests while the company is under administration.
- (3) An order may be made subject to conditions.

**447C Court may declare whether administrator validly appointed**

- (1) If there is doubt, on a specific ground, about whether a purported appointment of a person as administrator of a company, or of a deed of company arrangement, is valid, the person, the company or any of the company's creditors may apply to the Court for an order under subsection (2).
- (2) On an application, the Court may make an order declaring whether or not the purported appointment was valid on the ground specified in the application or on some other ground.

**447D Administrator may seek directions**

- (1) The administrator of a company under administration, or of a deed of company arrangement, may apply to the Court for directions about a matter arising in connection with the performance or exercise of any of the administrator's functions and powers.
- (2) The administrator of a deed of company arrangement may apply to the Court for directions about a matter arising in connection with the operation of, or giving effect to, the deed.

**447E Supervision of administrator of company or deed**

- (1) Where the Court is satisfied that the administrator of a company under administration, or of a deed of company arrangement:
  - (a) has managed, or is managing, the company's business, property or affairs in a way that is prejudicial to the interests of some or all of the company's creditors or members; or

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- (b) has done an act, or made an omission, or proposes to do an act, or to make an omission, that is or would be prejudicial to such interests;  
the Court may make such order as it thinks just.
- (2) Where the Court is satisfied that:
  - (a) a company is under administration but:
    - (i) there is a vacancy in the office of administrator of the company; or
    - (ii) no administrator of the company is acting; or
  - (b) a deed of company arrangement has not yet terminated but:
    - (i) there is a vacancy in the office of administrator of the deed; or
    - (ii) no administrator of the deed is acting;the Court may make such order as it thinks just.
- (3) An order may only be made on the application of the Commission or of a creditor or member of the company.

**447F Effect of Division**

Nothing in this Division limits the generality of anything else in it.

## **Division 14—Qualifications of administrators**

### **448A Appointee must consent**

A person cannot be appointed as administrator of a company or of a deed of company arrangement unless:

- (a) the person has consented in writing to the appointment; and
- (b) as at the time of the appointment, the person has not withdrawn the consent.

### **448B Administrator must be registered liquidator**

A person must not consent to be appointed, and must not act, as administrator of a company or of a deed of company arrangement unless he or she is a registered liquidator.

### **448C Disqualification of person connected with company**

- (1) Subject to this section, a person must not, except with the leave of the Court, seek or consent to be appointed as, or act as, administrator of a company or of a deed of company arrangement if:
  - (a) the person, or a body corporate in which the person has a substantial holding, is indebted in an amount exceeding \$5,000 to the company or to a body corporate related to the company; or
  - (b) the person is, otherwise than in a capacity as administrator or liquidator of, or as administrator of a deed of company arrangement executed by, the company or a related body corporate, a creditor of the company or of a related body corporate in an amount exceeding \$5,000; or
  - (c) the person is an officer of the company (otherwise than because of being an administrator or liquidator of, or an administrator of a deed of company arrangement executed by, a body corporate related to the company); or

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- (d) the person is an officer of a body corporate that is a mortgagee of property of the company; or
  - (e) the person is an auditor of the company; or
  - (f) the person is a partner or employee of an auditor of the company; or
  - (g) the person is a partner, employer or employee of an officer of the company; or
  - (h) the person is a partner or employee of an employee of an officer of the company.
- (2) For the purposes of paragraph (1)(a), disregard a debt owed by a natural person to a body corporate if:
- (a) the body corporate is:
    - (i) an Australian ADI; or
    - (ii) a body corporate registered under the *Life Insurance Act 1995*; and
  - (b) the debt arose because of a loan that the body corporate or entity made to the person in the ordinary course of its ordinary business; and
  - (c) the person used the amount of the loan to pay the whole or part of the purchase price of premises that the person uses as their principal place of residence.
- (3) For the purposes of subsection (1), a person is taken to be an officer or auditor of a company if:
- (a) the person is an officer or auditor of the company or of a related body corporate; or
  - (b) except where the Commission, if it thinks fit in the circumstances of the case, directs that this paragraph not apply in relation to the person—the person has, within the last 2 years, been an officer, auditor or promoter of the company or of a related body corporate.

**448D Disqualification of insolvent under administration**

A person must not consent to be appointed, and must not act, as administrator of a company or of a deed of company arrangement if he or she is an insolvent under administration.

## Division 15—Removal, replacement and remuneration of administrator

### 449A Appointment of administrator cannot be revoked

The appointment of a person as administrator of a company or of a deed of company arrangement cannot be revoked.

### 449B Court may remove administrator

On the application of the Commission or of a creditor of the company concerned, the Court may:

- (a) remove from office the administrator of a company under administration or of a deed of company arrangement; and
- (b) appoint someone else as administrator of the company or deed.

### 449C Vacancy in office of administrator of company

- (1) Where the administrator of a company under administration:

- (a) dies; or
- (b) becomes prohibited from acting as administrator of the company; or
- (c) resigns by notice in writing given to his or her appointer and to the company;

his or her appointer may appoint someone else as administrator of the company.

- (2) In subsection (1):

***appointer***, in relation to the administrator of a company under administration, means:

- (a) if the administrator was appointed by the Court under section 449B or subsection (6) of this section—the Court; or
- (b) otherwise:

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- (i) if the administration began because of an appointment under section 436A—the company; or
  - (ii) if the administration began because of an appointment under section 436B—a liquidator or provisional liquidator of the company; or
  - (iii) if the administration began because of an appointment under section 436C—a person who is entitled, or would apart from section 440B or 441D be entitled, to enforce the charge.
- (3) An appointment under subsection (1) by the company under administration must be made pursuant to a resolution of the board.
- (4) Within 5 business days after being appointed under subsection (1) as administrator of a company otherwise than by the Court, a person must convene a meeting of the company's creditors so that they may:
- (a) determine whether to remove the person from office; and
  - (b) if so, appoint someone else as administrator of the company.
- (5) A person must convene a meeting under subsection (4) by:
- (a) giving written notice of the meeting to as many of the company's creditors as reasonably practicable; and
  - (b) causing notice of the meeting to be published:
    - (i) in a national newspaper; or
    - (ii) in each jurisdiction in which the company has its registered office or carries on business, in a daily newspaper that circulates generally in that jurisdiction;at least 2 business days before the meeting.
- (6) Where a company is under administration, but for some reason no administrator is acting, the Court may appoint a person as administrator on the application of the Commission or of an officer, member or creditor of the company.
- (7) Subsections (3) and (6) have effect despite section 437C.

**449D Vacancy in office of administrator of deed of company arrangement**

- (1) Where the administrator of a deed of company arrangement:
  - (a) dies; or
  - (b) becomes prohibited from acting as administrator of the deed; or
  - (c) resigns by notice in writing given to the company;the Court may appoint someone else as administrator of the deed.
- (2) Where a deed of company arrangement has not yet terminated, but for some reason no administrator of the deed is acting, the Court may appoint a person as administrator of the deed.
- (3) An appointment may be made on the application of the Commission or of an officer, member or creditor of the company.

**449E Remuneration of administrator**

- (1) The administrator of a company under administration, or of a deed of company arrangement, is entitled to:
  - (a) such remuneration as is fixed by a resolution of the company's creditors passed at a meeting convened under section 439A, or under section 439A or 445F, as the case may be; or
  - (b) if no remuneration is so fixed—such remuneration as the Court fixes on the application of the administrator.
- (2) Where remuneration is fixed under paragraph (1)(a), the Court may, on the application of the administrator or of an officer, member or creditor of the company:
  - (a) review the remuneration; and
  - (b) confirm, increase or reduce it.
- (3) Subsection (2) has effect despite section 437C.



## **Division 16—Notices about steps taken under Part**

### **450A Appointment of administrator**

- (1) Where an administrator of a company is appointed under section 436A, 436B or 436C, the administrator must:
  - (a) lodge a notice of the appointment before the end of the next business day after the appointment; and
  - (b) cause such a notice to be published, within 3 business days after the appointment:
    - (i) in a national newspaper; or
    - (ii) in each jurisdiction in which the company has its registered office or carries on business, in a daily newspaper that circulates generally in that jurisdiction.
- (2) As soon as practicable, and in any event before the end of the next business day, after appointing an administrator of a company under section 436C, a person must give to the company a written notice of the appointment.
- (3) As soon as practicable, and in any event before the end of the next business day, after an administrator of a company is appointed under section 436A, 436B or 436C, he or she must give a written notice of the appointment to:
  - (a) each person who holds a charge on the whole, or substantially the whole, of the company's property; and
  - (b) each person who holds 2 or more charges on property of the company where the property of the company subject to the respective charges together constitutes the whole, or substantially the whole, of the company's property.
- (4) An administrator need not give a notice under subsection (3) to the person who appointed the administrator.

### **450B Execution of deed of company arrangement**

As soon as practicable after a deed of company arrangement is executed, the deed's administrator must:

- (a) send to each creditor of the company a written notice of the execution of the deed; and
- (b) cause such a notice to be published:
  - (i) in a national newspaper; or
  - (ii) in each jurisdiction in which the company has its registered office or carries on business, in a daily newspaper that circulates generally in that jurisdiction; and
- (c) lodge a copy of the deed.

### **450C Failure to execute deed of company arrangement**

As soon as practicable after a company contravenes subsection 444B(2), the deed's administrator must:

- (a) lodge a notice that the company has failed to execute the instrument within the required period; and
- (b) cause a notice of the failure to be published as prescribed.

### **450D Termination of deed of company arrangement**

Where a deed of company arrangement terminates because of paragraph 445C(b), the deed's administrator must:

- (a) lodge a notice of the termination; and
- (b) send such a notice to each of the company's creditors; and
- (c) cause such a notice to be published as prescribed.

### **450E Notice in public documents etc. of company**

- (1) A company under administration must set out, in every public document, and in every negotiable instrument, of the company, after the company's name where it first appears, the expression "(administrator appointed)".

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- (2) Until a deed of company arrangement terminates, the company must set out, in every public document, and in every negotiable instrument, of the company, after the company's name where it first appears, the expression "(subject to deed of company arrangement)".

**450F Effect of contravention of this Division**

A contravention of this Division does not affect the validity of anything done or omitted under this Part, except so far as the Court otherwise orders.

## Division 17—Miscellaneous

### 451A Appointment of 2 or more administrators of company

- (1) Where a provision of this Law provides for an administrator of a company to be appointed, 2 or more persons may be appointed as administrators of the company.
- (2) Where, because of subsection (1), there are 2 or more administrators of a company:
  - (a) a function or power of an administrator of the company may be performed or exercised by any one of them, or by any 2 or more of them together, except so far as the instrument or resolution appointing them otherwise provides; and
  - (b) a reference in this Law to an administrator, or to the administrator, of a company is, in the case of the first-mentioned company, a reference to whichever one or more of those administrators the case requires.

### 451B Appointment of 2 or more administrators of deed of company arrangement

- (1) Where a provision of this Law provides for an administrator of a deed of company arrangement to be appointed, 2 or more persons may be appointed as administrators of the deed.
- (2) Where, because of subsection (1), there are 2 or more administrators of a deed of company arrangement:
  - (a) a function or power of an administrator of the deed may be performed or exercised by any one of them, or by any 2 or more of them together, except so far as the deed, or the resolution or instrument appointing them, otherwise provides; and
  - (b) a reference in this Law to an administrator, or to the administrator, of a deed of company arrangement is, in the

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case of the first-mentioned deed, a reference to whichever one or more of those administrators the case requires.

**451C Effect of things done during administration of company**

A payment made, transaction entered into, or any other act or thing done, in good faith, by, or with the consent of, the administrator of a company under administration:

- (a) is valid and effectual for the purposes of this Law; and
- (b) is not liable to be set aside in a winding up of the company.

**451D Time for doing act does not run while act prevented by this Part**

Where:

- (a) for any purpose (for example, the purposes of a law, agreement or instrument) an act must or may be done within a particular period or before a particular time; and
- (b) this Part prevents the act from being done within that period or before that time;

the period is extended, or the time is deferred, because of this section, according to how long this Part prevented the act from being done.