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Corporations Bill 2001 Volume 1

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(Treasury)

**A Bill for an Act to make provision in relation to
corporations, securities, the futures industry and
financial products and services, and for other
purposes**

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A Bill for an Act to make provision in relation to corporations, securities, the futures industry and financial products and services, and for other purposes

The Parliament of Australia enacts:

Chapter 1—Introductory

Part 1.1—Preliminary

1 Short title

This Act may be cited as the *Corporations Act 2001*.

2 Commencement

This Act commences on a day to be fixed by Proclamation.

3 Constitutional basis for this Act

- (1) The operation of this Act in the referring States is based on:
 - (a) the legislative powers that the Commonwealth Parliament has under section 51 of the Constitution (other than paragraph 51(xxxvii)); and
 - (b) the legislative powers that the Commonwealth Parliament has in respect of matters to which this Act relates because those matters are referred to it by the Parliaments of the referring States under paragraph 51(xxxvii) of the Constitution.

Note: The State referrals fully supplement the Commonwealth Parliament's other powers by referring the matters to the Commonwealth Parliament to the extent to which they are not otherwise included in the legislative powers of the Commonwealth Parliament.

- (2) The operation of this Act in the Northern Territory and the Capital Territory is based on:
 - (a) the legislative powers that the Commonwealth Parliament has under section 122 of the Constitution to make laws for the government of those Territories; and
 - (b) the legislative powers that the Commonwealth Parliament has under section 51 of the Constitution.

Despite subsection 22(3) of the *Acts Interpretation Act 1901*, this Act as applying in those territories is a law of the Commonwealth.

- (3) The operation of this Act outside Australia is based on:
 - (a) the legislative power the Commonwealth Parliament has under paragraph 51(xxix) of the Constitution; and
 - (b) the other legislative powers that the Commonwealth Parliament has under section 51 of the Constitution; and
 - (c) the legislative powers that the Commonwealth Parliament has under section 122 of the Constitution to make laws for the government of those Territories.
- (4) The operation of this Act in a State that is not a referring State is based on:

- (a) the legislative powers that the Commonwealth Parliament has under section 51 (other than paragraph 51(xxxvii)) and section 122 of the Constitution; and
- (b) the legislative powers that the Commonwealth Parliament has in respect of matters to which this Act relates because those matters are referred to it by the Parliaments of the referring States under paragraph 51(xxxvii) of the Constitution.

4 Referring States

Reference of matters by State Parliament to Commonwealth Parliament

- (1) A State is a **referring State** if the Parliament of the State has referred the matters covered by subsections (4) and (5) to the Parliament of the Commonwealth for the purposes of paragraph 51(xxxvii) of the Constitution:
 - (a) if and to the extent that the matters are not otherwise included in the legislative powers of the Parliament of the Commonwealth (otherwise than by a reference under paragraph 51(xxxvii) of the Constitution); and
 - (b) if and to the extent to which the matters are included in the legislative powers of the Parliament of the State.This subsection has effect subject to subsections (6) and (7).
- (2) A State is a **referring State** even if the State reference Act includes a provision to the effect that nothing in the State reference Act is intended to enable the making of laws pursuant to the amendment reference with the sole or main underlying purpose or object of regulating industrial relations matters even if, but for that provision in the State reference Act, the law would be a law with respect to a matter referred to the Parliament of the Commonwealth by the amendment reference.
- (3) A State is a **referring State** even if a law of the State provides that the reference to the Commonwealth Parliament of either or both of the matters covered by subsections (4) and (5) is to terminate in particular circumstances.

Reference covering initial Corporations Act and ASIC Act

- (4) This subsection covers the matters to which the referred provisions relate to the extent of making laws with respect to those matters by including the referred provisions in the initial Corporations Act and the initial ASIC Act.

Reference covering amendments of this Act and ASIC Act

- (5) This subsection covers the matters of the formation of corporations, corporate regulation and the regulation of financial products and services to the extent of the making of laws with respect to those matters by making express amendments of this Act or the ASIC Act.

Effect of termination of reference

- (6) A State ceases to be a **referring State** if the State's initial reference terminates.
- (7) A State ceases to be a **referring State** if:
- (a) the State's amendment reference terminates; and
 - (b) subsection (8) does not apply to the termination.
- (8) A State does not cease to be a **referring State** because of the termination of its amendment reference if:
- (a) the termination is effected by the Governor of that State fixing a day by proclamation as the day on which the reference terminates; and
 - (b) the day fixed is no earlier than the first day after the end of the period of 6 months beginning on the day on which the proclamation is published; and
 - (c) that State's amendment reference, and the amendment reference of every other State, terminates on the same day.

Definitions

- (9) In this section:

amendment reference of a State means the reference by the Parliament of the State to the Parliament of the Commonwealth of the matters covered by subsection (5).

express amendment of this Act or the ASIC Act means the direct amendment of the text of this Act or the ASIC Act (whether by the insertion, omission, repeal, substitution or relocation of words or matter) by Commonwealth Acts, but does not include the enactment by a Commonwealth Act of a provision that has, or will have, substantive effect otherwise than as part of the text of this Act or the ASIC Act.

initial ASIC Act means the ASIC Act as originally enacted.

initial Corporations Act means this Act as originally enacted.

initial reference of a State means the reference by the Parliament of the State to the Parliament of the Commonwealth of the matters covered by subsection (4).

referred provisions means:

- (a) the initial Corporations Act; and
- (b) the initial ASIC Act;

to the extent to which they deal with matters that are included in the legislative powers of the Parliaments of the States.

State reference Act for a State is the law under which the initial reference and the amendment reference are given.

5 General territorial application of Act

Geographical coverage of “this jurisdiction”

- (1) Section 9 defines ***this jurisdiction*** as the area that includes:
 - (a) each referring State (including its coastal sea); and
 - (b) the Capital Territory (including the coastal sea of the Jervis Bay Territory); and
 - (c) the Northern Territory (including its coastal sea).
- (2) ***This jurisdiction*** therefore consists of:
 - (a) the whole of Australia if all the States are referring States; or
 - (b) Australia (other than any State that is not a referring State) if one or more States are not referring States.

Chapters 1 to 6C, Chapter 9 and Chapter 10

- (3) Chapters 1 to 6C, inclusive, Chapter 9 and Chapter 10, apply in this jurisdiction.

- (4) Subject to subsection (8), Chapters 1 to 6C, inclusive, Chapter 9 and Chapter 10, also apply, according to their tenor, in relation to acts and omissions outside this jurisdiction.

Chapters 6D, 7 and 8

- (5) Chapter 6D (fundraising), Chapter 7 (securities) and Chapter 8 (futures) apply in this jurisdiction.
- (6) Subject to subsection (8), some provisions of Chapters 6D, 7 and 8 also apply in relation to acts and omissions outside this jurisdiction.

Note: The following provisions provide for such extended operation:

- (a) section 766I;
- (b) subsection 775(1A);
- (c) sections 819 and 820;
- (d) subsection 855(1);
- (e) section 865A;
- (f) subsections 920(3) and (5);
- (g) subsection 962(2);
- (h) section 1002;
- (i) section 1112A;
- (j) subsection 1184(1);
- (k) subsection 1185(1);
- (l) subsections 1209(3) and (4);
- (m) subsection 1212(1);
- (n) sections 1259, 1260, 1261 and 1263.

Residence, place of formation etc.

- (7) This Act applies according to its tenor to:
- (a) natural persons whether:
 - (i) resident in this jurisdiction or not; and
 - (ii) resident in Australia or not; and
 - (iii) Australian citizens or not; and
 - (b) all bodies corporate and unincorporated bodies whether:
 - (i) formed or carrying on business in this jurisdiction or not; and
 - (ii) formed or carrying on business in Australia or not.

Note: Paragraph (b)—many of the provisions in this Act apply only in relation to companies (that is, to companies that are registered under this Act).

Operation in non-referring States

- (8) This Act does not apply to an act or omission in a State that is not a referring State to the extent to which that application would be beyond the legislative powers of the Parliament (including powers it has under paragraphs 51(xxxvii) and (xxxix) of the Constitution).

5A Application to the Crown

- (1) To avoid doubt, a reference in this section to the Crown in a particular right includes a reference to an instrumentality or agency (whether a body corporate or not) of the Crown in that right.
- (2) Chapter 5 (except Part 5.8) binds the Crown in right of the Commonwealth, of each of the States, of the Capital Territory, of the Northern Territory and of Norfolk Island.
- (3) Chapters 6, 6A, 6B, 6C and 6D:
- (a) bind the Crown in right of the Commonwealth; and
 - (b) do not bind the Crown in right of any State, of the Capital Territory, of the Northern Territory or of Norfolk Island.
- (4) To avoid doubt, Chapter 7 does not bind the Crown in right of the Commonwealth, of any State, of the Capital Territory, of the Northern Territory or of Norfolk Island.
- (5) Nothing in this Act renders the Crown in any right liable to be prosecuted for an offence.

5B ASIC has general administration of this Act

Subject to the ASIC Act, ASIC has the general administration of this Act.

5C Application of Acts *Interpretation Act 1901*

- (1) The *Acts Interpretation Act 1901* as in force on 1 November 2000 applies to this Act.
- (2) Amendments of the *Acts Interpretation Act 1901* made after 1 November 2000 do not apply to this Act.

Part 1.1A—Interaction between Corporations legislation and State and Territory laws

5D Coverage of Part

- (1) This Part applies only to laws of a State or Territory that is in this jurisdiction.
- (2) This Part applies only to the following Corporations legislation:
 - (a) this Act (including the regulations made under this Act); and
 - (b) Part 3 of the ASIC Act; and
 - (c) regulations made under the ASIC Act for the purposes of Part 3 of that Act.
- (3) This Part does not apply to Part 3 of the ASIC Act, or regulations made under that Act for the purposes of Part 3 of that Act, to the extent to which they operate in relation to a contravention of Division 2 of Part 2 of that Act.

5E Concurrent operation intended

- (1) The Corporations legislation is not intended to exclude or limit the concurrent operation of any law of a State or Territory.
- (2) Without limiting subsection (1), the Corporations legislation is not intended to exclude or limit the concurrent operation of a law of a State or Territory that:
 - (a) imposes additional obligations or liabilities (whether criminal or civil) on:
 - (i) a director or other officer of a company or other corporation; or
 - (ii) a company or other body; or
 - (b) confers additional powers on:
 - (i) a director or other officer of a company or other corporation; or
 - (ii) a company or other body; or
 - (c) provides for the formation of a body corporate; or
 - (d) imposes additional limits on the interests a person may hold or acquire in a company or other body; or

- (e) prevents a person from:
 - (i) being a director of; or
 - (ii) being involved in the management or control of;
a company or other body; or
- (f) requires a company:
 - (i) to have a constitution; or
 - (ii) to have particular rules in its constitution.

Note: Paragraph (a)—this includes imposing additional reporting obligations on a company or other body.

- (3) Without limiting subsection (2), a reference in that subsection to a law of a State or Territory imposing obligations or liabilities, or conferring powers, includes a reference to a law of a State or Territory imposing obligations or liabilities, or conferring powers, by reference to the State or Territory in which a company is taken to be registered.
- (4) This section does not apply to the law of the State or Territory if there is a direct inconsistency between the Corporations legislation and that law.

Note: Section 5G prevents direct inconsistencies arising in some cases by limiting the operation of the Corporations legislation.

- (5) If:
 - (a) an act or omission of a person is both an offence against the Corporations legislation and an offence under the law of a State or Territory; and
 - (b) the person is convicted of either of those offences;the person is not liable to be convicted of the other of those offences.

5F Corporations legislation does not apply to matters declared by State or Territory law to be an excluded matter

- (1) Subsection (2) applies if a provision of a law of a State or Territory declares a matter to be an excluded matter for the purposes of this section in relation to:
 - (a) the whole of the Corporations legislation; or
 - (b) a specified provision of the Corporations legislation; or
 - (c) the Corporations legislation other than a specified provision;or

- (d) the Corporations legislation otherwise than to a specified extent.
- (2) By force of this subsection:
- (a) none of the provisions of the Corporations legislation (other than this section) applies in the State or Territory in relation to the matter if the declaration is one to which paragraph (1)(a) applies; and
 - (b) the specified provision of the Corporations legislation does not apply in the State or Territory in relation to the matter if the declaration is one to which paragraph (1)(b) applies; and
 - (c) the provisions of the Corporations legislation (other than this section and the specified provisions) do not apply in the State or Territory in relation to the matter if the declaration is one to which paragraph (1)(c) applies; and
 - (d) the provisions of the Corporations legislation (other than this section and otherwise than to the specified extent) do not apply in the State or Territory in relation to the matter if the declaration is one to which paragraph (1)(d) applies.
- (3) Subsection (2) does not apply to the declaration to the extent to which the regulations provide that that subsection does not apply to that declaration.
- (4) By force of this subsection, if:
- (a) the Corporations Law, ASC Law or ASIC Law of a State or Territory; or
 - (b) a provision of that Law;
- did not apply to a matter immediately before this Act commenced because a provision of a law of the State or Territory provided that that Law, or that provision, did not apply to the matter, the Corporations legislation, or the provision of the Corporations legislation that corresponds to that provision of that Law, does not apply in the State or Territory to the matter until that law of the State or Territory is omitted or repealed.
- (5) Subsection (4) does not apply to the application of the provisions of the Corporations legislation to the matter to the extent to which the regulations provide that that subsection does not apply to the matter.
- (6) In this section:

matter includes act, omission, body, person or thing.

5G Avoiding direct inconsistency arising between the Corporations legislation and State and Territory laws

Section overrides other provisions of the Corporations legislation

- (1) This section has effect despite anything else in the Corporations legislation.

Section does not deal with provisions capable of concurrent operation

- (2) This section does not apply to a provision of a law of a State or Territory that is capable of concurrent operation with the Corporations legislation.

Note: This kind of provision is dealt with by section 5E.

When this section applies to a provision of a State or Territory law

- (3) This section applies to the interaction between:
 - (a) a provision of a law of a State or Territory (the ***State provision***); and
 - (b) a provision of the Corporations legislation (the ***Commonwealth provision***);

only if the State provision meets the conditions set out in the following table:

Conditions to be met before section applies [operative]

Item	Kind of provision	Conditions to be met
1	a pre-commencement (commenced) provision	<p>(a) the State provision operated, immediately before this Act commenced, despite the provision of:</p> <ul style="list-style-type: none"> (i) the Corporations Law of the State or Territory (as in force at that time); or (ii) the ASC or ASIC Law of the State or Territory (as in force at that time); <p>that corresponds to the Commonwealth provision; and</p> <p>(b) the State provision is not declared to be one that this section does not apply to (either generally or specifically in relation to the Commonwealth provision) by:</p> <ul style="list-style-type: none"> (i) regulations made under this Act; or (ii) a law of the State or Territory.
2	a pre-commencement (enacted) provision	<p>(a) the State provision would have operated, immediately before this Act commenced, despite the provision of:</p> <ul style="list-style-type: none"> (i) the Corporations Law of the State or Territory (as in force at that time); or (ii) the ASC or ASIC Law of the State or Territory (as in force at that time); <p>that corresponds to the Commonwealth provision if the State provision had commenced before the commencement of this Act; and</p> <p>(b) the State provision is not declared to be one that this section does not apply to (either generally or specifically in relation to the Commonwealth provision) by:</p> <ul style="list-style-type: none"> (i) regulations made under this Act; or (ii) a law of the State or Territory.
3	a post-commencement provision	<p>the State provision is declared by a law of the State or Territory to be a Corporations legislation displacement provision for the purposes of this section (either generally or specifically in relation to the Commonwealth provision)</p>

Conditions to be met before section applies [operative]

Item	Kind of provision	Conditions to be met
4	a provision that is materially amended on or after this Act commenced if the amendment was enacted before this Act commenced	(a) the State provision as amended would have operated, immediately before this Act commenced, despite the provision of: <ul style="list-style-type: none"> (i) the Corporations Law of the State or Territory (as in force at that time); or (ii) the ASC or ASIC Law of the State or Territory (as in force at that time); that corresponds to the Commonwealth provision if the amendment had commenced before the commencement of this Act; and (b) the State provision is not declared to be one that this section does not apply to (either generally or specifically in relation to the Commonwealth provision) by: <ul style="list-style-type: none"> (i) regulations made under this Act; or (ii) a law of the State or Territory.
5	a provision that is materially amended on or after this Act commenced if the amendment is enacted on or after this Act commenced	the State provision as amended is declared by a law of the State or Territory to be a Corporations legislation displacement provision for the purposes of this section (either generally or specifically in relation to the Commonwealth provision)

Note 1: Item 1—subsection (12) tells you when a provision is a pre-commencement (commenced) provision.

Note 2: Item 1 paragraph (a)—For example, a State or Territory provision enacted after the commencement of the Corporations Law might not have operated despite the Corporations Law if it was not expressly provided that the provision was to operate despite a specified provision, or despite any provision, of the Corporations Law (see, for example, section 5 of the Corporations (New South Wales) Act 1990).

Note 3: Item 2—subsection (13) tells you when a provision is a pre-commencement (enacted) provision.

Note 4: Item 3—subsection (14) tells you when a provision is a post-commencement provision.

Note 5: Subsections (15) to (17) tell you when a provision is materially amended after commencement.

State and Territory laws specifically authorising or requiring act or thing to be done

- (4) A provision of the Corporations legislation does not:
- (a) prohibit the doing of an act; or

(b) impose a liability (whether civil or criminal) for doing an act; if a provision of a law of a State or Territory specifically authorises or requires the doing of that act.

Instructions given to directors under State and Territory laws

- (5) If a provision of a law of a State or Territory specifically:
- (a) authorises a person to give instructions to the directors or other officers of a company or body; or
 - (b) requires the directors of a company or body to:
 - (i) comply with instructions given by a person; or
 - (ii) have regard to matters communicated to the company or body by a person; or
 - (c) provides that a company or body is subject to the control or direction of a person;
- a provision of the Corporations legislation does not:
- (d) prevent the person from giving an instruction to the directors or exercising control or direction over the company or body; or
 - (e) without limiting subsection (4):
 - (i) prohibit a director from complying with the instruction or direction; or
 - (ii) impose a liability (whether civil or criminal) on a director for complying with the instruction or direction.

The person is not taken to be a director of a company or body for the purposes of the Corporations legislation merely because the directors of the company or body are accustomed to act in accordance with the person's instructions.

Use of names authorised by State and Territory laws

- (6) The provisions of Part 2B.6 and Part 5B.3 of this Act do not:
- (a) prohibit a company or other body from using a name if the use of the name is expressly provided for, or authorised by, a provision of a law of a State or Territory; or
 - (b) require a company or other body to use a word as part of its name if the company or body is expressly authorised not to use that word by a provision of a law of a State or Territory.

Meetings held in accordance with requirements of State and Territory laws

- (7) The provisions of Chapter 2G of this Act do not apply to the calling or conduct of a meeting of a company to the extent to which the meeting is called or conducted in accordance with a provision of a law of a State or Territory. Any resolutions passed at the meeting are as valid as if the meeting had been called and conducted in accordance with this Act.

External administration under State and Territory laws

- (8) The provisions of Chapter 5 of this Act do not apply to a scheme of arrangement, receivership, winding up or other external administration of a company to the extent to which the scheme, receivership, winding up or administration is carried out in accordance with a provision of a law of a State or Territory.

State and Territory laws dealing with company constitutions

- (9) If a provision of a law of a State or Territory provides that a provision is included, or taken to be included, in a company's constitution, the provision is included in the company's constitution even though the procedures and other requirements of this Act are not complied with in relation to the provision.
- (10) If a provision of a law of a State or Territory provides that additional requirements must be met for an alteration of a company's constitution to take effect, the alteration does not take effect unless those requirements are met.

Other cases

- (11) A provision of the Corporations legislation does not operate in a State or Territory to the extent necessary to ensure that no inconsistency arises between:
- (a) the provision of the Corporations legislation; and
 - (b) a provision of a law of the State or Territory that would, but for this subsection, be inconsistent with the provision of the Corporations legislation.

Note 1: A provision of the State or Territory law is not covered by this subsection if one of the earlier subsections in this section applies to the provision: if one of those subsections applies there would be no potential inconsistency to be dealt with by this subsection.

Note 2: The operation of the provision of the State or Territory law will be supported by section 5E to the extent to which it can operate concurrently with the provision of the Corporations legislation.

Pre-commencement (commenced) provision

- (12) A provision of a law of a State or Territory is a ***pre-commencement (commenced) provision*** if it:
- (a) is enacted, and comes into force, before the commencement of this Act; and
 - (b) is not a provision that has been materially amended after commencement (see subsections (15) to (17)).

Pre-commencement (enacted) provision

- (13) A provision of a law of a State or Territory is a ***pre-commencement (enacted) provision*** if it:
- (a) is enacted before, but comes into force on or after, the commencement of this Act; and
 - (b) is not a provision that has been materially amended after commencement (see subsections (15) to (17)).

Post-commencement provision

- (14) A provision of a law of a State or Territory is a ***post-commencement provision*** if it:
- (a) is enacted, and comes into force, on or after the commencement of this Act; and
 - (b) is not a provision that has been materially amended after commencement (see subsections (15) to (17)).

Provision materially amended after commencement

- (15) A provision of a law of a State or Territory is ***materially amended after commencement*** if:
- (a) an amendment of the provision commences on or after the commencement of this Act; and
 - (b) neither subsection (16) nor subsection (17) applies to the amendment.
- (16) A provision of a law of a State or Territory is not ***materially amended after commencement*** under subsection (15) if the amendment merely:
- (a) changes:

- (i) a reference to the Corporations Law or the ASC or ASIC Law, or the Corporations Law or the ASC or ASIC Law of a State or Territory, to a reference to the Corporations Act or the ASIC Act; or
 - (ii) a reference to a provision of the Corporations Law or the ASC or ASIC Law, or the Corporations Law or ASC or ASIC Law of a State or Territory, to a reference to a provision of the Corporations Act or the ASIC Act; or
 - (iii) a penalty for a contravention of a provision of a law of a State or Territory; or
 - (iv) a reference to a particular person or body to a reference to another person or body; or
 - (b) adds a condition that must be met before a right is conferred, an obligation imposed or a power conferred; or
 - (c) adds criteria to be taken into account before a power is exercised; or
 - (d) amends the provision in way declared by the regulations to not constitute a material amendment for the purposes of this subsection.
- (17) A provision of a law of a State or Territory is not *materially amended after commencement* under subsection (15) if:
- (a) the provision as amended would be inconsistent with a provision of the Corporations legislation but for this section; and
 - (b) the amendment would not materially reduce the range of persons, acts and circumstances to which the provision of the Corporations legislation applies if this section applied to the provision of the State or Territory law as amended.

5H Registration of body as company on basis of State or Territory law

- (1) A body is taken to be registered under this Act as a company of a particular type under section 118 if a law of a State or Territory in this jurisdiction:
- (a) provides that the body is a deemed registration company for the purposes of this section; and
 - (b) specifies:

- (i) the day on which the body is to be taken to be registered (the *registration day*) or the manner in which that day is to be fixed; and
- (ii) the type of company the body is to be registered as under this Act;
- (iii) the company's proposed name (unless the ACN is to be used in its name);

and subsections (2) and (3) are satisfied.

(2) A notice setting out the following details must be lodged before the registration day:

- (a) the name and address of each person who is to be a member on registration;
- (b) the present given and family name, all former given and family names and the date and place of birth of each person who is to be a director on registration;
- (c) 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;
- (d) the address of each person who is to be a director or company secretary on registration;
- (e) the address of the company's proposed registered office;
- (f) for a public company—the proposed opening hours of its registered office (if they are not the standard opening hours);
- (g) the address of the company's proposed principal place of business (if it is not the address of the proposed registered office);
- (h) 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;
- (i) 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;

(j) for a company limited by guarantee—the proposed amount of the guarantee that each member agrees to in writing.

(3) If the company:

(a) is to be a public company; and

(b) is to have a constitution on registration;

a copy of the constitution must be lodged before the registration day.

(4) On the registration day, the body is taken:

(a) to be registered as a company under this Act; and

(b) to be registered in the State or Territory referred to in subsection (1).

(5) The regulations may modify the operation of this Act to facilitate the registration of the company.

(6) Without limiting subsection (5), the regulations may make provision in relation to:

(a) the share capital of the company on registration; and

(b) the issue of a certificate of registration on the basis of the company's registration.

5I Regulations may modify operation of the Corporations legislation to deal with interaction between that legislation and State and Territory laws

(1) The regulations may modify the operation of the Corporations legislation so that:

(a) provisions of the Corporations legislation do not apply to a matter that is dealt with by a law of a State or Territory specified in the regulations; or

(b) no inconsistency arises between the operation of a provision of the Corporations legislation and the operation of a provision of a State or Territory law specified in the regulations.

(2) Without limiting subsection (1), regulations made for the purposes of that subsection may provide that the provision of the Corporations legislation:

- (a) does not apply to:
 - (i) a person specified in the regulations; or
 - (ii) a body specified in the regulations; or
 - (iii) circumstances specified in the regulations; or
 - (iv) a person or body specified in the regulations in the circumstances specified in the regulations; or
 - (b) does not prohibit an act to the extent to which the prohibition would otherwise give rise to an inconsistency with the State or Territory law; or
 - (c) does not require a person to do an act to the extent to which the requirement would otherwise give rise to an inconsistency with the State or Territory law; or
 - (d) does not authorise a person to do an act to the extent to which the conferral of that authority on the person would otherwise give rise to an inconsistency with the State or Territory law; or
 - (e) does not impose an obligation on a person to the extent to which complying with that obligation would require the person to not comply with an obligation imposed on the person under the State or Territory law; or
 - (f) authorises a person to do something for the purposes of the Corporations legislation that the person:
 - (i) is authorised to do under the State or Territory law; and
 - (ii) would not otherwise be authorised to do under the Corporations legislation; or
 - (g) will be taken to be satisfied if the State or Territory law is satisfied.
- (3) In this section:

matter includes act, omission, body, person or thing.

Part 1.2—Interpretation

Division 1—General

6 Effect of this Part

- (1) The provisions of this Part have effect for the purposes of this Act, except so far as the contrary intention appears in this Act.
- (2) This Part applies for the purposes of:
 - (a) Part 5.7; and
 - (b) Chapter 5 as applying by virtue of Part 5.7; and
 - (c) Part 9.2;as if a reference in this Part to a person or to a body corporate included a reference to a Part 5.7 body.
- (3) This Part applies for the purposes of Chapter 6 as if a reference in this Part to a body corporate included a reference to a Chapter 6 body.
- (4) Where, because of Part 11.2, provisions of this Act, as in force at a particular time, continue to apply:
 - (a) in relation to someone or something; or
 - (b) for particular purposes;then, for the purposes of those provisions as so applying:
 - (c) this Part as in force at that time continues to have effect; and
 - (d) this Part as in force at a later time does not have effect.

7 Location of other interpretation provisions

- (1) Most of the interpretation provisions for this Act are in this Part.
- (2) However, interpretation provisions relevant only to Chapters 6, 7 and 8, respectively, are to be found at the beginning of those Chapters.
- (3) Also, interpretation provisions relevant to a particular Part, Division or Subdivision may be found at the beginning of that Part, Division or Subdivision.
- (4) Occasionally, an individual section contains its own interpretation provisions, not necessarily at the beginning.

9 Dictionary

Unless the contrary intention appears:

AASB means the Australian Accounting Standards Board.

accounting standard means:

- (a) an instrument in force under section 334; or
- (b) a provision of such an instrument as it so has effect.

ACN (short for “Australian Company Number”) is the number given by ASIC to a company on registration (see sections 118 and 601BD).

acquire:

- (a) in relation to a futures contract—has the meaning given by sections 23, 26, 27 and 28; and
- (b) in relation to shares—has, in Chapter 7, the meaning given by section 51.

act includes thing.

adjustment agreement means a standardised agreement the effect of which is that:

- (a) a particular person will either be under a Chapter 8 obligation to pay, or will have a Chapter 8 right to receive, an amount of money; and
- (b) whether the person will be under such an obligation to pay, or will have such a right to receive, the amount of money will depend on a particular state of affairs existing at a particular future time, including, without limiting the generality of the foregoing, a state of affairs that relates to fluctuations in the value or price of a commodity or other property, or in an index or other factor; and
- (c) the amount of money will be calculated in a particular manner by reference to that state of affairs;

whether or not the agreement has any other effect or is capable of being varied or discharged before that future time.

administration, in relation to a company, has the meaning given by:

- (a) section 435C; and
- (b) section 1381.

administrator:

- (a) in relation to a body corporate but not in relation to a deed of company arrangement:
 - (i) means an administrator of the body or entity appointed under Part 5.3A; and
 - (ii) has a meaning affected by section 1381; and
 - (iii) if 2 or more persons are appointed under that Part as administrators of the body or entity—has a meaning affected by paragraph 451A(2)(b); or
- (b) in relation to a deed of company arrangement:
 - (i) means an administrator of the deed appointed under Part 5.3A; and
 - (ii) if 2 or more persons are appointed under that Part as administrators of the deed—has a meaning affected by paragraph 451B(2)(b).

admit to quotation: securities are ***admitted to quotation*** on a stock market of a securities exchange if the exchange has given unconditional permission for quotation of the securities on the stock market.

Advisory Committee means the Companies and Securities Advisory Committee.

affairs, in relation to a body corporate, has, in the provisions referred to in section 53, a meaning affected by that section.

affidavit includes affirmation.

agency means an agency, authority, body or person.

AGM means an annual general meeting of a company that section 250N requires to be held.

agreement means:

- (a) in Chapter 6 or 7—a relevant agreement; or
- (b) in Chapter 8—a Chapter 8 agreement.

amount includes a nil amount and zero.

ancillary offence, in relation to another offence, means an offence against:

- (a) section 5, 6, 7 or 7A of the *Crimes Act 1914*; or

(b) subsection 86(1) of that Act by virtue of paragraph 86(1)(a) of that Act;
being an offence that is related to that other offence.

annual return:

- (a) of a company—means the return that subsection 345(1) requires the company to lodge with ASIC; and
- (b) of a registered managed investment scheme—means the return that subsection 345(2) requires the responsible entity of the scheme to lodge with ASIC.

appropriate dealer for a market bid means a member of the relevant securities exchange.

approved foreign bank, in relation to a member of a futures organisation, means a bank, established by or under the law of a foreign country, in relation to which there is in force an approval given by the futures organisation in accordance with its business rules (within the meaning of Chapter 8).

approved securities organisation means a body corporate in relation to which an approval under section 770 is in force.

APRA means the Australian Prudential Regulation Authority.

arbitrage transaction means a purchase or sale of securities effected in the ordinary course of trading on a stock market together with an offsetting sale or purchase of those securities effected at the same time, or at as nearly the same time as practicable, in the ordinary course of trading on another stock market for the purpose of obtaining a profit from the difference between the prices of those securities in the 2 stock markets.

ARBN (short for “Australian Registered Body Number”) is the number given by ASIC to a registrable body on registration under Part 5B.2.

arrangement, in Part 5.1, includes a reorganisation of the share capital of a body corporate by the consolidation of shares of different classes, by the division of shares into shares of different classes, or by both of those methods.

ARSN (short for “Australian Registered Scheme Number”) is the number given by ASIC to a registered scheme on registration (see section 601EB).

ASIC means the Australian Securities and Investments Commission.

ASIC Act means the *Australian Securities and Investments Commission Act 2001* and includes the regulations made under that Act.

ASIC database means so much of the national companies database kept by ASIC as consists of:

- (a) some or all of a register kept by ASIC under this Act; or
 - (b) information set out in a document lodged under this Act;
- but does not include ASIC's document imaging system.

assets means:

- (a) in relation to the holder of a futures brokers licence—all the assets of the holder, whether or not used in connection with a business of dealing in futures contracts; and
- (b) in relation to the holder of a dealers licence—all the assets of the holder, whether or not used in connection with a securities business.

associate: the following are the associates of a bidder making a takeover offer, a substantial holder or a 90% holder:

- (a) if the bidder or holder is a body corporate:
 - (i) a body corporate it controls; or
 - (ii) a body corporate that controls it; or
 - (iii) a body corporate that is controlled by an entity that controls it;
- (b) a person with whom the bidder or holder has, or proposes to enter into, a relevant agreement for the purpose of controlling or influencing the composition of the body's board or the conduct of the body's affairs;
- (c) a person with whom the bidder or holder is acting, or proposes to act, in concert in relation to the body's affairs.

Otherwise a person's associates are determined under sections 10 to 17.

ASX means Australian Stock Exchange Limited.

Australia, when used in a geographical sense, does not include an external Territory.

Note: Paragraph 17(a) of the *Acts Interpretation Act 1901* would otherwise provide that **Australia** included the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands.

Australian ADI means:

- (a) an ADI (authorised deposit-taking institution) within the meaning of the *Banking Act 1959*; and
- (b) a person who carries on State banking within the meaning of paragraph 51(xiii) of the Constitution.

Australian bank means an Australian ADI that is permitted under section 66 of the *Banking Act 1959* to assume or use:

- (a) the word bank, banker or banking; or
- (b) any other word (whether or not in English) that is of like import to a word referred to in paragraph (a).

Australian court means a federal court or a court of a State or Territory.

Australian law means a law of the Commonwealth or of a State or Territory.

Australian register of a foreign company means a branch register of members kept under section 601CM.

authorised trustee corporation means a body corporate that is declared by the regulations to be an authorised trustee corporation for the purposes of the provision in which the expression appears.

bank or **banker** includes, but is not limited to, a body corporate that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*.

banker's books means:

- (a) books of an Australian ADI, including documents used in the ordinary business of an Australian bank; or
- (b) cheques, orders for the payment of money, bills of exchange and promissory notes in an Australian ADI's possession; or
- (c) scrip in an Australian ADI's possession, whether by way of pledge or otherwise; or
- (d) documents that create or evidence futures contracts and are in an Australian ADI's possession.

banking corporation means a body corporate that carries on, as its sole or principal business, the business of banking (other than State banking not extending beyond the limits of the State concerned).

banning order means:

- (a) in Chapter 7—an order by ASIC in force under Division 5 of Part 7.3; and
- (b) in Chapter 8—an order by ASIC in force under Division 5 of Part 8.3.

begin, in relation to a winding up, has the meaning given by Division 1A of Part 5.6.

benefit:

- (a) means any benefit, whether by way of payment of cash or otherwise; and
- (b) when used in Division 2 of Part 2D.2 (sections 200A to 200J)—means:
 - (i) a payment or other valuable consideration; or
 - (ii) an interest in property of any kind; or
 - (iii) any other benefit.

bid class of securities for a takeover bid is the class of securities to which the securities being bid for belong.

bidder for a takeover bid means the person who makes or proposes to make, or each of the people who make or propose to make, the offers under the bid (whether personally or by an agent or nominee).

Note: The dealer who announces a market bid is not the bidder; the bidder is the person or people on whose behalf the announcement is made.

bidder's statement means a bidder's statement under sections 636 and 637 as supplemented.

bid period:

- (a) for an off-market bid—starts when the bidder's statement is given to the target and ends:
 - (i) 1 month later if no offers are made under the bid; or
 - (ii) at the end of the offer period; and
- (b) for a market bid—starts when the bid is announced to the relevant securities exchange and ends at the end of the offer period.

Board means:

- (a) in Part 7.10—the board of SEGC; or
- (b) in Part 9.2—the Companies Auditors and Liquidators Disciplinary Board.

board or managerial office (when used in Division 2 of Part 2D.2 (sections 200A to 200J) in relation to a body corporate) means:

- (a) an office of director of the body corporate; and
- (b) any other office in connection with the management of the body corporate's affairs that is held by:
 - (i) a person who also holds an office of director of the body corporate or a related body corporate; or
 - (ii) a person who has held an office of director of the body corporate or a related body corporate at any time within the 12 months immediately before the loss of, or retirement from, that office.

body means a body corporate or an unincorporated body and includes, for example, a society or association.

body corporate:

- (a) includes a body corporate that is being wound up or has been dissolved; and
- (b) in this Chapter (except section 66A) and section 206E includes an unincorporated registrable body.

books includes:

- (a) a register; and
- (b) any other record of information; and
- (c) financial reports or financial records, however compiled, recorded or stored; and
- (d) a document.

borrower, in relation to a debenture, means the body that is or will be liable to repay money under the debenture.

bought position means:

- (a) in relation to a commodity agreement, or in relation to a futures contract, being a commodity agreement—the position of a person who, by virtue of the agreement, is under a Chapter 8 obligation to accept delivery in accordance with the agreement; or

- (b) in relation to a futures contract, being an adjustment agreement—the position of a person who, by virtue of the agreement:
- (i) will, if the value or worth of the agreement (as determined in accordance with the agreement) as at a particular future time is less by a particular amount than the value or worth of the agreement (as so determined) as at a particular earlier time, be under a Chapter 8 obligation to pay that amount; and
 - (ii) will, if the value or worth of the agreement (as so determined) as at a particular future time exceeds by a particular amount the value or worth of the agreement (as so determined) as at a particular earlier time, have a Chapter 8 right to receive that amount.

business affairs, in relation to an entity, has a meaning affected by sections 53AA, 53AB, 53AC and 53AD.

business day means a day that is not a Saturday, a Sunday or a public holiday or bank holiday in the place concerned.

buy-back by a company means the acquisition by the company of shares in itself.

buy-back agreement by a company means an agreement by the company to buy back its own shares (whether the agreement is conditional or not).

Capital Territory means the Australian Capital Territory and the Jervis Bay Territory.

carry on has a meaning affected by Division 3.

cash management trust interest means an interest that:

- (a) is an interest in a registered scheme; and
- (b) relates to an undertaking of the kind commonly known as a cash management trust.

cause includes procure.

certified means:

- (a) in relation to a copy of, or extract from, a document—certified by a statement in writing to be a true copy of, or extract from, the document; or

- (b) in relation to a translation of a document—certified by a statement in writing to be a correct translation of the document into English.

Chapter 8 agreement means:

- (a) a relevant agreement; or
- (b) a proposed relevant agreement; or
- (c) a relevant agreement as varied, or as proposed to be varied; or
- (d) where a relevant agreement has been varied—the relevant agreement as in force at any time before the variation; or
- (e) where a relevant agreement has been discharged—the relevant agreement as in force at any time before its discharge.

Chapter 8 obligation has the meaning given by section 55.

Chapter 8 right has the meaning given by section 55.

charge means a charge created in any way and includes a mortgage and an agreement to give or execute a charge or mortgage, whether on demand or otherwise.

chargeable matter has the same meaning as in the *Corporations (Fees) Act 2001*.

chargee means the holder of a charge and includes a person in whose favour a charge is to be given or executed, whether on demand or otherwise, under an agreement.

civil matter means a matter other than a criminal matter.

civil penalty disqualification has the meaning given by subsection 91(4A).

civil penalty order means any of the following:

- (a) a declaration of contravention under section 1317F;
- (b) a pecuniary penalty order under section 1317G;
- (c) a compensation order under section 1317H;
- (d) an order under section 206C disqualifying a person from managing corporations.

civil penalty provision has the meaning given in subsection 1317E(1).

class has:

- (a) in relation to futures contracts—a meaning affected by subsection 72(3); and
- (b) in relation to shares or interests in a managed investment scheme—a meaning affected by section 57; and
- (c) when used in relation to securities for the purposes of Chapter 6, 6A or 6C—a meaning affected by subsection 605(2).

clearing house means:

- (a) in relation to a body corporate:
 - (i) in any case—a person who provides, or proposes to provide, clearing house facilities for a futures market conducted by that body; or
 - (ii) in the case of a futures exchange—a body corporate in relation to which an approval as a clearing house for that futures exchange is in force under subsection 1131(2); and
- (b) in relation to a futures market:
 - (i) in any case—a person who provides, or proposes to provide, clearing house facilities for that futures market; or
 - (ii) in the case of a futures market of a futures exchange—a body corporate in relation to which an approval as a clearing house for that futures exchange is in force under subsection 1131(2).

clearing house facilities, in relation to a futures market, means facilities for the registration of futures contracts acquired or disposed of on that futures market.

client, in relation to a futures broker, means, except in Division 2 of Part 8.3, a person on whose behalf the broker deals, or from whom the broker accepts instructions to deal, in futures contracts.

clients' segregated account, in relation to a person who is a member of a futures organisation, means an account that:

- (a) the person maintains, whether in Australia or elsewhere, with:
 - (i) an Australian ADI; or
 - (ii) an approved foreign bank in relation to the person; and

- (b) is maintained for the sole purpose of containing money deposited by the person into the account under section 1209.

close out, in relation to a futures contract, means:

- (a) discharge the Chapter 8 obligations of the person in the bought position, or sold position, under the futures contract as a result of the matching up of the futures contract with a futures contract of the same kind under which the person has assumed an offsetting sold position, or offsetting bought position, as the case may be; or
- (b) otherwise discharge the Chapter 8 obligations of a party to the futures contract.

coastal sea:

- (a) in relation to Australia—means:
 - (i) the territorial sea of Australia; and
 - (ii) the sea on the landward side of the territorial sea of Australia and not within the limits of a State or internal Territory;and includes the airspace over, and the sea-bed and subsoil beneath, any such sea; and
- (b) in relation to a State or Territory—means so much of the coastal sea of Australia as is within the area described in Schedule 2 to the *Petroleum (Submerged Lands) Act 1967* under the heading that refers to that State or Territory.

commence, in relation to a winding up, has the meaning given by Division 1A of Part 5.6.

commencement, in relation to an accounting standard, means:

- (a) in the case of an accounting standard as originally in effect—the time when the accounting standard took effect; or
- (b) in the case of an accounting standard as varied by a particular provision of an instrument made under section 334—the time when that provision took effect.

Commission delegate has the same meaning as in the ASIC Act.

committee of creditors, in relation to a company under administration, means a committee of creditors of the company appointed at a meeting convened under section 436E.

commodity means:

- (a) any thing that is capable of delivery pursuant to an agreement for its delivery; or
- (b) without limiting the generality of paragraph (a), an instrument creating or evidencing a thing in action.

commodity agreement means a standardised agreement the effect of which is that:

- (a) a person is under a Chapter 8 obligation to make delivery; or
- (b) a person is under a Chapter 8 obligation to accept delivery; at a particular future time of a particular quantity of a particular commodity for a particular price or for a price to be calculated in a particular manner, whether or not:
- (c) the subject matter of the agreement is in existence; or
- (d) the agreement has any other effect; or
- (e) the agreement is capable of being varied or discharged before that future time.

Commonwealth authority means an authority or other body (whether incorporated or not) that is established or continued in existence by or under an Act.

company means a company registered under this Act and:

- (a) in Chapter 2K (other than sections 273A to 273E), includes a registrable body that is registered under Division 1 or 2 of Part 5B.2 of this Act; and
- (b) in sections 273A to 273E, includes a registered body that carries on business outside its place of origin; and
- (c) in Parts 5.7B and 5.8 (except sections 595 and 596), includes a Part 5.7 body; and
- (d) in Part 5B.1, includes an unincorporated registrable body.

company limited by guarantee means a company formed on the principle of having the liability of its members limited to the respective amounts that the members undertake to contribute to the property of the company if it is wound up.

company limited by shares means a company formed on the principle of having the liability of its members limited to the amount (if any) unpaid on the shares respectively held by them.

condition, in relation to a licence, means a condition or restriction to which the licence is subject, or will be subject, as the case requires.

conduct:

- (a) in relation to a futures market, a stock market, or any other market, exchange, place or facility—includes maintain or provide; and
- (b) in Chapter 7—has a meaning affected by section 762.

connected entity, in relation to a corporation, means:

- (a) a body corporate that is, or has been, related to the corporation; or
- (b) an entity that is, or has been, connected (as defined by section 64B) with the corporation.

consolidated entity means a company, registered managed investment scheme or disclosing entity together with all the entities it is required by the accounting standards to include in consolidated financial statements.

constitution means (depending on the context):

- (a) a company's constitution, which (where relevant) includes rules and consequential amendments that are part of the company's constitution because of the *Life Insurance Act 1995*; or
- (b) a managed investment scheme's constitution; or
- (c) in relation to any other kind of body:
 - (i) the body's charter or memorandum; or
 - (ii) any instrument or law (other than this Act) constituting, or defining the constitution of, the body or governing the activities of the body or its members.

Note: The *Life Insurance Act 1995* has rules about how benefit fund rules become part of a company's constitution. They override this Act. See Subdivision 2 of Division 4 of Part 2A of that Act.

continuous disclosure notice means:

- (a) a document used to notify a securities exchange of information relating to a body under provisions of the securities exchange's listing rules referred to in subsection 1001A(1); or
- (b) a document under section 1001B lodged in relation to the body.

continuously quoted securities are securities that:

- (a) are in a class of securities that were quoted ED securities at all times in the 12 months before the date of the prospectus; and
- (b) are securities of an entity that was not covered by any of the following at any time in that 12 months:
 - (i) an exemption under section 111AS or 111AT, or a modification under section 111AV;
 - (ii) an exemption under paragraph 741(1)(a), or a declaration under paragraph 741(1)(b), relating to a provision that is a disclosing entity provision for the purposes of Division 4 of Part 1.2A;

and, for these purposes, securities are not in different classes merely because of a temporary difference in the dividend, or distribution rights, attaching to the securities or because different amounts have been paid up on the securities.

contributing member, in relation to a futures organisation, means:

- (a) in the case of a futures exchange—a member or member organisation of the futures exchange; or
- (b) in the case of a futures association:
 - (i) a member of that futures association that is a member of no futures exchange; or
 - (ii) a member organisation of that futures association that is a member organisation of no futures exchange.

contributory means:

- (a) in relation to a company (other than a no liability company):
 - (i) a person liable as a member or past member to contribute to the property of the company if it is wound up; and
 - (ii) for a company with share capital—a holder of fully paid shares in the company; and
 - (iii) before the final determination of the persons who are contributories because of subparagraphs (i) and (ii)—a person alleged to be such a contributory; and
- (b) in relation to a Part 5.7 body:
 - (i) a person who is a contributory by virtue of section 586; and
 - (ii) before the final determination of the persons who are contributories by virtue of that section—a person alleged to be such a contributory; and

- (c) in relation to a no liability company—subject to section 385, a member of the company.

control has the meaning given by section 50AA.

control day, in relation to a controller of property of a corporation, means:

- (a) unless paragraph (b) applies:
 - (i) in the case of a receiver, or receiver and manager, of that property—the day when the receiver, or receiver and manager, was appointed; or
 - (ii) in the case of any other person who is in possession, or has control, of that property for the purpose of enforcing a charge—the day when the person entered into possession, or took control, of property of the corporation for the purpose of enforcing that charge; or
- (b) if the controller became a controller of property of the corporation:
 - (i) to act with an existing controller of such property; or
 - (ii) in place of a controller of such property who has died or ceased to be a controller of such property;the day that is, because of any other application or applications of this definition, the control day in relation to the controller referred to in subparagraph (i) or (ii).

controller, in relation to property of a corporation, means:

- (a) a receiver, or receiver and manager, of that property; or
- (b) anyone else who (whether or not as agent for the corporation) is in possession, or has control, of that property for the purpose of enforcing a charge.

convertible note has the same meaning as in Division 3A of Part III of the *Income Tax Assessment Act 1936*.

convertible securities: securities are convertible into another class of securities if the holder may have the other class of securities issued to them by the exercise of rights attached to those securities. An option may be a convertible security even if it is non-renounceable.

corporation has the meaning given by section 57A.

Corporations legislation means:

- (a) this Act; and
- (b) the ASIC Act; and
- (c) rules of court made by the Federal Court, the Supreme Court of the Capital Territory, or the Family Court, because of a provision of this Act; and
- (d) rules of court applied by the Supreme Court, or a State Family Court, of a State when exercising jurisdiction conferred by Division 1 of Part 9.6A (including jurisdiction conferred by virtue of any previous application or applications of this paragraph).

court has the meaning given by section 58AA.

Court has the meaning given by section 58AA.

court of summary jurisdiction means any justice or justices of the peace or other magistrate sitting as a court for the making of summary orders or the summary punishment of offences:

- (a) under a law of the Commonwealth or of a State or Territory;
or
- (b) by virtue of his or her commission or their commissions.

creditors' voluntary winding up means a winding up under Part 5.5, other than a members' voluntary winding up.

current market bid price for securities covered by a market bid is the price specified in the announcement of the bid as increased or decreased during the offer period.

daily newspaper means a newspaper that is ordinarily published on each day that is a business day in the place where the newspaper is published, whether or not the newspaper is ordinarily published on other days.

date of a takeover bid is:

- (a) for an off-market bid—the date on which offers are first made under the bid; or
- (b) for a market bid—the date on which the bid is announced to the relevant securities exchange.

deal:

- (a) in relation to a futures contract—has the meaning given by Division 4; and

- (b) in relation to securities—subject to subsection 93(4), means (whether as principal or agent) acquire, dispose of, subscribe for or underwrite the securities, or make or offer to make, or induce or attempt to induce a person to make or to offer to make, an agreement:
 - (i) for or with respect to acquiring, disposing of, subscribing for or underwriting the securities; or
 - (ii) the purpose or purported purpose of which is to secure a profit or gain to a person who acquires, disposes of, subscribes for or underwrites the securities or to any of the parties to the agreement in relation to the securities.

dealer means:

- (a) a person who carries on a securities business; or
- (b) 2 or more persons who together carry on a securities business.

dealers licence means a dealers licence granted under Part 7.3.

debenture of a body means a chose in action that includes an undertaking by the body to repay as a debt money deposited with or lent to the body. The chose in action may (but need not) include a charge over property of the body to secure repayment of the money. However, a debenture does not include:

- (a) an undertaking to repay money deposited with or lent to the body by a person if:
 - (i) the person deposits or lends the money in the ordinary course of a business carried on by the person; and
 - (ii) the body receives the money in the ordinary course of carrying on a business that neither comprises nor forms part of a business of borrowing money and providing finance; or
- (b) an undertaking by an Australian ADI to repay money deposited with it, or lent to it, in the ordinary course of its banking business; or
- (c) an undertaking to pay money under:
 - (i) a cheque; or
 - (ii) an order for the payment of money; or
 - (iii) a bill of exchange; or
- (d) an undertaking to pay money under a promissory note that has a face value of at least \$50,000; or

- (e) an undertaking by a body corporate to pay money to a related body corporate; or
- (f) an undertaking to repay money that is prescribed by the regulations.

For the purposes of this definition, if a chose in action that includes an undertaking by a body to pay money as a debt is offered as consideration for the acquisition of securities under an off-market takeover bid, or is issued under a compromise or arrangement under Part 5.1, the undertaking is taken to be an undertaking to repay as a debt money deposited with or lent to the body.

decision period, in relation to a chargee in relation to a charge on property of a company under administration, means the period beginning on the day when:

- (a) if notice of the appointment of the administrator must be given to the chargee under subsection 450A(3)—such notice is so given; or
 - (b) otherwise—the administration begins;
- and ending at the end of the tenth business day after that day.

deed includes a document having the effect of a deed.

deed of company arrangement means a deed of company arrangement executed under Part 5.3A or such a deed as varied and in force from time to time.

de facto spouse, in relation to a person, means an individual of the opposite sex to that person who is living with that person as his or her spouse on a genuine domestic basis although not legally married to that person.

defalcation, in Part 7.9, includes a contravention of subsection 870(3).

defeating condition for a takeover bid means a condition that:

- (a) will, in circumstances referred to in the condition, result in the rescission of, or entitle the bidder to rescind, a takeover contract; or
- (b) prevents a binding takeover contract from resulting from an acceptance of the offer unless or until the condition is fulfilled.

defect, in relation to a statutory demand, includes:

- (a) an irregularity; and
- (b) a misstatement of an amount or total; and
- (c) a misdescription of a debt or other matter; and
- (d) a misdescription of a person or entity.

deregistered means:

- (a) in relation to a company—deregistered under Chapter 5A; and
- (b) in relation to any other body corporate—deregistered in a way that results in the body corporate ceasing to exist.

director of a company or other body means:

- (a) a person who:
 - (i) is appointed to the position of a director; or
 - (ii) is appointed to the position of an alternate director and is acting in that capacity;regardless of the name that is given to their position; and
- (b) unless the contrary intention appears, a person who is not validly appointed as a director if:
 - (i) they act in the position of a director; or
 - (ii) the directors of the company or body are accustomed to act in accordance with the person's instructions or wishes.

Subparagraph (b)(ii) does not apply merely because the directors act on advice given by the person in the proper performance of functions attaching to the person's professional capacity, or the person's business relationship with the directors or the company or body.

Note: Paragraph (b)—Contrary intention—Examples of provisions for which a person referred to in paragraph (b) would not be included in the term “director” are:

- section 249C (power to call meetings of a company's members)
- subsection 251A(3) (signing minutes of meetings)
- section 205B (notice to ASIC of change of address).

disclosing entity has the meaning given by section 111AC.

disclosure document for an offer of securities means:

- (a) a prospectus for the offer; or
- (b) a profile statement for the offer; or

(c) an offer information statement for the offer.

discretionary account has the meaning given by section 61.

dispose of a futures contract has the meaning given by sections 24, 26, 27 and 28. For the purposes of Chapter 6, a person who has a relevant interest in securities **disposes** of the securities if, and only if, they cease to have a relevant interest in the securities.

document of title, in relation to securities, includes an instrument of transfer relating to the securities.

domestic corporation means a corporation that is incorporated or formed in Australia or an external Territory.

ED securities has the meaning given by section 111AD.

eligible applicant, in relation to a corporation, means:

- (a) ASIC; or
- (b) a liquidator or provisional liquidator of the corporation; or
- (c) an administrator of the corporation; or
- (d) an administrator of a deed of company arrangement executed by the corporation; or
- (e) a person authorised in writing by ASIC to make:
 - (i) applications under the Division of Part 5.9 in which the expression occurs; or
 - (ii) such an application in relation to the corporation.

eligible commodity agreement means a commodity agreement (in this definition called the **relevant agreement**), where, at the time when the relevant agreement:

- (a) unless paragraph (b) applies—is entered into; or
- (b) if the relevant agreement is not a commodity agreement at the time when it is entered into—becomes a commodity agreement;

it appears likely, having regard to all relevant circumstances (other than the respective intentions of the person in the sold position, and the person in the bought position, under the relevant agreement), including, without limiting the generality of the foregoing:

- (c) the provisions of any agreement; and
- (d) the rules and practices of any market; and
- (e) the manner in which the respective Chapter 8 obligations of persons in sold positions, and persons in bought positions,

under agreements of the same kind as the first-mentioned agreement are generally discharged;

that:

- (f) the Chapter 8 obligation of the person in the sold position under the relevant agreement to make delivery in accordance with the relevant agreement will be discharged otherwise than by the person so making delivery; or
- (g) the Chapter 8 obligation of the person in the bought position under the relevant agreement to accept delivery in accordance with the relevant agreement will be discharged otherwise than by the person so accepting delivery; or
- (h) the person in the sold position, or bought position, under the relevant agreement will assume an offsetting bought position, or offsetting sold position, as the case may be, under an agreement of the same kind as the relevant agreement.

eligible exchange-traded option means a contract that is entered into on a futures market of a futures exchange and under which a party acquires from another party an option or right, exercisable at or before a specified time:

- (a) to purchase from, or to sell to, that other party a specified quantity of a specified commodity at a price specified in, or to be determined in accordance with, the contract; or
- (b) to be paid by that other party an amount of money to be determined by reference to the amount by which a specified number is greater or less than the number of a specified index, being the Australian Stock Exchanges All Ordinaries Price Index or a prescribed index, as at the time when the option or right is exercised.

eligible money market dealer means a body corporate in respect of which a declaration is in force under section 65.

eligible securities conduct means conduct in the course of, for the purposes of, or otherwise in connection with:

- (a) dealing in securities; or
- (b) advising a person about securities; or
- (c) giving to a person a securities report.

emoluments means the amount or value of any money, consideration or benefit given, directly or indirectly, to a director of a body corporate in connection with the management of affairs

of the body or of any holding company or subsidiary of the body, whether as a director or otherwise, but does not include amounts in payment or reimbursement of out-of-pocket expenses incurred for the benefit of the body.

employee share scheme for a company means a scheme under which shares (or units in shares) in the company or a holding company may be acquired:

- (a) by, or for the benefit of:
 - (i) employees of the company, or of a related body corporate; or
 - (ii) directors of the company, or of a related body corporate, who hold a salaried employment or office in the company or in a related body corporate; or
- (b) by a corporation all of whose members are:
 - (i) employees of the company, or of a related body corporate; or
 - (ii) directors of the company, or of a related body corporate, who hold a salaried employment or office in the company or in a related body corporate.

employee share scheme buy-back means a buy-back under a scheme that:

- (a) has as its purpose the acquisition of shares in a company by, or on behalf of:
 - (i) employees of the company, or of a related body corporate; or
 - (ii) directors of the company, or a related body corporate, who hold a salaried employment or office in the company or in a related body corporate; and
- (b) has been approved by the company in general meeting.

enforce, in relation to a charge on property of a company under administration, includes:

- (a) appoint a receiver of property of the company under a power contained in an instrument relating to the charge; or
- (b) obtain an order for the appointment of a receiver of such property for the purpose of enforcing the charge; or
- (c) enter into possession, or assume control, of such property for that purpose; or

- (d) appoint a person so to enter into possession or assume control (whether as agent for the chargee or for the company); or
- (e) exercise, as chargee or as a receiver or person so appointed, a right, power or remedy existing because of the charge, whether arising under an instrument relating to the charge, under a written or unwritten law, or otherwise.

enforcement process, in relation to property, means:

- (a) execution against that property; or
- (b) any other enforcement process in relation to that property that involves a court or a sheriff.

enter into: a person who:

- (a) enters into, or becomes a party to, a relevant agreement in relation to voting shares or other securities; or
- (b) exercises an option to have voting shares or other securities issued or granted;

is taken to enter into a transaction in relation to the shares or securities. **Enter into**, in relation to a futures contract, has a meaning affected by subsection 72(2).

entitlements of an employee of a company has the meaning given by subsections 596AA(2) and (3).

entity: for the purposes of Chapter 2E an **entity** is any of the following:

- (a) a body corporate;
- (b) a partnership;
- (c) an unincorporated body;
- (d) an individual;
- (e) for a trust that has only 1 trustee—the trustee;
- (f) for a trust that has more than 1 trustee—the trustees together.

Otherwise, **entity** has the meaning given by section 64A.

equal access scheme has the meaning given by subsections 257B(2) and (3).

event includes any happening, circumstance or state of affairs.

examinable affairs, in relation to a corporation means:

- (a) the promotion, formation, management, administration or winding up of the corporation; or

- (b) any other affairs of the corporation (including anything that is included in the corporation's affairs because of section 53); or
- (c) the business affairs of a connected entity of the corporation, in so far as they are, or appear to be, relevant to the corporation or to anything that is included in the corporation's examinable affairs because of paragraph (a) or (b).

examinable assets and liabilities, in relation to an entity, means all of the following:

- (a) the entity's property and assets:
 - (i) whether present or future; and
 - (ii) whether held alone or jointly with any other person or persons; and
 - (iii) whether or not held as agent, bailee or trustee;
- (b) the entity's liabilities:
 - (i) whether present or future; and
 - (ii) whether actual or contingent; and
 - (iii) whether owed alone or jointly with any other person or persons; and
 - (iv) whether or not owed as trustee.

examinable officer, in relation to a corporation, means:

- (a) a director, secretary or executive officer of the corporation; or
- (b) a receiver, or receiver and manager, of property of the corporation (whether appointed under a provision contained in an instrument, or by a court); or
- (c) an administrator of the corporation; or
- (d) an administrator of a deed of company arrangement executed by the corporation; or
- (e) a liquidator or provisional liquidator of the corporation (whether or not appointed by a court); or
- (f) a trustee or other person administering a compromise or arrangement made between the corporation and any other person or persons.

examinable operations, in relation to an entity, means all of the following:

- (a) the entity's business, trading, transactions and dealings:

- (i) whether alone or jointly with any other entity or entities;
and
- (ii) whether or not as agent, bailee or trustee;
- (b) the entity's profits, income and receipts;
- (c) the entity's losses, outgoings and expenditure.

Exchange means Australian Stock Exchange Limited.

exchange member, in relation to a futures exchange, means:

- (a) a corporation that is a member of the futures exchange; or
- (b) a partnership that is a member of the futures exchange; or
- (c) a member of such a partnership.

Exchange subsidiary, in Chapter 7, means a securities exchange that is a subsidiary of the Exchange.

exchange traded option means an option declared by a securities exchange to be an exchange traded option.

excluded security means:

- (a) where:
 - (i) there is attached to a share or debenture a right to participate in a retirement village scheme; and
 - (ii) each of the other rights, and each interest (if any), attached to the share or debenture is a right or interest that is merely incidental to the right referred to in subparagraph (i);the share or debenture or a unit in the share or debenture; or
- (b) an interest in a managed investment scheme constituted by a right to participate in a retirement village scheme.

executive officer of a body corporate means a person who is concerned in, or takes part in, the management of the body (regardless of the person's designation and whether or not the person is a director of the body).

exempt body has the meaning given by section 66A.

exempt broker means a person who is an exempt broker by virtue of section 67.

exempt dealer has the meaning given by section 68.

exempt foreign company means a foreign company of a kind referred to in subsection 601CK(8), whether or not Division 2 of Part 5B.2 applies to it.

exempt futures market means a futures market in relation to which a declaration under section 1127 is in force.

exempt investment adviser has the meaning given by section 68.

exempt public authority means a body corporate that is incorporated within Australia or an external Territory and is:

- (a) a public authority; or
- (b) an instrumentality or agency of the Crown in right of the Commonwealth, in right of a State or in right of a Territory.

exempt stock market means a stock market in relation to which, or a stock market in a class of stock markets in relation to which, a declaration is in force under section 771.

expert, in relation to a matter, means a person whose profession or reputation gives authority to a statement made by him or her in relation to that matter.

extend, in relation to a period:

- (a) includes further extend; and
- (b) has a meaning affected by section 70.

externally-administered body corporate means a body corporate:

- (a) that is being wound up; or
- (b) in respect of property of which a receiver, or a receiver and manager, has been appointed (whether or not by a court) and is acting; or
- (c) that is under administration; or
- (ca) that has executed a deed of company arrangement that has not yet terminated; or
- (d) that has entered into a compromise or arrangement with another person the administration of which has not been concluded.

extraordinary resolution, in relation to a registered scheme, means a resolution:

- (a) of which notice as set out in paragraph 252J(c) has been given; and

- (b) that has been passed by at least 50% of the total votes that may be cast by members entitled to vote on the resolution (including members who are not present in person or by proxy).

Family Court means the Family Court of Australia.

Federal Court means the Federal Court of Australia.

fidelity fund means:

- (a) in relation to a futures organisation—the fidelity fund (if any) that section 1228 requires the futures organisation to keep; or
- (b) in relation to a securities exchange within the meaning of Chapter 7—the fidelity fund (if any) that section 895 requires or required the securities exchange to keep.

financial benefit (when used in Chapter 2E) has a meaning that is affected by section 229.

financial corporation means a financial corporation within the meaning of paragraph 51(20) of the Constitution.

financial records includes:

- (a) invoices, receipts, orders for the payment of money, bills of exchange, cheques, promissory notes and vouchers; and
- (b) documents of prime entry; and
- (c) working papers and other documents needed to explain:
 - (i) the methods by which financial statements are made up; and
 - (ii) adjustments to be made in preparing financial statements.

financial report means an annual financial report or a half-year financial report prepared under Chapter 2M.

Note: Section 295 deals with the contents of annual financial reports and section 302 deals with the contents of half-year financial reports.

financial statements means annual financial statements under section 295 or half-year financial statements under section 303.

financial year has the meaning given by section 323D.

find, in the case of a reference to a court finding a person guilty of an offence, has a meaning affected by section 73A.

floating charge includes a charge that conferred a floating security at the time of its creation but has since become a fixed or specific charge.

for, in relation to a fee or tax, includes in respect of.

foreign company means:

- (a) a body corporate that is incorporated in an external Territory, or outside Australia and the external Territories, and is not:
 - (i) a corporation sole; or
 - (ii) an exempt public authority; or
- (b) an unincorporated body that:
 - (i) is formed in an external Territory or outside Australia and the external Territories; and
 - (ii) under the law of its place of formation, may sue or be sued, or may hold property in the name of its secretary or of an officer of the body duly appointed for that purpose; and
 - (iii) does not have its head office or principal place of business in Australia.

foreign holder of securities means a holder of the securities whose address, as shown in the register in which details of their holding is recorded, is a place outside Australia and the external Territories.

franchise means an arrangement under which a person earns profits or income by exploiting a right, conferred by the owner of the right, to use a trade mark or design or other intellectual property or the goodwill attached to it in connection with the supply of goods or services. An arrangement is not a franchise if the person engages the owner of the right, or an associate of the owner, to exploit the right on the person's behalf.

Full Court, in relation to a Supreme Court of a State or Territory, includes any court of the State or Territory to which appeals lie from a single judge of that Supreme Court.

fully paid share means a share on which no amount remains unpaid.

function includes a duty.

Fund means the National Guarantee Fund continued in existence by section 928B.

futures advice business has the meaning given by section 71.

futures adviser means a person who carries on, or 2 or more persons who together carry on, a futures advice business.

futures advisers licence means a futures advisers licence granted under Part 8.3.

futures association, in this Chapter and Chapter 8, means a body corporate in relation to which an approval under section 1132 is in force.

futures broker means:

(a) except in section 1209 and Part 8.5:

- (i) a person who carries on, or 2 or more persons who together carry on, a futures broking business, whether or not the person, or any of the persons, also deals in futures contracts on the person's own account; or
- (ii) the holder of a futures brokers licence; and

(b) in section 1209 or Part 8.5—the holder of a futures brokers licence.

futures brokers licence, in this Chapter or Chapter 8, means a futures brokers licence granted under Part 8.3.

futures broking business, in relation to a person, means, subject to subsection 25(4), a business of dealing in futures contracts on behalf of other persons.

futures contract has the meaning given by section 72.

futures exchange, in this Chapter and Chapter 8, means a body corporate in relation to which an approval under section 1126 is in force.

futures law means a provision of Chapter 8.

futures licence means a futures brokers licence or a futures advisers licence.

futures licensee means a person who holds a futures licence.

futures market means a market, exchange or other place at which, or a facility by means of which, futures contracts are regularly acquired or disposed of.

futures option means an option or Chapter 8 right to assume, at a specified price or value and within a specified period, a bought position, or a sold position, in relation to an eligible commodity agreement or in relation to an adjustment agreement.

futures organisation means:

- (a) in this Chapter and Chapter 8 (other than Part 8.6)—a futures exchange or a futures association; and
- (b) in Part 8.6—a futures exchange or a futures association (other than a futures association each of whose members is also a member of a futures exchange).

futures report means an analysis or report about futures contracts.

futures representative has the meaning given by section 73.

Gazette notice means a notice published in the *Gazette*.

general law means the principles and rules of the common law and equity.

guarantor, in relation to a debenture, means a body that has guaranteed, or has agreed to guarantee, the repayment of any money deposited or lent to the borrower under the debenture.

guilty, in the case of a reference to a court finding a person guilty of an offence, has a meaning affected by section 73A.

half-year has the meaning given by subsection 323D(5).

have, in relation to information, includes be in possession of the information.

highest outside purchase price for a takeover bid is the highest amount paid or payable by the bidder for a security in the bid class under a purchase made outside the bid and during the bid period.

hold, in relation to a person, in relation to a document that is, or purports to be, a copy of a licence, means have in the person's possession.

holding company, in relation to a body corporate, means a body corporate of which the first body corporate is a subsidiary.

in Australia has the meaning given by section 102C.

included, in relation to an official list, has the meaning given by section 75.

incorporated in Australia, in relation to a body corporate, includes incorporated by or under a law of:

- (a) the Commonwealth; or
- (b) a State; or
- (c) an internal Territory.

incorporation:

- (a) of a company—means the company's first registration under this Act; and
- (b) of any other incorporated body—means the body's incorporation by or under a law (other than this Act).

industrial instrument means:

- (a) a contract of employment; or
- (b) a law, award, determination or agreement relating to terms or conditions of employment.

information includes complaint.

information service means:

- (a) a broadcasting service; or
- (b) an interactive or broadcast videotext or teletext service or a similar service; or
- (c) an online database service or a similar service; or
- (d) any other prescribed service.

injury compensation means compensation payable under any law relating to workers compensation.

inside information, in relation to a futures contract, means information that is not generally available but, if it were generally available, would be likely to affect materially the price for dealing in:

- (a) that futures contract; or
- (b) a futures contract of the same kind as that futures contract.

insolvent has the meaning given by subsection 95A(2) and, in Part 7.10, has a meaning affected by section 922.

insolvent transaction has the meaning given by section 588FC.

insolvent under administration means a person who:

- (a) under the *Bankruptcy Act 1966* or the law of an external Territory, is a bankrupt in respect of a bankruptcy from which the person has not been discharged; or
- (b) under the law of an external Territory or the law of a foreign country, has the status of an undischarged bankrupt;

and includes:

- (c) a person any of whose property is subject to control under:
 - (i) section 50 or Division 2 of Part X of the *Bankruptcy Act 1966*; or
 - (ii) a corresponding provision of the law of an external Territory or the law of a foreign country; or
- (d) a person who has executed a deed of assignment or a deed of arrangement under:
 - (i) Part X of the *Bankruptcy Act 1966*; or
 - (ii) the corresponding provisions of the law of an external Territory or the law of a foreign country;where the terms of the deed have not been fully complied with; or
- (e) a person whose creditors have accepted a composition under:
 - (i) Part X of the *Bankruptcy Act 1966*; or
 - (ii) the corresponding provisions of the law of an external Territory or the law of a foreign country;where a final payment has not been made under that composition.

interest in a managed investment scheme means a right to benefits produced by the scheme (whether the right is actual, prospective or contingent and whether it is enforceable or not).

invalid futures authority has the meaning given by subsection 87(2).

invalid securities authority has the meaning given by subsection 88(2).

investment advice business has the meaning given by section 77.

investment adviser means a person who carries on, or 2 or more persons who together carry on, an investment advice business.

investment advisers licence, in this Chapter or Chapter 7, means an investment advisers licence granted under Part 7.3.

investment contract means any contract, scheme or arrangement that, in substance and irrespective of its form, involves the investment of money in or under such circumstances that the investor acquires or may acquire an interest in, or right in respect of, property, whether in this jurisdiction or elsewhere, that, under, or in accordance with, the terms of investment will, or may at the option of the investor, be used or employed in common with any other interest in, or right in respect of, property, whether in this jurisdiction or elsewhere, acquired in or under like circumstances.

involved, in relation to a contravention, has the meaning given by section 79.

issue includes:

- (a) in relation to interests in a managed investment scheme—
make available; and
- (b) otherwise—circulate, distribute and disseminate.

Judge means a judge of the Court.

judgment means a judgment, decree or order, whether final or interlocutory.

large proprietary company has the meaning given by subsection 45A(3).

law of a State or Territory means a law of, or in force in, the State or Territory.

Note: This definition does not affect the meaning of **law** when used otherwise than in a phrase such as “law of a State or Territory”. Examples of such a use is in the phrase “any provision of any law” in section 100A and the phrase “law of the Commonwealth” in section 156.

lawyer means a duly qualified legal practitioner and, in relation to a person, means such a practitioner acting for the person.

leave of absence means long service leave, extended leave, recreation leave, annual leave, sick leave or any other form of leave of absence from employment.

licence means:

- (a) in Chapter 7—a securities licence; and

(b) in Chapter 8—a futures licence.

licensee means:

- (a) in Chapter 7—a securities licensee; and
- (b) in Chapter 8—a futures licensee; and
- (c) in relation to a licence—the person who holds the licence.

limited company means:

- (a) a company limited by shares; or
 - (b) a company limited by guarantee; or
 - (c) a company limited both by shares and guarantee;
- but does not include a no liability company.

linked: the incurring of a debt and a contravention of section 596AB are **linked** if they are linked under subsection 596AB(4).

liquidating trade means a transaction whereby, for the purpose of closing out a futures contract, the person in the bought position, or sold position, under the futures contract assumes an offsetting sold position, or offsetting bought position, as the case may be, under another futures contract.

liquidator, in Chapters 7 and 8, includes a provisional liquidator.

listed: a company, managed investment scheme or other body is **listed** if it is included in the official list of a securities exchange.

listed corporation means a body corporate that is included in an official list of a securities exchange (as defined, for the purposes of this definition, by the regulations) in Australia or an external Territory.

listed disclosing entity has the meaning given by subsection 111AL(1).

listing rules, when used in Chapter 7, has the meaning given by section 761.

local agent, in relation to a foreign company, means a person who is a local agent of the foreign company by virtue of subsection 601CG(5).

lodge means lodge with ASIC in this jurisdiction.

lower court means a court of a State or Territory that is not a superior court.

machine-copy, in relation to a document, means a copy made of the document by any machine in which, or process by which, an image of the contents of the document is reproduced.

managed investment scheme means:

- (a) a scheme that has the following features:
 - (i) people contribute money or money's worth as consideration to acquire rights (**interests**) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);
 - (ii) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the **members**) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders);
 - (iii) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions); or
- (b) a time-sharing scheme;

but does not include the following:

- (c) a partnership that has more than 20 members but does not need to be incorporated or formed under an Australian law because of regulations made for the purposes of subsection 115(2);
- (d) a body corporate (other than a body corporate that operates as a time sharing scheme);
- (e) a scheme in which all the members are bodies corporate that are related to each other and to the body corporate that promotes the scheme;
- (f) a franchise;
- (g) a statutory fund maintained under the *Life Insurance Act 1995*;
- (h) a regulated superannuation fund, an approved deposit fund, a pooled superannuation trust, or a public sector superannuation scheme, within the meaning of the *Superannuation Industry (Supervision) Act 1993*;

- (i) a scheme operated by an Australian ADI in the ordinary course of its banking business;
- (j) the issue of debentures or convertible notes by a body corporate;
- (k) a barter scheme under which each participant may obtain goods or services from another participant for consideration that is wholly or substantially in kind rather than in cash;
- (l) a retirement village scheme operating within or outside Australia:
 - (i) under which the participants, or a majority of them, are provided, or are to be provided, with residential accommodation within a retirement village (whether or not the entitlement of a participant to be provided with accommodation derives from a proprietary interest held by the participant in the premises where the accommodation is, or is to be, provided); and
 - (ii) which is not a time-sharing scheme;
- (m) a scheme that is operated by a co-operative company registered under Part VI of the *Companies (Co-operative) Act 1943* of Western Australia or under a previous law of Western Australia that corresponds to that Part;
- (n) a scheme of a kind declared by the regulations not to be a managed investment scheme.

Note: Paragraph (c)—A partnership with less than 20 members will usually not require registration because of paragraph 601ED(1)(a) and under section 115 a partnership with more than 20 members can only operate if covered by regulations made for the purposes of subsection 115(2).

manager has a meaning affected by section 90.

managing controller, in relation to property of a corporation, means:

- (a) a receiver and manager of that property; or
- (b) any other controller of that property who has functions or powers in connection with managing the corporation.

marketable securities means debentures, stocks, shares or bonds of any Government, of any local government authority or of any body corporate, association or society, and includes any right or option in respect of shares in any body corporate and any prescribed interest.

market bid means a takeover bid made under Chapter 6 as a market bid (see section 616).

member:

- (a) in relation to a managed investment scheme—means a person who holds an interest in the scheme; or
- (b) when used in Chapter 6 or Chapter 7 (except Part 7.1A and the provisions mentioned in paragraph (aa) of this definition) in relation to a securities exchange or stock exchange, means:
 - (i) a person who is a member organisation of that exchange; or
 - (ii) a person who is a partner in a partnership that is a member organisation of that exchange; or
- (c) when used in section 769, 769A or 772A, subsection 776(2), section 779, subsection 786(8) or 910(3) or section 913 or 1115, in relation to a securities exchange or stock exchange, means:
 - (i) a person who is a member organisation of that exchange; or
 - (ii) a person who is a partner in a partnership that is a member organisation of that exchange; or
 - (iii) a person who is recognised under the business rules of the exchange as a suitably qualified affiliate of the exchange and who is involved in the carrying on of a business of dealing in securities (whether as an employee, director or in any other capacity); or
- (d) in relation to a body corporate that is, or proposes to become, a futures organisation—has a meaning affected by section 56; or
- (e) in relation to a company—a person who is a member under section 231.

member firm, in relation to a securities exchange, means a partnership that is a member organisation of the securities exchange.

member organisation means:

- (a) in relation to a securities exchange or stock exchange:
 - (i) a person who is recognised under the business rules of the exchange as a suitably qualified participant of the

- exchange and who carries on a business of dealing in securities otherwise than in partnership; or
- (ii) a partnership that is recognised under the business rules of the exchange as a suitably qualified participant of the exchange and that carries on a business of dealing in securities; and
- (b) in relation to a futures organisation:
- (i) a member of the futures organisation that carries on a business of dealing in futures contracts otherwise than in partnership; or
 - (ii) a partnership that the futures organisation recognises as a member organisation, that carries on a business of dealing in futures contracts and each partner in which is a member of some futures organisation.

members' voluntary winding up means a winding up under Part 5.5 where a declaration has been made and lodged pursuant to section 494.

minerals means minerals in any form, whether solid, liquefied or gaseous and whether organic or inorganic.

minimum holding buy-back means a buy-back of all of a holder's shares in a listed corporation if the shares are less than a marketable parcel within the meaning of the rules of the relevant securities exchange.

mining purposes means any or all of the following purposes:

- (a) prospecting for ores, metals or minerals;
- (b) obtaining, by any mode or method, ores, metals or minerals;
- (c) the sale or other disposal of ores, metals, minerals or other products of mining;
- (d) the carrying on of any business or activity necessary for, or incidental to, any of the foregoing purposes;

whether in Australia or elsewhere, but does not include quarrying operations for the sole purpose of obtaining stone for building, roadmaking or similar purposes.

misconduct includes fraud, negligence, default, breach of trust and breach of duty.

modifications includes additions, omissions and substitutions.

money includes a payment order.

national business names register means the record or records of information identified by the Minister in a notice under subsection 147(5).

national newspaper means a daily newspaper that circulates generally in each State and each internal Territory.

NCSC means the National Companies and Securities Commission.

necessary transfer documents for the transfer of securities to a person means the documents that are sufficient to enable the person to become the holder of the securities.

negative, in relation to a document, means a transparent negative photograph used, or intended to be used, as a medium for reproducing the contents of the document, and includes a transparent photograph made from surface contact with the original negative photograph.

negotiable instrument, in relation to a body corporate, means:

- (a) a bill of exchange, promissory note, cheque or other negotiable instrument; or
- (b) an indorsement on, or order in, a bill of exchange, promissory note, cheque or other negotiable instrument; or
- (c) a letter of credit;

of, or purporting to be issued or signed by or on behalf of, the body.

no liability company means a company that is registered as, or converts to, a no liability company under this Act.

Note 1: A no liability company can be registered under section 118 or 601BD. A company can convert to a no liability company under Part 2B.7.

Note 2: A no liability company must have solely mining purposes and have no contractual right to recover unpaid calls (see subsection 112(2)).

nominee corporation means a body corporate whose principal business is the business of holding marketable securities as a trustee or nominee.

non-broker means a person who is neither a futures broker nor one of 2 or more persons who together constitute a futures broker.

non-dealer means a person who is neither a dealer nor one of 2 or more persons who together constitute a dealer.

non-voting share, in relation to a body corporate, means an issued share in the body that is not a voting share in the body.

notice includes a circular and an advertisement.

of, in relation to securities, means, in the case of interests in a managed investment scheme, made available by.

offence means an offence against a law of the Commonwealth or a State or Territory.

offer information statement means an offer information statement that is lodged with ASIC.

offer period for a takeover bid is the period for which offers under the bid remain open.

officer of a corporation means:

- (a) a director or secretary of the corporation; or
- (b) a person:
 - (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
 - (ii) who has the capacity to affect significantly the corporation's financial standing; or
 - (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding 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); or
- (c) a receiver, or receiver and manager, of the property of the corporation; or
- (d) an administrator of the corporation; or
- (e) an administrator of a deed of company arrangement executed by the corporation; or
- (f) a liquidator of the corporation; or
- (g) a trustee or other person administering a compromise or arrangement made between the corporation and someone else.

Note: Section 201B contains rules about who is a director of a corporation.

officer of the Commonwealth has the same meaning as in paragraph 75(v) of the Constitution.

official liquidator means a person registered as an official liquidator under section 1283.

official manager means a person appointed as an official manager under Part 5.3.

off-market bid means a takeover bid made under Chapter 6 as an off-market bid (see section 616).

old Corporations Law, in relation to a State or Territory, has the same meaning as it has in Part 11.1.

old Division 11 of Part 11.2 transitionals means the following:

- (a) the provisions of Division 11 of Part 11.2 of the old Corporations Law of each State or Territory in this jurisdiction, to the extent they continue to have effect because of section 1408 of this Act; and
- (b) if regulations for the purposes of subsection 1408(3) deal with a matter or matters dealt with in those provisions—the regulations that so deal with the matter or matters.

old Division 12 of Part 11.2 transitionals means the following:

- (a) the provisions of Division 12 of Part 11.2 of the old Corporations Law of each State or Territory in this jurisdiction, to the extent they continue to have effect because of section 1408 of this Act; and
- (b) if regulations for the purposes of subsection 1408(3) deal with a matter or matters dealt with in those provisions—the regulations that so deal with the matter or matters.

on, in relation to a stock market or futures market, includes at or by means of.

on behalf of includes on the instructions of.

on-market: a transaction of any kind is an ***on-market*** transaction if it is effected on a stock market of a securities exchange and is:

- (a) an on-market transaction as defined in the rules governing the operation of the exchange; or

- (b) if those rules do not define on-market transactions—effected in the ordinary course of trading on the stock market.

on-market buy-back means a buy-back by a listed corporation at an official meeting of a securities exchange in the ordinary course of trading on a stock market of the exchange.

option contract, in Chapter 7, means:

- (a) a contract under which a party acquires from another party an option or right, exercisable at or before a specified time, to buy from, or to sell to, that other party a number of specified securities, or of a specified class of securities, being securities of a kind referred to in paragraph 92(1)(a), (b), (c) or (d), at a price specified in, or to be determined in accordance with, the contract; or
- (b) a contract entered into on a stock market of a securities exchange or on an exempt stock market, being a contract under which a party to the contract acquires from another party to the contract an option or right, exercisable at or before a specified time:
 - (i) to buy from, or to sell to, that other party an amount of a specified foreign currency, or a quantity of a specified commodity, at a price specified in, or to be determined in accordance with, the contract; or
 - (ii) to be paid by that other party an amount of money to be determined by reference to the amount by which a specified number is greater or less than the number of a specified index, being the Australian Stock Exchanges All Ordinaries Price Index or a prescribed index, as at the time when the option or right is exercised.

outside this jurisdiction has a meaning affected by subsection 102B(2).

outstanding property, in relation to a body corporate that has been dissolved or deregistered, means outstanding property (other than unpaid capital, whether called or uncalled) that was vested in the body, to which it was entitled, or over which it had a disposing power, when it was dissolved or deregistered, but that neither the body nor its liquidator got in, realised on or otherwise disposed of or dealt with.

own account has:

- (a) in relation to a person dealing in a futures contract—a meaning affected by section 29; or
- (b) in relation to a person dealing in, or entering into a transaction in relation to, securities—a meaning affected by section 84.

Panel means the Corporations and Securities Panel.

Part 5.1 body means:

- (a) a company; or
- (b) a registrable body that is registered under Division 1 or 2 of Part 5B.2.

Part 5.7 body means:

- (a) a registrable body that is a registrable Australian body and:
 - (i) is registered under Division 1 of Part 5B.2; or
 - (ii) is not registered under that Division but carries on business in this jurisdiction and outside its place of origin; or
- (b) a registrable body that is a foreign company and:
 - (i) is registered under Division 2 of Part 5B.2; or
 - (ii) is not registered under that Division but carries on business in Australia; or
- (c) a partnership, association or other body (whether a body corporate or not) that consists of more than 5 members and that is not a registrable body.

Part 10.1 transitionals means the provisions of Part 10.1 and of regulations for the purposes of those provisions.

party:

- (a) in relation to a transaction—includes, if the transaction has been completed or given effect to, or has been terminated, a person who was a party to the transaction; and
- (b) in relation to a Chapter 8 agreement—means, in the case of a proposed or discharged relevant agreement, a person who would be a party to the relevant agreement if it were in effect.

payment (when used in Division 2 of Part 2D.2 (sections 200A to 200J) includes a payment by way of damages for breach of contract.

payment order means a cheque (including a cheque that a bank or other institution draws on itself), bank draft, money order or postal order.

person:

- (a) has a meaning affected by section 85A; and
- (b) when used in Division 2 of Part 2D.2 (sections 200A to 200J)—includes a superannuation fund.

place of origin:

- (a) in relation to a body corporate at a particular time, means:
 - (i) in the case of a body incorporated at that time in a State or Territory—that State or Territory; or
 - (ii) otherwise—the place of the body’s incorporation at that time; or
- (b) in relation to an unincorporated body—the State or Territory, or other place, in which the body is formed.

possession has a meaning affected by section 86.

power includes an authority.

premises includes:

- (a) a structure, building, aircraft, vehicle or vessel; and
- (b) any land or place (whether enclosed or built on or not); and
- (c) a part of a structure, building, aircraft, vehicle or vessel or of such a place.

price, in relation to a commodity agreement or a futures contract, or in Chapter 8, includes any amount payable for the delivery of a commodity under an agreement.

printed includes type-written, lithographed or reproduced by any mechanical means.

procure includes cause.

profile statement means a profile statement that is lodged with ASIC.

proper authority has:

- (a) in relation to a futures licensee—the meaning given by subsection 87(1); and

- (b) in relation to a securities licensee—the meaning given by subsection 88(1).

proper SCH transfer means:

- (a) an SCH-regulated transfer of a quoted security or quoted right effected in accordance with the SCH business rules; or
- (b) a transfer that is taken by section 1097D to be a proper SCH transfer.

property means any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description and includes a thing in action.

proportional takeover approval provisions, in relation to a company, means provisions of the kind referred to in subsection 648D(1) that are contained in, or that it is proposed to insert in, the constitution of the company.

proportional takeover bid means an off-market bid for a specified proportion of the securities in the bid class (see paragraph 618(1)(b)).

proprietary company has the meaning given by subsection 45A(1).

prospectus means a prospectus that is lodged with ASIC.

prove includes establish in any way (for example, but without limitation, through the operation of a presumption for which this Act or a law of a State or Territory provides).

providing finance means:

- (a) lending money; or
- (b) giving guarantees or security for loans made by someone else; or
- (c) drawing, accepting, indorsing, negotiating or discounting a bill of exchange, cheque, payment order or promissory note so that someone can obtain funds.

provision of a law includes:

- (a) a subsection, section, Subdivision, Division, Part or Chapter of the law; and
- (b) a Schedule, or an item in a Schedule, to the law.

public company means a company other than a proprietary company and:

- (a) in section 195 and Chapter 2E, includes a body corporate (other than a prescribed body corporate) that:
 - (i) is incorporated in a State or an internal Territory, but not under this Act; and
 - (ii) is included in the official list of a securities exchange; and
- (b) in Chapter 2E does not include a company that does not have “Limited” in its name because of section 150 or 151.

public document, in relation to a body corporate, has the meaning given by section 88A.

publish:

- (a) in relation to a notice—means, in Chapter 7, publish by any means, including in a newspaper or periodical, by broadcasting or televising or in a cinematograph film; and
- (b) in any case—includes issue.

qualified accountant means a member of a professional body that is approved by ASIC in writing for the purposes of this definition.

qualified privilege has the meaning given by section 89.

quarter day means 31 March, 30 June, 30 September or 31 December.

quotation, in relation to securities, in relation to a stock market of a securities exchange, or of a stock exchange, within the meaning of the provision where the expression occurs, includes the displaying or providing, on a stock market of the securities exchange or stock exchange, of information concerning:

- (a) if offers to sell, purchase or exchange the securities at particular prices, or for particular consideration, are made or accepted on that stock market—those prices or that consideration; or
- (b) if offers or invitations are made on that stock market, being offers or invitations that are intended, or may reasonably be expected, to result in the making or acceptance of offers to sell, purchase or exchange the securities at particular prices, or for particular consideration—those prices or that consideration; or

- (c) in any case—the price at which, or the consideration for which, particular persons, or particular classes of persons, propose, or may reasonably be expected, to sell, purchase or exchange the securities.

quoted ED securities has the meaning given by section 111AM.

quoted right has the meaning given by section 1097A.

Note: The meaning of ***quoted right*** may be extended by the SCH business rules (under section 1097B) or by an ASIC declaration (under section 1097C).

quoted security has the meaning given by section 1097A.

Note: The meaning of ***quoted security*** may be extended by the SCH business rules (under section 1097B) or by an ASIC declaration (under section 1097C).

receiver and manager has a meaning affected by section 90.

recognised futures exchange means a body corporate that:

- (a) conducts a futures market outside Australia; and
- (b) is prescribed for the purposes of this definition.

redeemable preference share means a preference share in a body corporate that is, or at the body's option is to be, liable to be redeemed.

referring State has the meaning given by section 4.

register means register under this Act.

registered Australian body means a registrable Australian body that is registered under Division 1 of Part 5B.2.

registered body mean a registered Australian body or a registered foreign company.

registered company auditor:

- (a) means a person registered as an auditor under Part 9.2; and
- (b) in relation to a body corporate that is not a company—includes a person qualified to act as the body's auditor under the law of the body's incorporation.

registered foreign company means a foreign company that is registered under Division 2 of Part 5B.2.

registered liquidator means a person registered as a liquidator under subsection 1282(2).

registered office, in relation to a body corporate, means the body's registered office under section 142 or 601CT, as the case requires.

registered scheme means a managed investment scheme that is registered under section 601EB.

registrable Australian body means:

- (a) a body corporate, not being:
 - (i) a company; or
 - (ii) an exempt public authority; or
 - (iii) a corporation sole; or
- (b) an unincorporated body that, under the law of its place of formation:
 - (i) may sue or be sued; or
 - (ii) may hold property;in the name of its secretary or of an officer of the body duly appointed for that purpose;

but does not include a foreign company.

registrable body means a registrable Australian body or a foreign company.

related body corporate, in relation to a body corporate, means a body corporate that is related to the first-mentioned body by virtue of section 50.

related entity, in relation to a body corporate, means any of the following:

- (a) a promoter of the body;
- (b) a relative, or de facto spouse, of such a promoter;
- (c) a relative of a spouse, or of a de facto spouse, of such a promoter;
- (d) a director or member of the body or of a related body corporate;
- (e) a relative, or de facto spouse, of such a director or member;
- (f) a relative of a spouse, or of a de facto spouse, of such a director or member;
- (g) a body corporate that is related to the first-mentioned body;

- (h) a beneficiary under a trust of which the first-mentioned body is or has at any time been a trustee;
- (i) a relative, or de facto spouse, of such a beneficiary;
- (j) a relative of a spouse, or of a de facto spouse, of such a beneficiary;
- (k) a body corporate one of whose directors is also a director of the first-mentioned body;
- (l) a trustee of a trust under which a person is a beneficiary, where the person is a related entity of the first-mentioned body because of any other application or applications of this definition.

related party (when used in Chapter 2E) has the meaning given by section 228.

relation-back day, in relation to a winding up of a company or Part 5.7 body, means:

- (a) if, because of Division 1A of Part 5.6, the winding up is taken to have begun on the day when an order that the company or body be wound up was made—the day on which the application for the order was filed; or
- (b) otherwise—the day on which the winding up is taken because of Division 1A of Part 5.6 to have begun.

relative, in relation to a person, means the spouse, parent or remoter lineal ancestor, son, daughter or remoter issue, or brother or sister of the person.

relevant agreement means an agreement, arrangement or understanding:

- (a) whether formal or informal or partly formal and partly informal; and
- (b) whether written or oral or partly written and partly oral; and
- (c) whether or not having legal or equitable force and whether or not based on legal or equitable rights.

relevant date, in relation to a winding up, means the day on which the winding up is taken because of Division 1A of Part 5.6 to have begun.

Note: Subsection 553(1B) modifies the operation of this definition for debts and claims that arise while a company is under a deed of company arrangement if the deed terminates immediately before the winding up.

relevant interest, in relation to securities, has a meaning given by sections 608 and 609.

relevant securities exchange for a listed company, or listed registered managed investment scheme, means:

- (a) the securities exchange on whose stock market the company or scheme is listed; or
- (b) if the company or scheme is listed on 2 or more exchanges—each of those exchanges.

remedial order means an order that:

- (a) restrains a person from exercising any voting or other rights attached to securities; or
- (b) directs a body corporate not to make or to defer payment of an amount due from the body corporate in respect of securities; or
- (c) restrains a person from acquiring securities or an interest in securities; or
- (d) directs a person to dispose of, or not to dispose of, securities or interests in securities; or
- (e) directs the disposal referred to in paragraph (d):
 - (i) to be made within a specified time; or
 - (ii) to be made subject to specified conditions; or
 - (iii) not to be made to a specified person or persons or to a specified class or classes of persons;
- (f) directs a specified person to pay to the body corporate an amount equal to any profit or benefit that the person obtains because of the disposal referred to in paragraph (d); or
- (g) vests securities, or an interest in securities, in ASIC; or
- (h) directs a body corporate not to register the transfer or transmission of securities; or
- (i) cancels securities issued as consideration for offers under a takeover bid; or
- (j) declares that an exercise of the voting or other rights attached to securities be disregarded; or
- (k) cancels or declares voidable:
 - (i) an agreement or offer relating to a takeover bid, or a proposed takeover bid; or

- (ii) any other agreement or offer in connection with the acquisition of securities or relevant interests in securities;
- (l) directs a person to give specified information to the holders of securities of a body corporate; or
- (m) directs a body corporate not to issue securities to a person; or
- (n) if an order of a kind referred to in paragraphs (a) to (m) is in force in respect of securities—directs the registered holder of the securities to give written notice of the order to any person whom the holder knows to be entitled to exercise a right to vote attached to those securities; or
- (o) directs a body corporate to repeal or modify its existing constitution or adopt a particular constitution; or
- (p) if a person has failed to comply with a requirement of Chapter 6, 6A, 6B or 6C—directs that person to comply with that requirement.

remuneration of an officer or employee of a corporation. A benefit given to an officer or employee of a corporation is **remuneration** if and only if the benefit, were it received by a director of the corporation, would be remuneration of the director for the purposes of an accounting standard that deals with disclosure in companies' financial reports of information about related parties. For the purposes of this definition, the following are not officers of a corporation:

- (a) a receiver, or receiver and manager, of the property of the corporation;
- (b) an administrator of the corporation;
- (c) an administrator of a deed of company arrangement executed by the corporation;
- (d) a liquidator of the corporation;
- (e) a trustee or other person administering a compromise or arrangement made between the corporation and someone else.

renounceable option means an assignable option to have an allotment of shares in a body corporate made to the holder of the option.

representative means:

- (a) in Chapter 7—a securities representative; or
- (b) in Chapter 8—a futures representative.

reproduction, in relation to a document, means a machine-copy of the document or a print made from a negative of the document.

resolution, in relation to creditors or contributories, means a resolution passed at a meeting of the creditors or contributories.

resolution for voluntary winding up means the special resolution referred to in section 491.

responsible entity of a registered scheme means the company named in ASIC's record of the scheme's registration as the responsible entity or temporary responsible entity of the scheme.

responsible officer means:

- (a) in relation to a body corporate that is, or proposes to be, a member of another body corporate:
 - (i) a director or executive officer of the first-mentioned body; or
 - (ii) a person who has control or substantial control of the first-mentioned body; and
- (b) in relation to a body corporate that applies for a licence—an officer of the body who would perform duties in connection with the holding of the licence.

result includes:

- (a) when used as a verb—result indirectly; and
- (b) when used as a noun—an indirect result.

retirement village scheme means a scheme, undertaking or enterprise (in this definition called the **relevant scheme**), whether in Australia or elsewhere, that is being, or is proposed to be, carried out or undertaken with the intention that the participants, or a majority of the participants, in the relevant scheme be provided, in connection with the relevant scheme, with residential accommodation within a retirement community, whether or not the entitlement of a participant to be provided with such accommodation derives from a proprietary interest held by the participant in the premises where the accommodation is provided, but does not include a time-sharing scheme.

revoke, in relation to an accounting standard, means, in the case of a provision of an accounting standard, vary the last-mentioned accounting standard by omitting the provision.

rules means:

- (a) rules of the Federal Court; or
 - (b) rules of the Supreme Court of a State or internal Territory;
- as the case requires.

same kind, in relation to a Chapter 8 agreement, has the meaning given by section 54.

SCH is short for securities clearing house.

SCH business rules means the business rules (within the meaning of Chapter 7) of the securities clearing house.

SCH certificate cancellation provisions means the provisions of the SCH business rules that deal with:

- (a) brokers cancelling certificates or other documents of title to quoted securities or quoted rights; and
- (b) matters incidental to brokers cancelling such certificates or documents.

scheme property of a registered scheme means:

- (a) contributions of money or money's worth to the scheme; and
- (b) money that forms part of the scheme property under provisions of this Act or the ASIC Act; and
- (c) money borrowed or raised by the responsible entity for the purposes of the scheme; and
- (d) property acquired, directly or indirectly, with, or with the proceeds of, contributions or money referred to in paragraph (a), (b) or (c); and
- (e) income and property derived, directly or indirectly, from contributions, money or property referred to in paragraph (a), (b), (c) or (d).

Note 1: Paragraph (a)—if what a member contributes to a scheme is rights over property, the rights in the property that the member retains do not form part of the scheme property.

Note 2: For provisions that are relevant to paragraph (b), see subsections 177(4), 1317HA(1A), 1317HB(3) and 1317HD(3) of this Act and subsection 93A(5) of the ASIC Act.

SCH participant means a person who, or a partnership that, under the SCH business rules, is entitled to participate in the facilities provided by the securities clearing house.

SCH-regulated transfer means a transfer (within the meaning of Division 3 of Part 7.13) of a quoted security or a quoted right that, according to the SCH business rules, is an SCH-regulated transfer.

SCH subregister means a subregister of quoted securities or quoted rights maintained by the SCH under the SCH business rules.

scrip means documents that are, or are documents of title to, securities.

section 513C day, in relation to the administration of a company, has the meaning given by section 513C.

section 770A stock market means a stock market in relation to which an approval under section 770A is in force.

securities has the meaning given by section 92.

securities adviser means a dealer, an investment adviser or a securities representative of a dealer or of an investment adviser.

securities business has the meaning given by section 93.

Note: The activities of the securities clearing house will not generally constitute a securities business—see subsection 779J(1).

securities clearing house means the body corporate in relation to which an approval under section 779B is in force.

securities exchange means:

- (a) in a provision (other than a provision of this Chapter or Chapter 6, 6C, 6D or 7) for the purposes of which a regulation is in force defining that expression—a securities exchange as defined by that regulation; or
- (b) in Chapters 6 and 6C:
 - (i) the Exchange;
 - (ii) Australian Stock Exchange (Adelaide) Limited; or
 - (iii) Australian Stock Exchange (Brisbane) Limited; or
 - (iv) Australian Stock Exchange (Hobart) Limited; or
 - (v) Australian Stock Exchange (Melbourne) Limited; or
 - (vi) Australian Stock Exchange (Perth) Limited; or
 - (vii) Australian Stock Exchange (Sydney) Limited; or

- (viii) a body corporate that is declared by the regulations to be a securities exchange for the purposes of that Chapter; or
- (c) in this Chapter or Chapter 6D or 7:
 - (i) a stock exchange; or
 - (ii) a body corporate in relation to which an approval under section 770 is in force.

securities law means a provision of Chapter 5C, 6, 6A, 6B, 6C, 6D or 7.

securities licence means a dealers licence or an investment advisers licence.

securities licensee means a person who holds a securities licence.

securities recommendation means a recommendation with respect to securities or a class of securities, whether made expressly or by implication.

securities report means an analysis or report about securities.

securities representative has the meaning given by section 94.

SEGC means a body corporate in relation to which a nomination as the Securities Exchanges Guarantee Corporation is in force under subsection 925A(1).

selective buy-back means a buy-back that is none of the following:

- (a) a buy-back under an equal access scheme within the meaning of subsections 257B(2) and (3);
- (b) a minimum holding buy-back;
- (c) an on-market buy-back;
- (d) an employee share scheme buy-back.

serious fraud means an offence involving fraud or dishonesty, being an offence:

- (a) against an Australian law or any other law; and
- (b) punishable by imprisonment for life or for a period, or maximum period, of at least 3 months.

sheriff includes a person charged with the execution of a writ or other process.

small proprietary company has the meaning given by subsection 45A(2).

sold position means:

- (a) in relation to a commodity agreement, or in relation to a futures contract, being a commodity agreement—the position of a person who, by virtue of the agreement, is under a Chapter 8 obligation to make delivery in accordance with the agreement; or
- (b) in relation to a futures contract, being an adjustment agreement—the position of a person who, by virtue of the agreement:
 - (i) will, if the value or worth of the agreement (as determined in accordance with the agreement) as at a particular future time exceeds by a particular amount the value or worth of the agreement (as so determined) as at a particular earlier time, be under a Chapter 8 obligation to pay that amount; and
 - (ii) will, if the value or worth of the agreement (as so determined) as at a particular future time is less by a particular amount than the value or worth of the agreement (as so determined) as at a particular earlier time, have a Chapter 8 right to receive that amount.

sole trader means a person who is a member organisation of a securities exchange.

solvent has the meaning given by subsection 95A(1).

special resolution means:

- (a) in relation to a company, a resolution:
 - (i) of which notice as set out in paragraph 249L(c) has been given; and
 - (ii) that has been passed by at least 75% of the votes cast by members entitled to vote on the resolution; or
- (b) in relation to a registered scheme, a resolution:
 - (i) of which notice as set out in paragraph 252J(c) has been given; and
 - (ii) that has been passed by at least 75% of the votes cast by members entitled to vote on the resolution.

staff member, in relation to ASIC, means a person who is a staff member for the purposes of the ASIC Act.

standardised agreement means a Chapter 8 agreement that is one of 2 or more Chapter 8 agreements each of which is a Chapter 8 agreement of the same kind as the other, or as each of the others, as the case may be.

standard opening hours means 10 am to 12 noon and 2 pm to 4 pm each business day.

State, when used in a geographical sense, includes the coastal sea of the State.

State Fair Trading Act means the following Acts for each State and Territory:

State Fair Trading Acts		
	State or Territory	Act
1	New South Wales	Fair Trading Act 1987
2	Victoria	Fair Trading Act 1999
3	Queensland	Fair Trading Act 1987
4	South Australia	Fair Trading Act 1987
5	Western Australia	Fair Trading Act 1987
6	Tasmania	Fair Trading Act 1990
7	Northern Territory	Fair Trading Act 1990
8	Australian Capital Territory	Fair Trading Act 1992

State Family Court, in relation to a State, means a court of that State to which section 41 of the *Family Law Act 1975* applies because of a Proclamation made under subsection 41(2) of that Act.

statement, in Chapter 7, includes matter that is not written but conveys a message.

State or Territory court means a court of a State, the Capital Territory or the Northern Territory.

State or Territory Supreme Court means the Supreme Court of:

- (a) a State; or
- (b) the Capital Territory; or

(c) the Northern Territory.

statutory demand means:

- (a) a document that is, or purports to be, a demand served under section 459E; or
- (b) such a document as varied by an order under subsection 459H(4).

statutory minimum means:

- (a) if an amount greater than \$2,000 is prescribed—the prescribed amount; or
- (b) otherwise—\$2,000.

stock exchange means:

- (a) in a provision (other than a provision of this Chapter or Chapter 6 or 7) for the purposes of which a regulation is in force defining that expression—a stock exchange as defined by that regulation; or
- (b) in Chapter 6:
 - (i) the Exchange;
 - (ii) Australian Stock Exchange (Adelaide) Limited; or
 - (iii) Australian Stock Exchange (Brisbane) Limited; or
 - (iv) Australian Stock Exchange (Hobart) Limited; or
 - (v) Australian Stock Exchange (Melbourne) Limited; or
 - (vi) Australian Stock Exchange (Perth) Limited; or
 - (vii) Australian Stock Exchange (Sydney) Limited; or
 - (viii) a body corporate that is declared by the regulations to be a stock exchange for the purposes of that Chapter; or
- (c) in this Chapter or Chapter 7—any of the following:
 - (i) the Exchange;
 - (ii) Australian Stock Exchange (Adelaide) Limited;
 - (iii) Australian Stock Exchange (Brisbane) Limited;
 - (iv) Australian Stock Exchange (Hobart) Limited;
 - (v) Australian Stock Exchange (Melbourne) Limited;
 - (vi) Australian Stock Exchange (Perth) Limited;
 - (vii) Australian Stock Exchange (Sydney) Limited;
 - (viii) the Stock Exchange of Bendigo Limited;
 - (ix) the Stock Exchange of Ballarat Limited;
 - (x) the Stock Exchange of Newcastle Limited;

- (xi) a body corporate in relation to which an approval under section 769 is in force.

stock market means, subject to section 97, a market, exchange or other place at which, or a facility by means of which:

- (a) offers to sell, purchase or exchange securities are regularly made or accepted; or
- (b) offers or invitations are regularly made, being offers or invitations that are intended, or may reasonably be expected, to result, whether directly or indirectly, in the making or acceptance of offers to sell, purchase or exchange securities; or
- (c) information is regularly provided about the prices at which, or the consideration for which, particular persons, or particular classes of persons, propose, or may reasonably be expected, to sell, purchase or exchange securities.

subscriber for securities that are interests in a managed investment scheme means any person:

- (a) accepting an offer, or making an offer pursuant to an invitation, in respect of the interests; or
- (b) subscribing for or buying the interests.

subsection 1337B(3) proceeding means a proceeding with respect to a matter referred to in subsection 1337B(3).

subsidiary, in relation to a body corporate, means a body corporate that is a subsidiary of the first-mentioned body by virtue of Division 6.

substantial holding: A person has a substantial holding in a body corporate, or listed registered managed investment scheme, if:

- (a) the total votes attached to voting shares in the body, or voting interests in the scheme, in which they or their associates:
 - (i) have relevant interests; and
 - (ii) would have a relevant interest but for subsection 609(6) (exchange traded options) or 609(7) (conditional agreements);

is 5% or more of the total number of votes attached to voting shares in the body, or interests in the scheme; or

- (b) the person has made a takeover bid for voting shares in the body, or voting interests in the scheme, and the takeover period has started and not yet ended.

Note: For *relevant interest*, see section 608.

substantial part, in relation to activities, includes the whole of those activities.

superior court means the Federal Court of Australia, the Supreme Court of a State or Territory, the Family Court or a State Family Court.

superior court matter means a civil matter that this Act clearly intends (for example, by use of the expression *the Court*) to be dealt with only by a superior court.

suspend, in relation to a licence, includes, except in sections 827 and 1192, make under section 827 or 1192, as the case requires, an order prohibiting the licensee as mentioned in paragraph 827(1)(d) or 1192(1)(d).

takeover bid means an off-market bid or market bid made under Chapter 6.

takeover contract means a contract that results from the acceptance of an offer made under a takeover bid.

target for a takeover bid means the company, listed body or managed investment scheme whose securities are to be acquired under the bid.

target's statement means a target's statement under sections 638 to 640 as supplemented.

territorial sea has the same meaning as in the *Seas and Submerged Lands Act 1973*.

Territory means:

- (a) the Capital Territory; or
- (b) the Northern Territory; or
- (c) an external Territory;

and, when used in a geographical sense, includes the coastal sea of the Territory.

this Act includes the regulations.

this jurisdiction means the geographical area that consists of:

- (a) each referring State (including its coastal sea); and
- (b) the Capital Territory (including the coastal sea of the Jervis Bay Territory); and
- (c) the Northern Territory (including its coastal sea).

time-sharing scheme means a scheme, undertaking or enterprise, whether in Australia or elsewhere:

- (a) participants in which are, or may become, entitled to use, occupy or possess, for 2 or more periods during the period for which the scheme, undertaking or enterprise is to operate, property to which the scheme, undertaking or enterprise relates; and
- (b) that is to operate for a period of not less than 3 years.

trade, in relation to securities, in relation to a stock market, includes:

- (a) make or accept on that stock market an offer to sell, buy or exchange the securities; and
- (b) make on that stock market an offer or invitation that is intended, or may reasonably be expected, to result in the making or acceptance of an offer to sell, buy or exchange the securities.

trading day of a securities exchange or stock exchange means a day on which a stock market of the exchange or stock exchange is open for trading in securities.

trading floor, in relation to a futures market conducted by a body corporate, means a place or facility that the body maintains or provides for the acquisition or disposal of futures contracts by members of the body, or by such members and other persons.

transaction, in Part 5.7B, in relation to a body corporate or Part 5.7 body, means a transaction to which the body is a party, for example (but without limitation):

- (a) a conveyance, transfer or other disposition by the body of property of the body; and
- (b) a charge created by the body on property of the body; and
- (c) a guarantee given by the body; and
- (d) a payment made by the body; and
- (e) an obligation incurred by the body; and

(f) a release or waiver by the body; and

(g) a loan to the body;

and includes such a transaction that has been completed or given effect to, or that has terminated.

transmission means a transmission, by means of electric or electromagnetic energy, of:

(a) sounds, including speech and music; or

(b) visual images; or

(c) signals for the communication, whether as between persons and persons, persons and things or things and things, of any matter otherwise than in the form of sounds or visual images; or

(d) signals for the actuation or control of machinery or apparatus.

transparency, in relation to a document, means:

(a) a developed negative or positive photograph of that document (in this definition called an **original photograph**) made, on a transparent base, by means of light reflected from, or transmitted through, the document; or

(b) a copy of an original photograph made by the use of photo-sensitive material (being photo-sensitive material on a transparent base) placed in surface contact with the original photograph; or

(c) any one of a series of copies of an original photograph, the first of the series being made by the use of photo-sensitive material (being photo-sensitive material on a transparent base) placed in surface contact with a copy referred to in paragraph (b), and each succeeding copy in the series being made, in the same manner, from any preceding copy in the series.

Tribunal means the Administrative Appeals Tribunal.

ultimate holding company, in relation to a body corporate, means a body corporate that:

(a) is a holding company of the first-mentioned body; and

(b) is itself a subsidiary of no body corporate.

unauthorised futures market means a futures market that is neither a futures market of a futures exchange nor an exempt futures market.

unauthorised stock market means a stock market that is not:

- (a) a stock market of a securities exchange; or
- (b) a section 770A stock market; or
- (c) an exempt stock market.

unclaimed money account means an account that:

- (a) ASIC maintains under section 63J of the *Audit Act 1901*; and
- (b) is maintained for the sole purpose of containing money that is unclaimed property.

unclaimed property means:

- (a) property paid or transferred to ASIC under a provision of this Act that provides for property to be transferred, or for the Court to direct that property be transferred, to ASIC to be dealt with under Part 9.7; or
- (b) any other property that a provision of this Act provides for ASIC to deal with under Part 9.7; or
- (c) property that vests in ASIC under section 1404; or
- (d) an accretion to, or substitution for, property that is unclaimed property because of any other application or applications of this definition; or
- (e) without limiting paragraph (d), money paid, or required to be paid, under paragraph 1339(2)(b) into an unclaimed money account;

but does not include income that the Minister has applied under subsection 1339(3).

uncommercial transaction has the meaning given by section 588FB.

underlying securities means:

- (a) in relation to an option over securities—those securities; and
- (b) in relation to scrip that is constituted by documents that are, or are documents of title to, securities—those securities.

undertaking, in relation to a managed investment scheme, means the undertaking, scheme, enterprise, contract or arrangement to which the scheme relates.

underwrite includes sub-underwrite.

unfair loan has the meaning given by section 588FD.

unfair preference has the meaning given by section 588FA.

unit, in relation to a share, debenture or other interest, means a right or interest, whether legal or equitable, in the share, debenture or other interest, by whatever term called, and includes an option to acquire such a right or interest in the share, debenture or other interest.

unlimited company means a company whose members have no limit placed on their liability.

unlisted disclosing entity has the meaning given by subsection 111AL(2).

unsecured, in relation to a debt, has in Part 5.7B a meaning affected by section 588D.

value, in relation to an asset, includes amount.

voting interest, in relation to a managed investment scheme, means an issued interest in the scheme that confers a right to vote, not being a right to vote that is exercisable only in one or more of the following circumstances:

- (a) on a proposal that affects rights attached to the interests;
- (b) on a proposal to wind up the scheme;
- (c) on a proposal for the disposal of the whole of the scheme property, business and undertaking;
- (d) during the winding up of the scheme.

voting power in a company has the meaning given by section 610.

voting share in a body corporate means an issued share in the body that carries any voting rights beyond the following:

- (a) a right to vote while a dividend (or part of a dividend) in respect of the share is unpaid;
- (b) a right to vote on a proposal to reduce the body's share capital;
- (c) a right to vote on a resolution to approve the terms of a buy-back agreement;
- (d) a right to vote on a proposal that affects the rights attached to the share;
- (e) a right to vote on a proposal to wind the body up;

- (f) a right to vote on a proposal for the disposal of the whole of the body's property, business and undertaking;
- (g) a right to vote during the body's winding up.

wages, in relation to a company, means amounts payable to or in respect of an employee of the company (whether the employee is remunerated by salary, wages, commission or otherwise) under an industrial instrument, including amounts payable by way of allowance or reimbursement but excluding amounts payable in respect of leave of absence.

wholly-owned subsidiary, in relation to a body corporate, means a body corporate none of whose members is a person other than:

- (a) the first-mentioned body; or
- (b) a nominee of the first-mentioned body; or
- (c) a subsidiary of the first-mentioned body, being a subsidiary none of whose members is a person other than:
 - (i) the first-mentioned body; or
 - (ii) a nominee of the first-mentioned body; or
- (d) a nominee of such a subsidiary.

winding up by the Court includes winding up in insolvency.

wound up by the Court includes wound up in insolvency.

Division 2—Associates

10 Effect of Division

- (1) This Division has effect for the purposes of interpreting a reference (in this Division called the *associate reference*), in relation to a person (in this Division called the *primary person*), to an associate.
- (2) A person is not an associate of the primary person except as provided in this Division.
- (3) Nothing in this Division limits the generality of anything else in it.

11 Associates of bodies corporate

If the primary person is a body corporate, the associate reference includes a reference to:

- (a) a director or secretary of the body; and
- (b) a related body corporate; and
- (c) a director or secretary of a related body corporate.

12 Matters relating to voting shares

- (1) If the associate reference relates to:
 - (a) the extent of a power to exercise, or to control the exercise of, the voting power attached to voting shares in a body corporate; or
 - (b) the primary person's voting power in a body corporate; or
 - (c) a takeover bid for securities in a body corporate;it includes a reference to a person with whom the primary person has, or proposes to enter into, a relevant agreement:
 - (d) because of which one of those persons has or will have power (even if it is in any way qualified):
 - (i) to exercise; or
 - (ii) to control, directly or indirectly, the exercise of; or
 - (iii) to influence substantially the exercise of; any voting power attached to shares in the body;
 - (e) for the purpose of controlling or influencing:
 - (i) the composition of the body's board; or
 - (ii) the conduct of affairs of the body;

- (f) under which one of those persons:
 - (i) will or may acquire; or
 - (ii) may be required by the other to acquire;shares in the body in which the other has a relevant interest;
or
 - (g) under which one of those persons may be required to dispose of shares in the body in accordance with the other's directions;
whatever other effect the relevant agreement may have.
- (2) In relation to a matter relating to shares in a body corporate, a person may be an associate of the body and the body may be an associate of a person.

13 References in Chapter 7

If the associate reference occurs in Chapter 7 and relates to a matter that is not of a kind referred to in paragraph 12(1)(a), (b) or (c), it includes a reference to:

- (a) a person in partnership with whom the primary person carries on a securities business; and
- (b) subject to subsection 16(2), a person who is a partner of the primary person otherwise than because of carrying on a securities business in partnership with the primary person; and
- (c) a trustee of a trust in relation to which the primary person benefits, or is capable of benefiting, otherwise than because of transactions entered into in the ordinary course of business in connection with the lending of money; and
- (d) a director of a body corporate of which the primary person is also a director and that carries on a securities business; and
- (e) subject to subsection 16(2), a director of a body corporate of which the primary person is also a director and that does not carry on a securities business.

14 References in Chapter 8

If it occurs in section 29 or 1323 or Chapter 8, the associate reference includes a reference to:

- (a) a person in partnership with whom the primary person carries on a business of dealing in futures contracts; and

- (b) subject to subsection 16(2), a person who is a partner of the primary person otherwise than because of carrying on in partnership with the primary person a business of dealing in futures contracts; and
- (c) a trustee of a trust in relation to which the primary person benefits, or is capable of benefiting, otherwise than because of transactions entered into in the ordinary course of business in connection with the lending of money; and
- (d) a director of a body corporate of which the primary person is also a director and that carries on a business of dealing in futures contracts; and
- (e) subject to subsection 16(2), a director of a body corporate of which the primary person is also a director and that does not carry on a business of dealing in futures contracts.

15 General

- (1) The associate reference includes a reference to:
 - (a) a person in concert with whom the primary person is acting, or proposes to act; and
 - (b) a person who, under the regulations, is, for the purposes of the provision in which the associate reference occurs, an associate of the primary person; and
 - (c) a person with whom the primary person is, or proposes to become, associated, whether formally or informally, in any other way;in respect of the matter to which the associate reference relates.
- (2) If the primary person has entered, or proposes to enter, into a transaction, or has done, or proposes to do, any act or thing, in order to become associated with another person as mentioned in an applicable provision of this Division, the associate reference includes a reference to that other person.

16 Exclusions

- (1) A person is not an associate of another person by virtue of section 12 or subsection 15(1), or by virtue of subsection 15(2) as it applies in relation to section 12 or subsection 15(1), merely because of one or more of the following:

- (a) one gives advice to the other, or acts on the other's behalf, in the proper performance of the functions attaching to a professional capacity or a business relationship;
 - (b) one, a client, gives specific instructions to the other, whose ordinary business includes dealing in securities, to acquire shares on the client's behalf in the ordinary course of that business;
 - (c) one had sent, or proposes to send, to the other an offer under a takeover bid for shares held by the other;
 - (d) one has appointed the other, otherwise than for valuable consideration given by the other or by an associate of the other, to vote as a proxy or representative at a meeting of members, or of a class of members, of a body corporate.
- (2) For the purposes of proceedings under this Act in which it is alleged that a person was an associate of another person by virtue of paragraph 13(b) or (e) or 14(b) or (e), the first-mentioned person is not taken to have been an associate of the other person in relation to a matter by virtue of that paragraph unless it is proved that the first-mentioned person knew, or ought to have known, at that time, the material particulars of that matter.

17 Associates of composite persons

A reference to an associate, in relation to a dealer, investment adviser, futures broker or futures adviser, is, if 2 or more persons constitute the dealer, investment adviser, futures broker or futures adviser, a reference to an associate of any of those persons.

Division 3—Carrying on business

18 Carrying on business: otherwise than for profit

A reference to a person carrying on business, carrying on a business, or carrying on a business of a particular kind, includes a reference to the person carrying on business, carrying on a business, or carrying on a business of that kind, as the case may be:

- (a) in any case—otherwise than for profit; or
- (b) in the case of a body corporate—otherwise than for the profit of the members or corporators of the body.

19 Businesses of a particular kind

A reference to a business of a particular kind includes a reference to a business of that kind that is part of, or is carried on in conjunction with, any other business.

20 Carrying on a business: alone or together with others

A reference in this Act to a person carrying on a business, or a business of a particular kind, is a reference to the person carrying on a business, or a business of that kind, whether alone or together with any other person or persons.

21 Carrying on business in Australia or a State or Territory

- (1) A body corporate that has a place of business in Australia, or in a State or Territory, carries on business in Australia, or in that State or Territory, as the case may be.
- (2) A reference to a body corporate carrying on business in Australia, or in a State or Territory, includes a reference to the body:
 - (a) establishing or using a share transfer office or share registration office in Australia, or in the State or Territory, as the case may be; or

- (b) administering, managing, or otherwise dealing with, property situated in Australia, or in the State or Territory, as the case may be, as an agent, legal personal representative or trustee, whether by employees or agents or otherwise.
- (3) Despite subsection (2), a body corporate does not carry on business in Australia, or in a State or Territory, merely because, in Australia, or in the State or Territory, as the case may be, the body:
- (a) is or becomes a party to a proceeding or effects settlement of a proceeding or of a claim or dispute; or
 - (b) holds meetings of its directors or shareholders or carries on other activities concerning its internal affairs; or
 - (c) maintains a bank account; or
 - (d) effects a sale through an independent contractor; or
 - (e) solicits or procures an order that becomes a binding contract only if the order is accepted outside Australia, or the State or Territory, as the case may be; or
 - (f) creates evidence of a debt, or creates a charge on property; or
 - (g) secures or collects any of its debts or enforces its rights in regard to any securities relating to such debts; or
 - (h) conducts an isolated transaction that is completed within a period of 31 days, not being one of a number of similar transactions repeated from time to time; or
 - (j) invests any of its funds or holds any property.

Division 4—Dealing in futures contracts

23 Acquiring a futures contract

- (1) A person acquires a futures contract (other than a futures option or an eligible exchange-traded option) if, and only if, the person enters into, or takes an assignment of, the futures contract, whether or not on another's behalf.
- (2) A person acquires a futures option or an eligible exchange-traded option if, and only if, the person takes the option, or takes an assignment of the option, whether or not on another's behalf.
- (3) This section has effect subject to sections 26 and 27.

24 Disposing of a futures contract

- (1) A person disposes of a futures contract (other than a futures option or an eligible exchange-traded option) if, and only if, the person takes, or causes to be taken, such action as closes out the futures contract, whether or not the action is taken on another's behalf.
- (2) A person disposes of a futures option or an eligible exchange-traded option if, and only if, the person:
 - (a) grants, assigns or exercises the option; or
 - (b) takes, or causes to be taken, such action as releases the option; or
 - (c) allows the option to lapse;whether or not on another's behalf.
- (3) This section has effect subject to sections 26 and 27.

25 Dealing in futures contracts: general

- (1) Subject to sections 26 and 27, a person deals in a futures contract if, and only if, the person:
 - (a) acquires, or disposes of, the futures contract; or
 - (b) offers to acquire, or to dispose of, the futures contract; or
 - (c) induces, or attempts to induce, another person to acquire, or to dispose of, the futures contract.

- (2) Subject to sections 26 and 27, a person deals in a futures contract on another person's behalf if, and only if, the first-mentioned person acquires, or disposes of, the futures contract on the other person's behalf, or offers so to acquire, or so to dispose of, the futures contract.
- (3) In determining whether or not a person who is not a resident of Australia or of an external Territory deals in a futures contract on another person's behalf, an act that the holder of a futures brokers licence or an exempt broker does on the first-mentioned person's behalf is to be disregarded.
- (4) Subsection (5) has effect for the purposes of determining:
 - (a) whether or not a person deals in a futures contract on another person's behalf; and
 - (c) what constitutes such a business carried on by a person.
- (5) An act that the person does:
 - (a) while employed by, or acting for or by arrangement with, a futures broker; and
 - (b) as employee or agent of, or otherwise on behalf of, on account of, or for the benefit of, the broker; and
 - (c) in connection with a business of dealing in futures contracts that the broker carries on;is to be disregarded.
- (6) Subsections (3), (4) and (5) do not have effect for the purposes of sections 26, 27, 28, 1126 and 1132.

26 Dealing in futures contracts through intermediaries: first step

Where a person acquires, disposes of, or otherwise deals in, a futures contract on another person's behalf, the other person is also taken to acquire, dispose of, or deal in, as the case may be, the futures contract.

27 Dealing in futures contracts through intermediaries: second and later steps

- (1) Where:
 - (a) because of instructions given, or any other act done, by a person (in this section called the *intermediary*), the intermediary is, by virtue of:

- (i) an application of section 26; or
 - (ii) an application of section 26 and an application, or 2 or more applications, of this section;taken to acquire, dispose of, or deal in, a futures contract; and
 - (b) the intermediary gave the instructions, or did that other act, on behalf of another person (in this section called the *principal*);
- this section has effect, except for the purposes of section 26.
- (2) The principal is also taken to acquire, dispose of, or deal in, as the case may be, the futures contract.
 - (3) The intermediary and:
 - (a) if subparagraph (1)(a)(i) applies—the person who acquires, disposes of, or otherwise deals in, as the case may be; or
 - (b) if subparagraph (1)(a)(ii) applies—the persons who, by virtue of the applications referred to in that subparagraph, are each taken to acquire, dispose of, or deal in, as the case may be;the futures contract on the intermediary's behalf is each taken to acquire, dispose of, or deal in, as the case may be, the futures contract on the principal's behalf.

28 Dealing in futures contracts, through intermediaries, on futures markets

- (1) This section has effect where a person acquires, disposes of, or otherwise deals in, a futures contract on a futures market and by virtue of:
 - (a) an application of section 26; or
 - (b) an application of section 26 and an application or applications of section 27;another person:
 - (c) is also taken to acquire, dispose of, or deal in, the futures contract; or
 - (d) is taken to acquire, dispose of, or deal in, the futures contract on a third person's behalf.
- (2) The other person is taken to acquire, dispose of, or deal in, the futures contract on that futures market, or on the third person's behalf on that futures market, as the case may be.

29 Own account dealings and transactions: futures contracts

- (1) A reference to a person dealing in a futures contract, or entering into a transaction in relation to a futures contract, on the person's own account includes a reference to a person so dealing, or entering into such a transaction, as the case may be, as principal or on behalf of:
 - (a) in any case—an associate of the person; or
 - (b) in any case—a body corporate in which the person has a controlling interest; or
 - (c) if the person carries on a futures broking business in partnership—a body corporate in which the person's interests and the interests of the other partners together constitute a controlling interest.
- (2) A futures broker who is a member of a futures exchange or of a recognised futures exchange does not deal in a futures contract, or enter into a transaction in relation to a futures contract, on the broker's own account merely because the dealing is with, or the transaction is entered into with, another futures broker who is a member of a futures exchange or of a recognised futures exchange.
- (3) Despite Division 2, a person is not an associate of another person for the purposes of subsection (1) merely because the first-mentioned person is either or both of the following:
 - (a) a partner of the other person otherwise than because of carrying on in partnership with the other person a business of dealing in futures contracts;
 - (b) a director of a body corporate of which the other person is also a director, whether or not the body carries on a business of dealing in futures contracts.

Division 5A—Types of company

45A Proprietary companies

- (1) A proprietary company is a company that is registered as, or converts to, a proprietary company under this Act.

Note 1: A proprietary company can be registered under section 118 or 601BD. A company can convert to a proprietary company under Part 2B.7.

Note 2: A proprietary company must:

- be limited by shares or be an unlimited company with a share capital
- have no more than 50 non-employee shareholders
- not do anything that would require disclosure to investors under Chapter 6D (except in limited circumstances).

(see section 113).

Small proprietary company

- (2) A proprietary company is a small proprietary company for a financial year if it satisfies at least 2 of the following paragraphs:
- (a) the consolidated gross operating revenue for the financial year of the company and the entities it controls (if any) is less than \$10 million;
 - (b) the value of the consolidated gross assets at the end of the financial year of the company and the entities it controls (if any) is less than \$5 million;
 - (c) the company and the entities it controls (if any) have fewer than 50 employees at the end of the financial year.

Note: A small proprietary company generally has reduced financial reporting requirements (see subsection 292(2)).

Large proprietary company

- (3) A proprietary company is a large proprietary company for a financial year if it satisfies at least 2 of the following paragraphs:
- (a) the consolidated gross operating revenue for the financial year of the company and the entities it controls (if any) is \$10 million or more;
 - (b) the value of the consolidated gross assets at the end of the financial year of the company and the entities it controls (if any) is \$5 million or more;

- (c) the company and the entities it controls (if any) have 50 or more employees at the end of the financial year.

When a company controls an entity

- (4) For the purposes of this section, the question whether a proprietary company controls an entity is to be decided in accordance with the accounting standards made for the purposes of paragraph 295(2)(d) (even if the standards do not otherwise apply to the company).

Counting employees

- (5) In counting employees for the purposes of subsections (2) and (3), take part-time employees into account as an appropriate fraction of a full-time equivalent.

Accounting standards

- (6) Consolidated gross operating revenue and the value of consolidated gross assets are to be calculated for the purposes of this section in accordance with accounting standards in force at the relevant time (even if the standard does not otherwise apply to the financial year of some or all of the companies concerned).

Division 6—Subsidiaries and related bodies corporate

46 What is a subsidiary

A body corporate (in this section called the *first body*) is a subsidiary of another body corporate if, and only if:

- (a) the other body:
 - (i) controls the composition of the first body's board; or
 - (ii) is in a position to cast, or control the casting of, more than one-half of the maximum number of votes that might be cast at a general meeting of the first body; or
 - (iii) holds more than one-half of the issued share capital of the first body (excluding any part of that issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital); or
- (b) the first body is a subsidiary of a subsidiary of the other body.

47 Control of a body corporate's board

Without limiting by implication the circumstances in which the composition of a body corporate's board is taken to be controlled by another body corporate, the composition of the board is taken to be so controlled if the other body, by exercising a power exercisable (whether with or without the consent or concurrence of any other person) by it, can appoint or remove all, or the majority, of the directors of the first-mentioned body, and, for the purposes of this Division, the other body is taken to have power to make such an appointment if:

- (a) a person cannot be appointed as a director of the first-mentioned body without the exercise by the other body of such a power in the person's favour; or
- (b) a person's appointment as a director of the first-mentioned body follows necessarily from the person being a director or other officer of the other body.

48 Matters to be disregarded

- (1) This section applies for the purposes of determining whether a body corporate (in this section called the *first body*) is a subsidiary of another body corporate.
- (2) Any shares held, or power exercisable, by the other body in a fiduciary capacity are treated as not held or exercisable by it.
- (3) Subject to subsections (4) and (5), any shares held, or power exercisable:
 - (a) by a person as a nominee for the other body (except where the other body is concerned only in a fiduciary capacity); or
 - (b) by, or by a nominee for, a subsidiary of the other body (not being a subsidiary that is concerned only in a fiduciary capacity);are treated as held or exercisable by the other body.
- (4) Any shares held, or power exercisable, by a person by virtue of the provisions of debentures of the first body, or of a trust deed for securing an issue of such debentures, are to be disregarded.
- (5) Any shares held, or power exercisable, otherwise than as mentioned in subsection (4), by, or by a nominee for, the other body or a subsidiary of it are to be treated as not held or exercisable by the other body if:
 - (a) the ordinary business of the other body or that subsidiary, as the case may be, includes lending money; and
 - (b) the shares are held, or the power is exercisable, only by way of security given for the purposes of a transaction entered into in the ordinary course of business in connection with lending money, not being a transaction entered into with an associate of the other body, or of that subsidiary, as the case may be.

49 References in this Division to a subsidiary

A reference in paragraph 46(b) or 48(3)(b) or subsection 48(5) to being a subsidiary, or to a subsidiary, of a body corporate includes a reference to being a subsidiary, or to a body corporate that is a subsidiary, as the case may be, of the first-mentioned body by virtue of any other application or applications of this Division.

50 Related bodies corporate

Where a body corporate is:

- (a) a holding company of another body corporate; or
 - (b) a subsidiary of another body corporate; or
 - (c) a subsidiary of a holding company of another body corporate;
- the first-mentioned body and the other body are related to each other.

50AA Control

- (1) For the purposes of this Act, an entity controls a second entity if the first entity has the capacity to determine the outcome of decisions about the second entity's financial and operating policies.
- (2) In determining whether the first entity has this capacity:
 - (a) the practical influence the first entity can exert (rather than the rights it can enforce) is the issue to be considered; and
 - (b) any practice or pattern of behaviour affecting the second 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) The first entity does not control the second entity merely because the first entity and a third entity jointly have the capacity to determine the outcome of decisions about the second entity's financial and operating policies.
- (4) If the first entity:
 - (a) has the capacity to influence decisions about the second entity's financial and operating policies; and
 - (b) is under a legal obligation to exercise that capacity for the benefit of someone other than the first entity's members;the first entity is taken not to control the second entity.

Division 7—Interpretation of other expressions

51 Acquisition and disposal of shares

For the purposes of the definition of *deal* in section 9 and of Chapter 7, a person acquires shares in a body corporate if, and only if:

- (a) the person acquires a relevant interest in those shares as a result of a transaction entered into by or on behalf of the person in relation to those shares, in relation to any other securities of that body corporate or in relation to securities of any other body corporate; or
- (b) the person acquires any legal or equitable interest in securities of that body corporate or in securities of any other body corporate and, as a result of the acquisition, another person acquires a relevant interest in those shares.

52 Doing acts

A reference to doing an act or thing includes a reference to causing or authorising the act or thing to be done.

52A Signing

Without affecting the law on agency, if this Act requires that something be signed, it can be signed by an individual using a power of attorney from the person required to sign.

53 Affairs of a body corporate

For the purposes of the definition of *examinable affairs* in section 9, section 53AA 232, 233 or 234, paragraph 461(1)(e), section 487, subsection 1307(1) or section 1309, or of a prescribed provision of this Act, the affairs of a body corporate include:

- (a) the promotion, formation, membership, control, business, trading, transactions and dealings (whether alone or jointly with any other person or persons and including transactions and dealings as agent, bailee or trustee), property (whether held alone or jointly with any other person or persons and including property held as agent, bailee or trustee), liabilities (including liabilities owed jointly with any other person or

persons and liabilities as trustee), profits and other income, receipts, losses, outgoings and expenditure of the body; and

(b) in the case of a body corporate (not being an authorised trustee corporation) that is a trustee (but without limiting the generality of paragraph (a))—matters concerned with the ascertainment of the identity of the persons who are beneficiaries under the trust, their rights under the trust and any payments that they have received, or are entitled to receive, under the terms of the trust; and

(c) the internal management and proceedings of the body; and

(d) any act or thing done (including any contract made and any transaction entered into) by or on behalf of the body, or to or in relation to the body or its business or property, at a time when:

(i) a receiver, or a receiver and manager, is in possession of, or has control over, property of the body; or

(ii) the body is under administration; or

(ia) a deed of company arrangement executed by the body has not yet terminated; or

(iii) a compromise or arrangement made between the body and any other person or persons is being administered; or

(iv) the body is being wound up;

and, without limiting the generality of the foregoing, any conduct of such a receiver or such a receiver and manager, of an administrator of the body, of an administrator of such a deed of company arrangement, of a person administering such a compromise or arrangement or of a liquidator or provisional liquidator of the body; and

(e) the ownership of shares in, debentures of, and interests in a managed investment scheme made available by, the body; and

(f) the power of persons to exercise, or to control the exercise of, the rights to vote attached to shares in the body or to dispose of, or to exercise control over the disposal of, such shares; and

(g) matters concerned with the ascertainment of the persons who are or have been financially interested in the success or failure, or apparent success or failure, of the body or are or have been able to control or materially to influence the policy of the body; and

- (h) the circumstances under which a person acquired or disposed of, or became entitled to acquire or dispose of, shares in, debentures of, or interests in a managed investment scheme made available by, the body; and
- (j) where the body has made available interests in a managed investment scheme—any matters concerning the financial or business undertaking, scheme, common enterprise or investment contract to which the interests relate; and
- (k) matters relating to or arising out of the audit of, or working papers or reports of an auditor concerning, any matters referred to in a preceding paragraph.

53AA Business affairs of a body corporate

A body corporate's business affairs include (without limitation):

- (a) any of the body's affairs (including anything that is included in the body's affairs because of section 53); and
- (b) matters concerned with ascertaining the corporations with which the body is or has been connected.

53AB Business affairs of a natural person

A natural person's business affairs include (without limitation):

- (a) the person's examinable operations and examinable assets and liabilities; and
- (b) any act done (including any contract made and any transaction entered into) by or on behalf of the person, or to or in relation to the person or his or her business or property, at a time when:
 - (i) the person was, under the *Bankruptcy Act 1966* or the law of an external Territory, a bankrupt in respect of a bankruptcy from which the person had not been discharged; or
 - (ii) the person had, under a law of an external Territory or of a foreign country, the status of an undischarged bankrupt; or
 - (iii) the person's property was subject to control under Division 2 of Part X of the *Bankruptcy Act 1966* because of an authority given by the person under section 188 of that Act; or

- (iv) a deed of assignment, deed of arrangement, or composition, under Part X of the *Bankruptcy Act 1966* or under the corresponding provisions of the law of an external Territory or of a foreign country was in effect in relation to the person or the person's property; and
- (c) without limiting the generality of paragraph (b), any conduct of the trustee of such a bankrupt estate or of such a deed of assignment or arrangement, a person acting under such an authority or a person administering such a composition; and
- (d) matters concerned with ascertaining the corporations with which the person is or has been connected.

53AC Business affairs of a partnership

A partnership's business affairs include (without limitation):

- (a) the partnership's promotion, formation, membership, control, examinable operations and examinable assets and liabilities; and
- (b) the partnership's management and proceedings; and
- (c) any act done (including any contract made and any transaction entered into) by or on behalf of the partnership, or to or in relation to the partnership, at a time when the partnership is being wound up; and
- (d) matters concerned with ascertaining the corporations with which the partnership is or has been connected.

53AD Business affairs of a trust

A trust's business affairs include (without limitation):

- (a) the creation of the trust; and
- (b) matters arising under, or otherwise relating to, the terms of the trust; and
- (c) the appointment and removal of a trustee of the trust; and
- (d) the business, trading, transactions and dealings of the trustee of the trust; and
- (e) the profits, income and receipts of the trustee of the trust; and
- (f) the losses, outgoings and expenditure of the trustee of the trust; and
- (g) the trust property, including transactions and dealings in, and the income arising from, the trust property; and
- (h) the liabilities of the trustee of the trust; and

- (j) the management of the trust; and
- (k) any act done (including any contract made and any transaction entered into) by or on behalf of the trustee of the trust, or to or in relation to the trust, at a time when the trust is being wound up; and
- (l) matters concerned with ascertaining the corporations with which the trust is or has been connected.

54 Chapter 8 agreements of the same kind

A Chapter 8 agreement is of the same kind as another Chapter 8 agreement if, and only if, the provisions of the first-mentioned Chapter 8 agreement are the same as, or not materially different from, the provisions of the other Chapter 8 agreement, disregarding:

- (a) the fact that the parties to the respective Chapter 8 agreements are different; and
- (b) any difference in the amounts payable under corresponding provisions of the respective Chapter 8 agreements.

55 Chapter 8 obligations and rights

- (1) A Chapter 8 obligation, or a Chapter 8 right, is an obligation or right, as the case may be, whether or not enforceable at law or in equity.
- (2) A reference to a Chapter 8 obligation of a particular kind includes a reference to alternative Chapter 8 obligations one of which is a Chapter 8 obligation of that kind.

56 Classes of futures organisation membership

A reference to a member, in relation to a body corporate that is, or proposes to become, a futures organisation, is, if the body may operate otherwise than as a futures organisation and any of the rules, regulations or by-laws made by the body or contained in its constituent documents provide for:

- (a) a separate class of membership for persons to whom the operation of the body otherwise than as a futures organisation relates (whether or not such persons may be members within another class of membership); or

(b) 2 or more such separate classes of membership;
a reference to a person in the person's capacity as a member of the body in a class of membership other than that separate class or those separate classes, as the case may be.

57 Classes of shares or interests in managed investment schemes

- (1) The shares in a body corporate, if not divided into 2 or more classes, constitute a class.
- (2) If the interests in a managed investment scheme to which an undertaking relates are not divided into 2 or more classes, they constitute a class.

57A Meaning of *corporation*

- (1) Subject to this section, in this Act, ***corporation*** includes:
 - (a) a company; and
 - (b) any body corporate (whether incorporated in this jurisdiction or elsewhere); and
 - (c) an unincorporated body that under the law of its place of origin, may sue or be sued, or may hold property in the name of its secretary or of an officer of the body duly appointed for that purpose.
- (2) Neither of the following is a ***corporation***:
 - (a) an exempt public authority;
 - (b) a corporation sole.

58AA Meaning of *court* and *Court*

- (1) Subject to subsection (2), in this Act:

court means any court.

Court means any of the following courts:

- (a) the Federal Court;
- (b) the Supreme Court of a State or Territory;
- (c) the Family Court of Australia;
- (d) a court to which section 41 of the *Family Law Act 1975* applies because of a Proclamation made under subsection 41(2) of that Act.

- (2) Except where there is a clear expression of a contrary intention (for example, by use of the expression “the Court”), proceedings in relation to a matter under this Act may, subject to Part 9.7, be brought in any court.

Note: The matters dealt with in Part 9.7 include the applicability of limits on the jurisdictional competence of courts.

58B Discharge of obligations under this Act

- (2) Subject to subsection (3), an act required to be done under this Act may, for the purposes of this Act, be done anywhere in Australia, whether in or outside this jurisdiction.
- (3) Nothing in subsection (2) affects the operation of any provision of this Act that:
- (a) expressly requires a particular act to be done in this jurisdiction; or
 - (b) expressly or by implication permits a particular act to be done outside Australia.

59 Debentures as consideration for acquisition of shares

A reference to a body corporate that offers debentures as consideration for the acquisition of shares in a body corporate includes a reference to a body corporate that offers a cash sum as consideration for the acquisition of shares where it is to be a term of the contract for the acquisition of those shares that the offeree makes, or that the sum is applied in whole or in part in making, a payment by way of deposit with, or loan to, the body corporate that offers the sum.

61 Discretionary accounts

A reference to operation by a futures broker on a discretionary account is a reference to dealings by the broker in futures contracts on instructions of another person that authorise the broker to deal in futures contracts without the prior approval of that other person, whether:

- (a) the instructions are given by, and the money used for operating on the account is provided by, one person only; or

- (b) the instructions are given by, and the money used for operating on the account is contributed as a common fund by, each of a number of persons;

not being dealings on instructions that authorise dealings in futures contracts without the prior approval of that other person only as to the time when or the price at which the dealings are to be effected, or both.

64 Entering into a transaction in relation to shares or securities

A reference in section 51 or Chapter 6 to entering into a transaction in relation to shares or securities includes a reference to:

- (a) entering into, or becoming a party to, a relevant agreement in relation to the shares or securities; and
- (b) exercising an option to have the shares or securities allotted.

64A Entities

Except in Chapter 2E, a reference to an entity:

- (a) is a reference to a natural person, a body corporate (other than an exempt public authority), a partnership or a trust; and
- (b) includes, in the case of a trust, a reference to the trustee of the trust.

64B Entities connected with a corporation

Body corporate

- (1) A body corporate is connected with a corporation if, and only if, the corporation:
 - (a) can control, or influence materially, the body's activities or internal affairs; or
 - (b) is a member of the body; or
 - (c) is in a position to cast, or to control the casting of, a vote at a general meeting of the body; or
 - (d) has power to dispose of, or to exercise control over the disposal of, a share in the body; or
 - (e) is financially interested in the body's success or failure or apparent success or failure; or
 - (f) is owed a debt by the body; or
 - (g) is engaged by the body under a contract for services; or

(h) acts as agent for the body in any transaction or dealing.

Natural person

- (2) A natural person is connected with a corporation if, and only if, the corporation:
- (a) is a trustee of a trust under which the person is capable of benefiting; or
 - (b) is engaged by the person under a contract for services; or
 - (c) acts as agent for the person in any transaction or dealing; or
 - (d) is an attorney of the person under a power of attorney; or
 - (e) has appointed the person as the corporation's attorney under a power of attorney; or
 - (f) is given financial, business or legal advice by the person in the performance of the functions attaching to the person's professional capacity.

Partnership

- (3) A partnership is connected with a corporation if, and only if, the corporation:
- (a) is a partner in the partnership; or
 - (b) can control, or influence materially, the partnership's activities or internal affairs; or
 - (c) is financially interested in the partnership's success or failure or apparent success or failure; or
 - (d) is a creditor of the partnership; or
 - (e) is engaged by the partnership under a contract for services; or
 - (f) acts as agent for the partnership in any transaction or dealing.

Trust

- (4) A trust is connected with a corporation if, and only if, the corporation:
- (a) is the settlor, or one of the settlors, of the trust; or
 - (b) has power under the terms of the trust to appoint or remove a trustee of the trust or to vary, or cause to be varied, any of the terms of the trust; or
 - (c) is a trustee of the trust; or
 - (d) can control, or influence materially, the activities of the trust;
or

- (e) is capable of benefiting under the trust; or
- (f) is a creditor of the trustee of the trust; or
- (g) is engaged by the trustee of the trust under a contract for services; or
- (h) acts as agent for the trustee of the trust in any transaction or dealing.

65 Eligible money market dealer

ASIC may declare a body corporate to be an authorised dealer in the short term money market by notice published in the *Gazette*.

66A Exempt bodies

A body corporate is an exempt body of a State or Territory if, and only if, it:

- (a) is not a company; and
- (b) is incorporated by or under a law of the State or Territory.

67 Exempt brokers and exempt futures advisers

- (1) A body corporate is both an exempt broker and an exempt futures adviser if it is:
 - (a) a prescribed body corporate; or
 - (b) an exempt public authority in relation to which a declaration is in force under subsection (2).
- (2) The Minister may by writing declare that paragraph (1)(b) applies in relation to specified bodies corporate.
- (3) ASIC must cause a copy of an instrument executed under subsection (2) to be published in the *Gazette*.
- (4) Subject to this section, a person is an exempt broker or an exempt futures adviser if the person is a futures broker or futures adviser, as the case may be, but does not carry on a futures broking business or a futures advice business, as the case may be, except:
 - (a) as an official receiver or trustee within the meaning of the *Bankruptcy Act 1966*; or
 - (b) as a receiver, receiver and manager, or liquidator, appointed by a court; or

- (c) as a person appointed by a court to carry on the business concerned; or
 - (d) as a receiver, receiver and manager, or liquidator, appointed otherwise than by a court; or
 - (e) as an administrator of a body corporate; or
 - (ea) as an administrator of a deed of company arrangement executed by a body corporate; or
 - (f) as a trustee or other person administering a compromise or arrangement between a body corporate and any other person or persons; or
 - (g) as a personal representative of a dead futures broker or futures adviser, as the case may be; or
 - (h) in such other capacity, or in such other circumstances, as are prescribed.
- (5) A person who carries on a futures broking business or futures advice business in a capacity referred to in any of paragraphs (4)(d) to (g) (inclusive) is taken for the purposes of subsection (4) to carry on the business otherwise than in that capacity unless there is in force under subsection (6) an approval of the person carrying on the business in that capacity.
- (6) ASIC may, on application by a person and after having regard to:
- (a) the prescribed matters (if any); and
 - (b) such matters as it thinks appropriate;
- by writing approve of the person carrying on a specified futures broking business or futures advice business in a specified capacity, being a capacity referred to in any of paragraphs (4)(d) to (g), inclusive.
- (7) A person is not an exempt broker or an exempt futures adviser except as provided by this section.

68 Exempt dealers and exempt investment advisers

- (1) A person is both an exempt dealer and an exempt investment adviser if the person is:
- (a) an eligible money market dealer; or
 - (b) an exempt public authority.
- (2) Subject to this section, a person is an exempt dealer or an exempt investment adviser if the person is a dealer or investment adviser,

as the case may be, but does not carry on a securities business or an investment advice business, as the case may be, except:

- (a) as an official receiver or trustee within the meaning of the *Bankruptcy Act 1966*; or
 - (b) as a receiver, receiver and manager, or liquidator, appointed by a court; or
 - (c) as a person appointed by a court to carry on the business concerned; or
 - (d) by virtue of the person's powers, as Public Trustee, under a prescribed law of a State or Territory; or
 - (e) as a receiver, receiver and manager, or liquidator, appointed otherwise than by a court; or
 - (f) as an administrator of a body corporate; or
 - (fa) as an administrator of a deed of company arrangement executed by a body corporate; or
 - (g) as a trustee or other person administering a compromise or arrangement between a body corporate and any other person or persons; or
 - (h) as a personal representative of a dead dealer or investment adviser, as the case may be; or
 - (j) in such other capacity, or in such other circumstances, as are prescribed.
- (3) A body corporate that carries on, or holds itself out as carrying on, a business of dealing in debentures of that body is an exempt dealer if it neither carries on, nor holds itself out as carrying on, a business of dealing in any other securities.
- (4) A person who carries on a securities business or investment advice business in a capacity referred to in any of paragraphs (2)(e) to (h) (inclusive) is taken for the purposes of subsection (2) to carry on the business otherwise than in that capacity unless there is in force under subsection (5) an approval of the person carrying on the business in that capacity.
- (5) ASIC may, on application by a person and after having regard to:
- (a) the prescribed matters (if any); and
 - (b) such matters as it thinks appropriate;
- by writing approve of the person carrying on a specified securities business or investment advice business in a specified capacity,

being a capacity referred to in any of paragraphs (2)(e) to (h), inclusive.

- (6) A person who carries on a securities business or investment advice business as a personal representative of a dead dealer or investment adviser, as the case may be, is taken for the purposes of subsection (2) to stop carrying on that business as such a personal representative:
- (a) at the end of 6 months after the death of the dealer or investment adviser; or
 - (b) on being discharged or removed as a personal representative of the dealer or investment adviser; or
 - (c) on the final distribution of the estate of the dealer or investment adviser;
- whichever happens first.
- (7) A person is not an exempt dealer or an exempt investment adviser except as provided by this section.

70 Extension of period for doing an act

Where this Act confers power to extend the period for doing an act, an application for the exercise of the power may be made, and the power may be exercised, even if the period, or the period as last extended, as the case requires, has ended.

71 Futures advice business

- (1) A reference to a futures advice business, in relation to a person, is a reference to:
- (a) a business of advising other persons about futures contracts; or
 - (b) a business in the course of which the person publishes futures reports.
- (3) The remaining provisions of this subsection apply for the purposes of determining:
- (a) whether or not a person carries on a futures advice business; and
 - (b) what constitutes a futures advice business carried on by a person; and

- (c) whether or not a person holds himself, herself or itself out to be a futures adviser.
- (4) If the person is a solicitor or accountant in public practice as such, an act that the person does is to be disregarded if it is merely incidental to the practice of his or her profession.
- (5) The fact that the person advises other persons about futures contracts, or publishes futures reports, in some or all of the following circumstances is to be disregarded:
 - (a) in a newspaper or periodical:
 - (i) of which the person is the proprietor or publisher; and
 - (ii) that is generally available to the public otherwise than only on subscription;
 - (b) in the course of, or by means of, transmissions that:
 - (i) the person makes by means of an information service; or
 - (ii) are made by means of an information service that the person owns, operates or makes available; and are generally available to the public;
 - (c) in sound recordings, video recordings, or data recordings, that the person makes generally available to the public in either or both of the following ways:
 - (i) by supplying copies of them to the public;
 - (ii) by causing the sound recordings to be heard by, the video recordings to be seen and heard by, or the contents of the data recordings to be displayed or reproduced for, the public, as the case may be.
- (6) Subsection (5) does not apply in relation to a newspaper or periodical, or transmissions, sound recordings, video recordings or data recordings, whose sole or principal purpose is to advise other persons about futures contracts or to publish futures reports.
- (7) The fact that the person holds himself, herself or itself out as advising other persons, or publishing futures reports, as mentioned in subsection (5) is to be disregarded.
- (8) An act that the person does:
 - (a) while employed by, or acting for or by arrangement with, another person; and

- (b) as employee or agent of, or otherwise on behalf of, on account of, or for the benefit of, the other person; and
 - (c) in connection with a futures advice business carried on by the other person;
- is to be disregarded.

72 Futures contract

- (1) A futures contract is:
- (a) a Chapter 8 agreement that is, or has at any time been, an eligible commodity agreement or adjustment agreement; or
 - (b) a futures option; or
 - (c) an eligible exchange-traded option;
- other than:
- (d) a Chapter 8 agreement:
 - (i) that is:
 - (A) a currency swap; or
 - (B) an interest rate swap; or
 - (C) a forward exchange rate contract; or
 - (D) a forward interest rate contract; and
 - (ii) to which an Australian bank, or a merchant bank as defined by subsection (4), is a party; or
 - (e) a Chapter 8 agreement that, when entered into, is in a class of agreements prescribed for the purposes of this paragraph.

Note: Regulations under subsection 72A(2) may provide that specified provisions of this Act and the regulations apply in relation to Chapter 8 agreements to which section 72A applies as if the agreements were futures contracts.

- (2) Where a Chapter 8 agreement that was not a futures contract when it was entered into becomes a futures contract at a later time:
- (a) the parties to the Chapter 8 agreement are taken to enter into a futures contract at the later time; and
 - (b) the Chapter 8 agreement is taken to constitute the futures contract referred to in paragraph (a).
- (3) Nothing in this Act limits the manner in which a class of futures contracts may be determined and such a class may be determined according to any criteria relevant to futures contracts.

- (4) For the purposes of subparagraph (1)(d)(ii), a body corporate is a merchant bank at a particular time if, and only if, it is at that time a registered corporation in:
 - (a) the category for authorised money market dealers or, if there is at that time no such category, a prescribed category; or
 - (b) the category for money market corporations or, if there is at that time no such category, a prescribed category.
- (5) An expression has the same meaning in subsection (4) as in the *Financial Corporations Act 1974*.

72A Act applies to certain Chapter 8 agreements as if they were futures contracts

- (1) This section applies to Chapter 8 agreements:
 - (a) that are entered into on a futures market of a futures exchange; and
 - (b) that are of a kind prescribed for the purposes of this paragraph.
- (2) The regulations may, in relation to Chapter 8 agreements to which this section applies:
 - (a) provide that specified provisions of this Act and the regulations apply in relation to the agreements as if the agreements were futures contracts; and
 - (b) provide that specified provisions of this Act and the regulations do not apply in relation to the agreements; and
 - (c) make modifications of this Act and the regulations as applying in relation to the agreements.
- (3) Modifications made by regulations referred to in paragraph (2)(c) may be of provisions specified in regulations referred to in paragraph (2)(a) or of other provisions of this Act or the regulations.

73 Futures representatives

- (1) Subject to subsection (2), a person is a futures representative of another person if, and only if, the first-mentioned person:
 - (a) is employed by; or

- (b) acts for or by arrangement with;
the other person in connection with a futures broking business or
futures advice business carried on by the other person.
- (2) Except for the purposes of paragraph 87(1)(b):
 - (a) a person who holds a proper authority from a futures licensee
is a futures representative of the licensee; and
 - (b) a person who holds an invalid futures authority from another
person is a futures representative of the other person.
- (3) Subject to subsection (4), a person does an act, or engages in
conduct, as a futures representative of another person if, and only
if, the first-mentioned person does the act, or engages in the
conduct:
 - (a) in connection with a futures broking business or futures
advice business carried on by the other person; and
 - (b) while the first-mentioned person is a futures representative of
the other person; and
 - (c) as employee or agent of, or otherwise on behalf of, on
account of, or for the benefit of, the other person; and
 - (d) otherwise than in the course of work of a kind ordinarily
done by accountants, clerks or cashiers.
- (4) Except for the purposes of Division 4 of Part 8.3, a person who
holds himself, herself or itself out to be a futures representative of
another person does an act as a futures representative of the other
person.

73A When a court is taken to find a person guilty of an offence

An Australian court finds a person guilty of an offence if, and only
if:

- (a) the court convicts the person of the offence; or
- (b) the person is charged before the court with the offence and is
found in the court to have committed the offence, but the
court does not proceed to convict the person of the offence.

75 Inclusion in official list

A reference to a body corporate or other person included in an
official list of a body corporate is a reference to:

- (a) a body corporate or other person whose name is included in that official list; or
- (b) a body corporate or other person whose name has been changed but whose previous name was included in that official list immediately before the change and is still so included.

77 Investment advice business

- (1) A reference to an investment advice business, in relation to a person, is a reference to:
 - (a) a business of advising other persons about securities; or
 - (b) a business in the course of which the person publishes securities reports.
- (3) The remaining provisions of this section apply for the purposes of determining:
 - (a) whether or not a person carries on an investment advice business; and
 - (b) what constitutes an investment advice business carried on by a person; and
 - (c) whether or not a person holds himself, herself, or itself out to be an investment adviser.
- (4) If the person is a body corporate authorised by a law of a State or Territory to take in its own name a grant of probate of the will, or a grant of letters of administration of the estate, of a dead person, an act done by the first-mentioned person is to be disregarded.
- (5) If the person is a solicitor or accountant in public practice as such, an act that the person does is to be disregarded if it is merely incidental to the practice of his or her profession.
- (6) The fact that the person advises other persons about securities, or publishes securities reports, in some or all of the following circumstances is to be disregarded:
 - (a) in a newspaper or periodical:
 - (i) of which the person is the proprietor or publisher; and
 - (ii) that is generally available to the public otherwise than only on subscription;
 - (b) in the course of, or by means of, transmissions that:

- (i) the person makes by means of an information service;
or
 - (ii) are made by means of an information service that the person owns, operates or makes available;
and are generally available to the public;
- (c) in sound recordings, video recordings, or data recordings, that the person makes generally available to the public in either or both of the following ways:
 - (i) by supplying copies of them to the public; or
 - (ii) by causing the sound recordings to be heard by, the video recordings to be seen and heard by, or the contents of the data recordings to be displayed or reproduced for, the public, as the case may be.
- (7) Subsection (6) does not apply in relation to a newspaper or periodical, or transmissions, sound recordings, video recordings or data recordings, as the case may be, whose sole or principal purpose is to advise other persons about securities or to publish securities reports.
- (8) The fact that the person holds himself, herself or itself out as advising other persons, or publishing securities reports, as mentioned in subsection (6) is to be disregarded.
- (9) An act that the person does:
 - (a) while employed by, or acting for or by arrangement with, another person; and
 - (b) as employee or agent of, or otherwise on behalf of, on account of, or for the benefit of, the other person; and
 - (c) in connection with an investment advice business carried on by the other person;is to be disregarded.

79 Involvement in contraventions

A person is involved in a contravention if, and only if, the person:

- (a) has aided, abetted, counselled or procured the contravention;
or
- (b) has induced, whether by threats or promises or otherwise, the contravention; or

- (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or
- (d) has conspired with others to effect the contravention.

80 Jervis Bay Territory taken to be part of the Australian Capital Territory

The Jervis Bay Territory is taken to be part of the Australian Capital Territory.

82 Offers and invitations to the public

A reference in this Act to, or to the making of, an offer to the public or to, or to the issuing of, an invitation to the public is, unless the contrary intention appears, to be construed as including a reference to, or to the making of, an offer to any section of the public or to, or to the issuing of, an invitation to any section of the public, as the case may be, whether selected as clients of the person making the offer or issuing the invitation or in any other manner and notwithstanding that the offer is capable of acceptance only by each person to whom it is made or that an offer or application may be made pursuant to the invitation only by a person to whom the invitation is issued, but a bona fide offer or invitation is not taken to be an offer or invitation to the public if it:

- (a) is an offer or invitation to enter into an underwriting agreement; or
- (b) is made or issued to a person whose ordinary business is to buy or sell shares, debentures or interests in managed investment schemes, whether as principal or agent; or
- (c) is made or issued to existing members or debenture holders of a corporation and relates to shares in, or debentures of, that corporation; or
- (d) is made or issued to existing members of a company in connection with a proposal referred to in section 507 and relates to shares in that company.

82A Officers of bodies corporate and other entities

- (1) Subject to subsection (2), *officer*, in relation to:
 - (a) a body corporate; or

(b) an entity;

includes:

- (c) a director, secretary, executive officer or employee of the body or entity; and
- (d) a receiver and manager, appointed under a power contained in an instrument, of property of the body or entity; and
- (e) an administrator of the body or entity; and
- (ea) an administrator of a deed of company arrangement executed by the body or entity; and
- (f) a liquidator of the body or entity appointed in a voluntary winding up of the body or entity; and
- (g) a trustee or other person administering a compromise or arrangement made between the body or entity and any other person or persons.

(2) None of the following is an officer of a body corporate, or of an entity:

- (a) a receiver who is not also a manager;
- (b) a receiver and manager appointed by a court;
- (c) a liquidator appointed by a court.

83 Officers, and other persons, in default

A reference, in relation to a contravention, to an officer of a body corporate, or to a person, who is in default is a reference to an officer of the body (including a person who later ceases to be such an officer), or to a person, as the case may be, who is involved in the contravention.

84 Own account dealings and transactions: securities

A person deals in, or enters into a transaction of sale or purchase of, securities on the person's own account if, and only if, the person deals in the securities, or enters into the transaction, as principal or on behalf of:

- (a) in any case—an associate of the person; or
- (b) in any case—a body corporate in which the person has a controlling interest; or
- (c) if the person carries on a securities business in partnership—a body corporate in which the person's interest and the

interests of the other partners together constitute a controlling interest.

86 Possession

A thing that is in a person's custody or under a person's control is in the person's possession.

87 Proper authority from futures licensee; invalid futures authority

- (1) A reference, in relation to a person (in this subsection called the *representative*), to a proper authority from a futures licensee (in this subsection called the *principal*) is a reference to a copy of the licence on which have been endorsed:
 - (a) a statement:
 - (i) certifying the copy to be a true copy of the licence; and
 - (ii) stating that the representative is employed by, or acts for or by arrangement with, the principal; and
 - (iii) signed by the principal; and
 - (b) in relation to each futures licensee (if any), other than the principal, of whom the representative is a futures representative, a statement that:
 - (i) sets out the name of the licensee; and
 - (ii) states that the representative is employed by, or acts for or by arrangement with, the licensee; and
 - (iii) states that the licensee consents to the representative being employed by, or acting for or by arrangement with, the principal; and
 - (iv) is signed by the licensee.
- (2) A reference, in relation to a person (in this subsection called the *representative*), to an invalid futures authority from a person (in this subsection called the *principal*) is a reference to a document:
 - (a) on which is endorsed a statement:
 - (i) stating that the representative is employed by, or acts for or by arrangement with, the principal; and
 - (ii) signed by the principal; and
 - (b) that purports to be a copy of a futures licence and to be a proper authority of the representative from the principal, but is not in fact such a proper authority;whether or not:

- (c) the principal is, or has ever been, a futures licensee; or
 - (d) the document is in fact a copy of a futures licence that exists or has ever existed.
- (3) For the purposes of this section, a statement is signed by a person if, and only if, it is signed:
- (a) if the person is a natural person—by the person; or
 - (b) if the person is a body corporate:
 - (i) by a director or secretary; or
 - (ii) by an executive officer who is authorised to sign the statement.

88 Proper authority from securities licensee; invalid securities authority

- (1) A reference, in relation to a person (in this subsection called the *representative*), to a proper authority from a securities licensee (in this subsection called the *principal*) is a reference to a copy of the licence on which are endorsed:
- (a) a statement:
 - (i) certifying the copy to be a true copy of the licence; and
 - (ii) stating that the representative is employed by, or acts for or by arrangement with, the principal; and
 - (iii) signed by the principal; and
 - (b) in relation to each licensee (if any), other than the principal, of whom the representative is a securities representative, a statement that:
 - (i) sets out the name of the licensee; and
 - (ii) states that the representative is employed by, or acts for or by arrangement with, the licensee; and
 - (iii) states that the licensee consents to the representative being employed by, or acting for or by arrangement with, the principal; and
 - (iv) is signed by the licensee.
- (2) A reference, in relation to a person (in this subsection called the *representative*), to an invalid securities authority from a person (in this subsection called the *principal*) is a reference to a document:
- (a) on which is endorsed a statement:
 - (i) stating that the representative is employed by, or acts for or by arrangement with, the principal; and

- (ii) signed by the principal; and
 - (b) that purports to be a copy of a securities licence and to be a proper authority of the representative from the principal, but is not in fact such a proper authority;
- whether or not:
 - (c) the principal is, or has ever been, a securities licensee; or
 - (d) the document is in fact a copy of a securities licence that exists or has ever existed.
- (3) For the purposes of this section, a statement is signed by a person if, and only if, it is signed:
 - (a) if the person is a natural person—by the person; or
 - (b) if the person is a body corporate:
 - (i) by a director or secretary; or
 - (ii) by an executive officer who is authorised to sign the statement.

88A Public document of a body corporate

- (1) Subject to this section, *public document*, in relation to a body, means:
 - (a) an instrument of, or purporting to be signed, issued or published by or on behalf of, the body that:
 - (i) when signed, issued or published, is intended to be lodged or is required by or under this Act or the ASIC Act to be lodged; or
 - (ii) is signed, issued or published under or for the purposes of this Act, the ASIC Act or any other Australian law; or
 - (b) an instrument of, or purporting to be signed or issued by or on behalf of, the body that is signed or issued in the course of, or for the purposes of, a particular transaction or dealing; or
 - (c) without limiting paragraph (a) or (b), a business letter, statement of account, invoice, receipt, order for goods, order for services or official notice of, or purporting to be signed or issued by or on behalf of, the body.
- (2) A thing is not a public document of a body if it:
 - (a) is applied, or is intended or required to be applied:
 - (i) to goods; or

- (ii) to a package, label, reel or thing in or with which goods are, or are to be, supplied; and
 - (b) is so applied, or is intended or required to be so applied, for a purpose connected with the supply of the goods.
- (3) In subsection (2):
 - apply to* includes print on, weave in, impress on, work into, or annex, affix or attach to.
 - label* includes a band or ticket.
 - package* includes:
 - (a) a covering, stopper, glass, bottle, vessel, box, capsule, case, frame or wrapper; or
 - (b) any other container or thing in which goods are, or are to be, packed.

89 Qualified privilege

- (1) Where this Act provides that a person has qualified privilege in respect of an act, matter or thing, the person:
 - (a) has qualified privilege in proceedings for defamation; or
 - (b) is not, in the absence of malice on the person's part, liable to an action for defamation at the suit of a person;as the case requires, in respect of that act, matter or thing.
- (2) In subsection (1):
 - malice* includes ill will to the person concerned or any other improper motive.
- (3) Neither this section nor a provision of this Act that provides as mentioned in subsection (1) limits or affects any right, privilege or immunity that a person has, apart from this section or such a provision, as defendant in proceedings, or an action, for defamation.

90 Receivers and managers

A receiver of property of a body corporate is also a manager if the receiver manages, or has under the terms of the receiver's appointment power to manage, affairs of the body.

91 Being or becoming subject to a section 206B prohibition, a section 206D or 206E order, a section 206F notice

- (1) For the purposes of this Act, a person is taken to be or become subject to a section 206B prohibition if, and only if, the person is or becomes, as the case may be, by virtue of section 206B, prohibited as mentioned in that section.
- (2) For the purposes of this Act, a person is taken to be or become subject to a section 206D order if, and only if, an order relating to the person is in force, or is made, as the case may be, under section 206D, and a reference in this Act to a section 599 order is a reference to an order so in force or made.
- (3) For the purposes of this Act, a person is taken to be or become subject to a section 206E order if, and only if, an order relating to the person is in force, or is made, as the case may be, under section 206E, and a reference in this Act to a section 230 order is a reference to an order so in force or made.
- (4) For the purposes of this Act, a person is taken to be or become subject to a section 206F notice if, and only if, a notice relating to the person is in force, or is served, as the case may be, under section 206F, and a reference in this Act to a section 600 notice is a reference to a notice so in force or served.
- (5) For the purposes of this section, an order or notice that prohibits a person for a specified period from engaging in particular conduct is, unless sooner revoked, taken to cease to be in force at the end of that period.

92 Securities

- (1) Subject to this section, *securities* means:
 - (a) debentures, stocks or bonds issued or proposed to be issued by a government; or
 - (b) shares in, or debentures of, a body; or
 - (c) interests in a managed investment scheme; or
 - (ca) in Parts 7.3 to 7.6 (inclusive)—interests that would be interests in a managed investment scheme but for paragraph (h) of the definition of *managed investment scheme* in section 9; or
 - (d) units of such shares; or

(e) an option contract within the meaning of Chapter 7;
but does not include a futures contract or an excluded security.

Note: Regulations under subsection 92A(2) may provide that specified provisions of this Act and the regulations apply in relation to relevant agreements to which section 92A applies as if the agreements were securities.

- (2) The expression *securities*, when used in relation to a body, means:
- (a) shares in the body; or
 - (b) debentures of the body; or
 - (c) interests in a managed investment scheme made available by the body; or
 - (ca) in Parts 7.3 to 7.6 (inclusive)—interests made available by the body that would be interests in a managed investment scheme but for paragraph (h) of the definition of *managed investment scheme* in section 9; or
 - (d) units of such shares;
- but does not include a futures contract or an excluded security.

- (2A) In Parts 7.3 to 7.6 (inclusive):

securities includes an interest in a benefit fund (within the meaning of the *Life Insurance Act 1995*).

Note: See section 16B of the *Life Insurance Act 1995*.

- (3) In Chapters 6 to 6D (inclusive):

securities means:

- (a) shares in a body; or
- (b) debentures of a body; or
- (c) interests in a registered managed investment scheme; or
- (d) legal or equitable rights or interests in:
 - (i) shares; or
 - (ii) debentures; or
 - (iii) interests in a registered managed investment scheme;
- (e) options to acquire (whether by way of issue or transfer) a security covered by paragraph (a), (b), (c) or (d).

It does not cover a futures contract or an option approved by a securities exchange as an exchange traded option.

Note: Section 9 defines *body* and sections 9 and 72 define *futures contract*.

92A Act applies to certain relevant agreements as if they were securities

- (1) This section applies to relevant agreements (whether or not they are futures contracts):
 - (a) that are entered into on a stock market of a securities exchange; and
 - (b) that are of a kind prescribed for the purposes of this paragraph.
- (2) The regulations may, in relation to relevant agreements to which this section applies:
 - (a) provide that specified provisions of this Act and the regulations apply in relation to the agreements as if the agreements were securities; and
 - (b) provide that specified provisions of this Act and the regulations do not apply in relation to the agreements; and
 - (c) make modifications of this Act and the regulations as applying in relation to the agreements.
- (3) Modifications made by regulations referred to in paragraph (2)(c) may be of provisions specified in regulations referred to in paragraph (2)(a) or of other provisions of this Act or the regulations.

93 Securities business

- (1) A securities business is a business of dealing in securities.
- (3) Subsections (5), (6) and (7) apply for the purposes of determining:
 - (a) whether or not a person carries on, or holds himself, herself or itself out as carrying on, a securities business; and
 - (b) what constitutes such a business carried on by a person.
- (4) Subsection (7) also applies for the purposes of determining whether or not a person deals in securities.
- (5) An act done on behalf of the person by the holder of a dealers licence or an exempt dealer is to be disregarded.
- (6) An act that the person does:
 - (a) while employed by, or acting for or by arrangement with, a dealer; and

- (b) as employee or agent of, or otherwise on behalf of, on account of, or for the benefit of, the dealer; and
 - (c) in connection with a securities business carried on by the dealer;
- is to be disregarded.
- (7) An act or acts done by the person that constitutes or together constitute a dealing by the person in a futures contract is to be disregarded.

94 Securities representatives

- (1) Subject to subsection (2), a person is a securities representative of another person if, and only if, the first-mentioned person:
- (a) is employed by; or
 - (b) acts for or by arrangement with;
- the other person in connection with a securities business or investment advice business carried on by the other person.
- (2) Except for the purposes of paragraph 88(1)(b):
- (a) a person who holds a proper authority from a securities licensee is a securities representative of the licensee; and
 - (b) a person who holds an invalid securities authority from another person is a securities representative of the other person.
- (3) Subject to subsection (4), a person does an act, or engages in conduct, as a securities representative of another person if, and only if, the first-mentioned person does the act, or engages in the conduct:
- (a) in connection with a securities business or investment advice business carried on by the other person; and
 - (b) while the first-mentioned person is a securities representative of the other person; and
 - (c) as employee or agent of, or otherwise on behalf of, on account of, or for the benefit of, the other person; and
 - (d) otherwise than in the course of work of a kind ordinarily done by accountants, clerks or cashiers.
- (4) Except for the purposes of Division 4 of Part 7.3, a person who holds himself, herself or itself out to be a securities representative

of another person does an act as a securities representative of the other person.

95A Solvency and insolvency

- (1) A person is solvent if, and only if, the person is able to pay all the person's debts, as and when they become due and payable.
- (2) A person who is not solvent is insolvent.
- (3) Section 922 defines when a person becomes insolvent for the purposes of Part 7.10.

97 Stock market not to include futures market

In determining whether a market, exchange, place or facility is a stock market, regard is not to be had to the making at that market, exchange or other place, or by means of that facility, as the case may be, of futures contracts.

Division 8—Miscellaneous interpretation rules

100 Address of registered office etc.

(1) Where a provision of this Act requires a notice to be lodged of, or information in an application to specify:

- (a) the address of an office, or of a proposed office, of a body corporate or other person; or
- (b) a change in the situation of an office of a body corporate or other person;

the notice:

- (c) must specify the full address, or the full new address, as the case requires, of the relevant office including, where applicable, the number of the room and of the floor or level of the building on which the office is situated; and
 - (d) where the notice or application relates to the address or situation of an office of a body corporate and the address specified in accordance with paragraph (a) is the address of premises that are not to be occupied by the body corporate—must include a written statement to the effect that the person who occupies those premises has consented in writing to the address being specified in the notice or application and has not withdrawn that consent.
- (2) ASIC may require a person who has lodged a notice or application that includes a statement under paragraph (1)(d) to produce to ASIC the consent referred to in the statement.

100A Operation of certain laws relating to instruments on which stamp duty has not been paid

Nothing in this Act affects the operation of any provision of any law:

- (a) relating to the admissibility in evidence, or any other use, in any proceedings, of a document in respect of which any applicable stamp duty has not been paid; or
- (b) prohibiting the registration by a company of a transfer of securities if any stamp duty applicable in respect of the transfer has not been paid.

101 Amount of stock representing a number of shares

In relation to a body corporate the whole or a portion of whose share capital consists of stock, a reference to a number of shares (including a number expressed as a percentage) is, in relation to an amount of stock, a reference to the amount of stock that represents that number of shares.

102 Applications to be in writing

An application to ASIC for the issuing of a document or the doing of any other act or thing by ASIC under this Act must be in writing.

Note: For electronic lodgment of documents with ASIC, see section 352.

102B *In Australia or elsewhere, in this jurisdiction or elsewhere etc.*

- (1) The expression *in Australia or elsewhere*, or a similar expression, does not limit the generality of the expression *in this jurisdiction or elsewhere* or a similar expression.
- (2) The expression *outside this jurisdiction* includes places outside Australia.

102C In Australia

In Australia means in Australia (whether in this jurisdiction or not).

Note: This definition is needed if there is a State that is not a referring State. If all the States are referring States, every place in Australia will also be in this jurisdiction.

103 Effect of certain contraventions of this Act

- (1) This section has effect except so far as this Act otherwise provides.
- (2) An act, transaction, agreement, instrument, matter or thing is not invalid merely because of:
 - (a) a contravention of section 115, 208, 209, 601CA, 601CD or of Chapter 8; or
 - (b) a failure to comply with a requirement of this Act that a person cause a notice, or a copy of a document, to be published in the *Gazette* or in a newspaper.

(4) In this section:

invalid includes void, voidable and unenforceable.

(5) Nothing in this section limits the generality of anything else in it.

104 Effect of provisions empowering a person to require or prohibit conduct

Where, in accordance with a provision of this Act other than the replaceable rules, a person requires another person to do, or prohibits another person from doing, a particular act, that provision is taken to require the other person to comply with the requirement or prohibition, as the case may be.

105 Calculation of time

Without limiting subsection 36(1) of the *Acts Interpretation Act 1901*, in calculating how many days a particular day, act or event is before or after another day, act or event, the first-mentioned day, or the day of the first-mentioned act or event, is to be counted but not the other day, or the day of the other act or event.

106 Performance of functions by Commission delegate

For the purpose of the performance of a function, or the exercise of a power, under this Act by a Commission delegate, a reference to ASIC in a provision of this Act relating to the performance of the function, or the exercise of the power, includes a reference to the Commission delegate.

108 Parts of dollar to be disregarded in determining majority in value of creditors etc.

In determining whether a majority in value of creditors, or a particular proportion in value of creditors, has passed a resolution or done any other act or thing, if a creditor's debt consists of a number of whole dollars and a part of a dollar, the part of the dollar is to be disregarded.

109 References to persons, things and matters

(1) Except so far as the contrary intention appears, a provision of this Act is to be interpreted in such a manner that any 2 or more

references in the provision are capable of having the same referent or referents, or of having a referent or referents in common, as the case requires.

- (2) In subsection (1), *referent*, in relation to a reference in a provision, means:
- (a) in so far as the reference is interpreted as being in the singular number—a person to whom, or a thing or matter to which; or
 - (b) in so far as the reference is interpreted as being in the plural number—any one or 2 or more persons to whom, or of 2 or more things or matters to which;
- the reference is taken, in the application of the provision, to refer.

109X Service of documents

- (1) For the purposes of any law, a document may be served on a company by:
- (a) leaving it at, or posting it to, the company's registered office; or
 - (b) delivering a copy of the document personally to a director of the company who resides in Australia or in an external Territory; or
 - (c) if a liquidator of the company has been appointed—leaving it at, or posting it to, the address of the liquidator's office in the most recent notice of that address lodged with ASIC; or
 - (d) if an administrator of the company has been appointed—leaving it at, or posting it to, the address of the administrator in the most recent notice of that address lodged with ASIC.
- (2) For the purposes of any law, a document may be served on a director or company secretary (in addition to the methods of service set out in subsection (4)) by leaving it at, or posting it to, the alternative address notified to ASIC under subsection 5H(2), 117(2), 205B(1) or (4) or 601BC(2). However, this only applies to service on the director or company secretary:
- (a) in their capacity as a director or company secretary; or
 - (b) for the purposes of a proceeding in respect of conduct they engaged in as a director or company secretary.

- (3) Subsections (1) and (2) do not apply to a process, order or document that may be served under section 9 of the *Service and Execution of Process Act 1992*.
- (6) This section does not affect the operation of a law or the power of a court to authorise a document to be served in a different way.
- (7) This section applies to provisions of a law dealing with service whether it uses the expression “serve” or uses any other similar expression such as “give” or “send”.

Part 1.2A—Disclosing entities

Division 1—Object of Part

111AA Object of Part

The object of this Part is:

- (a) to define *disclosing entity* and other key terms relevant to disclosing entities (this is done in Division 2); and
- (b) to outline the significance for this Act of being a disclosing entity (this is done in Division 3); and
- (c) to provide for exemptions from, and modifications of, the special requirements imposed by this Act in relation to disclosing entities (this is done in Division 4).

Division 2—Definitions

111AB Terms defined in Division

This Division contains definitions of the following terms:

- (a) disclosing entity (section 111AC);
- (b) ED securities (section 111AD);
- (c) ED securities of a disclosing entity (section 111AK);
- (d) listed disclosing entity (subsection 111AL(1));
- (e) quoted ED securities (section 111AM);
- (f) unlisted disclosing entity (subsection 111AL(2)).

111AC Disclosing entity

- (1) If any securities of a body (except interests in a managed investment scheme) are ED securities, the body is a *disclosing entity* for the purposes of this Act.
- (2) If any interests in a managed investment scheme are ED securities, the undertaking to which the interests relate is a *disclosing entity* for the purposes of this Act.

111AD ED securities

- (1) Securities of a body are *ED securities* (short for “enhanced disclosure securities”) for the purposes of this Act if, and only if:
 - (a) they are ED securities under section 111AE, 111AF, 111AG or 111AI; and
 - (b) they are not declared under section 111AJ not to be ED securities.
- (2) For the purposes of sections 111AE, 111AF, 111AG and 111AI, a class of shares or debentures is taken to include units of shares or debentures in that class.

111AE Securities quoted on a stock market

- (1) Securities in a class of securities of a body are *ED securities* if securities in that class are quoted on a stock market of a securities exchange.
- (2) Subsection (1) does not apply to securities of a body if:

- (a) the body is a public authority of the Commonwealth or an instrumentality or agency of the Crown in right of the Commonwealth; and
 - (b) the only securities of the body that are quoted as mentioned in subsection (1) are debentures; and
 - (c) both the repayment of principal, and the payment of interest, in respect of those debentures is guaranteed by the Commonwealth.
- (3) Subsection (1) does not apply to securities of a body that is:
- (a) a public authority of a State or Territory; or
 - (b) an instrumentality or agency of the Crown in right of a State or Territory.

111AF Securities to which lodged or deemed prospectus relates

Securities (except debentures) in a class of securities of a body are *ED securities* if:

- (a) a disclosure document in relation to securities in that class has been lodged with ASIC under Chapter 6D; or
- (b) securities in that class have been issued pursuant to the disclosure document; and
- (c) after an issue of securities in that class pursuant to the disclosure document, 100 or more persons held securities in that class; and
- (d) securities in that class have been held by 100 or more persons at all times since the issue of securities referred to in paragraph (c).

111AG Securities issued as consideration for an acquisition under an off-market takeover bid or Part 5.1 compromise or arrangement

- (1) Securities (except debentures) in a class of securities of a body are *ED securities* if:
- (a) securities in that class have been issued by the body as consideration for offers under an off-market bid; and
 - (b) after an issue of securities in that class under the off-market bid, 100 or more persons held securities in that class; and

- (c) securities in that class have been held by 100 or more persons at all times since the issue of securities referred to in paragraph (b).
- (2) Securities in a class of securities of a body are *ED securities* if:
 - (a) securities in that class have been issued as consideration for the acquisition or cancellation of securities of another body pursuant to a compromise or arrangement under Part 5.1; and
 - (b) securities in that class, or those or any other securities of the other body, were ED securities immediately before securities in that class were first issued pursuant to the compromise or arrangement; and
 - (c) after an issue of securities in that class pursuant to the compromise or arrangement, 100 or more persons held securities in that class; and
 - (d) securities in that class have been held by 100 or more persons at all times since the issue of securities referred to in paragraph (c).

111AH When a person holds securities for the purposes of sections 111AF and 111AG

- (1) For the purposes of sections 111AF and 111AG, a person holds securities if, and only if:
 - (a) the person is registered as the holder of the securities in a register under section 169, 170, 171, 601CZB or 1070; or
 - (b) the person is entitled to be so registered.
- (2) For the purposes of sections 111AF and 111AG, joint holders of securities count as one person.

111AI Debentures that need trustee appointed under section 283AA

Debentures of a borrower are *ED securities* if section 283AA requires the borrower to appoint a trustee.

111AJ Regulations may declare securities not to be ED securities

- (1) The regulations may declare specified securities of bodies not to be ED securities.
- (2) Regulations in force for the purposes of subsection (1) have effect accordingly, despite anything else in this Division.

111AK ED securities of a disclosing entity

For the purposes of this Act, ED securities because of which (having regard to section 111AC) a disclosing entity is such an entity are ED securities of the entity.

111AL Listed or unlisted disclosing entity

- (1) For the purposes of this Act, a disclosing entity is a *listed disclosing entity* if all or any ED securities of the entity are quoted ED securities.
- (2) For the purposes of this Act, a disclosing entity that is not a listed disclosing entity is an *unlisted disclosing entity*.

111AM Quoted ED securities

For the purposes of this Act, ED securities are *quoted ED securities* if they are ED securities because of section 111AE.

Division 3—Significance of being a disclosing entity

111AN Division contains outline of significance of being a disclosing entity

This Division outlines the significance for this Act of being a disclosing entity.

111AO Accounting requirements

A disclosing entity has to prepare financial statements and reports for half-years as well as full financial years. These requirements are set out in Chapter 2M.

111AP Continuous disclosure requirements

- (1) A disclosing entity is subject to the continuous disclosure requirements of sections 1001A and 1001B.
- (2) Section 1001A applies to listed disclosing entities and requires them to comply with certain obligations in the listing rules of a securities exchange requiring the notification of information.
- (3) Section 1001B applies to unlisted disclosing entities and requires them to lodge documents containing information.

111AQ Prospectus relief

Section 713 applies (subject to certain qualifications) to prospectuses for quoted ED securities of disclosing entities. The section's requirements for the content of prospectuses are less comprehensive than those that apply to other prospectuses under section 710.

Division 4—Exemptions and modifications

111AR Meaning of *disclosing entity provisions*

- (1) For the purposes of this Division, the *disclosing entity provisions* are the provisions of the following:
 - (a) Chapter 2M as it applies to disclosing entities;
 - (d) sections 1001A and 1001B.
- (2) A reference in subsection (1) to a Part, Division or section includes a reference to regulations in force for the purposes of the Part, Division or section.

111AS Exemptions by regulations

- (1) The regulations may exempt specified persons from all or specified disclosing entity provisions:
 - (a) either generally or as otherwise specified; and
 - (b) either unconditionally or subject to specified conditions.
- (2) Without limiting subsection (1), an exemption may relate to specified securities.

111AT Exemptions by ASIC

- (1) ASIC may, by writing, exempt specified persons from all or specified disclosing entity provisions:
 - (a) either generally or as otherwise specified; and
 - (b) either unconditionally or subject to specified conditions.
- (2) Without limiting subsection (1), an exemption may relate to specified securities.
- (3) ASIC must cause a copy of an exemption to be published in the *Gazette*.

111AU Enforcing conditions of exemptions

- (1) A person must not intentionally or recklessly contravene a condition to which an exemption under section 111AS or 111AT is subject.

- (2) If a person contravenes such a condition, the Court may, on the application of ASIC, order the person to comply with the condition.

111AV Modifications by regulations

- (1) The regulations may make modifications of all or specified disclosing entity provisions.
- (2) Without limiting subsection (1), a modification may relate to specified securities.

111AW Exemptions and modifications have effect

Exemptions and modifications under this Division have effect accordingly.

111AX Effect of Division

Nothing in this Division limits, or is limited by, any other exemption or modification power (for example, section 340, 341 or 741).

Part 1.4—Technical provisions about aids for readers

111J Small business guide

- (1) If, because of:
 - (a) regulations made under this Act; or
 - (b) instruments issued by ASIC under this Act;the small business guide as set out in Part 1.5 has become out of date, the regulations may set out modifications of the guide that would bring it up to date. The guide then is to be read as if it were so modified.
- (2) The small business guide is divided into sections (numbered 1, 2, 3...) and the sections are divided into paragraphs (numbered 1.1, 1.2, 1.3...). For example, a reference in the guide to 3.1 is a reference to paragraph 3.1 of the guide.

Part 1.5—Small business guide

This guide summarises the main rules in the Corporations Act (the *Corporations Act 2001*) that apply to proprietary companies limited by shares—the most common type of company used by small business. The guide gives a general overview of the Corporations Act as it applies to those companies and directs readers to the operative provisions in the Corporations Act.

The notes in square brackets at the end of paragraphs in the guide indicate the main provisions of the Corporations Act, the regulations made under the Corporations Act, and ASIC Practice Notes that are relevant to the information in the paragraphs.

Other Commonwealth, State and Territory laws also impose obligations on proprietary companies and their operators.

1 What registration means

1.1 Separate legal entity that has its own powers

As far as the law is concerned, a company has a separate legal existence that is distinct from that of its owners, managers, operators, employees and agents. A company has its own property, its own rights and its own obligations. A company's money and other assets belong to the company and must be used for the company's purposes.

A company has the powers of an individual, including the powers to:

- own and dispose of property and other assets
- enter into contracts
- sue and be sued.

Once a company is registered, its separate legal status, property, rights and liabilities continue until ASIC (Australian Securities and Investments Commission) deregisters the company.

[sections 119, 124—125, 601AA—601AD]

1.2 Limited liability of shareholders

Shareholders of a company are not liable (in their capacity as shareholders) for the company's debts. As shareholders, their only obligation is to pay the company any amount unpaid on their shares if they are called upon to do so. However, particularly if a shareholder is also a director, this limitation may be affected by other laws and the commercial practices discussed in 1.3 and 1.4.

[section 516]

1.3 Director's liability for company's debts

A director of a company may be liable for debts incurred by the company at a time when the company itself is unable to pay those debts as they fall due.

A director of a company may be liable to compensate the company for any losses the company suffers from a breach of certain of the director's duties to the company (see 5.3).

In addition to having liability for the company's debts or to pay compensation to the company, a director may also be subject to a civil penalty.

If a company holds property on trust, a director of the company may be liable in some circumstances for liabilities incurred by the company as trustee.

[sections 197, 344, 588G, 588J, 588M, 1317H]

1.4 Director's liability as guarantor/security over personal assets

As a matter of commercial practice, a bank, trade creditor or anyone else providing finance or credit to a company may ask a director of the company:

- for a personal guarantee of the company's liabilities; and
- for some form of security over their house or personal assets to secure the performance by the company of its obligations.

The director of a company may, for example, be asked by a bank to give a mortgage over their house to secure the company's

repayment of a loan. If the company does not repay the loan as agreed with the bank, the director may lose the house.

1.5 Continuous existence

A company continues to exist even if 1 or more of its shareholders or directors sells their shares, dies or leaves the company. If a company has only 1 shareholder who is also the only director of the company and that person dies, their personal representative is able to ensure that the company continues to operate.

[sections 119, 224A]

1.6 Rules for the internal management of a company

The Corporations Act contains a basic set of rules for the internal management of a company (appointments, meetings etc.).

Some of these rules are mandatory for all companies. There are a few special rules for single shareholder/single director companies.

Other internal management rules in the Corporations Act are replaceable rules. The replaceable rules do not apply to:

- a single shareholder/single director company; or
- a company that had a constitution before the introduction of the replaceable rules regime and has not repealed it.

A company does not need to have a separate constitution of its own; it can simply take advantage of the rules in the Corporations Act. The company will need a constitution only if it wants to displace, modify or add to the replaceable rules.

[sections 134—141, 224B]

1.7 How a company acts

A company does not have a physical existence. It must act through other people.

Individual directors, the company secretary, company employees or agents may be authorised to enter into contracts that bind the company (see 7).

In some circumstances, a company will be bound by something done by another person (see 1.8).

1.8 Directors

The directors of a company are responsible for managing the company's business. It is a replaceable rule (see 1.6) that generally the directors may exercise all the powers of the company except a power that the Corporations Act, a replaceable rule or a provision of the company's constitution (if any) requires the company to exercise in general meeting.

The only director of a company who is also the only shareholder is responsible for managing the company's business and may exercise all of the company's powers.

The Corporations Act sets out rules dealing with the calling and conduct of directors' meetings. Directors must keep a written record (minutes) of their resolutions and meetings.

There are 2 ways that directors may pass resolutions:

- at a meeting; or
- by having all of the directors record and sign their decision.

If a company has only 1 director, the sole director may also pass a resolution by recording and signing their decision.

[sections 224B, 226A, 248A—248G, 251A]

1.9 Shareholders

The shareholders of a company own the company, but the company has a separate legal existence and the company's assets belong to the company.

Shareholders can make decisions about the company by passing a resolution, usually at a meeting. A "special resolution" usually involves more important questions affecting the company as a whole or the rights of some or all of its shareholders.

There are 2 ways that shareholders may pass a resolution:

- at a meeting; or
- by having all of the shareholders record and sign their decision.

If a meeting is held, an ordinary resolution must be passed by a majority of the votes cast by shareholders of the company entitled to vote on the resolution at the meeting in person or by proxy (if proxies are allowed). A special resolution must be passed by at least 75% of the votes cast by shareholders of the company entitled to vote on the resolution and who vote at the meeting in person or by proxy (if proxies are allowed).

The sole shareholder of a company may pass a resolution by recording and signing their decision.

A company must keep a written record (minutes) of the members' resolutions and meetings.

[sections 9 (*special resolution*), 249A, 249B, 249L, 251A]

1.10 What others can assume about the company

Anyone who does any business with the company is entitled to assume that the company has a legal right to conduct that business unless the person knows, or suspects, otherwise. For example, an outsider dealing with the company is entitled to assume:

- that a person who is shown in a notice lodged with ASIC as being the director or company secretary of a company has been properly appointed and is authorised to act for the company; and
- that a person who is held out by the company to be a director, company secretary or agent of the company has been properly appointed and is authorised to act for the company.

[sections 128—130]

2 The company structure for small business

2.1 Proprietary company for small business

Generally, a proprietary company limited by shares is the most suitable company for use by small business. Such a proprietary company must have a least 1 shareholder but no more than 50 shareholders (not counting employee shareholders). It may have 1 or more directors.

[sections 112—113]

3 Setting up a new company

The operators of small businesses can either buy “shelf” companies or set up new companies themselves.

3.1 “Shelf” companies

The operator of a small business may find it more convenient to buy a “shelf” company (a company that has already been registered but has not traded) from businesses which set up companies for this purpose or from some legal or accounting firms.

3.2 Setting up a company

To set up a new company themselves, the operator must apply to ASIC for registration of the company.

A proprietary company limited by shares must have at least 1 shareholder.

To obtain registration, a person must lodge a properly completed application form with ASIC. The form must set out certain information including details of every person who has consented to be a shareholder, director or company secretary of the company.

The company comes into existence when ASIC registers it.

[sections 117—119, 135—136, 140]

3.3 ACN and name

When a company is registered, ASIC allocates to it a unique 9 digit number called the Australian Company Number (ACN). (For use of the ACN see 4.1).

In practice, a new company must have a name that is different from the name of a company that is already registered. A proprietary company limited by shares must have the words “Proprietary Limited” as part of its name. Those words can be abbreviated to “Pty Ltd”.

A proprietary company may adopt its ACN as its name. If it does so, its name must also contain the words “Australian Company Number” (which can be abbreviated to “ACN”). For example, the company’s name might be “ACN 123 456 789 Pty Ltd”.

[sections 119, 147—161]

3.4 Contracts entered into before the company is registered

A company can ratify a contract entered into by someone on its behalf or for its benefit before it was registered. If the company does not ratify the contract, the person who entered into the contract may be personally liable.

[sections 131—133]

3.5 First shareholders, directors and company secretary

A person listed with their consent as a shareholder, director or company secretary in the application for registration of the company becomes a shareholder, director or company secretary of the company on its registration.

The same person may be both a director of the company and the company secretary.

See 5.1 and 5.2 for directors and 5.4 for company secretaries. See 6.1 for shareholders.

[section 120]

3.6 Issuing shares

It is a replaceable rule (see 1.6) that, before issuing new shares, a company must first offer them to the existing shareholders in the proportions that the shareholders already hold. A company may issue shares at a price it determines.

[sections 254B, 254D]

3.7 Registered office

A company must have a registered office in this jurisdiction and must inform ASIC of the location of the office. A post office box cannot be the registered office of a company. The purpose of the registered office is to have a place where all communications and notices to the company may be sent.

If the company does not occupy the premises where its registered office is located, the occupier of the premises must agree in writing to having the company's registered office located there.

A proprietary company is not required to open its registered office to the public but this does not affect its obligation to make documents available for inspection.

The company must notify ASIC of any change of address of its registered office.

Note: If all the States refer power to the Commonwealth to enact the *Corporations Act 2001*, **this jurisdiction** is effectively the whole of Australia. If they do not, **this jurisdiction** consists of:

- (a) those States that do refer the power to the Commonwealth; and
- (b) the Northern Territory; and
- (c) the Australian Capital Territory.

[sections 100, 142, 143, 173, 1300]

3.8 Principal place of business

If a company has a principal place of business that is different from its registered office, it must notify ASIC of the address of its principal place of business and of any changes to that address.

[sections 117, 146]

3.9 Registers kept by the company

A company must keep registers, including a register of shareholders and a register of charges. A company must keep its registers at:

- the company's registered office; or
- the company's principal place of business; or
- a place (whether on premises of the company or of someone else) where the work in maintaining the register is done; or
- another place approved by ASIC.

A register may be kept either in a bound or looseleaf book or on computer.

If a register is kept on computer, its contents must be capable of being printed out in hard copy.

[sections 172, 1300—1302, 1306]

3.10 Register of shareholders

A company must keep in its register of shareholders such information as:

- the names and addresses of its shareholders; and
- details of shares held by individual shareholders.

[sections 168—169]

3.11 Register of charges

A company must keep a register of charges if the company gives a bank, trade creditor or anybody else a charge over company assets.

[section 271]

4 Continuing obligations after the company is set up

The Corporations Act and other laws impose obligations on companies themselves and on their directors and company secretaries. Some of the more important obligations imposed under the Corporations Act are discussed below.

4.1 Use of company name and ACN

The name of a company must be shown at all the company's business premises (including its registered office) that are open to the public. The company's name and its ACN must appear:

- on some of its public documents; and
- on its cheques and negotiable instruments; and
- on all documents lodged with ASIC; and
- if it has one, on its common seal.

[sections 123, 144, 147—156,
ASIC Practice Note 47]

4.2 Annual return

A company must lodge with ASIC an annual return which contains such information as:

- names and addresses of each director and company secretary; and
- issued shares and options granted; and
- details of its shareholders; and
- address of its registered office; and
- address of its principal place of business; and
- a statement that the directors have resolved in the last month that, in the directors' opinion, there are reasonable grounds to believe the company will be able to pay its debts as and when they become payable (but if the company has lodged an annual financial report with ASIC within the last 12 months, it does not need to include this statement).

An annual return may be lodged with ASIC on a printed form or, if an agreement is in place to lodge electronically, in accordance with the agreement.

ASIC may send a partially completed annual return to a company that wants to lodge its annual return on a printed form for the company to check, amend if necessary, verify and send back to ASIC. However, a company must lodge an annual return with ASIC even if ASIC does not send a partially completed annual return to the company.

[sections 345—348, 352]

4.3 Annual fee

A company must pay an annual fee to ASIC on lodgment of the annual return.

[Corporations (Fees) Regulations]

4.4 Notification to ASIC of changes

The company must notify ASIC if certain basic changes to the company occur. The following table sets out these notification requirements.

Notification requirements				
	If...	the company must notify ASIC of the change...	using Form No...	see section...
1.	a company issues shares	within 1 month after the issue	207	254X
2.	a company changes the location of a register	within 7 days after the change	909	172, 1302
3.	a company changes the address of its registered office or principal place of business	within 14 days after the change	203	142, 146
4.	a company changes its directors or company secretary	within 14 days after the change	304	205B
5.	there is a change in the name or address of the company's directors or secretary	within 14 days after the change	304	205B
6.	a company creates certain kinds of charges	within 45 days after the charge is created	309	263

5 Company directors and company secretaries

5.1 Who can be a director

Only an individual who is at least 18 years old can be a director. If a company has only 1 director, they must ordinarily reside in Australia. If a company has more than 1 director, at least 1 of the directors must ordinarily reside in Australia.

A director must consent in writing to holding the position of director. The company must keep the consent and must notify ASIC of the appointment.

In some circumstances, the Corporations Act imposes the duties and obligations of a director on a person who, although not formally appointed as a director of a company, nevertheless acts as a director or gives instructions to the formally appointed directors as to how they should act.

The Court or ASIC may prohibit a person from being a director or from otherwise being involved in the management of a company if, for example, the person has breached the Corporations Act.

A person needs the Court's permission to be a director if the person has been convicted of certain offences or is, in some circumstances, unable to pay their debts as they fall due.

Generally, a director may resign by giving notice of the resignation to the company. The company must notify ASIC of a director's resignation. A director who resigns may also notify ASIC of the resignation.

[sections 60, 221, 222A, 224, 228—230, 242, 242C, 599, 600, 206C, 1317G, 1317EA(3)]

5.2 Appointment of new directors

It is a replaceable rule (see 1.6) that shareholders may appoint directors by resolution at a general meeting.

[section 224C]

5.3 Duties and liabilities of directors

In managing the business of a company (see 1.7), each of its directors is subject to a wide range of duties under the Corporations Act and other laws. Some of the more important duties are:

- to act in good faith
- to act in the best interests of the company
- to avoid conflicts between the interests of the company and the director's interests
- to act honestly
- to exercise care and diligence
- to prevent the company trading while it is unable to pay its debts
- if the company is being wound up—to report to the liquidator on the affairs of the company

- if the company is being wound up—to help the liquidator (by, for example, giving to the liquidator any records of the company that the director has).

A director who fails to perform their duties:

- may be guilty of a criminal offence with a penalty of \$200,000 or imprisonment for up to 5 years, or both; and
- may contravene a civil penalty provision (and the Court may order the person to pay to the Commonwealth an amount of up to \$200,000); and
- may be personally liable to compensate the company or others for any loss or damage they suffer; and
- may be prohibited from managing a company.

A director's obligations may continue even after the company has been deregistered.

[Sections 180, 181, 182, 183, 184, 475, 530A, 588G, 596, 601AE, 601AH, 1317H]

5.4 Company secretaries

A company must have a company secretary. The directors appoint the company secretary. A company secretary must be at least 18 years old. If a company has only 1 company secretary, they must ordinarily reside in Australia. If a company has more than 1 company secretary, at least 1 of them must ordinarily reside in Australia.

A company secretary must consent in writing to holding the position of company secretary. The company must keep the consent and must notify ASIC of the appointment.

The same person may be both a director of a company and the company secretary.

Generally, a company secretary may resign by giving written notice of the resignation to the company. The company must notify ASIC of a company secretary's resignation. A company secretary who resigns may also notify ASIC of the resignation.

The company secretary is an officer of the company and, in that capacity, may be subject to the requirements imposed by the Corporations Act on company officers. The company secretary has specific responsibilities under the Corporations Act, including responsibility for ensuring that the company notifies ASIC about changes to the identities, names and addresses of the company's directors and company secretaries and that the company lodges its annual return.

A company secretary's obligations may continue even after the company has been deregistered.

[sections 83, 142, 222A, 240, 242, 242C, 345, 601AD, 601AH]

6 Shares and shareholders

A proprietary company limited by shares must have a share capital and at least 1 shareholder. ASIC may apply to a Court to have a company wound up if it does not have any shareholders.

[sections 461—462]

6.1 Becoming a shareholder and ceasing to be a shareholder

A person may become a shareholder of a company in several ways, including the following:

- the person being listed as a shareholder of the company in the application for registration of the company
- the company issuing shares to the person
- the person buying shares in the company from an existing shareholder and the company registering the transfer.

Some of the ways in which a person ceases to be a shareholder are:

- the person sells all of their shares in the company and the company registers the transfer of the shares
- the company buys back all the person's shares
- ASIC cancels the company's registration.

[sections 117, 120, 601AA—601AD]

6.2 Classes of shares

A company may have different classes of shares. The rights and restrictions attached to the shares in a class distinguish it from other classes of shares.

[sections 254A—254B]

6.3 Meetings of shareholders

Directors have the power to call meetings of all shareholders or meetings of only those shareholders who hold a particular class of shares.

Shareholders who hold at least 5% of the votes which may be cast at a general meeting of a company have the power to call and hold a meeting themselves or to require the directors to call and hold a meeting. Meetings may be held regularly or to resolve specific questions about the management or business of the company.

The Corporations Act sets out rules dealing with shareholders' meetings.

A shareholder of a company may ask the company for a copy of the record of a meeting or of a decision of shareholders taken without a meeting.

[sections 249A—251B]

6.4 Voting rights

Different rights to vote at meetings of shareholders may attach to different classes of shares. It is a replaceable rule (see 1.6) that, subject to those different rights, each shareholder has 1 vote on a show of hands and, on a poll, 1 vote for each share held.

[sections 250E, 254A—254B]

6.5 Buying and selling shares

A shareholder may sell their shares but only if the sale would not breach the company's constitution (if any). It is a replaceable rule (see 1.6) that the directors have a discretion to refuse to register a transfer of shares.

[sections 1091D—1091E]

7 Signing company documents

A company's power to sign, discharge and otherwise deal with contracts can be exercised by an individual acting with the company's authority and on its behalf. A company can deal with contracts without using a common seal.

A company may execute a document by having it signed by:

- 2 directors of the company; or
- a director and the company secretary; or
- for a company with a sole director who is also the sole secretary—that director.

If the document is to have effect as a deed, it should be expressed to be a deed.

[sections 126—127, 240]

A company is not required to have a common seal. If it does, the seal must show the company's name and its ACN. The seal is equivalent to the company's signature and may be used on important company documents such as mortgages.

[sections 123, 127(2)]

8 Funding the company's operations

The shareholders may fund the company's operations by lending money to the company or by taking up other shares in the company. Except if it is raising funds from its own employees or shareholders, a proprietary company must not engage in any fundraising activity that would require disclosure to investors under Chapter 6D (for example, advertising in a newspaper inviting people to invest in the company).

The company may also borrow money from banks and other financial organisations.

Anyone who has lent money, or provided credit, to the company may ask for a mortgage or charge over the company's assets to secure the performance by the company of its obligations.

[sections 113, 124]

9 Returns to shareholders

Shareholders can take money out of the company in a number of ways, but only if the company complies with its constitution (if any), the Corporations Act and all other relevant laws. If a company pays out money in a way that results in the company being unable to pay its debts as they fall due, its directors may be liable:

- to pay compensation; and
- for criminal and civil penalties.

[sections 588G, 1317H]

9.1 Dividends

Dividends are payments to shareholders out of the company's after tax profits. It is a replaceable rule (see 1.6) that the directors decide whether the company should pay a dividend.

[sections 254T, 254U]

9.2 Buy-back of shares

A company can buy back shares from shareholders.

[sections 257A—257J]

9.4 Distribution of surplus assets on winding up

If a company is wound up and there are any assets left over after all the company's debts have been paid, the surplus is distributed to shareholders in accordance with the rights attaching to their shares.

10 Annual financial reports and audit

10.1 The small/large distinction

The accounting requirements imposed on a proprietary company under the Corporations Act depend on whether the company is classified as small or large. A company's classification can change from 1 financial year to another as its circumstances change.

A company is classified as small for a financial year if it satisfies at least 2 of the following tests:

- gross operating revenue of less than \$10 million for the year
- gross assets of less than \$5 million at the end of the year
- fewer than 50 employees at the end of the year.

A company that does not satisfy at least 2 of these tests is classified as large.

[section 45A]

As the great majority of proprietary companies are small under these tests, the discussion below deals mainly with the accounting requirements for small proprietary companies.

[sections 286—301]

10.2 Financial records

Under the Corporations Act, all proprietary companies must keep sufficient financial records to record and explain their transactions and financial position and to allow true and fair financial statements to be prepared and audited. **Financial record** here means some kind of systematic record of the company's financial transactions—not merely a collection of receipts, invoices, bank statements and cheque butts. Financial records may be kept on computer.

[sections 286—289]

10.3 Preparing annual financial reports and directors' reports

The Corporations Act requires a small proprietary company to prepare an annual financial report (an annual profit and loss statement, a balance sheet and a statement of cash flows) and a directors' report (about the company's operations, dividends paid or recommended, options issued etc.) if:

- the shareholders with at least 5% of the votes in the company direct it to do so; or
- ASIC directs it to do so.

Unless the shareholders' direction specifies otherwise, the company must prepare the annual financial report in accordance with the applicable accounting standards.

Although the Corporations Act itself may not require a small proprietary company to prepare a financial report except in the circumstances mentioned, the company may need to prepare the annual financial reports for the purposes of other laws (for example, income tax laws). Moreover, good business practice may also make it advisable for the company to prepare the financial reports so that it can monitor and better manage its financial position.

Large proprietary companies must prepare annual financial reports and a directors' report, have the financial report audited and send both reports to shareholders. They must also lodge the annual financial reports with ASIC unless exempted.

[sections 286—301, 319—320]

11 Disagreements within the company

11.1 Special problems faced by minority shareholders

There are remedies available to a shareholder of a company if:

- the affairs of the company are being conducted in a way that is unfair to that shareholder or to other shareholders of the company; or
- the affairs of the company are being conducted in a way that is against the interests of the company as a whole.

A Court may, for example, order the winding up of a company or the appointment of a receiver.

[sections 246AA, 461]

11.2 Buy—back of shares

A company may buy back the shares of a shareholder who wants to sever their relationship with the company.

[sections 257A—257J]

11.3 Selling shares

A shareholder in a company who wants to sever their relationship with the company may decide to sell their shares. However, the shareholder may not be able to sell their shares readily—particularly if they want to sell their shares to someone who is not

an existing shareholder. Some of the difficulties they may face in that case are:

- under the replaceable rules the directors have a discretion to refuse to transfer the shares; and
- restrictions in the company's constitution (if any) on transferring shares.

[sections 995, 707, 1091D—1091E]

12 Companies in financial trouble

12.1 Voluntary administration

If a company experiences financial problems, the directors may appoint an administrator to take over the operations of the company to see if the company's creditors and the company can work out a solution to the company's problems.

If the company's creditors and the company cannot agree, the company may be wound up (see 12.3).

[Part 5.3A]

12.2 Receivers

A receiver, or receiver and manager, may be appointed by order of a Court or under an agreement with a secured creditor to take over some or all of the assets of a company. Generally this would occur if the company is in financial difficulty. A receiver may be appointed, for example, because an amount owed to a secured creditor is overdue.

[Part 5.2]

12.3 Winding up and distribution

A company may be wound up by order of a Court, or voluntarily if the shareholders of the company pass a special resolution to do so.

A liquidator is appointed:

- when a Court orders a company to be wound up; or
- the shareholders of a company pass a resolution to wind up the company.

12.4 Liquidators

A liquidator is appointed to administer the winding up of a company. The liquidator's main functions are:

- to take possession of the company's assets; and
- to determine debts owed by the company and pay the company's creditors; and
- to distribute to shareholders any assets of the company left over after paying creditors (any distribution to shareholders is made according to the rights attaching to their shares); and
- finally, to have the company deregistered.

[Parts 5.4B, 5.5]

12.5 Order of payment of debts

Generally, creditors who hold security over company assets are paid first.

[Division 6 of Part 5.6]

12.6 Cancellation of registration

If a company has ceased trading or has been wound up, it remains on the register until ASIC cancels the company's registration. Once a company is deregistered, it ceases to exist.

[sections 601AA—601AB, 601AH]

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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 Act:

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 the Part 10.1 transitionals.

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.

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

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

Section 113

No liability company provisions		
item	topic	provisions
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	the Part 10.1 transitionals

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

13 **113 Proprietary companies**

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

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

- 1 (2) In applying subsection (1):
2 (a) count joint holders of a particular parcel of shares as 1
3 person; and
4 (b) an employee shareholder is:
5 (i) a shareholder who is an employee of the company or of
6 a subsidiary of the company; or
7 (ii) a shareholder who was an employee of the company, or
8 of a subsidiary of the company, when they became a
9 shareholder.
- 10 (3) A proprietary company must not engage in any activity that would
11 require disclosure to investors under Chapter 6D, except for an
12 offer of its shares to:
13 (a) existing shareholders of the company; or
14 (b) employees of the company or of a subsidiary of the company.
- 15 (4) An act or transaction is not invalid merely because of a
16 contravention of subsection (3).
- 17 Note: If a proprietary company contravenes this section, ASIC may require
18 it to change to a public company (see section 165).

19 **114 Minimum of 1 member**

20 A company needs to have at least 1 member.

21 **115 Restrictions on size of partnerships and associations**

- 22 (1) A person must not participate in the formation of a partnership or
23 association that:
24 (a) has as an object gain for itself or for any of its members; and
25 (b) has more than 20 members;
26 unless the partnership or association is incorporated or formed
27 under an Australian law.
- 28 Note: For the effect of a contravention of this section, see section 103.
- 29 (2) The regulations may specify a higher number that is higher than
30 the number specified in paragraph (1)(b) for the purposes of the

Section 116

1 application of that paragraph to a particular kind of partnership or
2 association.

3 **116 Trade unions cannot be registered**

4 A trade union cannot be registered under this Act.

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Part 2A.2—How a company is registered

3

4

117 Applying for registration

5

Lodging application

6

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

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

9

Contents of the application

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- (2) The application must state the following:

11

(a) the type of company that is proposed to be registered under this Act;

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(b) the company's proposed name (unless the ACN is to be used in its name);

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(c) the name and address of each person who consents to become a member;

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(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;

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(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;

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(f) the address of each person who consents in writing to become a director or company secretary;

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(g) the address of the company's proposed registered office;

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(h) for a public company—the proposed opening hours of its registered office (if they are not the standard opening hours);

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(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:

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Section 117

- 1 (i) the number and class of shares each member agrees in
2 writing to take up;
- 3 (ii) the amount (if any) each member agrees in writing to
4 pay for each share;
- 5 (iii) if that amount is not to be paid in full on registration—
6 the amount (if any) each member agrees in writing to be
7 unpaid on each share;
- 8 (l) for a public company that is limited by shares or is an
9 unlimited company, if shares will be issued for non-cash
10 consideration—the prescribed particulars about the issue of
11 the shares, unless the shares will be issued under a written
12 contract and a copy of the contract is lodged with the
13 application;
- 14 (m) for a company limited by guarantee—the proposed amount of
15 the guarantee that each member agrees to in writing;
- 16 (n) the State or Territory in this jurisdiction in which the
17 company is to be taken to be registered.
- 18 Note 1: Paragraph (b)—sections 147 and 152 deal with the availability and
19 reservation of names.
- 20 Note 2: Paragraph (f)—the address that must be stated is usually the
21 residential address, although an alternative address can sometimes be
22 stated instead (see section 205D).
- 23 Note 3: Paragraph (g)—if the company is not to be the occupier of premises at
24 the address of its registered office, the application must state that the
25 occupier has consented to the address being specified in the
26 application and has not withdrawn that consent (see section 100).
- 27 Note 4: Paragraph (h)—for *standard opening hours*, see section 9.
- 28 (3) If the company is to be a public company and is to have a
29 constitution on registration, a copy of the constitution must be
30 lodged with the application.
- 31 (4) The application must be in the prescribed form.
- 32 (5) An applicant must have the consents and agreements referred to in
33 subsection (2) when the application is lodged. After the company is
34 registered, the applicant must give the consents and agreements to
35 the company. The company must keep the consents and
36 agreements.

1 **118 ASIC gives company ACN, registers company and issues**
2 **certificate**

3 *Registration*

- 4 (1) If an application is lodged under section 117, ASIC may:
- 5 (a) give the company an ACN; and
 - 6 (b) register the company; and
 - 7 (c) issue a certificate that states:
 - 8 (i) the company's name; and
 - 9 (ii) the company's ACN; and
 - 10 (iii) the company's type; and
 - 11 (iv) that the company is registered as a company under this
 - 12 Act; and
 - 13 (v) the State or Territory in this jurisdiction in which the
 - 14 company is taken to be registered; and
 - 15 (vi) the date of registration.

16 Note: For the evidentiary value of a certificate of registration, see subsection
17 1274(7A).

18 *ASIC must keep record of registration*

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

22 **119 Company comes into existence on registration**

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

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

Section 119A

1 **119A Jurisdiction of incorporation and jurisdiction of registration**

2 *Jurisdiction in which company incorporated*

- 3 (1) A company is incorporated in this jurisdiction.

4 *Jurisdiction of registration*

- 5 (2) A company is taken to be registered in:

- 6 (a) the State or Territory specified:

- 7 (i) in the application for the company's registration under
8 paragraph 117(2)(n) (registration of company under this
9 Part); or
10 (ii) in the application for the company's registration under
11 paragraph 601BC(2)(o) (registration of registrable body
12 as company under Part 5B.1); or

- 13 (b) the State or Territory in which the company is taken to be
14 registered under paragraph 5H(4)(b) (registration of body as
15 company on basis of State or Territory law).

16 This subsection has effect subject to subsection (3).

17 Note 1: ASIC must specify the State or Territory in which the company is
18 taken to be registered in the company's certificate of registration (see
19 paragraph 118(1)(c)(v) and 601BD(1)(c)(v)).

20 Note 2: The company's legal capacity and powers do not depend in any way
21 on the particular State or Territory it is taken to be registered in (see
22 section 124).

23 Note 3: A law of a State or Territory may impose obligations, or confer rights
24 or powers, on a person by reference to the State or Territory in which
25 a company is taken to be registered for the purposes of this Act. For
26 example, a State or Territory law dealing with stamp duty on share
27 transfers might impose duty on transfers of shares in companies that
28 are taken to be registered in that State or Territory for the purposes of
29 this Act.

- 30 (3) The State or Territory in which a company is taken to be registered
31 changes to the State or Territory in this jurisdiction nominated by
32 the company if:

- 33 (a) either:

Section 120

- 1 (i) the relevant Minister of the State or Territory in which
2 the company is taken to be registered before the change
3 approves the change; or
4 (ii) the State in which the company is taken to be registered
5 ceases to be a referring State; and
6 (b) the procedural requirements specified in the regulations are
7 satisfied.
- 8 (4) A company continues to be registered under this Act even if the
9 State in which the company is taken to be registered ceases to be a
10 referring State.

11 **120 Members, directors and company secretary of a company**

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

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

21 **121 Registered office**

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

25 **122 Expenses incurred in promoting and setting up company**

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

28 **123 Company may have common seal**

- 29 (1) A company may have a common seal. If a company does have a
30 common seal, the company must set out on it:

Section 123

- 1 (a) for a company that has its ACN in its name—the company’s
2 name; or
3 (b) otherwise—the company’s name, the expression “Australian
4 Company Number” and the company’s ACN.

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

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

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

1
2 **Chapter 2B—Basic features of a company**

3 **Part 2B.1—Company powers and how they are**
4 **exercised**
5

6 **124 Legal capacity and powers of a company**

7 (1) A company has the legal capacity and powers of an individual both
8 in and outside this jurisdiction. A company also has all the powers
9 of a body corporate, including the power to:

- 10 (a) issue and cancel shares in the company;
11 (b) issue debentures (despite any rule of law or equity to the
12 contrary, this power includes a power to issue debentures that
13 are irredeemable, redeemable only if a contingency, however
14 remote, occurs, or redeemable only at the end of a period,
15 however long);
16 (c) grant options over unissued shares in the company;
17 (d) distribute any of the company's property among the
18 members, in kind or otherwise;
19 (e) give security by charging uncalled capital;
20 (f) grant a floating charge over the company's property;
21 (g) arrange for the company to be registered or recognised as a
22 body corporate in any place outside this jurisdiction;
23 (h) do anything that it is authorised to do by any other law
24 (including a law of a foreign country).

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

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

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

32 (3) For the avoidance of doubt, this section does not:

Section 125

- 1 (a) authorise a company to do an act that is prohibited by a law
2 of a State or Territory; or
3 (b) give a company a right that a law of a State or Territory
4 denies to the company.

5 **125 Constitution may limit powers and set out objects**

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

14 **126 Agent exercising a company's power to make contracts**

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

21 **127 Execution of documents (including deeds) by the company itself**

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

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

Section 127

- 1 (2) A company with a common seal may execute a document if the
2 seal is fixed to the document and the fixing of the seal is witnessed
3 by:
4 (a) 2 directors of the company; or
5 (b) a director and a company secretary of the company; or
6 (c) for a proprietary company that has a sole director who is also
7 the sole company secretary—that director.

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

- 11 (3) A company may execute a document as a deed if the document is
12 expressed to be executed as a deed and is executed in accordance
13 with subsection (1) or (2).

- 14 (4) This section does not limit the ways in which a company may
15 execute a document (including a deed).

Section 128

1

2

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

3

4

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128 Entitlement to make assumptions

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(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.

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(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.

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(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.

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(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.

20

21

22

129 Assumptions that can be made under section 128

23

Constitution and replaceable rules complied with

24

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

25

26

27

Director or company secretary

28

(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:

29

30

- 1 (a) has been duly appointed; and
2 (b) has authority to exercise the powers and perform the duties
3 customarily exercised or performed by a director or company
4 secretary of a similar company.

5 *Officer or agent*

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

12 *Proper performance of duties*

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

15 *Document duly executed without seal*

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

23 *Document duly executed with seal*

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

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

30 For the purposes of making the assumption, a person may also
31 assume that anyone who witnesses the fixing of the common seal

Section 130

1 and states next to their signature that they are the sole director and
2 sole company secretary of the company occupies both offices.

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

5 (7) A person may assume that an officer or agent of the company who
6 has authority to issue a document or a certified copy of a document
7 on its behalf also has authority to warrant that the document is
8 genuine or is a true copy.

9 (8) Without limiting the generality of this section, the assumptions that
10 may be made under this section apply for the purposes of this
11 section.

12 **130 Information available to the public from ASIC does not**
13 **constitute constructive notice**

14 (1) A person is not taken to have information about a company merely
15 because the information is available to the public from ASIC.

16 (2) Subsection (1) does not apply in relation to a document that has
17 been lodged with ASIC to the extent that the document relates to a
18 charge that is registrable under this Act.

1
2 **Part 2B.3—Contracts before registration**
3

4 **131 Contracts before registration**

5 (1) If a person enters into, or purports to enter into, a contract on
6 behalf of, or for the benefit of, a company before it is registered,
7 the company becomes bound by the contract and entitled to its
8 benefit if the company, or a company that is reasonably identifiable
9 with it, is registered and ratifies the contract:

- 10 (a) within the time agreed to by the parties to the contract; or
11 (b) if there is no agreed time—within a reasonable time after the
12 contract is entered into.

13 (2) The person is liable to pay damages to each other party to the
14 pre-registration contract if the company is not registered, or the
15 company is registered but does not ratify the contract or enter into
16 a substitute for it:

- 17 (a) within the time agreed to by the parties to the contract; or
18 (b) if there is no agreed time—within a reasonable time after the
19 contract is entered into.

20 The amount that the person is liable to pay to a party is the amount
21 the company would be liable to pay to the party if the company had
22 ratified the contract and then did not perform it at all.

23 (3) If proceedings are brought to recover damages under subsection (2)
24 because the company is registered but does not ratify the
25 pre-registration contract or enter into a substitute for it, the court
26 may do anything that it considers appropriate in the circumstances,
27 including ordering the company to do 1 or more of the following:

- 28 (a) pay all or part of the damages that the person is liable to pay;
29 (b) transfer property that the company received because of the
30 contract to a party to the contract;
31 (c) pay an amount to a party to the contract.

Section 132

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

4 **132 Person may be released from liability but is not entitled to**
5 **indemnity**

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

13 **133 This Part replaces other rights and liabilities**

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

1
2 **Part 2B.4—Replaceable rules and constitution**
3

4 **134 Internal management of companies**

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

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

10 **135 Replaceable rules**

11 *Companies to which replaceable rules apply*

12 (1) A section or subsection (except subsection 129(1), this section and
13 sections 140 and 141) whose heading contains the words:

14 (a) *replaceable rule*—applies as a replaceable rule to:

15 (i) each company that is or was registered after 1 July
16 1998; and

17 (ii) any company registered before 1 July 1998 that repeals
18 or repealed its constitution after that day; and

19 (b) *replaceable rule for proprietary companies and mandatory*
20 *rule for public companies*—applies:

21 (i) as a replaceable rule to any proprietary company that is
22 or was registered after 1 July 1998; and

23 (ii) as a replaceable rule to any company that is or was
24 registered after 1 July 1998 and that changes or changed
25 to a proprietary company (but only while it is a
26 proprietary company); and

27 (iii) as a replaceable rule to any proprietary company that is
28 or was registered before 1 July 1998 that repeals or
29 repealed its constitution after that day; and

30 (iv) as an ordinary provision of this Act to any public
31 company whenever registered.

Section 136

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

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

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

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

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

12 *Failure to comply with replaceable rules*

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

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

19 **136 Constitution of a company**

20 (1) A company adopts a constitution:

21 (a) on registration—if each person specified in the application
22 for the company's registration as a person who consents to
23 become a member agrees in writing to the terms of a
24 constitution before the application is lodged; or

25 (b) after registration—if the company passes a special resolution
26 adopting a constitution or a court order is made under
27 section 233 that requires the company to adopt the
28 constitution.

29 Note: The *Life Insurance Act 1995* has rules about how benefit fund rules
30 become part of a company's constitution and about amending those
31 rules. They override this Act (see section 1348 of this Act).
32 Consequential amendments to the rest of the company's constitution
33 can be made under that Act or this Act (see Subdivision 2 of
34 Division 4 of Part 2A of that Act).

Section 137

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

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

6 (3) The company's constitution may provide that the special resolution
7 does not have any effect unless a further requirement specified in
8 the constitution relating to that modification or repeal has been
9 complied with.

10 (4) Unless the constitution provides otherwise, the company may
11 modify or repeal a further requirement described in subsection (3)
12 only if the further requirement is itself complied with.

13 (5) A public company must lodge with ASIC a copy of a special
14 resolution adopting, modifying or repealing its constitution within
15 14 days after it is passed. The company must also lodge with ASIC
16 within that period:

17 (a) if the company adopts a constitution—a copy of that
18 constitution; or

19 (b) if the company modifies its constitution—a copy of that
20 modification.

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

24 **137 Date of effect of adoption, modification or repeal of constitution**

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

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

29 (i) on the date on which the resolution is passed if it
30 specified no later date; or

31 (ii) on a date specified in, or determined in accordance with,
32 the resolution if the relevant date is later than the date
33 on which the resolution is passed; or

34 (b) if it is the result of a Court order made under section 233:

Section 138

- 1 (i) on the date on which the order is made if it specifies no
2 later date; or
3 (ii) on a date specified by the order.

4 **138 ASIC may direct company to lodge consolidated constitution**

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

7 **139 Company must send copy of constitution to member**

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

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

13 **140 Effect of constitution and replaceable rules**

14 (1) A company's constitution (if any) and any replaceable rules that
15 apply to the company have effect as a contract:

- 16 (a) between the company and each member; and
17 (b) between the company and each director and company
18 secretary; and
19 (c) between a member and each other member;
20 under which each person agrees to observe and perform the
21 constitution and rules so far as they apply to that person.

22 (2) Unless a member of a company agrees in writing to be bound, they
23 are not bound by a modification of the constitution made after the
24 date on which they became a member so far as the modification:

- 25 (a) requires the member to take up additional shares; or
26 (b) increases the member's liability to contribute to the share
27 capital of, or otherwise to pay money to, the company; or
28 (c) imposes or increases restrictions on the right to transfer the
29 shares already held by the member, unless the modification is
30 made:

- 1 (i) in connection with the company's change from a public
2 company to a proprietary company under Part 2B.7; or
3 (ii) to insert proportional takeover approval provisions into
4 the company's constitution.

5 **141 Table of replaceable rules**

6 The following table sets out the provisions of this Act that apply as
7 replaceable rules.
8

Provisions that apply as replaceable rules

Officers and Employees

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3	Negotiable instruments	198B
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Director's Meetings

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Section 141

Provisions that apply as replaceable rules

Meetings of members

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[replaceable rule for proprietary companies only]

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

4

142 Registered office

5

- (1) A company must have a registered office in this jurisdiction.

6

Communications and notices to the company may be addressed to its registered office.

7

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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)).

9

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- (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.

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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).

15

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- (3) A notice of change of address takes effect from the later of:

19

(a) the seventh day after the notice was lodged; or

20

(b) a later day specified in the notice as the date from which the change is to take effect.

21

22

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

23

24

- (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.

25

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28

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

29

30

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

31

(a) has not consented to the use of the premises as the address of the company's registered office; or

32

33

(b) has withdrawn the consent;

Section 144

1 ASIC may give written notice to a director of the company who
2 resides in this jurisdiction that ASIC intends to change the address
3 of the company's registered office to the director's address.

4 (3) If ASIC is not notified of the address of the company's proposed
5 new registered office under subsection 142(2) within 14 days after
6 the notice under subsection (2) is sent, ASIC may change the
7 address of the company's registered office to the director's address.

8 **144 Company's name must be displayed at registered office etc.**

9 (1) A company must display its name prominently at every place at
10 which the company carries on business and that is open to the
11 public.

12 (2) A public company must also display its name and the words
13 "Registered Office" prominently at its registered office.

14 **145 Opening hours of registered office of public company**

15 (1) The registered office of a public company must be open to the
16 public:
17 (a) each business day from at least 10 am to 12 noon and from at
18 least 2 pm to 4 pm; or
19 (b) at least 3 hours chosen by the company between 9 am and 5
20 pm each business day.

21 (2) If the company chooses its own opening hours, the hours must be
22 specified:
23 (a) if the company is to have its own opening hours from its
24 registration—in the application for registration of the
25 company under section 117 (normal registration process) or
26 the notice lodged under section 5H (registration of body as
27 company on basis of State or Territory law); or
28 (b) if the company changes its opening hours after its
29 registration—in the most recent notice of change of opening
30 hours lodged with ASIC under subsection (3).

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

4 **146 Change of address of principal place of business**

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

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2 **Part 2B.6—Names**

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

4 **147 When a name is available**

5 *Name is available unless identical or unacceptable*

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

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

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

22 Note: If the company breaches a condition, ASIC may direct it to change its

23 name under section 158.

- 24 (4) The regulations may specify that a particular unacceptable name is
- 25 available to a company if:
- 26 (a) a specified public authority, or an instrumentality or agency
- 27 of the Crown in right of the Commonwealth, a State or an
- 28 internal Territory has consented to the company using or
- 29 assuming the name; or

- 1 (b) the company is otherwise permitted to use or assume the
2 name by or under:
3 (i) an Act of the Commonwealth, a State or an internal
4 Territory; or
5 (ii) a specified provision of an Act of the Commonwealth, a
6 State or an internal Territory.

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

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

12 *National business names register*

- 13 (5) If the Minister is satisfied that ASIC has access to electronic
14 records of information containing, in relation to a State or Territory
15 in this jurisdiction, names registered from time to time as business
16 names in that State or Territory, the Minister may, by notice
17 published in the *Gazette* identifying the records concerned, declare
18 that he or she is so satisfied.

19 **148 A company's name**

20 *Company may use available name or ACN*

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

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

27 *Limited companies*

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

Chapter 2B Basic features of a company

Part 2B.6 Names

Division 1 Selecting and using a name

Section 149

1 *Unlimited proprietary companies*

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

4 *No liability companies*

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

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

8 (5) A public company must not include the word “Proprietary” (or an
9 abbreviation of it) in its name unless:

- 10 (a) it was a public company before 1 July 1998; and
11 (b) the word “Proprietary” (or an abbreviation of it) was
12 included in its name before 1 July 1998.

13 **149 Acceptable abbreviations**

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

Acceptable abbreviations		[operative table]
Word	Abbreviation	
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	

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

3 **150 Exception to requirement for using "Limited" in name**

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

17 **151 Exception to requirement for using "Limited" in name—**
18 **pre-existing licences**

- 19 (1) A licence that:
20 (a) allowed a company to omit "Limited" from its name; and
21 (b) was in force immediately before 1 July 1998; and
22 (c) was in force immediately before the commencement of this
23 section;
24 continues in force subject to subsection (3).
- 25 (2) The company must notify ASIC as soon as practicable if it:
26 (a) breaches a condition of the licence; or
27 (b) pursues objects or purposes that would have prevented it
28 being granted the licence; or
29 (c) applies its profits or other income to promote objects or
30 purposes that would have prevented it being granted the
31 licence; or
32 (d) pays a dividend to its members; or
-

Section 152

1 (e) modifies its constitution to allow it to do anything set out in
2 paragraphs (a) to (d).

3 (3) ASIC may revoke the company's licence if the company does
4 anything set out in paragraphs (2)(a) to (e).

5 **152 Reserving a name**

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

9 Note: For available names, see section 147.

10 (2) The reservation lasts for 2 months from the date when the
11 application was lodged. An applicant may ask ASIC in writing for
12 an extension of the reservation during a period that the name is
13 reserved, and ASIC may extend the reservation for 2 months.

14 (3) ASIC must cancel a reservation if the applicant asks ASIC in
15 writing to do so.

16 **153 Using a name and ACN on documents**

17 (1) A company must set out its name on all its public documents and
18 negotiable instruments.

19 (2) Subject to sections 154 and 155, if the company's ACN is not used
20 in its name, the company must also set out with its name, or with 1
21 of the references to its name, the expression "Australian Company
22 Number" followed by its ACN. If the company's name appears on
23 2 or more pages of the document or instrument, this must be done
24 on the first of those pages.

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

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

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

1 **154 Exception to requirement to have ACN on receipts**

2 A company does not have to set out the expression “Australian
3 Company Number” followed by its ACN on a receipt (for example,
4 a cash register receipt) that sets out information recorded in the
5 machine that produced the receipt.

6 **155 Regulations may exempt from requirement to set out**
7 **information on documents**

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

13 **156 Carrying on business using “Limited”, “No Liability” or**
14 **“Proprietary” in name**

15 A person must not carry on business in this jurisdiction under a
16 name or title that:

- 17 (a) has the words “Limited” or “No Liability” (or an
18 abbreviation of those words) at the end; or
19 (b) includes the word “Proprietary” (or an abbreviation of it);
20 unless allowed or required to do so under a law of the
21 Commonwealth or a law of a State or Territory in this jurisdiction.

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

3 **157 Company changing its name**

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

7 Note: The company may reserve a name before the resolution is passed or

8 the application is lodged (see section 152).

- 9 (2) The company must lodge a copy of the special resolution with
- 10 ASIC within 14 days after it is passed.

- 11 (3) If the proposed name is available, ASIC must change the
- 12 company's name by altering the details of the company's
- 13 registration to reflect the change. The change of name takes effect
- 14 when ASIC alters the details of the company's registration.

15 Note: For available names, see section 147.

16 **158 ASIC's power to direct company to change its name**

- 17 (1) ASIC may direct a company in writing to change its name within 2
- 18 months if:

- 19 (a) the name should not have been registered; or
- 20 (b) the company has breached a condition under subsection
- 21 147(3) on the availability of the name; or
- 22 (c) a consent given under subsection 147(4) to use or assume the
- 23 name has been withdrawn; or
- 24 (d) the company has breached a condition on a consent given
- 25 under subsection 147(4); or
- 26 (e) the company ceases to be permitted to use or assume the
- 27 name (as referred to in paragraph 147(4)(b)).

- 28 (2) The company must comply with the direction within 2 months after
- 29 being given it by doing everything necessary to change its name
- 30 under section 157.

Section 159

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

5 (4) A change of name under subsection (3) takes effect when ASIC
6 alters the details of the company's registration.

7 **159 ASIC's power to include "Limited" in company's name**

8 (1) ASIC may change a company's name so that it includes the word
9 "Limited" by altering the details of the company's registration to
10 reflect the change if:

- 11 (a) the company contravenes any of the requirements or
12 prohibitions in its constitution referred to in subsection
13 150(1); or
14 (b) the company modifies its constitution to remove any of those
15 requirements or prohibitions; or
16 (c) ASIC revokes a licence referred to in section 151 that applies
17 to the company.

18 (2) The change of name takes effect when ASIC alters the details of
19 the company's registration.

20 **160 ASIC must issue new certificate if company's name changes**

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

25 Note: For the evidentiary value of a certificate of registration, see subsection
26 1274(7A).

27 **161 Effect of name change**

- 28 (1) A change of company name does not:
29 (a) create a new legal entity; or
30 (b) affect the company's existing property, rights or obligations;
31 or
-

Chapter 2B Basic features of a company

Part 2B.6 Names

Division 2 Changing a company's name

Section 161

- 1 (c) render defective any legal proceedings by or against the
2 company.
- 3 (2) Any legal proceedings that could have been continued or begun by
4 or against the company in its former name may be continued or
5 begun by or against it in its new name.

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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> unlimited public company
3	public company limited by shares	unlimited public company unlimited proprietary company proprietary company limited by shares no liability company (see subsection (2))
4	company limited by guarantee	public company limited by shares unlimited public company proprietary company limited by shares unlimited proprietary company

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Allowed conversions		[operative table]
	This type of company may change...	...to this type of 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>

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

4 Note 2: Other types of companies that were previously allowed can change
 5 type under the Part 10.1 transitionals.

- 6 (2) A public company limited by shares may only convert to a no
 7 liability company if:
 8 (a) the company's constitution states that its sole objects are
 9 mining purposes; and
 10 (b) under the constitution the company has no contractual right
 11 to recover calls made on its shares from a shareholder who
 12 fails to pay them; and
 13 (c) all the company's issued shares are fully paid up.

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

- 15 (3) The company must lodge a copy of the special resolution with
 16 ASIC within 14 days after it is passed.

- 17 (4) A special resolution to change an unlimited company that has share
 18 capital to a company limited by shares may also provide that a

1 specified portion of its uncalled share capital may only be called up
2 if the company becomes an externally-administered body
3 corporate.

4 **163 Applying for change of type**

5 *Lodging application*

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

8 *Contents of the application*

- 9 (2) The application must be accompanied by the following:
- 10 (a) a copy of:
- 11 (i) the special resolution that resolves to change the type of
12 the company, specifies the new type and the company's
13 new name (if a change of name is necessary); and
- 14 (ii) any other special resolution passed in connection with
15 the change of type;
- 16 (b) for a company limited by guarantee changing to a company
17 limited by shares:
- 18 (i) a statement signed by the directors of the company that
19 in their opinion the company's creditors are not likely to
20 be materially prejudiced by the change of type and that
21 sets out their reasons for that opinion; and
- 22 (ii) any special resolution dealing with an issue of shares
23 according to section 167;
- 24 (c) for a company limited by shares or a company limited by
25 guarantee changing to an unlimited company:
- 26 (i) an assent to the change of type in the prescribed form
27 signed by all the members of the company; and
- 28 (ii) a statement signed by a director or a company secretary
29 of the company that all the members of the company
30 have signed the assent;
- 31 (d) for a proprietary company changing to a public company:
- 32 (i) a consolidated copy of the company's constitution (if
33 any) as at the date of lodgment; and

Section 163

- 1 (ii) a copy of each document (including an agreement or
2 consent) or resolution that is necessary to ascertain the
3 rights attached to issued or unissued shares of the
4 company.

5 Note 1: The company must lodge a copy of any special resolution modifying
6 its constitution passed after the application is lodged (see subsection
7 136(5)).

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

12 *Company limited by guarantee to company limited by shares*

13 (3) If shares will be issued to persons under paragraph 166(2)(c) on the
14 change of type from a company limited by guarantee to a company
15 limited by shares, the application must state:

- 16 (a) that the company has prepared a list that sets out the
17 following details about each person to whom the shares will
18 be issued:
19 (i) name and address;
20 (ii) the number and class of shares the person will take up;
21 (iii) the amount (if any) the person will pay for the shares;
22 (iv) the amount (if any) that will be unpaid on the shares;
23 and
24 (b) the number and class of shares those persons will take up;
25 and
26 (c) the amount (if any) those persons will pay for the shares; and
27 (ca) the amount (if any) that will be unpaid on the shares; and
28 (d) if the shares will be issued for non-cash consideration—the
29 prescribed particulars about the issue of the shares, unless the
30 shares will be issued under a written contract and a copy of
31 the contract is lodged with the application; and
32 (e) that each of those persons who is not a member of the
33 company when the application is made consents in writing to
34 the inclusion in the list of the details about them that are
35 referred to in paragraph (a).

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

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

6 (4) The application must be in the prescribed form.

7 (5) The company must have the consents referred to in
8 paragraph (3)(e) (if any) when the application is lodged. The
9 company must keep the consents.

10 **164 ASIC changes type of company**

11 (1) ASIC must give notice under subsection (3) that it intends to alter
12 the details of the company's registration if:

13 (a) ASIC is satisfied that:

14 (i) the application complies with section 163; and

15 (ii) for an application by a company limited by guarantee to
16 change to a company limited by shares—the company's
17 creditors are not likely to be materially prejudiced by
18 the change; and

19 (b) for an application by a company limited by guarantee to
20 change to a company limited by shares that is accompanied
21 by a copy of a special resolution dealing with an issue of
22 shares according to section 167—ASIC is not of the opinion
23 that the obligations that would attach to the shares are
24 unreasonable compared with the obligations that attach to
25 membership of the company limited by guarantee.

26 (2) To make a decision under subparagraph (1)(a)(ii), ASIC may direct
27 the company in writing to:

28 (a) notify some or all of its creditors of the proposed change in
29 the way ASIC specifies; and

30 (b) invite those creditors to make submissions to ASIC.

31 (3) The notice that ASIC intends to alter the details of the company's
32 registration must be:

33 (a) included on ASIC database; and

Section 165

- 1 (b) published in the *Gazette*.
2 The notice must also state that ASIC will alter the details of the
3 company's registration 1 month after the notice has been published
4 in the *Gazette* unless an order by a court or the Administrative
5 Appeals Tribunal prevents it from doing so.
- 6 (4) Subject to an order made by a court or the Administrative Appeals
7 Tribunal within that month, after that month has passed ASIC must
8 alter the details of the company's registration to reflect the
9 company's new type.
- 10 (5) A change of type under this section takes effect when ASIC alters
11 the details of the company's registration. Despite subsection
12 246D(3) and section 246E, a special resolution passed in
13 connection with the change of type also takes effect when ASIC
14 alters the details of the company's registration.
- 15 (6) ASIC must give the company a new certificate of registration after
16 it alters the details of the company's registration. The company's
17 name is the name specified in the certificate of registration issued
18 under this section.
- 19 Note: For the evidentiary value of a certificate of registration, see subsection
20 1274(7A).
- 21 (7) If ASIC alters the details of a company's registration under
22 subsection (4), a court is not to make an order reversing the
23 alteration of the details of the company's registration.
- 24 Note: The Administrative Appeals Tribunal cannot review the change of the
25 company's type once ASIC has issued a new certificate of registration
26 to the company (see subsection 1274(7A) and paragraph 1317C(b)).

27 **165 ASIC may direct a proprietary company to change to a public**
28 **company in certain circumstances**

- 29 (1) ASIC may direct a proprietary company in writing to change to a
30 public company within 2 months if it is satisfied that the company
31 has contravened section 113 (requirements for proprietary
32 companies).

Section 166

- 1 (2) The company must comply with the direction within 2 months after
2 being given it by doing everything necessary to change to a public
3 company under section 164.
- 4 (3) If a proprietary company does not comply with subsection (2),
5 ASIC may change the company from a proprietary to a public
6 company by altering the details of the company's registration to
7 reflect the company's new type.
- 8 (4) A change of type under this section takes effect when ASIC alters
9 the details of the company's registration.
- 10 (5) ASIC must give the company a new certificate of registration after
11 it alters the details of the company's registration under
12 subsection (3). The company's name is the name specified in the
13 certificate of registration issued under this section.
- 14 Note: For the evidentiary value of a certificate of registration, see subsection
15 1274(7A).

16 **166 Effect of change of type**

- 17 (1) A change of type does not:
18 (a) create a new legal entity; or
19 (b) affect the company's existing property, rights or obligations
20 (except as against the members of the company in their
21 capacity as members); or
22 (c) render defective any legal proceedings by or against the
23 company or its members.
- 24 (2) On the change of type of a company from a company limited by
25 guarantee to a company limited by shares:
26 (a) the liability of each member and past member as a guarantor
27 on the winding up of the company is extinguished; and
28 (b) the members cease to be members of the company; and
29 (c) if shares are to be issued to a person as specified in the list
30 referred to in subsection 163(3):
31 (i) the shares are taken to be issued to that person; and
32 (ii) the person is taken to have consented to be a member of
33 the company; and

Section 167

1 (iii) the person becomes a member of the company.

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

4 **167 Issue of shares by company or holding company—company**
5 **limited by guarantee changing to company limited by**
6 **shares**

7 (1) If:

8 (a) a company limited by guarantee changes type under this Part
9 to a company limited by shares; and

10 (b) that company, or another company that beneficially owns all
11 the shares in that company, issues shares to a person who was
12 a member of that company immediately before the change of
13 type took effect;

14 the person becomes a member of the company issuing the shares if:

15 (c) the issue of the shares is in accordance with the special
16 resolution that accompanied the application to change type
17 under subparagraph 163(2)(a)(ii); and

18 (d) the shares are fully paid up; and

19 (e) the business, assets and liabilities of the issuing company
20 (together with its subsidiaries) when the shares are issued are
21 substantially the same as the business, assets and liabilities of
22 the company changing type (together with its subsidiaries)
23 immediately before the change of type took effect.

24 (2) If shares are issued according to this section, a court is not to make
25 an order reversing the issue of the shares.

26 **167AA Application of Part to company limited both by shares and**
27 **by guarantee**

28 (1) A company limited both by shares and by guarantee may change to
29 one of the following types of companies under this Part:

30 (a) a proprietary company limited by shares;

31 (b) a public company limited by shares;

32 (c) a company limited by guarantee.

Section 167AA

- 1 (2) This Part applies to the change with any modifications that are
2 necessary.

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Chapter 2C—Registers

167A Who is covered by this Chapter

- 5
- 6 (1) This Chapter covers:
- 7 (a) all companies; and
- 8 (b) all registered schemes.
- 9 (2) A registered scheme's responsible entity:
- 10 (a) must perform the obligations imposed under this Chapter in
- 11 respect of the scheme; and
- 12 (b) may exercise the powers given by this Chapter in respect of
- 13 the scheme.

168 Registers to be maintained

- 14
- 15 (1) A company or registered scheme must set up and maintain:
- 16 (a) a register of members (see section 169); and
- 17 (b) if the company or scheme grants options over unissued
- 18 shares or interests—a register of option holders and copies of
- 19 options documents (see section 170); and
- 20 (c) if the company issues debentures—a register of debenture
- 21 holders (see section 171).

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

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

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

28 169 Register of members

29 *General requirements*

- 30 (1) The register of members must contain the following information
- 31 about each member:

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

4 *Index to register*

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

11 *Companies with share capital*

- 12 (3) If the company has a share capital, the register must also show:
13 (a) the date on which every allotment of shares takes place; and
14 (b) the number of shares in each allotment; and
15 (c) the shares held by each member; and
16 (d) the class of shares; and
17 (e) the share numbers (if any), or share certificate numbers (if
18 any), of the shares; and
19 (f) the amount unpaid on the shares (if any).

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

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

- 24 (4) The register does not have to show the amount unpaid on the
25 shares (see paragraph (1)(f)) if:
26 (a) all of the company's shares were issued before 1 July 1998;
27 and
28 (b) the register continues to show the par values of the shares as
29 they were immediately before 1 July 1998.
- 30 (5) The register does not have to show the amount unpaid on the
31 shares (see paragraph (1)(f)) if:
32 (a) all of the company's shares were issued before 1 July 1998;
33 and
-

Section 169

1 (b) the company is not a listed company.

2 *Non-beneficial ownership—companies other than listed companies*

3 (5A) The register of a company that:

4 (a) has a share capital; and

5 (b) is neither a listed company (within the meaning of
6 section 603) nor a company covered by an order under
7 section 707;

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

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

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

15 *Registered schemes*

16 (6A) The register of a registered scheme must also show:

17 (a) the date on which every issue of interests takes place; and

18 (b) the number of interests in each issue; and

19 (c) the interests held by each member; and

20 (d) the class of interests; and

21 (e) the amount paid, or agreed to be considered as paid, on the
22 interests.

23 *Former members*

24 (7) A register of members must also show:

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

28 (b) the date on which the person stopped being a member.

29 The company or scheme may keep these entries separately from
30 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;

(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.

Section 171

- 1 (2) Information about the grant of an option must be entered in the
2 register within 14 days after the grant of the option.

3 *Copies of options documents*

- 4 (3) The company or scheme must keep with the register a copy of
5 every document that grants an option over unissued shares or
6 interests unless the option has been granted official quotation by a
7 securities exchange.
- 8 (4) The company or scheme must change the register to reflect the
9 transfer of an option only if the person transferring the option gives
10 the company or scheme written notice of the transfer.
- 11 (5) A failure to comply with this section in relation to an option does
12 not affect the option itself.

13 **171 Register of debenture holders**

- 14 (1) The register of debenture holders must contain the following
15 information about each holder of a debenture:
16 (a) the debenture holder's name and address;
17 (b) the amount of the debentures held.

18 Note: See subsection 168(2) for the coverage of *debenture*.

- 19 (2) A company's failure to comply with this section in relation to a
20 debenture does not affect the debenture itself.

21 **172 Location of registers**

- 22 (1) A register kept under this Chapter that relates to a company must
23 be kept at:
24 (a) the company's registered office; or
25 (b) the company's principal place of business in this jurisdiction;
26 or
27 (c) a place in this jurisdiction (whether of the company or of
28 someone else) where the work involved in maintaining the
29 register is done; or
30 (d) another place in this jurisdiction approved by ASIC.

1 (1A) A register kept under this Chapter that relates to a registered
2 scheme must be kept at:

- 3 (a) the responsible entity's registered office; or
4 (b) an office at the responsible entity's principal place of
5 business in this jurisdiction; or
6 (c) an office in this jurisdiction (whether of the responsible
7 entity or of someone else) where the work involved in
8 maintaining the register is done; or
9 (d) another office in this jurisdiction approved by ASIC.

10 *Notice to ASIC*

11 (2) The company or scheme must lodge with ASIC a notice of the
12 address at which the register is kept within 7 days after the register
13 is:

- 14 (a) established at an office that:
15 (i) is not the registered office of the company or
16 responsible entity; and
17 (ii) is not at the principal place of business of the company
18 or responsible entity in this jurisdiction; or
19 (b) moved from one place to another.

20 Notice is not required for moving the register between the
21 registered office and the principal place of business in this
22 jurisdiction.

23 **173 Right to inspect and get copies**

24 *Right to inspect*

25 (1) A company or registered scheme must allow anyone to inspect a
26 register kept under this Chapter. If the register is not kept on a
27 computer, the person inspects the register itself. If the register is
28 kept on a computer, the person inspects a hard copy of the
29 information on the register unless the person and the company or
30 the responsible entity agree that the person can access the
31 information by computer.

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

- 33
 - section 1300 (place and times for inspection)

- 1 (7) The exemption:
2 (a) must be in writing; and
3 (b) may be general or limited; and
4 (c) may be subject to conditions specified in the exemption.
- 5 (8) ASIC must publish a copy of the exemption in the *Gazette*.
- 6 (9) A person must not contravene a condition of the exemption.
- 7 (10) On application by ASIC, the Court may order a person who
8 contravenes a condition of the exemption to comply with the
9 condition.

10 **174 Agent's obligations**

- 11 A person who agrees to maintain a register on behalf of a company
12 or registered scheme for the purposes of this Chapter must:
13 (a) make the register available for inspection under this Chapter;
14 and
15 (b) provide the copies required by this Chapter.

16 **175 Correction of registers**

- 17 (1) A company or registered scheme or a person aggrieved may apply
18 to the Court to have a register kept by the company or scheme
19 under this Part corrected.
- 20 (2) If the Court orders the company or scheme to correct the register, it
21 may also order the company or scheme to compensate a party to
22 the application for loss or damage suffered.
- 23 (3) If:
24 (a) the Court orders a company or scheme to correct its register
25 of members; and
26 (b) the company or scheme has lodged a list of its members with
27 ASIC;
28 the company or scheme must lodge notice of the correction with
29 ASIC.

1 **176 Evidentiary value of registers**

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

5 **177 Use of information on registers**

6 (1) A person must not:

- 7 (a) use information about a person obtained from a register kept
8 under this Chapter to contact or send material to the person;
9 or
10 (b) disclose information of that kind knowing that the
11 information is likely to be used to contact or send material to
12 the person;

13 unless that use or disclosure of the information is:

- 14 (c) relevant to the holding of the interests recorded in the register
15 or the exercise of the rights attaching to them; or
16 (d) approved by the company or scheme.

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

20 (2) A person who contravenes subsection (1) is liable to compensate
21 anyone else who suffers loss or damage because of the
22 contravention.

23 (3) A person who makes a profit from a contravention of
24 subsection (1) owes a debt to the company or the scheme. The
25 amount of the debt is the amount of the profit.

26 (4) If a person owes a debt under subsection (3) to the scheme:

- 27 (a) the debt may be recovered by the responsible entity as a debt
28 due to it; and
29 (b) any amount paid or recovered in respect of the debt forms
30 part of the scheme property.

178 Overseas branch registers1
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- (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 Act 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.

1

2

Chapter 2D—Officers and employees

3

Part 2D.1—Duties and powers

4

5

179 Background to duties of directors, other officers and employees

6

(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 Act and other laws (including the general law).

7

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(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).

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12

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2 **Division 1—General duties**

3 **180 Care and diligence—civil obligation only**

4 *Care and diligence—directors and other officers*

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

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

13 *Business judgment rule*

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

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

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

- 33 (3) In this section:
-

Section 181

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

4 **181 Good faith—civil obligations**

5 *Good faith—directors and other officers*

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

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

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

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

15 Note 1: Section 79 defines *involved*.

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

17 **182 Use of position—civil obligations**

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

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

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

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

26 Note 1: Section 79 defines *involved*.

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

1 **183 Use of information—civil obligations**

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

3 (1) A person who obtains information because they are, or have been,
4 a director or other officer or employee of a corporation must not
5 improperly use the information to:

- 6 (a) gain an advantage for themselves or someone else; or
7 (b) cause detriment to the corporation.

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

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

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

13 Note 1: Section 79 defines *involved*.

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

15 **184 Good faith, use of position and use of information—criminal**
16 **offences**

17 *Good faith—directors and other officers*

18 (1) A director or other officer of a corporation commits an offence if
19 they:

- 20 (a) are reckless; or
21 (b) are intentionally dishonest;

22 and fail to exercise their powers and discharge their duties:

- 23 (c) in good faith in the best interests of the corporation; or
24 (d) for a proper purpose.

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

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

28 (2) A director, other officer or employee of a corporation commits an
29 offence if they use their position dishonestly:

Chapter 2D Officers and employees

Part 2D.1 Duties and powers

Division 1 General duties

Section 185

- 1 (a) with the intention of directly or indirectly gaining an
2 advantage for themselves, or someone else, or causing
3 detriment to the corporation; or
4 (b) recklessly as to whether the use may result in themselves or
5 someone else directly or indirectly gaining an advantage, or
6 in causing detriment to the corporation.

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

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

17 **185 Interaction of sections 180 to 184 with other laws etc.**

18 Sections 180 to 184:

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

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

28 **186 Territorial application of sections 180 to 184**

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

- 1 (a) the foreign company carrying on business in this jurisdiction;
2 or
3 (b) an act that the foreign company does, or proposes to do, in
4 this jurisdiction; or
5 (c) a decision by the foreign company whether or not to do, or
6 refrain from doing, an act in this jurisdiction.

7 **187 Directors of wholly-owned subsidiaries**

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

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

18 **188 Responsibility of secretaries and directors for certain**
19 **contraventions**

20 *Secretary's functions*

- 21 (1) A secretary of a company contravenes this subsection if the
22 company contravenes:
23 (a) section 142 (requirement for companies to have registered
24 office); or
25 (b) section 145 (requirement for registered office of public
26 company to be open to public); or
27 (c) section 345 (annual returns); or
28 (d) section 205B (lodgment of notices with ASIC).

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

Section 189

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

3 (2) Each director of a proprietary company contravenes this subsection
4 if:

5 (a) the proprietary company contravenes section 142, 145, 205B
6 or 345; and

7 (b) the proprietary company does not have a secretary when it
8 contravenes that section.

9 *Defence*

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

13 **189 Reliance on information or advice provided by others**

14 If:

15 (a) a director relies on information, or professional or expert
16 advice, given or prepared by:

17 (i) an employee of the corporation whom the director
18 believes on reasonable grounds to be reliable and
19 competent in relation to the matters concerned; or

20 (ii) a professional adviser or expert in relation to matters
21 that the director believes on reasonable grounds to be
22 within the person's professional or expert competence;

23 or

24 (iii) another director or officer in relation to matters within
25 the director's or officer's authority; or

26 (iv) a committee of directors on which the director did not
27 serve in relation to matters within the committee's
28 authority; and

29 (b) the reliance was made:

30 (i) in good faith; and

31 (ii) after making an independent assessment of the
32 information or advice, having regard to the director's

Section 190

1 knowledge of the corporation and the complexity of the
2 structure and operations of the corporation; and
3 (c) the reasonableness of the director's reliance on the
4 information or advice arises in proceedings brought to
5 determine whether a director has performed a duty under this
6 Part or an equivalent general law duty;
7 the director's reliance on the information or advice is taken to be
8 reasonable unless the contrary is proved.

9 **190 Responsibility for actions of delegate**

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

25 **190A Limited application of Division to registrable Australian**
26 **bodies**

27 This Division does not apply to an act or omission by a director or
28 other officer or employee of a corporation that is a registrable
29 Australian body unless the act or omission occurred in connection
30 with:

- 31 (a) the body carrying on business outside its place of origin; or
32 (b) an act that the body does or proposed to do outside its place
33 of origin; or

Chapter 2D Officers and employees

Part 2D.1 Duties and powers

Division 1 General duties

Section 190A

- 1 (c) a decision by the body whether or not to do or refrain from
2 doing outside its place of origin.

1

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

4 **191 Material personal interest—director’s duty to disclose**

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

7 (1) A director of a company who has a material personal interest in a
8 matter that relates to the affairs of the company must give the other
9 directors notice of the interest unless subsection (2) says otherwise.

10 (2) The director does not need to give notice of an interest under
11 subsection (1) if:

12 (a) the interest:

13 (i) arises because the director is a member of the company
14 and is held in common with the other members of the
15 company; or

16 (ii) arises in relation to the director’s remuneration as a
17 director of the company; or

18 (iii) relates to a contract the company is proposing to enter
19 into that is subject to approval by the members and will
20 not impose any obligation on the company if it is not
21 approved by the members; or

22 (iv) arises merely because the director is a guarantor or has
23 given an indemnity or security for all or part of a loan
24 (or proposed loan) to the company; or

25 (v) arises merely because the director has a right of
26 subrogation in relation to a guarantee or indemnity
27 referred to in subparagraph (iv); or

28 (vi) relates to a contract that insures, or would insure, the
29 director against liabilities the director incurs as an
30 officer of the company (but only if the contract does not
31 make the company or a related body corporate the
32 insurer); or

33 (vii) relates to any payment by the company or a related body
34 corporate in respect of an indemnity permitted under

Chapter 2D Officers and employees

Part 2D.1 Duties and powers

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

Section 191

- 1 section 199A or any contract relating to such an
2 indemnity; or
- 3 (viii) is in a contract, or proposed contract, with, or for the
4 benefit of, or on behalf of, a related body corporate and
5 arises merely because the director is a director of the
6 related body corporate; or
- 7 (b) the company is a proprietary company and the other directors
8 are aware of the nature and extent of the interest and its
9 relation to the affairs of the company; or
- 10 (c) all the following conditions are satisfied:
- 11 (i) the director has already given notice of the nature and
12 extent of the interest and its relation to the affairs of the
13 company under subsection (1);
- 14 (ii) if a person who was not a director of the company at the
15 time when the notice under subsection (1) was given is
16 appointed as a director of the company—the notice is
17 given to that person;
- 18 (iii) the nature or extent of the interest has not materially
19 increased above that disclosed in the notice; or
- 20 (d) the director has given a standing notice of the nature and
21 extent of the interest under section 192 and the notice is still
22 effective in relation to the interest.
- 23 Note: Subparagraph (c)(ii)—the notice may be given to the person referred
24 to in this subparagraph by someone other than the director to whose
25 interests it relates (for example, by the secretary).
- 26 (3) The notice required by subsection (1) must:
- 27 (a) give details of:
- 28 (i) the nature and extent of the interest; and
29 (ii) the relation of the interest to the affairs of the company;
30 and
- 31 (b) be given at a directors' meeting as soon as practicable after
32 the director becomes aware of their interest in the matter.
33 The details must be recorded in the minutes of the meeting.

1 *Effect of contravention by director*

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

5 *Section does not apply to single director proprietary company*

6 (5) This section does not apply to a proprietary company that has only
7 1 director.

8 **192 Director may give other directors standing notice about an**
9 **interest**

10 *Power to give notice*

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

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

18 (2) The notice under subsection (1) must:

19 (a) give details of the nature and extent of the interest; and

20 (b) be given:

21 (i) at a directors' meeting (either orally or in writing); or

22 (ii) to the other directors individually in writing.

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

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

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

Chapter 2D Officers and employees

Part 2D.1 Duties and powers

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

Section 193

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

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

5 *Dates of effect and expiry of standing notice*

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

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

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

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

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

21 *Effect of contravention by director*

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

25 **193 Interaction of sections 191 and 192 with other laws etc.**

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

- 28 (a) any general law rule about conflicts of interest; and
29 (b) any provision in a company's constitution (if any) that
30 restricts a director from:
31 (i) having a material personal interest in a matter; or

- 1 (ii) holding an office or possessing property;
2 involving duties or interests that conflict with their duties or
3 interests as a director.

4 **194 Voting and completion of transactions—directors of proprietary**
5 **companies** (*replaceable rule—see section 135*)

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

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

13 then:

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

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

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

27 **195 Restrictions on voting—directors of public companies only**

28 *Restrictions on voting and being present*

- 29 (1) A director of a public company who has a material personal
30 interest in a matter that is being considered at a directors' meeting
31 must not:
32 (a) be present while the matter is being considered at the
33 meeting; or
-

Section 195

- 1 (b) vote on the matter;
2 unless:
3 (c) subsection (2) or (3) allows the director to be present; or
4 (d) the interest does not need to be disclosed under section 191.

5 *Participation with approval of other directors*

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

14 *Participation with ASIC approval*

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

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

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

24 *Effect of contravention by director*

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

1 **196 ASIC power to make declarations and class orders**

2 *ASIC's power to make specific declarations*

3 (1) ASIC may declare in writing that a director of a public company
4 who has a material personal interest in a matter that is being, or is
5 to be, considered at a directors' meeting may, despite the director's
6 interest, be present while the matter is being considered at the
7 meeting, vote on the matter, or both be present and vote. However,
8 ASIC may only make the declaration if:

9 (a) the number of directors entitled to be present and vote on the
10 matter would be less than the quorum for a directors' meeting
11 if the director were not allowed to vote on the matter at the
12 meeting; and

13 (b) the matter needs to be dealt with urgently, or there is some
14 other compelling reason for the matter being dealt with at the
15 directors' meeting, rather than by a general meeting called
16 under subsection 195(4).

17 (2) The declaration may:

18 (a) apply to all or only some of the directors; or

19 (b) specify conditions that the company or director must comply
20 with.

21 *ASIC's power to make class orders*

22 (3) ASIC may make an order in writing that enables directors who
23 have a material personal interest in a matter to be present while the
24 matter is being considered at a directors' meeting, vote on that
25 matter, or both be present and vote. The order may be made in
26 respect of a specified class of public companies, directors,
27 resolutions or interests.

28 (4) The order may be expressed to be subject to conditions.

29 (5) Notice of the making, revocation or suspension of the order must
30 be published in the *Gazette*.

Section 197

1

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

3 **197 Directors liable for debts and other obligations incurred by**
4 **corporation as trustee**

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

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

- 16 (2) The person is not liable under subsection (1) if the person would be
17 entitled to have been fully indemnified by 1 of the other directors
18 against the liability had all the directors of the corporation been
19 trustees when the liability was incurred.
- 20 (3) This section does not apply to a liability incurred outside Australia
21 by a foreign company.
- 22 (4) This section does not apply to a liability incurred by a registrable
23 Australian body outside its place of origin.

1

2 **Division 4—Powers**

3 **198A Powers of directors** (*replaceable rule—see section 135*)

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

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

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

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

13 **198B Negotiable instruments** (*replaceable rule—see section 135*)

14 (1) Any 2 directors of a company that has 2 or more directors, or the
15 director of a proprietary company that has only 1 director, may
16 sign, draw, accept, endorse or otherwise execute a negotiable
17 instrument.

18 (2) The directors may determine that a negotiable instrument may be
19 signed, drawn, accepted, endorsed or otherwise executed in a
20 different way.

21 **198C Managing director** (*replaceable rule—see section 135*)

22 (1) The directors of a company may confer on a managing director any
23 of the powers that the directors can exercise.

24 (2) The directors may revoke or vary a conferral of powers on the
25 managing director.

26 **198D Delegation**

27 (1) Unless the company's constitution provides otherwise, the
28 directors of a company may delegate any of their powers to:

29 (a) a committee of directors; or

Chapter 2D Officers and employees

Part 2D.1 Duties and powers

Division 4 Powers

Section 198E

- 1 (b) a director; or
2 (c) an employee of the company; or
3 (d) any other person.

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

6 (2) The delegate must exercise the powers delegated in accordance
7 with any directions of the directors.

8 (3) The exercise of the power by the delegate is as effective as if the
9 directors had exercised it.

10 **198E Single director/shareholder proprietary companies**

11 *Powers of director*

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

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

20 *Negotiable instruments*

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

26 **198F Right of access to company books**

27 *Right while director*

28 (1) A director of a company may inspect the books of the company
29 (other than its financial records) at all reasonable times for the
30 purposes of a legal proceeding:

Section 198F

- 1 (a) to which the person is a party; or
2 (b) that the person proposes in good faith to bring; or
3 (c) that the person has reason to believe will be brought against
4 them.

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

6 *Right during 7 years after ceasing to be director*

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

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

16 *Right to take copies*

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

20 *Company not to refuse access*

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

23 *Interaction with other rules*

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

Section 199A

1

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

4 **Division 1—Indemnities and insurance for officers and**
5 **auditors**

6 **199A Indemnification and exemption of officer or auditor**

7 *Exemptions not allowed*

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

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

- 13 (2) A company or a related body corporate must not indemnify a
14 person (whether by agreement or by making a payment and
15 whether directly or through an interposed entity) against any of the
16 following liabilities incurred as an officer or auditor of the
17 company:

- 18 (a) a liability owed to the company or a related body corporate;
19 (b) a liability for a pecuniary penalty order under section 1317G
20 or a compensation order under section 1317H;
21 (c) a liability that is owed to someone other than the company or
22 a related body corporate and did not arise out of conduct in
23 good faith.

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

25 *When indemnity for legal costs not allowed*

- 26 (3) A company or related body corporate must not indemnify a person
27 (whether by agreement or by making a payment and whether
28 directly or through an interposed entity) against legal costs
29 incurred in defending an action for a liability incurred as an officer
30 or auditor of the company if the costs are incurred:

Section 199B

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

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

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

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

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

23 **199B Insurance premiums for certain liabilities of director,**
24 **secretary, other officer or auditor**

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

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

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

Section 199C

1 **199C Certain indemnities, exemptions, payments and agreements**
2 **not authorised and certain documents void**

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

1

2 **Division 2—Termination payments**

3 **200A When benefit given in connection with retirement from office**

4

(1) For the purposes of this Division:

5

(a) a benefit is given in connection with a person's retirement
6 from an office if the benefit is given:

6

7

(i) by way of compensation for, or otherwise in connection
8 with, the loss by the person of the office; or

8

9

(ii) in connection with the person's retirement from the
9 office; and

10

11

(b) giving a benefit includes:

12

(i) if the benefit is a payment—making the payment; and

13

(ii) if the benefit is an interest in property—transferring the
14 interest; and

14

15

(c) a person gives a benefit even if the person is obliged to give
16 the benefit under a contract; and

16

17

(d) a pension or lump sum is paid or payable in connection with
18 the person's retirement from an office if the pension or lump
19 sum is paid or payable:

19

20

(i) by way of compensation for, or otherwise in connection
21 with, the loss by the person of the office; or

21

22

(ii) in connection with the person's retirement from the
23 office; and

23

24

(e) retirement from an office includes:

25

(i) loss of the office; and

26

(ii) resignation from the office; and

27

(iii) death of a person at a time when they hold the office.

28

(2) For the purposes of this Division, if:

29

(a) a person (*person A*) gives another person a benefit (*benefit A*); and

30

31

(b) person A gives benefit A for the purpose, or for purposes
32 including the purpose, of enabling or assisting someone to
33 give a person a benefit in connection with the retirement of a
34 person (*person B*) from an office;

32

33

34

Section 200B

1 person A is taken to give benefit A in connection with the person
2 B's retirement from that office.

3 **200B Retirement benefits generally need membership approval**

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

6 (1) The following must not give a person a benefit in connection with
7 that person's, or someone else's, retirement from a board or
8 managerial office in a company, or a related body corporate,
9 without member approval under section 200E:

- 10 (a) the company;
- 11 (b) an associate of the company (other than a body corporate that
12 is related to the company and is itself a company);
- 13 (c) a prescribed superannuation fund in relation to the company.

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

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

16 *Prescribed superannuation funds*

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

26 *Prescribed circumstances*

- 27 (3) For the purposes of this section, if:
- 28 (a) a company, or an associate of a company, gives a benefit to a
29 superannuation fund solely for the purpose of enabling or
30 assisting the superannuation fund to give to a person a benefit

Section 200C

1 in connection with a person's retirement from an office in the
2 company or a related body corporate; or
3 (b) a superannuation fund gives a benefit to another
4 superannuation fund solely for the purpose of enabling or
5 assisting the other superannuation fund to give to a person a
6 benefit in connection with a person's retirement from an
7 office in a company or a related body corporate;
8 the benefit first referred to in paragraph (a) or (b) is taken to be
9 given in prescribed circumstances.

10 (4) In this section:

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

13 **200C Benefits on transfer of undertaking or property need**
14 **membership approval**

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

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

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

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

27 **200D Contravention to receive benefit without member approval**

28 A person who:

- 29 (a) holds, or has at any previous time held, a board or managerial
30 office in a company or related body corporate; or
31 (b) is the spouse of a person referred to in paragraph (a); or

Section 200E

- 1 (c) is a relative of a person referred to in paragraph (a) or of the
2 spouse of such a person; or
3 (d) is an associate of a person referred to in paragraph (a) or the
4 spouse of an associate of such a person;
5 must not receive a benefit if the giving of the benefit contravenes
6 section 200B or 200C.

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

8 **200E Approval by members**

- 9 (1) If section 200B or 200C requires member approval for giving a
10 person a benefit, it must be approved by a resolution passed at a
11 general meeting of:
12 (a) the company; and
13 (b) if the company is a subsidiary of a listed domestic
14 corporation—the listed corporation; and
15 (c) if the company has a holding company that:
16 (i) is a domestic corporation that is not listed; and
17 (ii) is not itself a subsidiary of a domestic corporation—the
18 holding company.
- 19 (2) Details of the benefit must be set out in, or accompany, the notice
20 of the meeting at which the resolution is to be considered. The
21 details must include:
22 (a) if the proposed benefit is a payment:
23 (i) the amount of the payment; or
24 (ii) if that amount cannot be ascertained at the time of the
25 disclosure—the manner in which that amount is to be
26 calculated and any matter, event or circumstance that
27 will, or is likely to, affect the calculation of that amount;
28 and
29 (b) otherwise:
30 (i) the money value of the proposed prescribed benefit; or
31 (ii) if that value cannot be ascertained at the time of the
32 disclosure—the manner in which that value is to be
33 calculated and any matter, event or circumstance that
34 will, or is likely to, affect the calculation of that value.

Section 200F

- 1 These requirements are in addition to, and not in derogation of, any
2 other law that requires disclosure to be made with respect to giving
3 or receiving a benefit.
- 4 (3) The approval extends to the giving of another benefit to the person
5 if:
- 6 (a) the other benefit is given to the person instead of the
7 proposed benefit; and
- 8 (b) the amount or money value of the benefit is less than the
9 amount or money value of the proposed benefit.
- 10 (4) The approval does not relieve a director of a body corporate from
11 any duty to the body corporate (whether under section 180, 181,
12 182, 183 or 184 or otherwise and whether of a fiduciary nature or
13 not) in connection with the giving of the benefit.

14 **200F Exempt benefits and benefits given in certain circumstances**

- 15 Subsection 200B(1) does not apply to:
- 16 (a) a benefit given in connection with a person's retirement from
17 an office in relation to a company if the benefit is:
- 18 (i) given under an agreement entered into before 1 January
19 1991 if giving the benefit in accordance with the
20 agreement would have been lawful if the benefit were
21 given when the agreement was entered into; or
- 22 (ii) a genuine payment by way of damages for breach of
23 contract; or
- 24 (iii) given to the person under an agreement made between
25 the company and the person before the person became
26 the holder of the office as the consideration, or part of
27 the consideration, for the person agreeing to hold the
28 office; or
- 29 (iv) a payment made in respect of leave of absence to which
30 the person is entitled under an industrial instrument; or
- 31 (b) a benefit given in prescribed circumstances.

Section 200G

1 **200G Genuine payments of pension and lump sum**

2 (1) Subsection 200B(1) does not apply to a benefit if:

- 3 (a) the benefit is a payment in connection with a person's
4 retirement from a board or managerial office (the *relevant*
5 *office*) in a company or a related body corporate; and
6 (b) the payment is for past services the person rendered to:
7 (i) the company; or
8 (ii) a related body corporate; or
9 (iii) a body that was a related body corporate of the company
10 when the past services were rendered; and
11 (c) the value of the benefit, when added to the value of all other
12 payments (if any) already made or payable in connection
13 with the person's retirement from board or managerial offices
14 in the company and related bodies corporate does not exceed
15 the payment limit set by subsection (2).

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

18 (2) The payment limit is:

- 19 (a) the amount worked out under subsection (3) if the person:
20 (i) was an eligible employee in relation to the company at
21 the time when the person retired from the relevant
22 office; and
23 (ii) has been an eligible employee in relation to the
24 company throughout a period (the *relevant period*), or
25 throughout periods totalling a period (also the *relevant*
26 *period*), of more than 3 years; or
27 (b) otherwise—the total remuneration of the person from the
28 company and related bodies corporate during the period of 3
29 years ending when the person retired from the relevant office.

30 Note: Section 9 defines *remuneration*.

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

1
$$\frac{\text{Total remuneration} \times \text{Relevant period}}{3}$$

2 where:

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

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

8 (4) In determining for the purposes of paragraph (1)(c) the value of a
9 pension or lump sum payment, disregard any part of the pension or
10 lump sum payment that is attributable to:

11 (a) a contribution made by the person; or

12 (b) a contribution made by a person other than:

13 (i) the company; or

14 (ii) a body corporate (a ***relevant body corporate***) that is a
15 related body corporate of the company, or that was,
16 when the contribution was made, such a related body
17 corporate; or

18 (iii) an associate of the company, or of a relevant body
19 corporate, in respect of:

20 (A) the payment of the pension, or the making of
21 the lump sum payment, as the case may be; or

22 (B) the making of the contribution.

23 (5) For the purposes of subparagraph (2)(a), a person is taken to have
24 been an eligible employee in relation to a company at a particular
25 time if:

26 (a) the person was a genuine full-time employee of the company
27 at that time; or

28 (b) the person was a genuine full-time employee of a body
29 corporate at that time and the body corporate was related to
30 the company at that time.

31 (6) In this section:

Section 200H

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

4 **200H Benefits required by law**

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

9 **200J Benefits to be held in trust for company**

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

1
2 **Part 2D.3—Appointment, remuneration and**
3 **cessation of appointment of directors**

4 **Division 1—Appointment of directors**

5 **201A Minimum number of directors**

6 *Proprietary companies*

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

9 *Public companies*

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

13 **201B Who can be a director**

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

20 **201C Directors of public companies, or subsidiaries, over 72**

- 21 (1) A person who has turned 72 may only be appointed or act as a
22 director of:
23 (a) a public company; or
24 (b) a company that is a subsidiary of a public company;
25 if authorised to do so under this section.
- 26 (2) A person may act as a director of a company during the period that:
27 (a) starts on the day on which they turn 72; and

Chapter 2D Officers and employees

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

Division 1 Appointment of directors

Section 201C

- 1 (b) ends at the conclusion of the AGM beginning next after that
2 day.
- 3 (3) The office of a director of a public company, or of a subsidiary of a
4 public company, becomes vacant at the conclusion of the AGM of
5 the public company, or the subsidiary, beginning next after the
6 director turns 72.
- 7 (4) If a proprietary company is a subsidiary of a public company:
8 (a) subsection (3) does not apply to it; and
9 (b) a person may continue to act as a director of the proprietary
10 company until the next AGM of the public company after the
11 person turns 72; and
12 (c) the person's office of director becomes vacant at the end of
13 that meeting.
- 14 Note: Proprietary companies do not need to hold annual general meetings
15 (see section 250N).
- 16 (5) An act done by a person as a director is valid even if it is
17 afterwards discovered that they had turned 72 at the time when
18 they were appointed or that their appointment had terminated under
19 subsection (3) or (4).
- 20 (6) If the office of a director has become vacant under subsection (3)
21 or (4), no provision for the automatic re-appointment of retiring
22 directors in default of another appointment applies in relation to
23 that director.
- 24 (7) If a vacancy created under subsection (3) or (4) is not filled at the
25 meeting at which the office became vacant, the office may be filled
26 as a casual vacancy.
- 27 (8) Subject to subsections (9) and (10), a person who has turned
28 72 may by special resolution be appointed or re-appointed as a
29 director of that company to hold office until the conclusion of the
30 company's next AGM if:
31 (a) the resolution states the person's age; and
32 (b) the notice of meeting states that the person is a candidate for
33 election who has turned 72 and states the person's age.

Section 201C

- 1 (9) If the company is a subsidiary of a public company, the
2 appointment or re-appointment referred to in subsection (8) does
3 not have effect unless:
- 4 (a) the person appointed or re-appointed is a director of the
5 public company; or
- 6 (b) the appointment or re-appointment of the person as a director
7 of the company has been approved by a special resolution of
8 the public company and the notice of meeting states that the
9 person is a candidate for election as a director of the
10 company who has turned 72 and states the person's age.
- 11 (10) If the subsidiary is a proprietary company:
- 12 (a) the person may be appointed or re-appointed as a director of
13 the subsidiary until the end of the next AGM of the holding
14 company; and
- 15 (b) the appointment does not need a resolution under
16 subsection (8); and
- 17 (c) the appointment must satisfy either paragraph (9)(a) or (b).
- 18 (11) If:
- 19 (a) the constitution of a company limited by guarantee provides
20 for the holding of postal ballots for the election of a director
21 or directors; and
- 22 (b) a postal ballot for the election of a director or directors is
23 held and in the ballot:
- 24 (i) the members entitled to vote have been given notice in
25 writing by the company stating that a candidate for
26 election has turned 72 and stating the age of the
27 candidate; and
- 28 (ii) that candidate is elected by a majority of not less than
29 75% of the members who, being entitled to vote, vote in
30 the ballot;
- 31 that candidate may be appointed or re-appointed as a director to
32 hold office until the conclusion of the next AGM of the company.
- 33 (12) If:
- 34 (a) the constitution of a company limited by guarantee provides
35 for the election or appointment of a director or directors

Chapter 2D Officers and employees

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

Division 1 Appointment of directors

Section 201D

1 otherwise than by members at a general meeting or by postal
2 ballot of members; and

3 (b) ASIC declares in writing that this section does not apply to
4 the company or its directors;

5 then, subject to the conditions (if any) that ASIC specifies in the
6 declaration, this section does not so apply.

7 (13) A vacancy in the office of a director occurring under subsection (3)
8 or (4) is not to be taken into account in determining when other
9 directors are to retire.

10 (14) Nothing in this section limits, or affects the operation of, any
11 provision of a company's constitution that prevents any person
12 from being appointed as a director or requiring any director to
13 vacate their office at any age less than 72 years.

14 **201D Consent to act as director**

15 (1) A company contravenes this subsection if a person does not give
16 the company a signed consent to act as a director of the company
17 before being appointed.

18 (2) The company must keep the consent.

19 **201E Special rules for the appointment of public company directors**

20 (1) A resolution passed at a general meeting of a public company
21 appointing or confirming the appointment of 2 or more directors is
22 void unless:

23 (a) the meeting has resolved that the appointments or
24 confirmations may be voted on together; and

25 (b) no votes were cast against the resolution.

26 (2) This section does not affect:

27 (a) a resolution to appoint directors by an amendment to the
28 company's constitution (if any); or

29 (b) a ballot or poll to elect 2 or more directors if the ballot or poll
30 does not require members voting for 1 candidate to vote for
31 another candidate.

- 1 (3) For the purposes of paragraph (2)(b), a ballot or poll does not
2 require a member to vote for a candidate merely because the
3 member is required to express a preference among individual
4 candidates in order to cast a valid vote.

5 **201F Special rules for the appointment of directors for single**
6 **director/single shareholder proprietary companies**

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

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

- 12 (2) If a person who is the only director and the only shareholder of a
13 proprietary company:
14 (a) dies; or
15 (b) cannot manage the company because of the person's mental
16 incapacity;
17 and a personal representative or trustee is appointed to administer
18 the person's estate or property, the personal representative or
19 trustee may appoint a person as the director of the company.

- 20 (3) If:
21 (a) the office of the director of a proprietary company is vacated
22 under subsection 206B(3) or (4) because of the bankruptcy of
23 the director; and
24 (b) the person is the only director and the only shareholder of the
25 company; and
26 (c) a trustee in bankruptcy is appointed to the person's property;
27 the trustee may appoint a person as the director of the company.

- 28 (4) A person who has a power of appointment under subsection (2) or
29 (3) may appoint themselves as director.

- 30 (5) A person appointed as a director of a company under
31 subsection (2), (3) or (4) holds office as if they had been appointed
32 in the usual way.

Section 201G

1 **201G Company may appoint a director** (*replaceable rule—see*
2 *section 135*)

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

5 **201H Directors may appoint other directors** (*replaceable rule—see*
6 *section 135*)

7 *Appointment by other directors*

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

12 *Proprietary company—confirmation by meeting within 2 months*

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

18 *Public company—confirmation by next AGM*

19 (3) If a person is appointed by the other directors as a director of a
20 public company, the company must confirm the appointment by
21 resolution at the company's next AGM. If the appointment is not
22 confirmed, the person ceases to be a director of the company at the
23 end of the AGM.

24 **201J Appointment of managing directors** (*replaceable rule—see*
25 *section 135*)

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

1 **201K Alternate directors** (*replaceable rule—see section 135*)

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

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

16 **201L Signpost—ASIC to be notified of appointment**

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

19 **201M Effectiveness of acts by directors**

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

28 Note: The kinds of acts that this section validates are those that are only
29 legally effective if the person doing them is a director (for example,
30 calling a meeting of the company's members or signing a document to
31 be lodged with ASIC or minutes of a meeting). Sections 128-130

Chapter 2D Officers and employees

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

Division 1 Appointment of directors

Section 201M

1
2

contain rules about the assumptions people are entitled to make when dealing with a company and its officers.

1

2 **Division 2—Remuneration of directors**

3 **202A Remuneration of directors** (*replaceable rule—see section 135*)

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

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

8 (2) The company may also pay the directors' travelling and other
9 expenses that they properly incur:

10 (a) in attending directors' meetings or any meetings of
11 committees of directors; and

12 (b) in attending any general meetings of the company; and

13 (c) in connection with the company's business.

14 **202B Members may obtain information about directors'**
15 **remuneration**

16 (1) A company must disclose the remuneration paid to each director of
17 the company or a subsidiary (if any) by the company or by an
18 entity controlled by the company if the company is directed to
19 disclose the information by:

20 (a) members with at least 5% of the votes that may be cast at a
21 general meeting of the company; or

22 (b) at least 100 members who are entitled to vote at a general
23 meeting of the company.

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

27 (2) The company must comply with the direction as soon as
28 practicable by:

29 (a) preparing a statement of the remuneration of each director of
30 the company or subsidiary for the last financial year before
31 the direction was given; and

32 (b) having the statement audited; and

Chapter 2D Officers and employees

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

Division 2 Remuneration of directors

Section 202C

- 1 (c) sending a copy of the audited statement to each person
2 entitled to receive notice of general meetings of the company.

3 **202C Special rule for single director/single shareholder proprietary**
4 **companies**

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

1
2 **Division 3—Resignation, retirement or removal of**
3 **directors**

4 **203A Director may resign by giving written notice to company**
5 *(replaceable rule—see section 135)*

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

9 **203B Signpost to consequences of disqualification from managing**
10 **corporations**

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

15 **203C Removal by members—proprietary companies** *(replaceable*
16 *rule—see section 135)*

17 A proprietary company:

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

21 **203D Removal by members—public companies**

22 *Resolution for removal of director*

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

Chapter 2D Officers and employees

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

Division 3 Resignation, retirement or removal of directors

Section 203D

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

5 Note: See sections 249C to 249G for the rules on who may call meetings,
6 sections 249H to 249M on how to call meetings and sections 249N to
7 249Q for rules on members' resolutions.

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

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

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

17 *Director to be informed*

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

20 *Director's right to put case to members*

21 (4) The director is entitled to put their case to members by:
22 (a) giving the company a written statement for circulation to
23 members (see subsections (5) and (6)); and
24 (b) speaking to the motion at the meeting (whether or not the
25 director is a member of the company).

26 (5) The written statement is to be circulated by the company to
27 members by:
28 (a) sending a copy to everyone to whom notice of the meeting is
29 sent if there is time to do so; or
30 (b) if there is not time to comply with paragraph (a)—having the
31 statement distributed to members attending the meeting and
32 read out at the meeting before the resolution is voted on.

- 1 (6) The director's statement does not have to be circulated to members
2 if it is more than 1,000 words long or defamatory.

3 *Time of retirement*

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

11 **203E Director cannot be removed by other directors—public**
12 **companies**

- 13 A resolution, request or notice of any or all of the directors of a
14 public company is void to the extent that it purports to:
15 (a) remove a director from their office; or
16 (b) require a director to vacate their office.

17 **203F Termination of appointment of managing director** (*replaceable*
18 *rule—see section 135*)

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

Section 204A

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Part 2D.4—Appointment of secretaries

4

204A Minimum number of secretaries

5

Proprietary companies

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7

8

- (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.

9

Public companies

10

11

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

12

204B Who can be a secretary

13

14

- (1) Only an individual who is at least 18 may be appointed as a secretary of a company.

15

16

17

18

- (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.

19

204C Consent to act as secretary

20

21

22

- (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.

23

- (2) The company must keep the consent.

24

204D How a secretary is appointed

25

A secretary is to be appointed by the directors.

26

27

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

Section 204E

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

3 **204E Effectiveness of acts by secretaries**

4 (1) An act done by a secretary is effective even if their appointment, or
5 the continuance of their appointment, is invalid because the
6 company or secretary did not comply with the company's
7 constitution (if any) or any provision of this Act.

8 (2) Subsection (1) does not deal with the question whether an effective
9 act by a secretary:

- 10 (a) binds the company in its dealings with other people; or
11 (b) makes the company liable to another person.

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

19 **204F Terms and conditions of office for secretaries** (*replaceable*
20 *rule—see section 135*)

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

23 **204G Signpost to consequences of disqualification from managing**
24 **corporations**

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

Section 205A

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

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

6

7

(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.

8

9

10

(2) To be effective, a notice of resignation must be accompanied by a copy of the letter of resignation given to the company.

11

12

(3) Nothing in this section affects the company's obligations to notify ASIC of the resignation or retirement.

13

14

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

15

16

New directors or secretaries

17

(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.

18

19

20

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

21

22

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.

23

24

25

26

New alternate directors

27

(2) A company must lodge with ASIC a notice of:

28

(a) the personal details of a person who is appointed as an alternate director; and

29

30

(b) the terms of their appointment (including terms about when the alternate director is to act as a director);

31

Section 205C

1 within 14 days after their appointment as an alternate director. The
2 notice must be in the prescribed form.

3 *Personal details*

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

10 Note: For *address* see section 205D.

11 *Changes in details*

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

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

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

24 **205C Director and secretary must give information to company**

- 25 (1) A director, alternate director or secretary must give the company
26 any information the company needs to comply with subsection
27 205B(1) or (2) within 7 days after their initial appointment unless
28 they have previously given the information to the company.
29 (2) A director, alternate director or secretary must give the company
30 any information the company needs to comply with subsection
31 205B(4) within 7 days after any change in their personal details.

Section 205D

1 **205D Address for officers**

2 *Address is normally residential address*

- 3 (1) A person's address for the purposes of a notice or application
4 under subsection 5H(2), 117(2), 205B(1), (2) or (4) or 601BC(2)
5 must be their usual residential address unless they are entitled to
6 have an alternative address substituted for their usual residential
7 address under subsection (2).

8 *Entitlement to have alternative address*

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

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

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

- 24 (3) A person who takes advantage of subsection (2) must:
25 (a) before or at the same time as the alternative address is first
26 included in a notice or application, lodge with ASIC notice of
27 the person's usual residential address; and
28 (b) lodge with ASIC notice of any change in the person's usual
29 residential address within 14 days after the change.

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

- 31 (4) If a court gives a judgment for payment of a sum of money against
32 a person who is taking advantage of subsection (2), ASIC may give

Section 205E

1 details of the person's usual residential address to an officer of the
2 court for the purposes of enforcing the judgment debt.

3 **205E ASIC's power to ask for information about person's position**
4 **as director or secretary**

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

13 **205F Director must give information to company**

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

21 **205G Listed company—director to notify securities exchange of**
22 **shareholdings etc.**

23 *Notifiable interests*

- 24 (1) A director of a listed public company must notify the relevant
25 securities exchange under subsections (3) and (4) of the following
26 interests of the director:
- 27 (a) relevant interests in securities of the company or a related
28 body corporate;
- 29 (b) contracts:
- 30 (i) to which the director is a party or under which the
31 director is entitled to a benefit; and

Section 205G

1 (ii) that confer a right to call for or deliver shares in,
2 debentures of, or interests in a managed investment
3 scheme made available by, the company or a related
4 body corporate.

5 (2) A notice of a relevant interest in securities under paragraph (1)(a)
6 must give details of:

- 7 (a) the number of securities; and
8 (b) the circumstances giving rise to the relevant interest.

9 *Occasions for initial notification*

10 (3) The director must notify the exchange within 14 days after each of
11 the following occasions:

- 12 (a) appointment as a director of the company;
13 (b) the listing of the company.

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

16 *Updating notices*

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

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

22 *ASIC's power to make class orders*

23 (6) ASIC may make an order in writing relieving a director of the
24 obligation to notify the relevant securities exchange of an interest
25 in a security or contract. The order may be made in respect of a
26 specified class of companies, directors, securities or contracts.

27 (7) The order may be expressed to be subject to conditions.

28 (8) Notice of the making, revocation or suspension of the order must
29 be published in the *Gazette*.

1
2 **Part 2D.6—Disqualification from managing**
3 **corporations**
4

5 **206A Disqualified person not to manage corporations**

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

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

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

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

33 Note: If a person ceases to be a director, alternate director or a secretary
34 under subsection (2) the company must notify ASIC (see subsection
35 205B(5)).

Section 206B

1 **206B Automatic disqualification**

2 *Convictions*

3 (1) A person becomes disqualified from managing corporations if the
4 person:

5 (a) is convicted on indictment of an offence that:

6 (i) concerns the making, or participation in making, of
7 decisions that affect the whole or a substantial part of
8 the business of the corporation; or

9 (ii) concerns an act that has the capacity to affect
10 significantly the corporation's financial standing; or

11 (b) is convicted of an offence that:

12 (i) is a contravention of this Act and is punishable by
13 imprisonment for a period greater than 12 months; or

14 (ii) involves dishonesty and is punishable by imprisonment
15 for at least 3 months; or

16 (c) is convicted of an offence against the law of a foreign
17 country that is punishable by imprisonment for a period
18 greater than 12 months.

19 The offences covered by paragraph (a) and subparagraph (b)(ii)
20 include offences against the law of a foreign country.

21 (2) The period of disqualification under subsection (1) starts on the
22 day the person is convicted and lasts for:

23 (a) if the person does not serve a term of imprisonment—5 years
24 after the day on which they are convicted; or

25 (b) if the person serves a term of imprisonment—5 years after
26 the day on which they are released from prison.

27 *Bankruptcy, deed of arrangement or composition with creditors*

28 (3) A person is disqualified from managing corporations if the person
29 is an undischarged bankrupt under the law of Australia, its external
30 territories or another country.

31 (4) A person is disqualified from managing corporations if:

Section 206C

- 1 (a) the person has executed a deed of arrangement under Part X
2 of the *Bankruptcy Act 1966* (or a similar law of an external
3 Territory or another country) and the terms of the deed have
4 not been fully complied with; or
5 (b) the person's creditors have accepted a composition under
6 Part X of the *Bankruptcy Act 1966* (or a similar law of an
7 external Territory or another country) and final payment has
8 not been made under the composition.

9 **206C Court power of disqualification—contravention of civil**
10 **penalty provision**

- 11 (1) On application by ASIC, the Court may disqualify a person from
12 managing corporations for a period that the Court considers
13 appropriate if:
14 (a) a declaration is made under section 1317E (civil penalty
15 provision) that the person has contravened a civil penalty
16 provision; and
17 (b) the Court is satisfied that the disqualification is justified.
18 Note: The civil penalty provisions are subsection 180(1) and (2), 181(1) and
19 (2), 182(1) and (2), 183(1) and (2), 209(2), 254L(2), 256D(3),
20 259F(2), 260D(2) or 344(1) or section 588G.
21 (2) In determining whether the disqualification is justified, the Court
22 may have regard to:
23 (a) the person's conduct in relation to the management, business
24 or property of any corporation; and
25 (b) any other matters that the Court considers appropriate.

26 **206D Court power of disqualification—insolvency and non-payment**
27 **of debts**

- 28 (1) On application by ASIC, the Court may disqualify a person from
29 managing corporations for up to 10 years if:
30 (a) within the last 7 years, the person has been an officer of 2 or
31 more corporations when they have failed; and
32 (b) the Court is satisfied that:

Section 206D

- 1 (i) the manner in which the corporation was managed was
2 wholly or partly responsible for the corporation failing;
3 and
4 (ii) the disqualification is justified.
- 5 (2) For the purposes of subsection (1), a corporation fails if:
6 (a) a Court orders the corporation to be wound up under
7 section 459B because the Court is satisfied that the
8 corporation is insolvent; or
9 (b) the corporation enters into voluntary liquidation and creditors
10 are not fully paid or are unlikely to be fully paid; or
11 (c) the corporation executes a deed of company arrangement and
12 creditors are not fully paid or are unlikely to be fully paid; or
13 (d) the corporation ceases to carry on business and creditors are
14 not fully paid or are unlikely to be fully paid; or
15 (e) a levy of execution against the corporation is not satisfied; or
16 (f) a receiver, receiver and manager, or provisional liquidator is
17 appointed in relation to the corporation; or
18 (g) the corporation enters into a compromise or arrangement
19 with its creditors under Part 5.1; or
20 (h) the corporation is wound up and a liquidator lodges a report
21 under subsection 533(1) about the corporation's inability to
22 pay its debts.
- 23 Note: To satisfy paragraph (h), a corporation must begin to be wound up
24 while the person is an officer or within 12 months after the person
25 ceases to be an officer. However, the report under subsection 533(1)
26 may be lodged by the liquidator at a time that is more than 12 months
27 after the person ceases to be an officer. Sections 513A to 513D
28 contain rules about when a company begins to be wound up.
- 29 (3) In determining whether the disqualification is justified, the Court
30 may have regard to:
31 (a) the person's conduct in relation to the management, business
32 or property of any corporation; and
33 (b) any other matters that the Court considers appropriate.

1 **206E Court power of disqualification—repeated contraventions of**
2 **Act**

- 3 (1) On application by ASIC, the Court may disqualify a person from
4 managing corporations for the period that the Court considers
5 appropriate if:
6 (a) the person:
7 (i) has at least twice been an officer of a body corporate
8 that has contravened this Act while they were an officer
9 of the body corporate and each time the person has
10 failed to take reasonable steps to prevent the
11 contravention; or
12 (ii) has at least twice contravened this Act while they were
13 an officer of a body corporate; or
14 (iii) has been an officer of a body corporate and has done
15 something that would have contravened subsection
16 180(1) or section 181 if the body corporate had been a
17 corporation; and
18 (b) the Court is satisfied that the disqualification is justified.
- 19 (2) In determining whether the disqualification is justified, the Court
20 may have regard to:
21 (a) the person's conduct in relation to the management, business
22 or property of any corporation; and
23 (b) any other matters that the Court considers appropriate.

24 **206F ASIC's power of disqualification**

25 *Power to disqualify*

- 26 (1) ASIC may disqualify a person from managing corporations for up
27 to 5 years if:
28 (a) within 7 years immediately before ASIC gives a notice under
29 paragraph (b)(i):
30 (i) the person has been an officer of 2 or more
31 corporations; and
32 (ii) while the person was an officer, or within 12 months
33 after the person ceased to be an officer of those

Section 206F

- 1 corporations, each of the corporations was wound up
2 and a liquidator lodged a report under subsection 533(1)
3 about the corporation's inability to pay its debts; and
4 (b) ASIC has given the person:
5 (i) a notice in the prescribed form requiring them to
6 demonstrate why they should not be disqualified; and
7 (ii) an opportunity to be heard on the question; and
8 (c) ASIC is satisfied that the disqualification is justified.

9 *Grounds for disqualification*

- 10 (2) In determining whether disqualification is justified, ASIC:
11 (a) must have regard to whether any of the corporations
12 mentioned in subsection (1) were related to one another; and
13 (b) may have regard to:
14 (i) the person's conduct in relation to the management,
15 business or property of any corporation; and
16 (ii) whether the disqualification would be in the public
17 interest; and
18 (iii) any other matters that ASIC considers appropriate.

19 *Notice of disqualification*

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

23 *Start of disqualification*

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

26 *ASIC power to grant leave*

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

1 **206G Court power to grant leave**

- 2 (1) A person who is disqualified from managing corporations may
3 apply to the Court for leave to manage:
4 (a) corporations; or
5 (b) a particular class of corporations; or
6 (c) a particular corporation;
7 if the person was not disqualified by ASIC.
- 8 (2) The person must lodge a notice with ASIC at least 21 days before
9 commencing the proceedings. The notice must be in the prescribed
10 form.
- 11 (3) The order granting leave may be expressed to be subject to
12 exceptions and conditions determined by the Court.
- 13 Note: If the Court grants the person leave to manage the corporation, the
14 person may be appointed as a director (see section 201B) or secretary
15 (see section 204B) of a company.
- 16 (4) The person must lodge with ASIC a copy of any order granting
17 leave within 14 days after the order is made.
- 18 (5) On application by ASIC, the Court may revoke the leave. The
19 order revoking leave does not take effect until it is served on the
20 person.

21 **206H Territorial application of this Part**

- 22 This Part does not apply in respect of an act or omission by a
23 person while they are managing a corporation that is a foreign
24 company unless the act or omission occurred in connection with:
25 (a) the foreign company carrying on business in this jurisdiction;
26 or
27 (b) an act that the foreign company does, or proposes to do, in
28 this jurisdiction; or
29 (c) a decision by the foreign company whether or not to do, or
30 refrain from doing, an act in this jurisdiction.

Section 206HA

1 **206HA Limited application of Part to registrable Australian bodies**

2 This Part does not apply in respect of an act or omission by a
3 person while they are managing a corporation that is a registrable
4 Australian body unless the act or omission occurred in connection
5 with:

- 6 (a) the body carrying on business outside its place of origin; or
7 (b) an act that the body does or proposes to do outside its place
8 of origin; or
9 (c) a decision by the body whether or not to do, or refrain from
10 doing, an act outside its place of origin.

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Chapter 2E—Related party transactions

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207 Purpose

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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.

Section 208

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

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

5 **208 Need for member approval for financial benefit**

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

15 Note: Section 228 defines *related party*, section 9 defines *entity*,
16 section 50AA defines *control* and section 229 affects the meaning of
17 *giving a financial benefit*.

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

29 **209 Consequences of breach**

- 30 (1) If the public company or entity contravenes section 208:

Section 209

- 1 (a) the contravention does not affect the validity of any contract
2 or transaction connected with the giving of the benefit; and
3 (b) the public company or entity is not guilty of an offence.
- 4 Note: A Court may order an injunction to stop the company or entity giving
5 the benefit to the related party (see section 1324).
- 6 (2) A person contravenes this subsection if they are involved in a
7 contravention of section 208 by a public company or entity.
- 8 Note 1: This subsection is a civil penalty provision.
9 Note 2: Section 79 defines *involved*.
- 10 (3) A person commits an offence if they are involved in a
11 contravention of section 208 by a public company or entity and the
12 involvement is dishonest.

Section 210

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

4 **210 Arm’s length terms**

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

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

12 **211 Remuneration and reimbursement for officer or employee**

13 *Benefits that are reasonable remuneration*

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

27 *Benefits that are payments of expenses incurred*

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

Section 212

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

21 **212 Indemnities, exemptions, insurance premiums and payment for**
22 **legal costs for officers**

23 *Indemnities, exemptions and insurance premiums*

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

Chapter 2E Related party transactions

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

Division 2 Exceptions to the requirement for member approval

Section 212

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

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

5 *Payments in respect of legal costs*

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

7 (a) the benefit is for a related party who is an officer of the
8 public company or entity; and

9 (b) the benefit is the making of, or an agreement to make, a
10 payment (whether by way of advance, loan or otherwise) in
11 respect of legal costs incurred by the officer in defending an
12 action for a liability incurred as an officer of the public
13 company or entity; and

14 (c) either:

15 (i) section 199A does not apply to the costs; or

16 (ii) if section 199A applies to the costs—the officer must
17 repay the amount paid if the costs become costs for
18 which the company must not give the officer an
19 indemnity under that section; and

20 (d) to give the benefit would be reasonable in the circumstances
21 of the public company or entity giving the benefit.

22 (3) In working out for the purposes of subsection (1) or (2) whether
23 giving the benefit is reasonable in the circumstances:

24 (a) assess whether it would be reasonable on the basis of the
25 circumstances existing:

26 (i) if the benefit is given under an agreement—at the time
27 when the agreement is or was made; or

28 (ii) if the benefit is not given under an agreement—at the
29 time when the benefit is or was given; and

30 (b) disregard any other financial benefit given or payable to the
31 officer by the public company or entity.

1 **213 Small amounts given to director or spouse**

2 (1) Member approval is not needed to give a financial benefit that is an
3 amount of money for a director of the public company or their
4 spouse or de facto spouse if the amount does not exceed \$2,000 or
5 a greater amount as prescribed by the regulations.

6 (2) In working out the amount given:

7 (a) add in all amounts previously given by the public company
8 and any entities controlled by the public company to:

9 (i) the director; or

10 (ii) their spouse; or

11 (iii) their de facto spouse; and

12 (b) disregard:

13 (i) amounts that have been repaid; and

14 (ii) amounts that fall under any other exception in this Part.

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

18 **214 Benefit to or by closely-held subsidiary**

19 (1) Member approval is not needed to give a financial benefit if the
20 benefit is given:

21 (a) by a body corporate to a closely-held subsidiary of the body;
22 or

23 (b) by a closely-held subsidiary of a body corporate to the body
24 or an entity it controls.

25 (2) For the purposes of this section, a body corporate is a closely-held
26 subsidiary of another body corporate if, and only if, no member of
27 the first-mentioned body is a person other than:

28 (a) the other body; or

29 (b) a nominee of the other body; or

30 (c) a body corporate that is a closely-held subsidiary of the other
31 body because of any other application or applications of this
32 subsection; or

33 (d) a nominee of a body referred to in paragraph (c).

Chapter 2E Related party transactions

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

Division 2 Exceptions to the requirement for member approval

Section 215

- 1 (3) For the purposes of subsection (2), disregard shares that are not
2 voting shares.

3 **215 Benefits to members that do not discriminate unfairly**

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

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

9 **216 Court order**

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

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

3 **217 Resolution may specify matters by class or kind**

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

6 **218 Company must lodge material that will be put to members with**
7 **ASIC**

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

Chapter 2E Related party transactions

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

Division 3 Procedure for obtaining member approval

Section 219

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

3 **219 Requirements for explanatory statement to members**

- 4 (1) The proposed explanatory statement lodged under section 218 must
5 be in writing and set out:
- 6 (a) the related parties to whom the proposed resolution would
7 permit financial benefits to be given; and
 - 8 (b) the nature of the financial benefits; and
 - 9 (c) in relation to each director of the company:
 - 10 (i) if the director wanted to make a recommendation to
11 members about the proposed resolution—the
12 recommendation and his or her reasons for it; or
 - 13 (ii) if not—why not; or
 - 14 (iii) if the director was not available to consider the
15 proposed resolution—why not; and
 - 16 (d) in relation to each such director:
 - 17 (i) whether the director had an interest in the outcome of
18 the proposed resolution; and
 - 19 (ii) if so—what it was; and
 - 20 (e) all other information that:
 - 21 (i) is reasonably required by members in order to decide
22 whether or not it is in the company's interests to pass
23 the proposed resolution; and
 - 24 (ii) is known to the company or to any of its directors.
- 25 (2) An example of the kind of information referred to in
26 paragraph (1)(d) is information about what, from an economic and
27 commercial point of view, are the true potential costs and
28 detriments of, or resulting from, giving financial benefits as
29 permitted by the proposed resolution, including (without
30 limitation):
- 31 (a) opportunity costs; and
 - 32 (b) taxation consequences (such as liability to fringe benefits
33 tax); and
 - 34 (c) benefits forgone by whoever would give the benefits.

Chapter 2E Related party transactions

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

Division 3 Procedure for obtaining member approval

Section 222

- 1 (d) if ASIC has given to the public company, under section 220,
2 comments on the documents lodged under section 218—must
3 be accompanied by a copy of those comments; and
4 (e) must not be accompanied by any other documents.

5 **222 Other material put to members**

6 Each document (if any) that:

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

20 **223 Proposed resolution cannot be varied**

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

23 **224 Voting by or on behalf of related party interested in proposed**
24 **resolution**

- 25 (1) At a general meeting, a vote on a proposed resolution under this
26 Division must not be cast (in any capacity) by or on behalf of:
27 (a) a related party of the public company to whom the resolution
28 would permit a financial benefit to be given; or
29 (b) an associate of such a related party.
30 (2) Subsection (1) does not prevent the casting of a vote if:

- 1 (a) it is cast by a person as a proxy appointed by writing that
2 specifies how the proxy is to vote on the proposed resolution;
3 and
4 (b) it is not cast on behalf of a related party or associate of a kind
5 referred to in subsection (1).
- 6 (3) The regulations may prescribe cases where subsection (1) does not
7 apply.
- 8 (4) ASIC may by writing declare that:
9 (a) subsection (1) does not apply to a specified proposed
10 resolution; or
11 (b) subsection (1) does not prevent the casting of a vote, on a
12 specified proposed resolution, by a specified entity, or on
13 behalf of a specified entity;
14 but may only do so if satisfied that the declaration will not cause
15 unfair prejudice to the interests of any member of the public
16 company.
- 17 (5) A declaration in force under subsection (4) has effect accordingly.
- 18 (6) If a vote is cast in contravention of subsection (1), the related party
19 or associate, as the case may be, contravenes this subsection,
20 whether or not the proposed resolution is passed.
- 21 (7) For the purposes of this section, a vote is cast on behalf of an entity
22 if, and only if, it is cast:
23 (a) as proxy for the entity; or
24 (b) otherwise on behalf of the entity; or
25 (c) in respect of a share in respect of which the entity has:
26 (i) power to vote; or
27 (ii) power to exercise, or control the exercise of, a right to
28 vote.
- 29 (8) Subject to subsection 225(1), a contravention of this section does
30 not affect the validity of a resolution.
- 31 (9) Subject to Part 1.1A, this section has effect despite:
32 (a) anything else in:
-

Chapter 2E Related party transactions

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

Division 3 Procedure for obtaining member approval

Section 225

- 1 (i) this Act; or
2 (ii) any other law (including the general law) of a State or
3 Territory; or
4 (b) anything in a body corporate's constitution.

5 **225 Voting on the resolution**

- 6 (1) If any votes on the resolution are cast in contravention of
7 subsection 224(1), it must be the case that the resolution would still
8 be passed even if those votes were disregarded.
- 9 (2) If a poll was duly demanded on the question that the resolution be
10 passed, subsections (3) and (4) apply in relation to voting on the
11 poll.
- 12 (3) In relation to each member of the public company who voted on
13 the resolution in person, the public company must record in
14 writing:
15 (a) the member's name; and
16 (b) how many votes the member cast for the resolution and how
17 many against.
- 18 (4) In relation to each member of the public company who voted on
19 the resolution by proxy, or by a representative authorised under
20 section 250D, the public company must record in writing:
21 (a) the member's name; and
22 (b) in relation to each person who voted as proxy, or as such a
23 representative, for the member:
24 (i) the person's name; and
25 (ii) how many votes the person cast on the resolution as
26 proxy, or as such a representative, for the member; and
27 (iii) how many of those votes the person cast for the
28 resolution and how many against.
- 29 (5) For 7 years after the day when a resolution under this Division is
30 passed, the public company must retain the records it made under
31 this section in relation to the resolution.

1 **226 Notice of resolution to be lodged**

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

4 **227 Declaration by court of substantial compliance**

5 (1) The Court may declare that the conditions prescribed by this
6 Division have been satisfied if it finds that they have been
7 substantially satisfied.

8 (2) A declaration may be made only on the application of an interested
9 person.

Section 228

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Part 2E.2—Related parties and financial benefits

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228 Related parties

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Controlling entities

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

7

8

Directors and their spouses

9

- (2) The following persons are related parties of a public company:

10

(a) directors of the public company;

11

(b) directors (if any) of an entity that controls the public company;

12

13

(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;

14

15

16

(d) spouses and de facto spouses of the persons referred to in paragraphs (a), (b) and (c).

17

18

Relatives of directors and spouses

19

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

20

21

(a) parents;

22

(b) children.

23

Entities controlled by other related parties

24

- (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.

25

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1 *Related party in previous 6 months*

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

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

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

12 *Acting in concert with related party*

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

17 **229 Giving a financial benefit**

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

Section 229

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

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Part 2E.3—Interaction with other rules

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230 General duties still apply

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A director is not relieved from any of their duties under this Act (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.

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Chapter 2F—Members' rights and remedies

5 231 Membership of a company

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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).

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Part 2F.1—Oppressive conduct of affairs

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232 Grounds for Court order

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The Court may make an order under section 233 if:

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(a) the conduct of a company's affairs; or

7

(b) an actual or proposed act or omission by or on behalf of a company; or

8

(c) a resolution, or a proposed resolution, of members or a class of members of a company;

11

is either:

12

(d) contrary to the interests of the members as a whole; or

13

(e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.

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16

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.

17

18

19

Note: For *affairs*, see section 53.

20

233 Orders the Court can make

21

(1) The Court can make any order under this section that it considers appropriate in relation to the company, including an order:

22

23

(a) that the company be wound up;

24

(b) that the company's existing constitution be modified or repealed;

25

26

(c) regulating the conduct of the company's affairs in the future;

27

(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;

28

29

(e) for the purchase of shares with an appropriate reduction of the company's share capital;

30

31

(f) for the company to institute, prosecute, defend or discontinue specified proceedings;

32

33

Section 234

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

10 *Order that the company be wound up*

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

16 *Order altering constitution*

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

26 **234 Who can apply for order**

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

- 29 (a) a member of the company, even if the application relates to
30 an act or omission that is against:
31 (i) the member in a capacity other than as a member; or
32 (ii) another member in their capacity as a member; or

Section 235

- 1 (b) a person who has been removed from the register of members
2 because of a selective reduction; or
3 (c) a person who has ceased to be a member of the company if
4 the application relates to the circumstances in which they
5 ceased to be a member; or
6 (d) a person to whom a share in the company has been
7 transmitted by will or by operation of law; or
8 (e) a person whom ASIC thinks appropriate having regard to
9 investigations it is conducting or has conducted into:
10 (i) the company's affairs; or
11 (ii) matters connected with the company's affairs.

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

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

16 **235 Requirement for person to lodge order**

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

Section 236

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

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

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(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

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29

30

(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:

- 1 (a) it is probable that the company will not itself bring the
2 proceedings, or properly take responsibility for them, or for
3 the steps in them; and
4 (b) the applicant is acting in good faith; and
5 (c) it is in the best interests of the company that the applicant be
6 granted leave; and
7 (d) if the applicant is applying for leave to bring proceedings—
8 there is a serious question to be tried; and
9 (e) either:
10 (i) at least 14 days before making the application, the
11 applicant gave written notice to the company of the
12 intention to apply for leave and of the reasons for
13 applying; or
14 (ii) it is appropriate to grant leave even though
15 subparagraph (i) is not satisfied.
- 16 (3) A rebuttable presumption that granting leave is not in the best
17 interests of the company arises if it is established that:
18 (a) the proceedings are:
19 (i) by the company against a third party; or
20 (ii) by a third party against the company; and
21 (b) the company has decided:
22 (i) not to bring the proceedings; or
23 (ii) not to defend the proceedings; or
24 (iii) to discontinue, settle or compromise the proceedings;
25 and
26 (c) all of the directors who participated in that decision:
27 (i) acted in good faith for a proper purpose; and
28 (ii) did not have a material personal interest in the decision;
29 and
30 (iii) informed themselves about the subject matter of the
31 decision to the extent they reasonably believed to be
32 appropriate; and
33 (iv) rationally believed that the decision was in the best
34 interests of the company.
-

Section 238

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

4 (4) For the purposes of subsection (3):

5 (a) a person is a third party if:

6 (i) the company is a public company and the person is not a
7 related party of the company; or

8 (ii) the company is not a public company and the person
9 would not be a related party of the company if the
10 company were a public company; and

11 (b) proceedings by or against the company include any appeal
12 from a decision made in proceedings by or against the
13 company.

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

15 **238 Substitution of another person for the person granted leave**

16 (1) Any of the following persons may apply to the Court for an order
17 that they be substituted for a person to whom leave has been
18 granted under section 237:

19 (a) a member, former member, or a person entitled to be
20 registered as a member, of the company or of a related body
21 corporate;

22 (b) an officer, or former officer, of the company.

23 (2) The Court may make the order if it is satisfied that:

24 (a) the applicant is acting in good faith; and

25 (b) it is appropriate to make the order in all the circumstances.

26 (3) An order substituting one person for another has the effect that:

27 (a) the grant of leave is taken to have been made in favour of the
28 substituted person; and

29 (b) if the other person has already brought the proceedings or
30 intervened—the substituted person is taken to have brought
31 those proceedings or to have made that intervention.

1 **239 Effect of ratification by members**

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

21 **240 Leave to discontinue, compromise or settle proceedings brought,
22 or intervened in, with leave**

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

26 **241 General powers of the Court**

- 27 (1) The Court may make any orders, and give any directions, that it
28 considers appropriate in relation to proceedings brought or
29 intervened in with leave, or an application for leave, including:
- 30 (a) interim orders; and
- 31 (b) directions about the conduct of the proceedings, including
32 requiring mediation; and

Section 242

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

26 **242 Power of the Court to make costs orders**

- 27 The Court may at any time make any orders it considers
28 appropriate about the costs of the following persons in relation to
29 proceedings brought or intervened in with leave under section 237
30 or an application for leave under that section:
31 (a) the person who applied for or was granted leave;
32 (b) the company;
33 (c) any other party to the proceedings or application.

Section 242

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An order under this section may require indemnification for costs.

Section 246B

1

2 **Part 2F.2—Class rights**

3

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

7 **246B Varying and cancelling class rights**

8 *If constitution sets out procedure*

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

18 *If constitution does not set out procedure*

- 19 (2) If a company does not have a constitution, or has a constitution that
20 does not set out the procedure for varying or cancelling:
21 (a) for a company with a share capital—rights attached to shares
22 in a class of shares; or
23 (b) for a company without a share capital—rights of members in
24 a class of members;
25 those rights may be varied or cancelled only by special resolution
26 of the company and:
27 (c) by special resolution passed at a meeting:
28 (i) for a company with a share capital of the class of
29 members holding shares in the class; or
30 (ii) for a company without a share capital of the class of
31 members whose rights are being varied or cancelled; or
32 (d) with the written consent of members with at least 75% of the
33 votes in the class.

Section 246C

- 1 (3) The company must give written notice of the variation or
2 cancellation to the members of the class within 7 days after the
3 variation or cancellation is made.

4 **246C Certain actions taken to vary rights etc.**

5 *Company with share capital*

- 6 (1) If the shares in a class of shares in a company are divided into
7 further classes, and after the division the rights attached to all of
8 those shares are not the same:
9 (a) the division is taken to vary the rights attached to every share
10 that was in the class existing before the division; and
11 (b) members who hold shares to which the same rights are
12 attached after the division form a separate class.
- 13 (2) If the rights attached to some of the shares in a class of shares in a
14 company are varied:
15 (a) the variation is taken to vary the rights attached to every
16 other share that was in the class existing before the variation;
17 and
18 (b) members who hold shares to which the same rights are
19 attached after the variation form a separate class.

20 *Company without share capital*

- 21 (3) If the members in a class of members in a company without share
22 capital are divided into further classes of members, and after the
23 division the rights of all of those members are not the same:
24 (a) the division is taken to vary the rights of every member who
25 was in the class existing before the division; and
26 (b) members who have the same rights after the division form a
27 separate class.
- 28 (4) If the rights of some of the members in a class of members in a
29 company without a share capital are varied:
30 (a) the variation is taken to vary the rights of every other
31 member who was in the class existing before the variation;
32 and

Section 246D

- 1 (b) members who have the same rights after the variation form a
2 separate class.

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

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

19 **246D Variation, cancellation or modification without unanimous**
20 **support of class**

- 21 (1) If members in a class do not all agree (whether by resolution or
22 written consent) to:
23 (a) a variation or cancellation of their rights; or
24 (b) a modification of the company's constitution (if any) to allow
25 their rights to be varied or cancelled;
26 members with at least 10% of the votes in the class may apply to
27 the Court to have the variation, cancellation or modification set
28 aside.
- 29 (2) An application may only be made within 1 month after the
30 variation, cancellation or modification is made.
- 31 (3) The variation, cancellation or modification takes effect:

Section 246E

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

16 **246E Variation, cancellation or modification with unanimous**
17 **support of class**

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

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

24 **246F Company must lodge documents and resolutions with ASIC**

- 25 (1) A company must lodge with ASIC a notice in the prescribed form
26 setting out particulars of any of the following:
27 (a) a division of shares in the company into classes if the shares
28 were not previously so divided;
29 (b) a conversion of shares in a class of shares in the company
30 into shares in another class.

Section 246G

- 1 (2) The notice must be lodged within 14 days after the division or
2 conversion.
- 3 (3) A public company must lodge with ASIC a copy of each document
4 (including an agreement or consent) or resolution that:
5 (a) does any of the following:
6 (i) attaches rights to issued or unissued shares;
7 (ii) varies or cancels rights attaching to issued or unissued
8 shares;
9 (iii) varies or cancels rights of members in a class of
10 members of a company that does not have a share
11 capital;
12 (iv) binds a class of members; and
13 (b) is not already lodged with ASIC.
14 This also applies to a proprietary company that has applied under
15 Part 2B.7 to change to a public company, while its application has
16 not yet been determined.
- 17 (4) The document must be lodged within 14 days after it is made. The
18 resolution must be lodged within 14 days after it is passed.

246G Member's copies of documents and resolutions

- 19 (1) A member of a company may ask the company in writing for a
20 copy of a document or resolution referred to in section 246F. The
21 company must send the copy to the member.
22
- 23 (2) If the company requires the member to pay for the copy, the
24 company must send it:
25 (a) within 7 days after the company receives the payment; or
26 (b) within any longer period approved by ASIC.
- 27 (3) The amount of any payment the company requires cannot exceed
28 the prescribed amount.
- 29 (4) If the company does not require payment for the copy, the
30 company must send it:
31 (a) within 7 days after the member asks for it; or
32 (b) within any longer period approved by ASIC.

1
2 **Part 2F.3—Inspection of books**
3

4 **247A Order for inspection of books of company or registered**
5 **managed investment scheme**

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

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

- 16 (2) A person authorised to inspect books may make copies of the
17 books unless the Court orders otherwise.

- 18 (3) A person who:

- 19 (a) is granted leave under section 237; or
20 (b) applies for leave under that section; or
21 (c) is eligible to apply for leave under that section;

22 may apply to the Court for an order under this section.

- 23 (4) On application, the Court may make an order authorising:

- 24 (a) the applicant to inspect books of the company; or
25 (b) another person to inspect books of the company on the
26 applicant's behalf.

- 27 (5) The Court may make the order only if it is satisfied that:

- 28 (a) the applicant is acting in good faith; and
29 (b) the inspection is to be made for a purpose connected with:
30 (i) applying for leave under section 237; or
31 (ii) bringing or intervening in proceedings with leave under
32 that section.

Section 247B

1 (6) A person authorised to inspect books may make copies of the
2 books unless the Court orders otherwise.

3 **247B Ancillary orders**

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

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

11 **247C Disclosure of information acquired in inspection**

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

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

17 **247D Company or directors may allow member to inspect books**

18 *(replaceable rule see section 135)*

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

1

Chapter 2G—Meetings

2

3

Part 2G.1—Directors' meetings

4

Division 1—Resolutions and declarations without meetings

5

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

6

7

Resolutions

8

- (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.

9

10

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Copies

13

- (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.

14

15

16

When the resolution is passed

17

- (3) The resolution is passed when the last director signs.

18

Note: Passage of a resolution under this section must be recorded in the company's minute books (see section 251A).

19

20

248B Resolutions and declarations of 1 director proprietary companies

21

22

Resolutions

23

- (1) The director of a proprietary company that has only 1 director may pass a resolution by recording it and signing the record.

24

Chapter 2G Meetings

Part 2G.1 Directors' meetings

Division 1 Resolutions and declarations without meetings

Section 248B

1

Declarations

2

- (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 Act that the declaration be made at a directors' meeting.

3

4

5

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Note 1: For directors' declarations, see sections 295 and 494.

7

8

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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).

1

2 **Division 2—Directors' meetings**

3 **248C Calling directors' meetings** (*replaceable rule see section 135*)

4 A directors' meeting may be called by a director giving reasonable
5 notice individually to every other director.

6 Note: A director who has appointed an alternate director may ask for the
7 notice to be sent to the alternate director (see subsection 201K(2)).

8 **248D Use of technology**

9 A directors' meeting may be called or held using any technology
10 consented to by all the directors. The consent may be a standing
11 one. A director may only withdraw their consent within a
12 reasonable period before the meeting.

13 **248E Chairing directors' meetings** (*replaceable rule see section 135*)

14 (1) The directors may elect a director to chair their meetings. The
15 directors may determine the period for which the director is to be
16 the chair.

17 (2) The directors must elect a director present to chair a meeting, or
18 part of it, if:
19 (a) a director has not already been elected to chair the meeting;
20 or
21 (b) a previously elected chair is not available or declines to act,
22 for the meeting or the part of the meeting.

23 **248F Quorum at directors' meetings** (*replaceable rule see*
24 *section 135*)

25 Unless the directors determine otherwise, the quorum for a
26 directors' meeting is 2 directors and the quorum must be present at
27 all times during the meeting.

28 Note 1: For special quorum rules for public companies, see section 195.

29 Note 2: For resolutions of 1 director proprietary companies without meetings,
30 see section 248B.

Section 248G

1 **248G Passing of directors' resolutions** (*replaceable rule see*
2 *section 135*)

3 (1) A resolution of the directors must be passed by a majority of the
4 votes cast by directors entitled to vote on the resolution.

5 (2) The chair has a casting vote if necessary in addition to any vote
6 they have in their capacity as a director.

7 Note: The chair may be precluded from voting, for example, by a conflict of
8 interest.

1

2 **Part 2G.2—Meetings of members of companies**

3 **Division 1—Resolutions without meetings**

4 **249A Circulating resolutions of proprietary companies with more**
5 **than 1 member**

- 6 (1) This section applies to resolutions of the members of proprietary
7 companies that this Act or, if a company has a constitution, the
8 company's constitution requires or permits to be passed at a
9 general meeting. It does not apply to a resolution under section 329
10 to remove an auditor.
- 11 (2) A company may pass a resolution without a general meeting being
12 held if all the members entitled to vote on the resolution sign a
13 document containing a statement that they are in favour of the
14 resolution set out in the document. Each member of a joint
15 membership must sign.
- 16 (3) Separate copies of a document may be used for signing by
17 members if the wording of the resolution and statement is identical
18 in each copy.
- 19 (4) The resolution is passed when the last member signs.
- 20 (5) A company that passes a resolution under this section without
21 holding a meeting satisfies any requirement in this Act:
- 22 (a) to give members information or a document relating to the
23 resolution—by giving members that information or document
24 with the document to be signed; and
- 25 (b) to lodge with ASIC a copy of a notice of meeting to consider
26 the resolution—by lodging a copy of the document to be
27 signed by members; and
- 28 (c) to lodge a copy of a document that accompanies a notice of
29 meeting to consider the resolution—by lodging a copy of the
30 information or documents referred to in paragraph (a).

Section 249B

- 1 (6) The passage of the resolution satisfies any requirement in this Act,
2 or a company's constitution (if any), that the resolution be passed
3 at a general meeting.
- 4 (7) This section does not affect any rule of law relating to the assent of
5 members not given at a general meeting.
- 6 Note 1: A body corporate representative may sign a circulating resolution (see
7 section 250D).
- 8 Note 2: Passage of a resolution under this section must be recorded in the
9 company's minute books (see section 251A).

10 **249B Resolutions of 1 member companies**

- 11 (1) A company that has only 1 member may pass a resolution by the
12 member recording it and signing the record.
- 13 (2) If this Act requires information or a document relating to the
14 resolution to be lodged with ASIC, that requirement is satisfied by
15 lodging the information or document with the resolution that is
16 passed.
- 17 Note 1: A body corporate representative may sign such a resolution (see
18 section 250D).
- 19 Note 2: Passage of a resolution under this section must be recorded in the
20 company's minute books (see section 251A).

1

2 **Division 2—Who may call meetings of members**

3 **249C Calling of meetings of members by a director** (*replaceable*
4 *rule—see section 135*)

5 A director may call a meeting of the company's members.

6 **249CA Calling of meetings of members of a listed company by a**
7 **director**

8 (1) A director may call a meeting of the company's members.

9 (2) This section applies only to a company that is included in an
10 official list of the Exchange.

11 (3) This section applies despite anything in the company's
12 constitution.

13 **249D Calling of general meeting by directors when requested by**
14 **members**

15 (1) The directors of a company must call and arrange to hold a general
16 meeting on the request of:

17 (a) members with at least 5% of the votes that may be cast at the
18 general meeting; or

19 (b) at least 100 members who are entitled to vote at the general
20 meeting.

21 (1A) The regulations may prescribe a different number of members for
22 the purposes of the application of paragraph (1)(b) to:

23 (a) a particular company; or

24 (b) a particular class of company.

25 Without limiting this, the regulations may specify the number as a
26 percentage of the total number of members of the company.

27 (2) The request must:

28 (a) be in writing; and

29 (b) state any resolution to be proposed at the meeting; and

Section 249E

- 1 (c) be signed by the members making the request; and
2 (d) be given to the company.
- 3 (3) Separate copies of a document setting out the request may be used
4 for signing by members if the wording of the request is identical in
5 each copy.
- 6 (4) The percentage of votes that members have is to be worked out as
7 at the midnight before the request is given to the company.
- 8 (5) The directors must call the meeting within 21 days after the request
9 is given to the company. The meeting is to be held not later than 2
10 months after the request is given to the company.

11 **249E Failure of directors to call general meeting**

- 12 (1) Members with more than 50% of the votes of all of the members
13 who make a request under section 249D may call and arrange to
14 hold a general meeting if the directors do not do so within 21 days
15 after the request is given to the company.
- 16 (2) The meeting must be called in the same way—so far as is
17 possible—in which general meetings of the company may be
18 called. The meeting must be held not later than 3 months after the
19 request is given to the company.
- 20 (3) To call the meeting the members requesting the meeting may ask
21 the company under section 173 for a copy of the register of
22 members. Despite paragraph 173(3)(b), the company must give the
23 members the copy of the register without charge.
- 24 (4) The company must pay the reasonable expenses the members
25 incurred because the directors failed to call and arrange to hold the
26 meeting.
- 27 (5) The company may recover the amount of the expenses from the
28 directors. However, a director is not liable for the amount if they
29 prove that they took all reasonable steps to cause the directors to
30 comply with section 249D. The directors who are liable are jointly
31 and individually liable for the amount. If a director who is liable
32 for the amount does not reimburse the company, the company must

1 deduct the amount from any sum payable as fees to, or
2 remuneration of, the director.

3 **249F Calling of general meetings by members**

4 (1) Members with at least 5% of the votes that may be cast at a general
5 meeting of the company may call, and arrange to hold, a general
6 meeting. The members calling the meeting must pay the expenses
7 of calling and holding the meeting.

8 (2) The meeting must be called in the same way—so far as is
9 possible—in which general meetings of the company may be
10 called.

11 (3) The percentage of votes that members have is to be worked out as
12 at the midnight before the meeting is called.

13 **249G Calling of meetings of members by the Court**

14 (1) The Court may order a meeting of the company's members to be
15 called if it is impracticable to call the meeting in any other way.

16 (2) The Court may make the order on application by:
17 (a) any director; or
18 (b) any member who would be entitled to vote at the meeting.

19 Note: For the directions the Court may give for calling, holding or
20 conducting a meeting it has ordered be called, see section 1319.

Section 249H

1

2 **Division 3—How to call meetings of members**

3 **249H Amount of notice of meetings**

4 *General rule*

- 5 (1) Subject to subsection (2), at least 21 days notice must be given of a
6 meeting of a company's members. However, if a company has a
7 constitution, it may specify a longer minimum period of notice.

8 *Calling meetings on shorter notice*

- 9 (2) A company may call on shorter notice:
10 (a) an AGM, if all the members entitled to attend and vote at the
11 AGM agree beforehand; and
12 (b) any other general meeting, if members with at least 95% of
13 the votes that may be cast at the meeting agree beforehand.

14 A company cannot call an AGM or other general meeting on
15 shorter notice if it is a meeting of the kind referred to in
16 subsection (3) or (4).

17 *Shorter notice not allowed—removing or appointing director*

- 18 (3) At least 21 days notice must be given of a meeting of the members
19 of a public company at which a resolution will be moved to:
20 (a) remove a director under section 203D; or
21 (b) appoint a director in place of a director removed under that
22 section.

23 *Shorter notice not allowed—removing auditor*

- 24 (4) At least 21 days notice must be given of a meeting of a company at
25 which a resolution will be moved to remove an auditor under
26 section 329.

1 **249HA Amount of notice of meetings of listed company**

- 2 (1) Despite section 249H, at least 28 days notice must be given of a
3 meeting of a company's members.
- 4 (2) This section applies only to a company that is included in an
5 official list of the Exchange.
- 6 (3) This section applies despite anything in the company's
7 constitution.

8 **249J Notice of meetings of members to members and directors**

9 *Notice to members and directors individually*

- 10 (1) Written notice of a meeting of a company's members must be
11 given individually to each member entitled to vote at the meeting
12 and to each director. Notice need only be given to 1 member of a
13 joint membership.

14 *Notice to joint members (replaceable rule—see section 135)*

- 15 (2) Notice to joint members must be given to the joint member named
16 first in the register of members.

17 *How notice is given*

- 18 (3) A company may give the notice of meeting to a member:
19 (a) personally; or
20 (b) by sending it by post to the address for the member in the
21 register of members or the alternative address (if any)
22 nominated by the member; or
23 (c) by sending it to the fax number or electronic address (if any)
24 nominated by the member; or
25 (d) by any other means that the company's constitution (if any)
26 permits.

27 Note: A defect in the notice given may not invalidate a meeting (see
28 section 1322).

Section 249K

1 *When notice by post or fax is given (replaceable rule—see*
2 *section 135)*

3 (4) A notice of meeting sent by post is taken to be given 3 days after it
4 is posted. A notice of meeting sent by fax, or other electronic
5 means, is taken to be given on the business day after it is sent.

6 **249K Auditor entitled to notice and other communications**

7 A company must give its auditor:

- 8 (a) notice of a general meeting in the same way that a member of
9 the company is entitled to receive notice; and
10 (b) any other communications relating to the general meeting
11 that a member of the company is entitled to receive.

12 Note 1: For when a company must have an auditor, see Part 2M.3.

13 Note 2: An auditor may appoint a representative to attend a meeting (see
14 subsection 249V(4)).

15 **249L Contents of notice of meetings of members**

16 A notice of a meeting of a company's members must:

- 17 (a) set out the place, date and time for the meeting (and, if the
18 meeting is to be held in 2 or more places, the technology that
19 will be used to facilitate this); and
20 (b) state the general nature of the meeting's business; and
21 (c) if a special resolution is to be proposed at the meeting—set
22 out an intention to propose the special resolution and state the
23 resolution; and
24 (d) if a member is entitled to appoint a proxy—contain a
25 statement setting out the following information:
26 (i) that the member has a right to appoint a proxy;
27 (ii) whether or not the proxy needs to be a member of the
28 company;
29 (iii) that a member who is entitled to cast 2 or more votes
30 may appoint 2 proxies and may specify the proportion
31 or number of votes each proxy is appointed to exercise.

32 Note: There may be other requirements for disclosure to members.

1 **249M Notice of adjourned meetings** (*replaceable rule—see*
2 *section 135*)

3 When a meeting is adjourned, new notice of the resumed meeting
4 must be given if the meeting is adjourned for 1 month or more.

Section 249N

1

2

**Division 4—Members' rights to put resolutions etc. at
general meetings**

3

4

249N Members' resolutions

5

(1) The following members may give a company notice of a resolution that they propose to move at a general meeting:

6

7

(a) members with at least 5% of the votes that may be cast on the resolution; or

8

9

(b) at least 100 members who are entitled to vote at a general meeting.

10

11

(1A) The regulations may prescribe a different number of members for the purposes of the application of paragraph (1)(b) to:

12

13

(a) a particular company; or

14

(b) a particular class of company.

15

Without limiting this, the regulations may specify the number as a percentage of the total number of members of the company.

16

17

(2) The notice must:

18

(a) be in writing; and

19

(b) set out the wording of the proposed resolution; and

20

(c) be signed by the members proposing to move the resolution.

21

(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.

22

23

24

(4) The percentage of votes that members have is to be worked out as at the midnight before the members give the notice.

25

26

249O Company giving notice of members' resolutions

27

(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.

28

29

Section 249P

- 1 (2) The company must give all its members notice of the resolution at
2 the same time, or as soon as practicable afterwards, and in the same
3 way, as it gives notice of a meeting.
- 4 (3) The company is responsible for the cost of giving members notice
5 of the resolution if the company receives the notice in time to send
6 it out to members with the notice of meeting.
- 7 (4) The members requesting the meeting are jointly and individually
8 liable for the expenses reasonably incurred by the company in
9 giving members notice of the resolution if the company does not
10 receive the members' notice in time to send it out with the notice
11 of meeting. At a general meeting, the company may resolve to
12 meet the expenses itself.
- 13 (5) The company need not give notice of the resolution:
14 (a) if it is more than 1,000 words long or defamatory; or
15 (b) if the members making the request are to bear the expenses
16 of sending the notice out—unless the members give the
17 company a sum reasonably sufficient to meet the expenses
18 that it will reasonably incur in giving the notice.

19 **249P Members' statements to be distributed**

- 20 (1) Members may request a company to give to all its members a
21 statement provided by the members making the request about:
22 (a) a resolution that is proposed to be moved at a general
23 meeting; or
24 (b) any other matter that may be properly considered at a general
25 meeting.
- 26 (2) The request must be made by:
27 (a) members with at least 5% of the votes that may be cast on the
28 resolution; or
29 (b) at least 100 members who are entitled to vote at the meeting.
- 30 (2A) The regulations may prescribe a different number of members for
31 the purposes of the application of paragraph (2)(b) to:
32 (a) a particular company; or

Chapter 2G Meetings

Part 2G.2 Meetings of members of companies

Division 4 Members' rights to put resolutions etc. at general meetings

Section 249P

- 1 (b) a particular class of company.
2 Without limiting this, the regulations may specify the number as a
3 percentage of the total number of members of the company.
- 4 (3) The request must be:
5 (a) in writing; and
6 (b) signed by the members making the request; and
7 (c) given to the company.
- 8 (4) Separate copies of a document setting out the request may be used
9 for signing by members if the wording of the request is identical in
10 each copy.
- 11 (5) The percentage of votes that members have is to be worked out as
12 at the midnight before the request is given to the company.
- 13 (6) After receiving the request, the company must distribute to all its
14 members a copy of the statement at the same time, or as soon as
15 practicable afterwards, and in the same way, as it gives notice of a
16 general meeting.
- 17 (7) The company is responsible for the cost of making the distribution
18 if the company receives the statement in time to send it out to
19 members with the notice of meeting.
- 20 (8) The members making the request are jointly and individually liable
21 for the expenses reasonably incurred by the company in making the
22 distribution if the company does not receive the statement in time
23 to send it out with the notice of meeting. At a general meeting, the
24 company may resolve to meet the expenses itself.
- 25 (9) The company need not comply with the request:
26 (a) if the statement is more than 1,000 words long or
27 defamatory; or
28 (b) if the members making the request are responsible for the
29 expenses of the distribution—unless the members give the
30 company a sum reasonably sufficient to meet the expenses
31 that it will reasonably incur in making the distribution.

1

2 **Division 5—Holding meetings of members**

3 **249Q Purpose**

4 A meeting of a company's members must be held for a proper
5 purpose.

6 **249R Time and place for meetings of members**

7 A meeting of a company's members must be held at a reasonable
8 time and place.

9 **249S Technology**

10 A company may hold a meeting of its members at 2 or more
11 venues using any technology that gives the members as a whole a
12 reasonable opportunity to participate.

13 Note: See section 1322 for the consequences of a member not being given a
14 reasonable opportunity to participate.

15 **249T Quorum** (*replaceable rule—see section 135*)

16 (1) The quorum for a meeting of a company's members is 2 members
17 and the quorum must be present at all times during the meeting.

18 Note: For single member companies, see section 249B.

19 (2) In determining whether a quorum is present, count individuals
20 attending as proxies or body corporate representatives. However, if
21 a member has appointed more than 1 proxy or representative, count
22 only 1 of them. If an individual is attending both as a member and
23 as a proxy or body corporate representative, count them only once.

24 Note 1: For rights to appoint proxies, see section 249X.

25 Note 2: For body corporate representatives, see section 250D.

26 (3) A meeting of the company's members that does not have a quorum
27 present within 30 minutes after the time for the meeting set out in
28 the notice of meeting is adjourned to the date, time and place the

Section 249U

- 1 directors specify. If the directors do not specify 1 or more of those
2 things, the meeting is adjourned to:
3 (a) if the date is not specified—the same day in the next week;
4 and
5 (b) if the time is not specified—the same time; and
6 (c) if the place is not specified—the same place.
- 7 (4) If no quorum is present at the resumed meeting within
8 30 minutes after the time for the meeting, the meeting is dissolved.

9 **249U Chairing meetings of members** (*replaceable rule—see*
10 *section 135*)

- 11 (1) The directors may elect an individual to chair meetings of the
12 company's members.
- 13 (2) The directors at a meeting of the company's members must elect
14 an individual present to chair the meeting (or part of it) if an
15 individual has not already been elected by the directors to chair it
16 or, having been elected, is not available to chair it, or declines to
17 act, for the meeting (or part of the meeting).
- 18 (3) The members at a meeting of the company's members must elect a
19 member present to chair the meeting (or part of it) if:
20 (a) a chair has not previously been elected by the directors to
21 chair the meeting; or
22 (b) a previously elected chair is not available, or declines to act,
23 for the meeting (or part of the meeting).
- 24 (4) The chair must adjourn a meeting of the company's members if the
25 members present with a majority of votes at the meeting agree or
26 direct that the chair must do so.

27 **249V Auditor's right to be heard at general meetings**

- 28 (1) A company's auditor is entitled to attend any general meeting of
29 the company.

Section 249W

- 1 (2) The auditor is entitled to be heard at the meeting on any part of the
2 business of the meeting that concerns the auditor in their capacity
3 as auditor.
- 4 (3) The auditor is entitled to be heard even if:
5 (a) the auditor retires at the meeting; or
6 (b) the meeting passes a resolution to remove the auditor from
7 office.
- 8 (4) The auditor may authorise a person in writing as their
9 representative for the purpose of attending and speaking at any
10 general meeting.
- 11 Note 1: At an AGM, members may ask the auditor questions (see
12 section 250T).
- 13 Note 2: For when a company must have an auditor, see Part 2M.3.

14 **249W Adjourned meetings**

15 *When resolution passed*

- 16 (1) A resolution passed at a meeting resumed after an adjournment is
17 passed on the day it was passed.

18 *Business at adjourned meetings (replaceable rule—see*
19 *section 135)*

- 20 (2) Only unfinished business is to be transacted at a meeting resumed
21 after an adjournment

Section 249X

1

2 **Division 6—Proxies and body corporate representatives**

3 **249X Who can appoint a proxy** (*replaceable rule for proprietary*
4 *companies and mandatory rule for public companies—see*
5 *section 135*)

- 6 (1) A member of a company who is entitled to attend and cast a vote at
7 a meeting of the company's members may appoint a person as the
8 member's proxy to attend and vote for the member at the meeting.
- 9 (2) The appointment may specify the proportion or number of votes
10 that the proxy may exercise.
- 11 (3) Each member may appoint a proxy. If the member is entitled to
12 cast 2 or more votes at the meeting, they may appoint 2 proxies. If
13 the member appoints 2 proxies and the appointment does not
14 specify the proportion or number of the member's votes each proxy
15 may exercise, each proxy may exercise half of the votes.
- 16 (4) Disregard any fractions of votes resulting from the application of
17 subsection (2) or (3).

18 **249Y Rights of proxies**

19 *Rights of proxies*

- 20 (1) A proxy appointed to attend and vote for a member has the same
21 rights as the member:
22 (a) to speak at the meeting; and
23 (b) to vote (but only to the extent allowed by the appointment);
24 and
25 (c) join in a demand for a poll.

26 *Proxy's right to vote*

- 27 (2) If a company has a constitution, the constitution may provide that a
28 proxy is not entitled to vote on a show of hands.

29 Note: Even if the proxy is not entitled to vote on a show of hands, they may
30 make or join in the demand for a poll.

1 *Effect of member's presence on proxy's authority*

- 2 (3) A company's constitution (if any) may provide for the effect that a
3 member's presence at a meeting has on the authority of a proxy
4 appointed to attend and vote for the member. However, if the
5 constitution does not deal with this, a proxy's authority to speak
6 and vote for a member at a meeting is suspended while the member
7 is present at the meeting.

8 **249Z Company sending appointment forms or lists of proxies must**
9 **send to all members**

10 If a company sends a member a proxy appointment form for a
11 meeting or a list of persons willing to act as proxies at a meeting:

- 12 (a) if the member requested the form or list—the company must
13 send the form or list to all members who ask for it and who
14 are entitled to appoint a proxy to attend and vote at the
15 meeting; or
16 (b) otherwise—the company must send the form or list to all its
17 members entitled to appoint a proxy to attend and vote at the
18 meeting.

19 **250A Appointing a proxy**

- 20 (1) An appointment of a proxy is valid if it is signed by the member of
21 the company making the appointment and contains the following
22 information:
23 (a) the member's name and address;
24 (b) the company's name;
25 (c) the proxy's name or the name of the office held by the proxy;
26 (d) the meetings at which the appointment may be used.
27 An appointment may be a standing one.
- 28 (2) If a company has a constitution, the constitution may provide that
29 an appointment is valid even if it contains only some of the
30 information required by subsection (1).
- 31 (3) An undated appointment is taken to have been dated on the day it
32 is given to the company.

Section 250B

- 1 (4) An appointment may specify the way the proxy is to vote on a
2 particular resolution. If it does:
3 (a) the proxy need not vote on a show of hands, but if the proxy
4 does so, the proxy must vote that way; and
5 (b) if the proxy has 2 or more appointments that specify different
6 ways to vote on the resolution—the proxy must not vote on a
7 show of hands; and
8 (c) if the proxy is the chair—the proxy must vote on a poll, and
9 must vote that way; and
10 (d) if the proxy is not the chair—the proxy need not vote on a
11 poll, but if the proxy does so, the proxy must vote that way.
12 If a proxy is also a member, this subsection does not affect the way
13 that the person can cast any votes they hold as a member.
14 Note: A company's constitution may provide that a proxy is not entitled to
15 vote on a show of hands (see subsection 249Y(2)).
- 16 (5) A person who contravenes subsection (4) is guilty of an offence,
17 but only if their appointment as a proxy resulted from the company
18 sending to members:
19 (a) a list of persons willing to act as proxies; or
20 (b) a proxy appointment form holding the person out as being
21 willing to act as a proxy.
- 22 (6) An appointment does not have to be witnessed.
- 23 (7) A later appointment revokes an earlier one if both appointments
24 could not be validly exercised at the meeting.

250B Proxy documents

Documents to be received by company before meeting

- 26
27 (1) For an appointment of a proxy for a meeting of a company's
28 members to be effective, the following documents must be
29 received by the company at least 48 hours before the meeting:
30 (a) the proxy's appointment;
31 (b) if the appointment is signed by the appointor's attorney—the
32 authority under which the appointment was signed or a
33 certified copy of the authority.

1 *Documents received following adjournment of meeting*

- 2 (2) If a meeting of a company's members has been adjourned, an
3 appointment and any authority received by the company at least 48
4 hours before the resumption of the meeting are effective for the
5 resumed part of the meeting.

6 *Receipt of documents*

- 7 (3) A company receives an appointment authority when it is received
8 at any of the following:
9 (a) the company's registered office;
10 (b) a fax number at the company's registered office;
11 (c) a place, fax number or electronic address specified for the
12 purpose in the notice of meeting.

13 *Constitution or notice of meeting may provide for different*
14 *notification period*

- 15 (5) The company's constitution (if any) or the notice of meeting may
16 reduce the period of 48 hours referred to in subsection (1) or (2).

17 **250BA Proxy documents—listed companies**

- 18 (1) In a notice of meeting for a meeting of the members of a company,
19 the company:
20 (a) must specify a place and a fax number; and
21 (b) may specify an electronic address;
22 for the purposes of receipt of proxy appointments.
- 23 (2) This section applies only to a company that is included in an
24 official list of the Exchange.
- 25 (3) This section applies despite anything in the company's
26 constitution.

Section 250C

1 **250C Validity of proxy vote**

2 *Proxy vote valid even if proxy cannot vote as member*

- 3 (1) A proxy who is not entitled to vote on a resolution as a member
4 may vote as a proxy for another member who can vote if their
5 appointment specifies the way they are to vote on the resolution
6 and they vote that way.

7 *Proxy vote valid even if member dies, revokes appointment etc.*
8 *(replaceable rule—see section 135)*

- 9 (2) Unless the company has received written notice of the matter
10 before the start or resumption of the meeting at which a proxy
11 votes, a vote cast by the proxy will be valid even if, before the
12 proxy votes:
13 (a) the appointing member dies; or
14 (b) the member is mentally incapacitated; or
15 (c) the member revokes the proxy's appointment; or
16 (d) the member revokes the authority under which the proxy was
17 appointed by a third party; or
18 (e) the member transfers the share in respect of which the proxy
19 was given.

20 Note: A proxy's authority to vote is suspended while the member is present
21 at the meeting (see subsection 249Y(3)).

22 **250D Body corporate representative**

- 23 (1) A body corporate may appoint an individual as a representative to
24 exercise all or any of the powers the body corporate may exercise:
25 (a) at meetings of a company's members; or
26 (b) at meetings of creditors or debenture holders; or
27 (c) relating to resolutions to be passed without meetings.

28 The appointment may be a standing one.

- 29 (2) The appointment may set out restrictions on the representative's
30 powers. If the appointment is to be by reference to a position held,
31 the appointment must identify the position.

Section 250D

1 (3) A body corporate may appoint more than 1 representative but only
2 1 representative may exercise the body's powers at any one time.

3 (4) Unless otherwise specified in the appointment, the representative
4 may exercise, on the body corporate's behalf, all of the powers that
5 the body could exercise at a meeting or in voting on a resolution.

6 Note: For resolutions of members without meetings, see sections 249A and
7 249B.

Section 250E

1

2 **Division 7—Voting at meetings of members**

3 **250E How many votes a member has** (*replaceable rule—see*
4 *section 135*)

5 *Company with share capital*

- 6 (1) Subject to any rights or restrictions attached to any class of shares,
7 at a meeting of members of a company with a share capital:
8 (a) on a show of hands, each member has 1 vote; and
9 (b) on a poll, each member has 1 vote for each share they hold.

10 Note: Unless otherwise specified in the appointment, a body corporate
11 representative has all the powers that a body corporate has as a
12 member (including the power to vote on a show of hands).

13 *Company without share capital*

- 14 (2) Each member of a company that does not have a share capital has 1
15 vote, both on a show of hands and a poll.

16 *Chair's casting vote*

- 17 (3) The chair has a casting vote, and also, if they are a member, any
18 vote they have in their capacity as a member.

19 Note 1: The chair may be precluded from voting, for example, by a conflict of
20 interest.

21 Note 2: For rights to appoint proxies, see section 249X.

22 **250F Jointly held shares** (*replaceable rule—see section 135*)

23 If a share is held jointly and more than 1 member votes in respect
24 of that share, only the vote of the member whose name appears
25 first in the register of members counts.

26 **250G Objections to right to vote** (*replaceable rule—see section 135*)

27 A challenge to a right to vote at a meeting of a company's
28 members:

Section 250H

- 1 (a) may only be made at the meeting; and
2 (b) must be determined by the chair, whose decision is final.

3 **250H Votes need not all be cast in the same way**

4 On a poll a person voting who is entitled to 2 or more votes:

- 5 (a) need not cast all their votes; and
6 (b) may cast their votes in different ways.

7 Note: For proxy appointments that specify the way the proxy is to vote on a
8 particular resolution, see subsection 250A(4).

9 **250J How voting is carried out** (*replaceable rule—see section 135*)

- 10 (1) A resolution put to the vote at a meeting of a company's members
11 must be decided on a show of hands unless a poll is demanded.
- 12 (1A) Before a vote is taken the chair must inform the meeting whether
13 any proxy votes have been received and how the proxy votes are to
14 be cast.
- 15 (2) On a show of hands, a declaration by the chair is conclusive
16 evidence of the result, provided that the declaration reflects the
17 show of hands and the votes of the proxies received. Neither the
18 chair nor the minutes need to state the number or proportion of the
19 votes recorded in favour or against.

20 Note: Even though the chair's declaration is conclusive of the voting results,
21 the members present may demand a poll (see paragraph 250L(3)(c)).

22 **250K Matters on which a poll may be demanded**

- 23 (1) A poll may be demanded on any resolution.
- 24 (2) If a company has a constitution, the constitution may provide that a
25 poll cannot be demanded on any resolution concerning:
26 (a) the election of the chair of a meeting; or
27 (b) the adjournment of a meeting.
- 28 (3) A demand for a poll may be withdrawn.

Section 250L

1 **250L When a poll is effectively demanded**

- 2 (1) At a meeting of a company's members, a poll may be demanded
3 by:
4 (a) at least 5 members entitled to vote on the resolution; or
5 (b) members with at least 5% of the votes that may be cast on the
6 resolution on a poll; or
7 (c) the chair.

8 Note: A proxy may join in the demand for a poll (see paragraph
9 249Y(1)(c)).

- 10 (2) If a company has a constitution, the constitution may provide that
11 fewer members or members with a lesser percentage of votes may
12 demand a poll.
- 13 (3) The poll may be demanded:
14 (a) before a vote is taken; or
15 (b) before the voting results on a show of hands are declared; or
16 (c) immediately after the voting results on a show of hands are
17 declared.
- 18 (4) The percentage of votes that members have is to be worked out as
19 at the midnight before the poll is demanded.

20 **250M When and how polls must be taken** (*replaceable rule—see*
21 *section 135*)

- 22 (1) A poll demanded on a matter other than the election of a chair or
23 the question of an adjournment must be taken when and in the
24 manner the chair directs.
- 25 (2) A poll on the election of a chair or on the question of an
26 adjournment must be taken immediately.

1

2 **Division 8—AGMs of public companies**

3 **250N Public company must hold AGM**

4 (1) A public company must hold an annual general meeting (*AGM*)
5 within 18 months after its registration.

6 (2) A public company must hold an AGM at least once in each
7 calendar year and within 5 months after the end of its financial
8 year.

9 Note: An AGM held to satisfy this subsection may also satisfy
10 subsection (1).

11 (3) An AGM is to be held in addition to any other meetings held by a
12 public company in the year.

13 Note 1: The company's annual financial report, directors' report and auditor's
14 report must be laid before the AGM (see section 317).

15 Note 2: The rules in sections 249C-250M apply to an AGM.

16 (4) A public company that has only 1 member is not required to hold
17 an AGM under this section.

18 **250P Extension of time for holding AGM**

19 (1) A public company may lodge an application with ASIC to extend
20 the period within which section 250N requires the company to hold
21 an AGM.

22 (2) If the company applies before the end of the period within which
23 the company would otherwise be required to hold an AGM, ASIC
24 may extend the period in writing. ASIC must specify the period of
25 the extension.

26 (3) A company granted an extension under subsection (2) must hold its
27 AGM within the extended period.

28 (4) ASIC may impose conditions on the extension and the company
29 must comply with those conditions.

Section 250R

1 **250R Business of AGM**

2 The business of an AGM may include any of the following, even if
3 not referred to in the notice of meeting:

- 4 (a) the consideration of the annual financial report, directors'
5 report and auditor's report;
6 (b) the election of directors;
7 (c) the appointment of the auditor;
8 (d) the fixing of the auditor's remuneration.

9 **250S Questions and comments by members on company**
10 **management at AGM**

11 The chair of an AGM must allow a reasonable opportunity for the
12 members as a whole at the meeting to ask questions about or make
13 comments on the management of the company.

14 **250T Questions by members of auditors at AGM**

15 If the company's auditor or their representative is at the meeting,
16 the chair of an AGM must allow a reasonable opportunity for the
17 members as a whole at the meeting to ask the auditor or their
18 representative questions relevant to the conduct of the audit and the
19 preparation and content of the auditor's report.

1

2 **Part 2G.3—Minutes and members' access to**
3 **minutes**
4

5 **251A Minutes**

- 6 (1) A company must keep minute books in which it records within 1
7 month:
8 (a) proceedings and resolutions of meetings of the company's
9 members; and
10 (b) proceedings and resolutions of directors' meetings (including
11 meetings of a committee of directors); and
12 (c) resolutions passed by members without a meeting; and
13 (d) resolutions passed by directors without a meeting; and
14 (e) if the company is a proprietary company with only 1
15 director—the making of declarations by the director.

16 Note: For resolutions and declarations without meetings, see sections 248A,
17 248B, 249A and 249B.

- 18 (2) The company must ensure that minutes of a meeting are signed
19 within a reasonable time after the meeting by 1 of the following:
20 (a) the chair of the meeting;
21 (b) the chair of the next meeting.
- 22 (3) The company must ensure that minutes of the passing of a
23 resolution without a meeting are signed by a director within a
24 reasonable time after the resolution is passed.
- 25 (4) The director of a proprietary company with only 1 director must
26 sign the minutes of the making of a declaration by the director
27 within a reasonable time after the declaration is made.
- 28 (5) A company must keep its minute books at:
29 (a) its registered office; or
30 (b) its principal place of business in this jurisdiction; or
31 (c) another place in this jurisdiction approved by ASIC.

Section 251AA

- 1 (6) A minute that is so recorded and signed is evidence of the
2 proceeding, resolution or declaration to which it relates, unless the
3 contrary is proved.

4 **251AA Disclosure of proxy votes—listed companies**

- 5 (1) A company must record in the minutes of a meeting, in respect of
6 each resolution in the notice of meeting, the total number of proxy
7 votes exercisable by all proxies validly appointed and:
8 (a) if the resolution is decided by a show of hands—the total
9 number of proxy votes in respect of which the appointments
10 specified that:
11 (i) the proxy is to vote for the resolution; and
12 (ii) the proxy is to vote against the resolution; and
13 (iii) the proxy is to abstain on the resolution; and
14 (iv) the proxy may vote at the proxy's discretion; and
15 (b) if the resolution is decided on a poll—the information
16 specified in paragraph (a) and the total number of votes cast
17 on the poll:
18 (i) in favour of the resolution; and
19 (ii) against the resolution; and
20 (iii) abstaining on the resolution.
- 21 (2) A company that must notify the Exchange of a resolution passed
22 by members at a meeting of the company must, at the same time,
23 give the Exchange the information specified in subsection (1).
- 24 (3) This section applies only to a company that is included in an
25 official list of the Exchange.
- 26 (4) This section applies despite anything in the company's
27 constitution.

28 **251B Members' access to minutes**

- 29 (1) A company must ensure that the minute books for the meetings of
30 its members and for resolutions of members passed without
31 meetings are open for inspection by members free of charge.

Section 251B

- 1 (2) A member of a company may ask the company in writing for a
2 copy of:
3 (a) any minutes of a meeting of the company's members or an
4 extract of the minutes; or
5 (b) any minutes of a resolution passed by members without a
6 meeting.
- 7 (3) If the company does not require the member to pay for the copy,
8 the company must send it:
9 (a) within 14 days after the member asks for it; or
10 (b) within any longer period that ASIC approves.
- 11 (4) If the company requires payment for the copy, the company must
12 send it:
13 (a) within 14 days after the company receives the payment; or
14 (b) within any longer period that ASIC approves.
15 The amount of any payment the company requires cannot exceed
16 the prescribed amount.

1

2 **Part 2G.4—Meetings of members of registered**
3 **managed investment schemes**

4 **Division 1—Who may call meetings of members**

5 **252A Calling of meetings of members by responsible entity**

6 The responsible entity of a registered scheme may call a meeting of
7 the scheme's members.

8 **252B Calling of meetings of members by responsible entity when**
9 **requested by members**

- 10 (1) The responsible entity of a registered scheme must call and arrange
11 to hold a meeting of the scheme's members to consider and vote on
12 a proposed special or extraordinary resolution on the request of:
13 (a) members with at least 5% of the votes that may be cast on the
14 resolution; or
15 (b) at least 100 members who are entitled to vote on the
16 resolution.

- 17 (1A) The regulations may prescribe a different number of members for
18 the purposes of the application of paragraph (1)(b) to:
19 (a) a particular scheme; or
20 (b) a particular class of scheme.
21 Without limiting this, the regulations may specify the number as a
22 percentage of the total number of members of the scheme.

- 23 (2) The request must:
24 (a) be in writing; and
25 (b) state any resolution to be proposed at the meeting; and
26 (c) be signed by the members proposing to move the resolution.

- 27 (3) The request may be accompanied by a statement about the
28 proposed resolution provided by the members making the request.

Section 252C

- 1 (4) Separate copies of a document setting out the request and statement
2 (if any) may be used for signing by members if the wording of the
3 request and statement (if any) is identical in each copy.
- 4 (5) The percentage of the votes that members have is to be worked out
5 as at the midnight before the request is given to the responsible
6 entity.
- 7 (6) The responsible entity must call the meeting within 21 days after
8 the request is given to it. The meeting is to be held not later than 2
9 months after the request is given to the responsible entity.
- 10 (7) The responsible entity must give to each of the members a copy of
11 the proposed resolution and statement (if any) at the same time, or
12 as soon as practicable afterwards, as it gives notice of the meeting.
13 The responsible entity must distribute the copies in the same way
14 in which it gives notice of the meeting.
- 15 (8) The responsible entity does not have to distribute a copy of the
16 resolution or statement if either is more than 1,000 words long or
17 defamatory.
- 18 (9) The responsible entity is responsible for the expenses of calling
19 and holding the meeting and making the distribution. The
20 responsible entity may meet those expenses from the scheme's
21 assets.

22 **252C Failure of responsible entity to call meeting of the scheme's**
23 **members**

- 24 (1) Members with more than 50% of the votes carried by interests held
25 by the members who make a request under section 252B may call
26 and arrange to hold a meeting of the scheme's members and
27 distribute the statement (if any) if the responsible entity does not
28 do so within 21 days after the request is given to the responsible
29 entity.
- 30 (2) The meeting must be called and the statement is to be distributed in
31 the same way—so far as is possible—in which meetings of the
32 scheme's members may be called by the responsible entity and
33 information is distributed to members by the responsible entity.

Chapter 2G Meetings

Part 2G.4 Meetings of members of registered managed investment schemes

Division 1 Who may call meetings of members

Section 252D

1 The meeting must be held not later than 3 months after the request
2 is given to the responsible entity.

3 (3) To call the meeting the members requesting the meeting may ask
4 the responsible entity under section 173 for a copy of the register
5 of members. Despite paragraph 173(3)(b), the responsible entity
6 must give the members requesting the meeting the copy of the
7 register without charge.

8 (4) The responsible entity must pay the reasonable expenses the
9 members incurred because the responsible entity failed to call and
10 arrange to hold the meeting and to make the distribution (if any).
11 The responsible entity must not pay those expenses from the
12 scheme's assets.

13 **252D Calling of meetings of members by members**

14 (1) Members of a registered scheme who hold interests carrying at
15 least 5% of the votes that may be cast at a meeting of the scheme's
16 members may call and arrange to hold a meeting of the scheme's
17 members to consider and vote on a proposed special resolution or a
18 proposed extraordinary resolution. The members calling the
19 meeting must pay the expenses of calling and holding the meeting.

20 (2) The meeting must be called in the same way—so far as is
21 possible—in which meetings of the scheme's members may be
22 called by the responsible entity.

23 (3) The percentage of the votes carried by interests that members hold
24 is to be worked out as at the midnight before the meeting is called.

25 **252E Calling of meetings of members by the Court**

26 (1) The Court may order a meeting of a registered scheme's members
27 to be called to consider and vote on a proposed special or
28 extraordinary resolution if it is impracticable to call the meeting in
29 any other way.

30 (2) The Court may make the order on application by:
31 (a) the responsible entity; or

Section 252E

1 (b) any member of the scheme who would be entitled to vote at
2 the meeting.

3 Note: For the directions the Court may give for calling, holding or
4 conducting a meeting it has ordered be called, see section 1319.

Section 252F

1

2 **Division 2—How to call meetings of members**

3 **252F Amount of notice of meetings**

4 At least 21 days notice must be given of a meeting of the members
5 of a registered scheme. However, the scheme's constitution may
6 specify a longer minimum period of notice.

7 **252G Notice of meetings of members to members, directors and**
8 **auditors**

9 *Notice to members, directors and auditors individually*

- 10 (1) Written notice of a meeting of a registered scheme's members must
11 be given to:
- 12 (a) each member of the scheme entitled to vote at the meeting;
 - 13 and
 - 14 (b) each director of the responsible entity; and
 - 15 (c) the auditor of the scheme; and
 - 16 (d) the auditor of the scheme compliance plan.

17 If an interest is held jointly, notice need only be given to 1 of the
18 members.

19 *Notice to joint members*

- 20 (2) Unless the scheme's constitution provides otherwise, notice to joint
21 members must be given to the joint member named first in the
22 register of members.

23 *How notice is given*

- 24 (3) Unless the scheme's constitution provides otherwise, the
25 responsible entity may give notice of the meeting to a member:
- 26 (a) personally; or
 - 27 (b) by sending it by post to the address for the member in the
28 register of members or an alternative address (if any)
29 nominated by the member; or

Section 252H

- 1 (c) by sending it to the fax number or electronic address (if any)
2 nominated by the member.

3 Note: A defect in the notice given may not invalidate a meeting (see
4 section 1322).

5 *When notice by post or fax is given*

- 6 (4) Unless the scheme's constitution provides otherwise, a notice of
7 meeting sent by post is taken to be given 3 days after it is posted. A
8 notice of meeting sent by fax, or other electronic means, is taken to
9 be given on the business day after it is sent.

10 **252H Auditors entitled to other communications**

11 The responsible entity of a registered scheme must give the auditor
12 of the scheme and the auditor of the scheme compliance plan any
13 other communications relating to the meeting that a member of the
14 scheme is entitled to receive.

15 **252J Contents of notice of meetings of members**

16 A notice of a meeting of a registered scheme's members must:

- 17 (a) set out the place, date and time for the meeting (and, if the
18 meeting is to be held in 2 or more places, the technology that
19 will be used to facilitate this); and
20 (b) state the general nature of the meeting's business; and
21 (c) if a special or extraordinary resolution is to be proposed at
22 the meeting—set out an intention to propose the special or
23 extraordinary resolution and state the resolution; and
24 (d) contain a statement setting out the following information:
25 (i) that the member has a right to appoint a proxy;
26 (ii) that the proxy does not need to be a member of the
27 registered scheme;
28 (iii) that if the member appoints 2 proxies the member may
29 specify the proportion or number of votes the proxy is
30 appointed to exercise.

31 Note: There may be other requirements for disclosure to members.

Chapter 2G Meetings

Part 2G.4 Meetings of members of registered managed investment schemes

Division 2 How to call meetings of members

Section 252K

1 **252K Notice of adjourned meetings**

2 When a meeting is adjourned, new notice of the adjourned meeting
3 must be given if the meeting is adjourned for 1 month or more.

1
2 **Division 3—Members' rights to put resolutions etc. at**
3 **meetings of members**

4 **252L Members' resolutions**

5 (1) The following members of a registered scheme may give the
6 responsible entity notice of a resolution that they propose to move
7 at a meeting of the scheme's members:

- 8 (a) members with at least 5% of the votes that may be cast on the
9 resolution; or
10 (b) at least 100 members who are entitled to vote at a meeting of
11 the scheme's members.

12 (1A) The regulations may prescribe a different number of members for
13 the purposes of the application of paragraph (1)(b) to:

- 14 (a) a particular scheme; or
15 (b) a particular class of scheme.

16 Without limiting this, the regulations may specify the number as a
17 percentage of the total number of members of the scheme.

18 (1B) The resolution must be:

- 19 (a) a special resolution; or
20 (b) an extraordinary resolution; or
21 (c) a resolution to remove the responsible entity of a scheme that
22 is listed and choose a new responsible entity.

23 (2) The notice must:

- 24 (a) be in writing; and
25 (b) set out the wording of the proposed resolution; and
26 (c) be signed by the members giving the notice.

27 (3) Separate copies of a document setting out the notice may be used
28 for signing by members if the wording of the notice is identical in
29 each copy.

30 (4) The percentage of the votes that members have is to be worked out
31 as at the midnight before the members give the notice.

Section 252M

1 **252M Responsible entity giving notice of members' resolutions**

- 2 (1) If a responsible entity has been given notice of a resolution under
3 section 252L, the resolution is to be considered at the next meeting
4 of the scheme's members that occurs more than 2 months after the
5 notice is given.
- 6 (2) The responsible entity must give all the members of the scheme
7 notice of the resolution at the same time, or as soon as practicable
8 afterwards, and in the same way, as it gives notice of a meeting.
- 9 (3) The responsible entity is responsible for the cost of giving
10 members notice of the resolution if the responsible entity receives
11 the notice in time to send it out to members with the notice of
12 meeting.
- 13 (4) The members requesting the meeting are jointly and individually
14 liable for the expenses reasonably incurred by the responsible
15 entity in giving members notice of the resolution if the responsible
16 entity does not receive the members' notice in time to send it out
17 with the notice of meeting. A resolution may be passed at a
18 meeting of the scheme's members that the responsible entity is to
19 meet the expenses out of the scheme's assets.
- 20 (5) The responsible entity need not give notice of the resolution:
21 (a) if it is more than 1,000 words long or defamatory; or
22 (b) if the members making the request are to bear the expenses
23 of sending the notice out—unless the members give the
24 responsible entity a sum reasonably sufficient to meet the
25 expenses that it will reasonably incur in giving the notice.

26 **252N Members' statements to be distributed**

- 27 (1) Members may request a responsible entity to give to all its
28 members a statement provided by the members making the request
29 about:
30 (a) a resolution that is proposed to be moved at a meeting of the
31 scheme's members; or
32 (b) any other matter that may be properly considered at a
33 meeting of the scheme's members.

- 1 (2) The request must be made by:
- 2 (a) members with at least 5% of the votes that may be cast on the
- 3 resolution; or
- 4 (b) at least 100 members who are entitled to vote at the meeting.
- 5 (2A) The regulations may prescribe a different number of members for
- 6 the purposes of the application of paragraph (2)(b) to:
- 7 (a) a particular scheme; or
- 8 (b) a particular class of scheme.
- 9 Without limiting this, the regulations may specify the number as a
- 10 percentage of the total number of members of the scheme.
- 11 (3) The request must be:
- 12 (a) in writing; and
- 13 (b) signed by the members making the request; and
- 14 (c) given to the responsible entity.
- 15 (4) Separate copies of a document setting out the request may be used
- 16 for signing by members if the wording of the request is identical in
- 17 each copy.
- 18 (5) The percentage of the votes that members have is to be worked out
- 19 as at the midnight before the request is given to the responsible
- 20 entity.
- 21 (6) After receiving the request, the responsible entity must distribute to
- 22 all the members of the scheme a copy of the statement at the same
- 23 time, or as soon as practicable afterwards, and in the same way, as
- 24 it gives notice of a meeting.
- 25 (7) The responsible entity is responsible for the cost of making the
- 26 distribution if the responsible entity receives the statement in time
- 27 to send it out to members with the notice of meeting.
- 28 (8) The members making the request are jointly and individually liable
- 29 for the expenses reasonably incurred by the responsible entity in
- 30 making the distribution if the responsible entity does not receive
- 31 the statement in time to send it out with the notice of meeting. A
- 32 resolution may be passed at a meeting of the scheme's members

Chapter 2G Meetings

Part 2G.4 Meetings of members of registered managed investment schemes

Division 3 Members' rights to put resolutions etc. at meetings of members

Section 252N

- 1 that the responsible entity is to meet the expenses out of the
2 scheme's assets.
- 3 (9) The responsible entity need not comply with the request:
- 4 (a) if the statement is more than 1,000 words long or
5 defamatory; or
- 6 (b) if the members making the request are responsible for the
7 expenses of the distribution—unless the members give the
8 company a sum reasonably sufficient to meet the expenses
9 that it will reasonably incur in making the distribution.

1

2 **Division 4—Holding meetings of members**

3 **252P Time and place for meetings of members**

4 A meeting of a registered scheme's members must be held at a
5 reasonable time and place.

6 **252Q Technology**

7 A responsible entity of a registered scheme may hold a meeting of
8 the scheme's members at 2 or more venues using any technology
9 that gives the members as a whole a reasonable opportunity to
10 participate.

11 Note: See section 1322 for the consequences of members not being given a
12 reasonable opportunity to participate.

13 **252R Quorum**

14 (1) This section applies to a registered scheme subject to the
15 provisions of the scheme's constitution.

16 (2) The quorum for a meeting of a registered scheme's members is 2
17 members and the quorum must be present at all times during the
18 meeting.

19 (3) In determining whether a quorum is present, count individuals
20 attending as proxies or body corporate representatives. However, if
21 a member has appointed more than 1 proxy or representative, count
22 only 1 of them. If an individual is attending both as a member and
23 as a proxy or body corporate representative, count them only once.

24 Note 1: For rights to appoint proxies, see section 252V.

25 Note 2: For body corporate representatives, see section 253B.

26 (4) A meeting of the scheme's members that does not have a quorum
27 present within 30 minutes after the time for the start of the meeting
28 set out in the notice of meeting is adjourned to the date, time and
29 place the responsible entity specifies. If the responsible entity does
30 not specify 1 or more of those things, the meeting is adjourned to:

Chapter 2G Meetings

Part 2G.4 Meetings of members of registered managed investment schemes

Division 4 Holding meetings of members

Section 252S

- 1 (a) if the date is not specified—the same day in the next week;
2 and
3 (b) if the time is not specified—the same time; and
4 (c) if the place is not specified—the same place.
- 5 (5) If no quorum is present at the resumed meeting within 30 minutes
6 after the time for the start of the meeting, the meeting is dissolved.

252S Chairing meetings of members

- 8 (1) The responsible entity may, in writing, appoint an individual to
9 chair a meeting called under section 252A or 252B.
- 10 (2) The members present at a meeting called under section 252A or
11 252B must elect a member present to chair the meeting (or part of
12 it) if:
13 (a) a chair has not previously been appointed to chair the
14 meeting; or
15 (b) a previously appointed chair is not available, or declines to
16 act, for the meeting (or part of the meeting).
- 17 (3) The members present at a meeting called under section 252C,
18 252D or 252E must elect a member present to chair the meeting.
19 This is not so if the meeting is called under section 252E and the
20 Court has directed otherwise under section 1319.

252T Auditors' right to be heard at meetings of members

- 22 (1) The auditor of a registered scheme and the auditor of the scheme
23 compliance plan are entitled to attend any meeting of the scheme's
24 members.
- 25 (2) An auditor is entitled to be heard at the meeting on any part of the
26 business of the meeting that concerns the auditor in their capacity
27 as auditor.
- 28 (3) An auditor may authorise a person in writing as their representative
29 for the purpose of attending and speaking at any meeting of the
30 scheme's members.

1 **252U Adjourned meetings**

- 2 (1) A resolution passed at a meeting resumed after an adjournment is
3 passed on the day it was passed.
- 4 (2) Only unfinished business is to be transacted at a meeting resumed
5 after an adjournment.

Section 252V

1

2 **Division 5—Proxies and body corporate representatives**

3 **252V Who can appoint a proxy**

4 (1) A member of a registered scheme who is entitled to attend and cast
5 a vote at a meeting of the scheme's members may appoint a person
6 as the member's proxy to attend and vote for the member at the
7 meeting.

8 (2) The appointment may specify the proportion or number of votes
9 that the proxy may exercise.

10 (3) A member may appoint 1 or 2 proxies. If the member appoints 2
11 proxies and the appointment does not specify the proportion or
12 number of the member's votes each proxy may exercise, each
13 proxy may exercise half of the votes.

14 (4) Disregard any fractions of votes resulting from the application of
15 subsection (2) or (3).

16 **252W Rights of proxies**

17 *Rights of proxies*

18 (1) A proxy appointed to attend and vote for a member has the same
19 rights as the member:

20 (a) to speak at the meeting; and

21 (b) to vote (but only to the extent allowed by the appointment).

22 *Proxy's right to vote*

23 (2) A registered scheme's constitution (if any) may provide that a
24 proxy is not entitled to vote on a show of hands.

25 Note: Even if the proxy is not entitled to vote on a show of hands, they may
26 make or join in the demand for a poll (see section 253L).

1 *Effect of member's presence on proxy's authority*

- 2 (3) A registered scheme's constitution (if any) may provide for the
3 effect that a member's presence at a meeting has on the authority
4 of a proxy appointed to attend and vote for the member. However,
5 if the constitution does not make such provision, a proxy's
6 authority to speak and vote for a member at a meeting is suspended
7 while the member is present at the meeting.

8 **252X Responsible entity sending appointment forms or lists of**
9 **proxies must send to all members**

10 If the responsible entity of a registered scheme sends a member a
11 proxy appointment form for a meeting or a list of persons willing
12 to act as proxies at a meeting:

- 13 (a) if the member requested the form or list—the responsible
14 entity must send the form or list to all members who ask for
15 it and who are entitled to appoint a proxy to attend and vote
16 at the meeting; or
17 (b) otherwise—the responsible entity must send the form or list
18 to all its members entitled to appoint a proxy to attend and
19 vote at the meeting.

20 **252Y Appointing a proxy**

- 21 (1) An appointment of a proxy is valid if it is signed by the member of
22 the registered scheme making the appointment and contains the
23 following information:
24 (a) the member's name and address;
25 (b) the scheme's name;
26 (c) the proxy's name or the name of the office held by the proxy;
27 (d) the meetings at which the appointment may be used.

28 *An appointment may be a standing one*

- 29 (2) A registered scheme's constitution may provide that an
30 appointment is valid even if it contains only some of the
31 information required by subsection (1).

Chapter 2G Meetings

Part 2G.4 Meetings of members of registered managed investment schemes

Division 5 Proxies and body corporate representatives

Section 252Z

- 1 (3) An undated appointment is taken to have been dated on the day it
2 is given to the responsible entity.
- 3 (4) An appointment may specify the way the proxy is to vote on a
4 particular resolution. If it does:
- 5 (a) the proxy need not vote on a show of hands, but if the proxy
6 does so, the proxy must vote that way; and
- 7 (b) if the proxy has 2 or more appointments that specify different
8 ways to vote on the resolution—the proxy must not vote on a
9 show of hands; and
- 10 (c) if the proxy is the chair—the proxy must vote on a poll, and
11 must vote that way; and
- 12 (d) if the proxy is not the chair—the proxy need not vote on a
13 poll, but if the proxy does so, the proxy must vote that way.
- 14 If a proxy is also a member, this subsection does not affect the way
15 that the person can cast any votes they hold as a member.
- 16 Note: The scheme's constitution may provide that a proxy is not entitled to
17 vote on a show of hands (see subsection 252W(2)).
- 18 (5) A person who contravenes subsection (4) is guilty of an offence,
19 but only if their appointment as a proxy resulted from the
20 responsible entity sending to members:
- 21 (a) a list of persons willing to act as proxies; or
22 (b) a proxy appointment form holding the person out as being
23 willing to act as a proxy.
- 24 (6) An appointment does not have to be witnessed.
- 25 (7) A later appointment revokes an earlier one if both appointments
26 could not be validly exercised at the meeting.

252Z Proxy documents

Section applies subject to scheme's constitution

- 28 (1) Subsections (2), (3) and (4) apply to a registered scheme subject to
29 the provisions of the scheme's constitution.
30

1 *Documents to be received by responsible entity before meeting*

- 2 (2) For an appointment of a proxy for a meeting of the scheme's
3 members to be effective, the following documents must be
4 received by the responsible entity at least 48 hours before the
5 meeting:
6 (a) the proxy's appointment
7 (b) if the appointment is signed by the appointor's attorney—the
8 authority under which the appointment was signed or a
9 certified copy of the authority.

10 *Documents received following adjournment of meeting*

- 11 (3) If a meeting of the scheme's members has been adjourned, an
12 appointment and any authority received by the responsible entity at
13 least 48 hours before the resumption of the meeting are effective
14 for the resumed part of the meeting.

15 *Receipt of documents*

- 16 (3) A responsible entity receives an appointment authority when it is
17 received at any of the following:
18 (a) the responsible entity's registered office;
19 (b) a fax number at the responsible entity's registered office;
20 (c) a place, fax number or electronic address specified for the
21 purpose in the notice of meeting.

22 *Ineffective appointments of fax or electronic notification*

- 23 (4) An appointment of a proxy is ineffective if:
24 (a) the responsible entity receives either or both the appointment
25 or authority at a fax number or electronic address; and
26 (b) a requirement (if any) in the notice of meeting that:
27 (i) the transmission be verified in a way specified in the
28 notice; or
29 (ii) the proxy produce the appointment and authority (if
30 any) at the meeting;
31 is not complied with.

Chapter 2G Meetings

Part 2G.4 Meetings of members of registered managed investment schemes

Division 5 Proxies and body corporate representatives

Section 253A

1 *Constitution or notice of meeting may provide for different*
2 *notification period*

3 (5) The scheme's constitution or the notice of meeting may reduce the
4 period of 48 hours referred to in subsection (2) or (3).

5 **253A Validity of proxy vote**

6 *Proxy vote valid even if member dies, revokes appointment etc.*

- 7 (1) Unless the responsible entity has received written notice of the
8 matter before the start or resumption of the meeting at which a
9 proxy votes, a vote cast by the proxy will be valid even if, before
10 the proxy votes:
11 (a) the appointing member dies; or
12 (b) the member is mentally incapacitated; or
13 (c) the member revokes the proxy's appointment; or
14 (d) the member revokes the authority under which the proxy was
15 appointed by a third party; or
16 (e) the member transfers the interest in respect of which the
17 proxy was given.

18 This subsection applies to a registered scheme subject to the
19 provisions of the scheme's constitution.

20 Note: A proxy's authority to vote is suspended while the member is present
21 at the meeting (see subsection 252W(3)).

22 *Proxy vote valid even if proxy cannot vote as member*

- 23 (2) A proxy who is not entitled to vote on a resolution as a member
24 may vote as a proxy for another member who can vote if their
25 appointment specifies the way they are to vote on the resolution
26 and they vote that way.

27 **253B Body corporate representative**

- 28 (1) A body corporate may appoint an individual as a representative to
29 exercise all or any of its powers at a meeting of a registered
30 scheme's members. The appointment may be a standing one.

Section 253B

- 1 (2) The appointment must set out what the representative is appointed
2 to do and may set out restrictions on the representative's powers. If
3 the appointment is to be by reference to a position held, the
4 appointment must identify the position.
- 5 (3) A body corporate may appoint more than 1 representative but only
6 1 representative may exercise the body's powers at any one time.
- 7 (4) Unless otherwise specified in the appointment, the representative
8 may exercise, on the body corporate's behalf, all of the powers that
9 the body could exercise at a meeting or in voting on a resolution.

Section 253C

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2 **Division 6—Voting at meetings of members**

3 **253C How many votes a member has**

4 (1) On a show of hands, each member of a registered scheme has 1
5 vote.

6 (2) On a poll, each member of the scheme has 1 vote for each dollar of
7 the value of the total interests they have in the scheme.

8 Note 1: For rights to appoint proxies, see section 252V.

9 Note 2: Unless otherwise specified in the appointment, a body corporate
10 representative has all the powers that a body corporate has as a
11 member (including the power to vote on a show of hands).

12 **253D Jointly held interests**

13 If an interest in a registered scheme is held jointly and more than 1
14 member votes in respect of that interest, only the vote of the
15 member whose name appears first in the register of members
16 counts.

17 **253E Responsible entity and associates cannot vote if interested in
18 resolution**

19 The responsible entity of a registered scheme and its associates are
20 not entitled to vote their interest on a resolution at a meeting of the
21 scheme's members if they have an interest in the resolution or
22 matter other than as a member. However, if the scheme is listed,
23 the responsible entity and its associates are entitled to vote their
24 interest on resolutions to remove the responsible entity and choose
25 a new responsible entity.

26 Note: The responsible entity and its associates may vote as proxies if their
27 appointments specify the way they are to vote and they vote that way
28 (see subsection 253A(2)).

29 **253F How to work out the value of an interest**

30 The value of an interest in a registered scheme is:

Section 253G

- 1 (a) if it is quoted on a stock market of a stock exchange—the last
2 sale price on that market on the trading day immediately
3 before the day on which the poll is taken; or
4 (b) if it is not quoted on a stock market of a stock exchange and
5 the scheme is liquid and has a withdrawal provision in its
6 constitution—the amount that would be paid for the interest
7 under that provision on the business day immediately before
8 the day on which the poll is taken; or
9 (c) in any other case—the amount that the responsible entity
10 determines in writing to be the price that a willing but not
11 anxious buyer would pay for the interest if it was sold on the
12 business day immediately before the day on which the poll is
13 taken.

14 **253G Objections to a right to vote**

15 A challenge to a right to vote at a meeting of members of a
16 registered scheme:

- 17 (a) may only be made at the meeting; and
18 (b) must be determined by the chair, whose decision is final.

19 **253H Votes need not all be cast in the same way**

20 On a poll a person voting who is entitled to 2 or more votes:

- 21 (a) need not cast all their votes; and
22 (b) may cast their votes in different ways.

23 Note: For proxy appointments that specify the proxy is to vote on a
24 particular resolution, see subsection 252Y(4).

25 **253J How voting is carried out**

- 26 (1) A special or extraordinary resolution put to the vote at a meeting of
27 a registered scheme's members must be decided on a poll.
28 (2) Any other resolution put to the vote at a meeting of the scheme's
29 members must be decided on a show of hands unless a poll is
30 demanded. The resolution is passed on a poll if it has been passed
31 by at least 50% of the votes cast by members entitled to vote on the
32 resolution.

Chapter 2G Meetings

Part 2G.4 Meetings of members of registered managed investment schemes

Division 6 Voting at meetings of members

Section 253K

- 1 (3) On a show of hands, a declaration by the chair is conclusive
2 evidence of the result. Neither the chair nor the minutes need to
3 state the number or proportion of the votes recorded in favour or
4 against.

5 Note: Even though the chair's declaration is conclusive of the voting results,
6 the members present may demand a poll (see paragraph 253L(3)(c)).

7 **253K Matters on which a poll may be demanded**

- 8 (1) A poll may be demanded on any resolution.
- 9 (2) A registered scheme's constitution may provide that a poll cannot
10 be demanded on any resolution concerning:
11 (a) the election of the chair of a meeting; or
12 (b) the adjournment of a meeting.
- 13 (3) A demand for a poll may be withdrawn.

14 **253L When a poll is effectively demanded**

- 15 (1) At a meeting of a registered scheme's members, a poll may be
16 demanded by:
17 (a) at least 5 members present entitled to vote on the resolution;
18 or
19 (b) members present with at least 5% of the votes that may be
20 cast on the resolution on a poll; or
21 (c) the chair.
- 22 (2) A registered scheme's constitution may provide that fewer
23 members or members with a lesser percentage of votes may
24 demand a poll.
- 25 (3) The poll may be demanded:
26 (a) before a vote is taken; or
27 (b) before the voting results on a show of hands are declared; or
28 (c) immediately after the voting results on a show of hands are
29 declared.

Section 253L

- 1 (4) The percentage of votes that members have is to be worked out as
2 at close of business on the day before the poll is demanded.

Section 253M

1

2 **Division 7—Minutes and members' access to minutes**

3 **253M Minutes**

- 4 (1) A responsible entity of a registered scheme must keep minute
5 books in which it records within 1 month:
- 6 (a) proceedings of meetings of the scheme's members; and
7 (b) resolutions of meetings of the scheme's members.
- 8 (2) The responsible entity must ensure that minutes of a meeting are
9 signed within a reasonable time after the meeting by the chair of
10 the meeting or the chair of the next meeting.
- 11 (3) The responsible entity must keep the minute books at:
- 12 (a) its registered office; or
13 (b) its principal place of business in this jurisdiction; or
14 (c) another place in this jurisdiction approved by ASIC.
- 15 (4) A minute that is so recorded and signed is evidence of the
16 proceeding or resolution to which it relates, unless the contrary is
17 proved.

18 **253N Members' access to minutes**

- 19 (1) The responsible entity of a registered scheme must ensure that the
20 minute books for the meetings of the scheme's members are open
21 for inspection by members free of charge.
- 22 (2) A member of a registered scheme may ask the responsible entity in
23 writing for a copy of any minutes of a meeting of the scheme's
24 members or an extract of the minutes.
- 25 (3) If the responsible entity does not require the member to pay for the
26 copy, the responsible entity must send it:
- 27 (a) within 14 days after the member asks for it; or
28 (b) within any longer period that ASIC approves.
- 29 (4) If the responsible entity requires payment for the copy, the
30 responsible entity must send it:

Section 253N

- 1 (a) within 14 days after the responsible entity receives the
2 payment; or
3 (b) within any longer period that ASIC approves.
4 The amount of any payment the responsible entity requires cannot
5 exceed the prescribed amount.

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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:

- (a) at a fixed time or on the happening of a particular event; or

Section 254B

- 1 (b) at the company's option; or
2 (c) at the shareholder's option.

3 Note: Redeemable preference shares are dealt with in sections 254J-254L.

4 **254B Terms of issue**

5 (1) A company may determine:

- 6 (a) the terms on which its shares are issued; and
7 (b) the rights and restrictions attaching to the shares.

8 Note 1: Details of any division of shares into classes or conversion of classes
9 of shares must be given to ASIC by a notice in the prescribed form
10 (see subsection 246F(1)).

11 Note 2: For public companies, any document or resolution that attaches rights
12 to shares or varies or cancels rights attaching to shares must be lodged
13 with ASIC (see subsection 246F(3)).

14 Note 3: Sections 246B-246G provide safeguards in cases where class rights
15 are cancelled or varied.

16 Note 4: The company cannot issue par value shares (see section 254C) or
17 bearer shares (see section 254F).

18 *No liability companies—special terms of issue*

19 (2) A share in a no liability company is issued on the following terms:

- 20 (a) if a no liability company is wound up and a surplus remains,
21 it must be distributed among the parties entitled to it in
22 proportion to the number of shares held by them, irrespective
23 of the amounts paid up on the shares; and
24 (b) a member who is in arrears in payment of a call on a share,
25 but whose share has not been forfeited, is not entitled to
26 participate in the distribution on the basis of holding that
27 share until the amount owing in respect of the call has been
28 fully paid and satisfied.

29 *Companies incorporated as no liability companies—special terms*
30 *of issue*

31 (3) If a company:

- 32 (a) either:
33 (i) is a no liability company; or
-

Section 254C

- 1 (ii) was initially registered as a no liability company and
2 has changed its status under section 162 to another type
3 of company; and
4 (b) ceases to carry on business within 12 months after its
5 registration and is wound up;
6 shares issued for cash rank (to the extent of the capital contributed
7 by subscribing shareholders) in the winding up in priority to shares
8 issued to vendors or promoters, or both, for consideration other
9 than cash.
- 10 (4) The holders of shares issued to vendors or promoters are not
11 entitled to preference on the winding up of a company that:
12 (a) is a no liability company; or
13 (b) was initially registered as a no liability company and has
14 changed its status under section 162 to another type of
15 company.
16 This is so despite anything in the company's constitution or the
17 terms on which the shares are on issue.

18 **254C No par value shares**

19 Shares of a company have no par value.

20 Note: The Part 10.1 transitional provisions contain provisions that deal with
21 the introduction of no par value shares. See also subsection 169(4).

22 **254D Pre-emption for existing shareholders on issue of shares in**
23 **proprietary company** (*replaceable rule—see section 135*)

- 24 (1) Before issuing shares of a particular class, the directors of a
25 proprietary company must offer them to the existing holders of
26 shares of that class. As far as practicable, the number of shares
27 offered to each shareholder must be in proportion to the number of
28 shares of that class that they already hold.
- 29 (2) To make the offer, the directors must give the shareholders a
30 statement setting out the terms of the offer, including:
31 (a) the number of shares offered; and
32 (b) the period for which it will remain open.

Section 254E

- 1 (3) The directors may issue any shares not taken up under the offer
2 under subsection (1) as they see fit.
- 3 (4) The company may by resolution passed at a general meeting
4 authorise the directors to make a particular issue of shares without
5 complying with subsection (1).

6 **254E Court validation of issue**

- 7 (1) On application by a company, a shareholder, a creditor or any other
8 person whose interests have been or may be affected, the Court
9 may make an order validating, or confirming the terms of, a
10 purported issue of shares if:
11 (a) the issue is or may be invalid for any reason; or
12 (b) the terms of the issue are inconsistent with or not authorised
13 by:
14 (i) this Act; or
15 (ii) another law of a State or Territory; or
16 (iii) the company's constitution (if any).
- 17 (2) On lodgment of a copy of the order with ASIC, the order has effect
18 from the time of the purported issue.

19 **254F Bearer shares and stock must not be issued**

- 20 A company does not have the power to:
21 (a) issue bearer shares; or
22 (b) issue stock or convert shares into stock.
- 23 Note: The Part 10.1 transitionals contain provisions for the conversion of
24 existing stock into shares.

25 **254G Conversion of shares**

- 26 (1) A company may:
27 (a) convert an ordinary share into a preference share; and
28 (b) convert a preference share into an ordinary share.
- 29 Note: The variation of class rights provisions (sections 246B-246G) will
30 apply to the conversion.

Section 254H

- 1 (2) A company can convert ordinary shares into preference shares only
2 if the holders' rights with respect to the following matters are set
3 out in the company's constitution (if any) or have been otherwise
4 approved by special resolution of the company:
5 (a) repayment of capital;
6 (b) participation in surplus assets and profits;
7 (c) cumulative and non-cumulative dividends;
8 (d) voting;
9 (e) priority of payment of capital and dividends in relation to
10 other shares or classes or preference shares.
- 11 (3) A share that is not a redeemable preference share when issued
12 cannot afterwards be converted into a redeemable preference share.

13 **254H Resolution to convert shares into larger or smaller number**

- 14 (1) A company may convert all or any of its shares into a larger or
15 smaller number of shares by resolution passed at a general
16 meeting.
- 17 Note: The variation of class rights provisions (sections 246B-246G) may
18 apply to the conversion.
- 19 (2) The conversion takes effect on:
20 (a) the day the resolution is passed; or
21 (b) a later date specified in the resolution.
- 22 (3) Any amount unpaid on shares being converted is to be divided
23 equally among the replacement shares.
- 24 (4) The company must lodge a copy of the resolution with ASIC
25 within 1 month after it is passed.

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2 **Part 2H.2—Redemption of redeemable preference**
3 **shares**
4

5 **254J Redemption must be in accordance with terms of issue**

6 (1) A company may redeem redeemable preference shares only on the
7 terms on which they are on issue. On redemption, the shares are
8 cancelled.

9 Note: For the power to issue redeemable preference shares see paragraph
10 254A(1)(b) and subsections 254A(2) and (3).

11 (2) This section does not affect the terms on which redeemable
12 preference shares may be cancelled under a reduction of capital or
13 a share buy-back under Part 2J.1.

14 **254K Other requirements about redemption**

15 A company may only redeem redeemable preference shares:

- 16 (a) if the shares are fully paid-up; and
17 (b) out of profits or the proceeds of a new issue of shares made
18 for the purpose of the redemption.

19 Note: For a director's duty to prevent insolvent trading on redeeming
20 redeemable preference shares, see section 588G.

21 **254L Consequences of contravening section 254J or 254K**

22 (1) If a company redeems shares in contravention of section 254J or
23 254K:

- 24 (a) the contravention does not affect the validity of the
25 redemption or of any contract or transaction connected with
26 it; and
27 (b) the company is not guilty of an offence.

28 (2) Any person who is involved in a company's contravention of
29 section 254J or 254K contravenes this subsection.

30 Note 1: Subsection (2) is a civil penalty provision (see section 1317E).

Chapter 2H Shares

Part 2H.2 Redemption of redeemable preference shares

Section 254L

1 Note 2: Section 79 defines *involved*.

2 (3) A person commits an offence if they are involved in a company's
3 contravention of section 254J or 254K and the involvement is
4 dishonest.

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2 **Chapter 2H—Shares**

3 **Part 2H.3—Partly-paid shares**
4

5 **254M Liability on partly-paid shares**

6 *General rule about shareholder's liability for calls*

- 7 (1) If shares in a company are partly-paid, the shareholder is liable to
8 pay calls on the shares in accordance with the terms on which the
9 shares are on issue. This subsection does not apply to a no liability
10 company.

11 Note: The shareholder may also be liable as a contributory under
12 sections 514-529 if the company is wound up.

13 *No liability companies*

- 14 (2) The acceptance by a person of a share in a no liability company,
15 whether by issue or transfer, does not constitute a contract by the
16 person to pay:
17 (a) calls in respect of the share; or
18 (b) any contribution to the debts and liabilities of the company.

19 **254N Calls may be limited to when company is**
20 **externally-administered**

- 21 (1) A limited company may provide by special resolution that the
22 whole or a part of its unpaid share capital may be called up only if
23 the company becomes an externally-administered body corporate.
24 (2) The company must lodge with ASIC a copy of the special
25 resolution within 14 days after it is passed.

Section 254P

1 **254P No liability companies—calls on shares**

2 *Making calls*

- 3 (1) A call on a share in a no liability company is not effective unless it
4 is made payable at least 14 days after the call is made.

5 *Notice of call*

- 6 (2) At least 7 days before a call on shares in a no liability company
7 becomes payable, the company must give the holders of the shares
8 notice of:

- 9 (a) the amount of the call; and
10 (b) the day when it is payable; and
11 (c) the place for payment.

12 The notice must be sent by post. If the notice is not given, the call
13 is not payable.

- 14 (3) A call does not have any effect on a forfeited share that is held by
15 or in trust for the company under subsection 254Q(6). However,
16 when the share is re-issued or sold by the company, the share may
17 be credited as paid up to the amount determined by the company in
18 accordance with its constitution or by resolution.

19 **254Q No liability companies—forfeiture and sale of shares for**
20 **failure to meet call**

21 *Forfeiture and sale of shares*

- 22 (1) A share in a no liability company is immediately forfeited if:
23 (a) a call is made on the share; and
24 (b) the call is unpaid at the end of 14 days after it became
25 payable.

26 Note: The holder of the share may redeem it under section 254R.

- 27 (2) The forfeited share must then be offered for sale by public auction
28 within 6 weeks after the call became payable.

Section 254Q

1 *Advertisement of sale*

- 2 (3) At least 14 days, and not more than 21 days, before the day of the
3 sale, the sale must be advertised in a daily newspaper circulating
4 generally throughout Australia. The specific number of shares to be
5 offered need not be specified in the advertisement and it is
6 sufficient to give notice of the sale by advertising to the effect that
7 all shares on which a call remains unpaid will be sold.

8 *Postponement of sale*

- 9 (4) An intended sale of forfeited shares that has been duly advertised
10 may be postponed for not more than 21 days from the advertised
11 date of sale. The date to which the sale is postponed must be
12 advertised in a daily newspaper circulating generally in Australia.
- 13 (5) There may be more than 1 postponement but the sale cannot be
14 postponed to a date more than 90 days from the first date fixed for
15 the intended sale.

16 *Shares may be offered as credited to a particular amount*

- 17 (6) The share may be sold credited as paid up to the sum of:
18 (a) the amount paid upon the share at the time of forfeiture; and
19 (b) the amount of the call; and
20 (c) the amount of any other calls becoming payable on or before
21 the day of the sale;
22 if the company in accordance with its constitution or by ordinary
23 resolution so determines.

24 *Reserve price*

- 25 (7) The directors may fix a reserve price for the share that does not
26 exceed the sum of:
27 (a) the amount of the call due and unpaid on the share at the time
28 of forfeiture; and
29 (b) the amount of any other calls that become payable on or
30 before the date of the sale.

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.

Section 254R

1 *Validity of sale*

- 2 (12) If a sale is not held in time because of error or inadvertence, a late
3 sale is not invalid if it is held as soon as practicable after the
4 discovery of the error or inadvertence.

5 *Failure to comply an offence*

- 6 (13) If there is failure to comply with subsection (2) or (3), the company
7 and any officer of the company who is involved in the
8 contravention are each guilty of an offence.

9 **254R No liability companies—redemption of forfeited shares**

- 10 (1) Despite section 254Q, if a person's share has been forfeited, the
11 person may redeem the share, at any time up to or on the last
12 business day before the proposed sale, by paying the company:
13 (a) all calls due on the share; and
14 (b) if the company so requires:
15 (i) a portion, calculated on a *pro rata* basis, of all expenses
16 incurred by the company in respect of the forfeiture; and
17 (ii) a portion, calculated on a *pro rata* basis, of all costs and
18 expenses of any proceeding that has been taken in
19 respect of the forfeiture.

20 On payment, the person is entitled to the share as if the forfeiture
21 had not occurred.

- 22 (2) On the last business day before the proposed sale, the registered
23 office of the company must be open during the hours for which it is
24 by this Act required to be open and accessible to the public.

Section 254S

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Part 2H.4—Capitalisation of profits

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254S Capitalisation of profits

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A company may capitalise profits. The capitalisation need not be accompanied by the issue of shares.

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Part 2H.5—Dividends

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254T Dividends to be paid out of profits

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A dividend may only be paid out of profits of the company.

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Note: For a director's duty to prevent insolvent trading on payment of dividends, see section 588G.

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254U Other provisions about paying dividends (*replaceable rule—see section 135*)

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(1) The directors may determine that a dividend is payable and fix:

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(a) the amount; and

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(b) the time for payment; and

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(c) the method of payment.

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The methods of payment may include the payment of cash, the issue of shares, the grant of options and the transfer of assets.

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(2) Interest is not payable on a dividend.

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254V When does the company incur a debt?

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(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.

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(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.

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254W Dividend rights

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Shares in public companies

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(1) Each share in a class of shares in a public company has the same dividend rights unless:

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Section 254W

- 1 (a) the company has a constitution and it provides for the shares
2 to have different dividend rights; or
3 (b) different dividend rights are provided for by special
4 resolution of the company.

5 *Shares in proprietary companies (replaceable rule—see*
6 *section 135)*

- 7 (2) Subject to the terms on which shares in a proprietary company are
8 on issue, the directors may pay dividends as they see fit.

9 *No liability companies*

- 10 (3) A person is not entitled to a dividend on a share in a no liability
11 company if a call:
12 (a) has been made on the share; and
13 (b) is due and unpaid.
- 14 (4) Dividends are payable to the shareholders in a no liability company
15 in proportion to the number of shares held by them, irrespective of
16 the amount paid up, or credited as paid up, on the shares. This
17 subsection has effect subject to any provisions in the company's
18 constitution relating to shares that are not ordinary shares.

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Part 2H.6—Notice requirements

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254X Notice to ASIC of share issue

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(1) Within 1 month after issuing shares, a company must lodge with ASIC a notice in the prescribed form that sets out:

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(a) the number of shares that were issued; and

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(b) if the company has different classes of shares—the class to which each of those shares belongs; and

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(c) the amount (if any) paid, or agreed to be considered as paid, on each of those shares; and

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(d) the amount unpaid (if any) on each of those shares; and

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(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.

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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).

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(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.

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(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.

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Note: Information about shares issued in these situations will come to ASIC under subsections 5H(2), 117(2), 163(3) and 601BC(2).

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Section 254Y

1 **254Y Notice to ASIC of share cancellation**

2 Within 1 month after shares are cancelled, the company must lodge
3 with ASIC a notice in the prescribed form that sets out:

- 4 (a) the number of shares cancelled; and
5 (b) any amount paid by the company (in cash or otherwise) on
6 the cancellation of the shares; and
7 (c) if the shares are cancelled following a share buy-back—the
8 amount paid by the company (in cash or otherwise) on the
9 buy-back; and
10 (d) if the company has different classes of shares—the class to
11 which each cancelled share belonged.

12 Note: Provisions under which shares are cancelled include section 254J
13 (redeemable preference shares), section 256B (capital reductions),
14 subsection 257H(3) (shares a company has bought back),
15 section 258D (forfeited shares), and subsections 258E(2) and (3)
16 (shares returned to a company).

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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.

Section 256B

1

2 **Division 1—Reductions in share capital not otherwise**
3 **authorised by law**

4 **256B Company may make reduction not otherwise authorised**

- 5 (1) A company may reduce its share capital in a way that is not
6 otherwise authorised by law if the reduction:
7 (a) is fair and reasonable to the company's shareholders as a
8 whole; and
9 (b) does not materially prejudice the company's ability to pay its
10 creditors; and
11 (c) is approved by shareholders under section 256C.

12 A cancellation of a share for no consideration is a reduction of
13 share capital, but paragraph (b) does not apply to this kind of
14 reduction.

15 Note 1: One of the ways in which a company might reduce its share capital is
16 cancelling uncalled capital.

17 Note 2: Sections 258A-258F deal with some of the other situations in which
18 reductions of share capital are authorised. Subsection 254K(2)
19 authorises capital reductions involved in the redemption of
20 redeemable preference shares and subsection 257A(2) authorises
21 reductions involved in share buy-backs.

22 Note 3: For a director's duty to prevent insolvent trading on reductions of
23 share capital, see section 588G.

- 24 (2) The reduction is either an equal reduction or a selective reduction.
25 The reduction is an *equal reduction* if:
26 (a) it relates only to ordinary shares; and
27 (b) it applies to each holder of ordinary shares in proportion to
28 the number of ordinary shares they hold; and
29 (c) the terms of the reduction are the same for each holder of
30 ordinary shares.

31 Otherwise, the reduction is a *selective reduction*.

- 32 (3) In applying subsection (2), ignore differences in the terms of the
33 reduction that are:

- 1 (a) attributable to the fact that shares have different accrued
2 dividend entitlements; or
3 (b) attributable to the fact that shares have different amounts
4 unpaid on them; or
5 (c) introduced solely to ensure that each shareholder is left with
6 a whole number of shares.

7 **256C Shareholder approval**

8 *Ordinary resolution required for equal reduction*

- 9 (1) If the reduction is an equal reduction, it must be approved by a
10 resolution passed at a general meeting of the company.

11 *Special shareholder approval for selective reduction*

- 12 (2) If the reduction is a selective reduction, it must be approved by
13 either:
14 (a) a special resolution passed at a general meeting of the
15 company, with no votes being cast in favour of the resolution
16 by any person who is to receive consideration as part of the
17 reduction or whose liability to pay amounts unpaid on shares
18 is to be reduced, or by their associates; or
19 (b) a resolution agreed to, at a general meeting, by all ordinary
20 shareholders.

21 If the reduction involves the cancellation of shares, the reduction
22 must also be approved by a special resolution passed at a meeting
23 of the shareholders whose shares are to be cancelled.

- 24 (3) The company must lodge with ASIC a copy of any resolution
25 under subsection (2) within 14 days after it is passed. The company
26 must not make the reduction until 14 days after lodgment.

27 *Information to accompany the notice of meeting*

- 28 (4) The company must include with the notice of the meeting a
29 statement setting out all information known to the company that is
30 material to the decision on how to vote on the resolution. However,
31 the company does not have to disclose information if it would be

Chapter 2J Transactions affecting share capital

Part 2J.1 Share capital reductions and share buy-backs

Division 1 Reductions in share capital not otherwise authorised by law

Section 256D

1 unreasonable to require the company to do so because the company
2 had previously disclosed the information to its shareholders.

3 *Documents to be lodged with ASIC*

4 (5) Before the notice of the meeting is sent to shareholders, the
5 company must lodge with ASIC a copy of:

6 (a) the notice of the meeting; and

7 (b) any document relating to the reduction that will accompany
8 the notice of the meeting sent to shareholders.

9 **256D Consequences of failing to comply with section 256B**

10 (1) The company must not make the reduction unless it complies with
11 subsection 256B(1).

12 (2) If the company contravenes subsection (1):

13 (a) the contravention does not affect the validity of the reduction
14 or of any contract or transaction connected with it; and

15 (b) the company is not guilty of an offence.

16 (3) Any person who is involved in a company's contravention of
17 subsection (1) contravenes this subsection.

18 Note 1: Subsection (3) is a civil penalty provision (see section 1317E).

19 Note 2: Section 79 defines *involved*.

20 (4) A person commits an offence if they are involved in a company's
21 contravention of section 256B and the involvement is dishonest.

22 **256E Signposts to other relevant provisions**

23 The following table lists other provisions of this Act that are
24 relevant to reductions in share capital.

25

Other provisions relevant to reductions in share capital

1	section 588G section 1317H	liability of directors on insolvency 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	injunctions to restrain contravention Under this section the Court may grant an injunction against conduct that constitutes or would constitute a contravention of this Act.
4	sections 1001A-1001D	continuous disclosure provisions Under these sections a disclosing entity is required to disclose information about its securities that is material and not generally available.
5	Chapter 2E	benefits to related parties to be disclosed 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	provisions in constitution 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-2 46G	variation of class rights 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.

Section 257A

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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.

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 ASIC [257E]	—	—	—	—	—	yes	yes	yes
14 days notice [257F]	—	yes	yes	yes	yes	yes	yes	yes
disclose relevant information when offer	—	—	—	—	—	yes	yes	yes

Section 257B

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	
made [257G]								
cancel shares [257H]	yes	yes	yes	yes	yes	yes	yes	yes
notify cancellation to ASIC [254Y]	yes	yes	yes	yes	yes	yes	yes	yes

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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*.

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Equal access scheme

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- (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;
 - (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.

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- (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;

Section 257B

1 (c) differences in the offers introduced solely to ensure that each
2 shareholder is left with a whole number of shares.

3 *10/12 limit*

4 (4) The 10/12 limit for a company proposing to make a buy-back is
5 10% of the smallest number, at any time during the last 12 months,
6 of votes attaching to voting shares of the company.

7 *Exceeding the 10/12 limit*

8 (5) A proposed buy-back would exceed the 10/12 limit if the number
9 of votes attaching to:

10 (a) all the voting shares in the company that have been bought
11 back during the last 12 months; and

12 (b) the voting shares that will be bought back if the proposed
13 buy-back is made;

14 would exceed the 10/12 limit.

15 *On-market buy-backs*

16 (6) A buy-back is an on-market buy-back if it results from an offer
17 made by a listed corporation at an official meeting of a securities
18 exchange in Australia in the ordinary course of trading on a stock
19 market of that exchange.

20 (7) A buy-back by a company (whether listed or not) is also an
21 on-market buy-back if it results from an offer made in the ordinary
22 course of trading on a stock market of a body corporate that:

23 (a) operates a securities market outside Australia; and

24 (b) ASIC declares in writing to be an approved overseas
25 securities exchange for the purposes of this subsection.

26 A buy-back by a listed company is an on-market buy-back under
27 this subsection only if an offer to buy-back those shares is also
28 made on a stock market of a securities exchange in Australia at the
29 same time.

30 (8) A declaration under paragraph (7)(b) may be subject to conditions.
31 Notice of the making of the declaration must be published in the
32 *Gazette*.

1 **257C Buy-back procedure—shareholder approval if the 10/12 limit**
2 **exceeded**

3 *Ordinary resolution required*

- 4 (1) If section 257B applies this section to a buy-back, the terms of the
5 buy-back agreement must be approved before it is entered into by a
6 resolution passed at a general meeting of the company, or the
7 agreement must be conditional on such an approval.

8 *Information to accompany the notice of meeting*

- 9 (2) The company must include with the notice of the meeting a
10 statement setting out all information known to the company that is
11 material to the decision how to vote on the resolution. However,
12 the company does not have to disclose information if it would be
13 unreasonable to require the company to do so because the company
14 had previously disclosed the information to its shareholders.

15 *Documents to be lodged with the ASIC*

- 16 (3) Before the notice of the meeting is sent to shareholders, the
17 company must lodge with ASIC a copy of:
18 (a) the notice of the meeting; and
19 (b) any document relating to the buy-back that will accompany
20 the notice of the meeting sent to shareholders.

21 **257D Buy-back procedure—special shareholder approval for**
22 **selective buy-back**

23 *Selective buy-back requires special or unanimous resolution*

- 24 (1) If section 257B applies this section to a buy-back, the terms of the
25 buy-back agreement must be approved before it is entered into by
26 either:
27 (a) a special resolution passed at a general meeting of the
28 company, with no votes being cast in favour of the resolution
29 by any person whose shares are proposed to be bought back
30 or by their associates; or

Section 257E

- 1 (b) a resolution agreed to, at a general meeting, by all ordinary
2 shareholders;
3 or the agreement must be conditional on such an approval.

4 *Information to accompany the notice of meeting*

- 5 (2) The company must include with the notice of the meeting a
6 statement setting out all information known to the company that is
7 material to the decision how to vote on the resolution. However,
8 the company does not have to disclose information if it would be
9 unreasonable to require the company to do so because the company
10 had previously disclosed the information to its shareholders.

11 *Documents to be lodged with the ASIC*

- 12 (3) Before the notice of the meeting is sent to shareholders, the
13 company must lodge with ASIC a copy of:
14 (a) the notice of the meeting; and
15 (b) any document relating to the buy-back that will accompany
16 the notice of the meeting sent to shareholders.
- 17 (4) ASIC may exempt a company from the operation of this section.
18 The exemption:
19 (a) must be in writing; and
20 (b) must be granted before the buy-back agreement is entered
21 into; and
22 (c) may be granted subject to conditions.

23 **257E Buy-back procedure—lodgment of offer documents with ASIC**

- 24 If section 257B applies this section to a buy-back, the company
25 must lodge with ASIC, before the buy-back agreement is entered
26 into, a copy of:
27 (a) a document setting out the terms of the offer; and
28 (b) any document that is to accompany the offer.

1 **257F Notice of intended buy-back**

2 (1) If section 257B applies this section to a buy-back, the company
3 must satisfy the lodgment requirement in subsection (2) at least 14
4 days before:

- 5 (a) if the buy-back agreement is conditional on the passing of a
6 resolution under subsection 257C(1) or 257D(1)—the
7 resolution is passed; or
8 (b) if it is not—the agreement is entered into.

9 (2) The company satisfies the lodgment requirement when it lodges
10 with ASIC:

- 11 (a) documents under subsection 257C(3) or 257D(3) or
12 section 257E; or
13 (b) a notice that the company intends to carry out the buy-back.

14 Note 1: A company that has to lodge documents under section 257C, 257D or
15 257E needs to lodge a notice under paragraph (2)(b) of this section
16 only if it wants for some reason to enter into the agreement or pass the
17 resolution less than 14 days after lodging the section 257C, 257D or
18 257E documents.

19 Note 2: The company may specify a buy-back under paragraph (2)(b) in any
20 way. It may, for instance, choose to lodge a notice covering buy-backs
21 to be carried out:

- 22 • under a particular scheme; or
23 • as part of particular on-market buy-back activity.

24 **257G Buy-back procedure—disclosure of relevant information**
25 **when offer made**

26 If section 257B applies this section to a buy-back, the company
27 must include with the offer to buy back shares a statement setting
28 out all information known to the company that is material to the
29 decision whether to accept the offer.

Section 257H

1 **257H Acceptance of offer and transfer of shares to the company**

2 *Effect of acceptance of the buy-back offer on share rights*

- 3 (1) Once a company has entered into an agreement to buy back shares,
4 all rights attaching to the shares are suspended. The suspension is
5 lifted if the agreement is terminated.

6 *Shares transferred to the company and cancelled*

- 7 (2) A company must not deal in shares it buys back. An agreement
8 entered into in contravention of this subsection is void.
- 9 (3) Immediately after the registration of the transfer to the company of
10 the shares bought back, the shares are cancelled.

11 Note: ASIC must be notified of the cancellation under section 254Y.

12 **257J Signposts to other relevant provisions**

13 The following table sets out other provisions of this Act that are
14 relevant to buy-backs.
15

Other provisions relevant to buy-backs

	provision	comment
1	section 588G section 1317H	liability of directors on insolvency 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	injunctions to restrain contravention The Court may grant an injunction against conduct that constitutes, or would constitute, a contravention of this Act.
4	subsection 609(4) section 611 (item 19 of the table)	application of takeover provisions These sections deal with the application of Chapter 6 to buy-backs.

Other provisions relevant to buy-backs

provision	comment
5 section 259A	consequences of failure to follow procedures—the company and the officers 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	consequences of failure to follow procedures if reduction in share capital involved—the company and the officers 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.
7 section 256D	consequences of failure to follow procedures if reduction in share capital involved—the transaction 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 1001A-1001D	continuous disclosure provisions A disclosing entity is required to disclose information about its securities that is material and not generally available.
9 Chapter 2E	benefits to related parties to be disclosed 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	provisions in constitution 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	variation of class rights 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.

Section 258A

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2 **Division 3—Other share capital reductions**

3 **258A Unlimited companies**

4 An unlimited company may reduce its share capital in any way.

5 **258B Right to occupy or use real property**

6 (1) If a company has a constitution, under it the company may grant to
7 a shareholder, as a shareholder, a right to occupy or use real
8 property that the company owns or holds under lease, whether the
9 right is a lease or licence or a contractual right.

10 Note: Before the introduction of strata or unit titles systems, rights to occupy
11 real property were sometimes based on a holding of shares in a
12 company.

13 (2) A company may transfer to a person an interest in land in exchange
14 for, or in satisfaction of, a right to occupy or use the land of the
15 kind referred to in subsection (1).

16 Example: A person has a right to occupy an apartment in a block of units
17 because they hold shares in a company. As part of converting the
18 block of units to strata title, the person surrenders the shares in return
19 for a transfer of strata title over the apartment. The capital reduction
20 involved in the transfer is authorised under this subsection.

21 **258C Brokerage or commission**

22 A company may pay brokerage or commission to a person in
23 respect of that person or another person agreeing to take up shares
24 in the company.

25 **258D Cancellation of forfeited shares**

26 A company may, by resolution passed at a general meeting, cancel
27 shares that have been forfeited under the terms on which the shares
28 are on issue.

29 **258E Other share cancellations**

30 (1) Any reduction in share capital involved in:

Section 258F

- 1 (a) the redemption of redeemable preference shares out of the
2 proceeds of a new issue of shares made for the purpose of the
3 redemption (see section 254K); or
4 (b) a company's buying-back of its own shares under
5 sections 257A to 257J if the shares are paid for out of share
6 capital.
7 is authorised by this section.
- 8 (2) A company may cancel shares returned to it under section 651C,
9 724(2), 737 or 738 and any reduction in the company's share
10 capital that is involved is authorised by this subsection.
- 11 (3) Any reduction in a company's share capital because of an order
12 under section 1325A is authorised by this subsection.

13 **258F Reductions because of lost capital**

14 A company may reduce its share capital by cancelling any paid-up
15 share capital that is lost or is not represented by available assets.
16 This power does not apply if the company also cancels shares.

Section 259A

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Part 2J.2—Self-acquisition and control of shares

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259A Directly acquiring own shares

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A company must not acquire shares (or units of shares) in itself
except:

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(a) in buying back shares under section 257A; or

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(b) in acquiring an interest (other than a legal interest) in

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fully-paid shares in the company if no consideration is given

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for the acquisition by the company or an entity it controls; or

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(c) under a court order; or

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(d) in circumstances covered by subsection 259B(2) or (3).

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259B Taking security over own shares or shares in holding company

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(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).

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(2) A company may take security over shares in itself under an
employee share scheme that has been approved by:

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(a) a resolution passed at a general meeting of the company; and

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(b) if the company is a subsidiary of a listed domestic

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corporation—a resolution passed at a general meeting of the
listed domestic corporation; and

22

23

(c) if paragraph (b) does not apply but the company has a

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holding company that is a domestic corporation and that is

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not itself a subsidiary of a domestic corporation—a

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resolution passed at a general meeting of that holding

27

company.

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Special exemptions for financial institutions

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(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:

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Section 259C

- 1 (a) the company's ordinary business includes providing finance;
2 and
3 (b) the security is taken in the ordinary course of that business
4 and on ordinary commercial terms.
- 5 (4) If a company acquires shares (or units of shares) in itself because it
6 exercises rights under a security permitted by subsection (2) or (3),
7 then, within the following 12 months, the company must cease to
8 hold those shares (or units of shares). ASIC may extend this period
9 of 12 months if the company applies for the extension before the
10 end of the period.
- 11 (5) Any voting rights attached to the shares (or units of shares) cannot
12 be exercised while the company continues to hold them.
- 13 (6) If, at the end of the 12 months (or extended period), the company
14 still holds any of the shares (or units of shares), the company
15 commits an offence for each day while that situation continues.

16 **259C Issuing or transferring shares to controlled entity**

- 17 (1) The issue or transfer of shares (or units of shares) of a company to
18 an entity it controls is void unless:
19 (a) the issue or transfer is to the entity as a personal
20 representative; or
21 (b) the issue or transfer is to the entity as trustee and neither the
22 company nor any entity it controls has a beneficial interest in
23 the trust, other than a beneficial interest that satisfies these
24 conditions:
25 (i) the interest arises from a security given for the purposes
26 of a transaction entered into in the ordinary course of
27 business in connection with providing finance; and
28 (ii) that transaction was not entered into with an associate of
29 the company or an entity it controls; or
30 (c) the issue to the entity is made as a result of an offer to all the
31 members of the company who hold shares of the class being
32 issued and is made on a basis that does not discriminate
33 unfairly, either directly or indirectly, in favour of the entity;
34 or
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Section 259D

- 1 (d) the transfer to the entity is by a wholly-owned subsidiary of a
2 body corporate and the entity is also a wholly-owned
3 subsidiary of that body corporate.
- 4 (2) ASIC may exempt a company from the operation of this section.
5 The exemption:
6 (a) must be in writing; and
7 (b) may be granted subject to conditions.
- 8 (3) If paragraph (1)(c) or (d) applies to an issue or transfer of shares
9 (or units of shares), section 259D applies.

10 **259D Company controlling entity that holds shares in it**

- 11 (1) If any of the following occur:
12 (a) a company obtains control of an entity that holds shares (or
13 units of shares) in the company;
14 (b) a company's control over an entity that holds shares (or units
15 of shares) in the company increases;
16 (c) a company issues shares (or units of shares) to an entity it
17 controls in the situation covered by paragraph 259C(1)(c);
18 (d) shares (or units of shares) in the company are transferred to
19 an entity it controls in the situation covered by paragraph
20 259C(1)(d);
21 then, within 12 months after it occurs either:
22 (e) the entity must cease to hold the shares (or units); or
23 (f) the company must cease to control the entity.
24 ASIC may extend this period of 12 months if the company applies
25 for the extension before the end of the period.
- 26 (2) If this section applies to shares (or units of shares), it also applies
27 to bonus shares issued in respect of those shares (or units of
28 shares). Within the same period that applies to the shares
29 themselves under subsection (1), either:
30 (a) the entity must cease to hold the bonus shares; or
31 (b) the company must cease to control the entity.

Section 259E

- 1 (3) Any voting rights attached to the shares (or units of shares) cannot
2 be exercised while the company continues to control the entity.
- 3 (4) If, at the end of the 12 months (or extended period), the company
4 still controls the entity and the entity still holds the shares (or units
5 of shares), the company commits an offence for each day while
6 that situation continues.
- 7 (5) This section does not apply to shares (or units of shares) if:
8 (a) they are held by the entity as a personal representative; or
9 (b) they are held by the entity as trustee and neither the company
10 nor any entity it controls has a beneficial interest in the trust,
11 other than a beneficial interest that satisfies these conditions:
12 (i) the interest arises from a security given for the purposes
13 of a transaction entered into in the ordinary course of
14 business in connection with providing finance; and
15 (ii) that transaction was not entered into with an associate of
16 the company or an entity it controls.
- 17 (6) A contravention of this section does not affect the validity of any
18 transaction.

19 **259E When a company controls an entity**

- 20 (1) For the purposes of this Part, a company controls an entity if the
21 company has the capacity to determine the outcome of decisions
22 about the entity's financial and operating policies.
- 23 (2) In determining whether a company has this capacity:
24 (a) the practical influence the company can exert (rather than the
25 rights it can enforce) is the issue to be addressed; and
26 (b) any practice or pattern of behaviour affecting the entity's
27 financial or operating policies is to be taken into account
28 (even if it involves a breach of an agreement or a breach of
29 trust).
- 30 (3) Merely because the company and an unrelated entity jointly have
31 the capacity to determine the outcome of decisions about another
32 entity's financial and operating policies, the company does not
33 control the other entity.
-

Section 259F

- 1 (4) A company is not taken to control an entity merely because of a
2 capacity that it is under a legal obligation to exercise for the benefit
3 of someone other than its shareholders.

4 Note: This situation could arise, for example, if the company holds shares as
5 a trustee or is performing duties as a liquidator.

6 **259F Consequences of failing to comply with section 259A or 259B**

- 7 (1) If a company contravenes section 259A or subsection 259B(1):
8 (a) the contravention does not affect the validity of the
9 acquisition or security or of any contract or transaction
10 connected with it; and
11 (b) the company is not guilty of an offence.

- 12 (2) Any person who is involved in a company's contravention of
13 section 259A or subsection 259B(1) contravenes this subsection.

14 Note 1: Subsection (2) is a civil penalty provision (see section 1317E).

15 Note 2: Section 79 defines *involved*.

- 16 (3) A person commits an offence if they are involved in a company's
17 contravention of section 259A or subsection 259B(1) and the
18 involvement is dishonest.

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Part 2J.3—Financial assistance

3

4

260A Financial assistance by a company for acquiring shares in the company or a holding company

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6

(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:

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8

9

(a) giving the assistance does not materially prejudice:

10

(i) the interests of the company or its shareholders; or

11

(ii) the company's ability to pay its creditors; or

12

(b) the assistance is approved by shareholders under section 260B (that section also requires advance notice to ASIC); or

13

14

(c) the assistance is exempted under section 260C.

15

16

(2) Without limiting subsection (1), financial assistance may:

17

(a) be given before or after the acquisition of shares (or units of shares); and

18

19

(b) take the form of paying a dividend.

20

(3) Subsection (1) extends to the acquisition of shares (or units of shares) by:

21

22

(a) issue; or

23

(b) transfer; or

24

(c) any other means.

25

260B Shareholder approval

26

Approval by company's own shareholders

27

(1) Shareholder approval for financial assistance by a company must be given by:

28

29

(a) a special resolution passed at a general meeting of the company, with no votes being cast in favour of the resolution

30

Section 260B

- 1 by the person acquiring the shares (or units of shares) or by
2 their associates; or
3 (b) a resolution agreed to, at a general meeting, by all ordinary
4 shareholders.

5 *Approval by shareholders of listed holding corporation*

- 6 (2) If the company will be a subsidiary of a listed domestic corporation
7 immediately after the acquisition referred to in section 260A
8 occurs, the financial assistance must also be approved by a special
9 resolution passed at a general meeting of that corporation.

10 *Approval by shareholders in ultimate Australian holding company*

- 11 (3) If, immediately after the acquisition, the company will have a
12 holding company that:
13 (a) is a domestic corporation but not listed; and
14 (b) is not itself a subsidiary of a domestic corporation;
15 the financial assistance must also be approved by a special
16 resolution passed at a general meeting of the body corporate that
17 will be the holding company.

18 *Information to accompany the notice of meeting*

- 19 (4) A company or other body that calls a meeting for the purpose of
20 subsection (1), (2) or (3) must include with the notice of the
21 meeting a statement setting out all the information known to the
22 company or body that is material to the decision on how to vote on
23 the resolution. However, the company or body does not have to
24 disclose information if it would be unreasonable to require the
25 company or body to do so because the company or body had
26 previously disclosed the information to its members.

27 *Documents to be lodged with the ASIC before notice of meeting is
28 sent out*

- 29 (5) Before the notice of a meeting for the purpose of subsection (1),
30 (2) or (3) is sent to members of a company or other body, the
31 company or body must lodge with ASIC a copy of:
32 (a) the notice of the meeting; and

Section 260C

1 (b) any document relating to the financial assistance that will
2 accompany the notice of the meeting sent to the members.

3 (6) The company must lodge with ASIC, at least 14 days before giving
4 the financial assistance, a notice in the prescribed form stating that
5 the assistance has been approved under this section.

6 *Lodgment of special resolutions*

7 (7) A special resolution passed for the purpose of subsection (1), (2) or
8 (3) must be lodged with ASIC by the company, listed domestic
9 corporation or holding company within 14 days after it is passed.

10 **260C Exempted financial assistance**

11 *General exemptions based on ordinary course of commercial*
12 *dealing*

13 (1) Financial assistance is exempted from section 260A if it is given in
14 the ordinary course of commercial dealing and consists of:

15 (a) acquiring or creating a lien on partly-paid shares in the
16 company for amounts payable to the company on the shares;
17 or

18 (b) entering into an agreement with a person under which the
19 person may make payments to the company on shares by
20 instalments.

21 *Special exemptions for financial institutions*

22 (2) Financial assistance is exempted from section 260A if:

23 (a) the company's ordinary business includes providing finance;
24 and

25 (b) the financial assistance is given in the ordinary course of that
26 business and on ordinary commercial terms.

27 *Special exemptions for subsidiaries of debenture issuers*

28 (3) Financial assistance is exempted from section 260A if:

29 (a) the company is a subsidiary of a borrower in relation to
30 debentures; and

Section 260D

- 1 (b) the financial assistance is a guarantee or other security given
2 by the company for the repayment by the borrower of money
3 that it is or will be liable to repay; and
4 (c) the borrower is a borrower in relation to the debentures
5 because it is or will be liable to repay the money; and
6 (d) the guarantee or security is given by the company in the
7 ordinary course of commercial dealing.

8 *Special exemption for approved employee share schemes*

- 9 (4) Financial assistance is exempted from section 260A if it is given
10 under an employee share scheme that has been approved by:
11 (a) a resolution passed at a general meeting of the company; and
12 (b) if the company is a subsidiary of a listed domestic
13 corporation—a resolution passed at a general meeting of the
14 listed domestic corporation; and
15 (c) if paragraph (b) does not apply but the company has a
16 holding company that is a domestic corporation and that is
17 not itself a subsidiary of a domestic corporation—a
18 resolution passed at a general meeting of that holding
19 company.

20 *Other exemptions*

- 21 (5) The following types of financial assistance are exempted from
22 section 260A:
23 (a) a reduction of share capital in accordance with Division 1 of
24 Part 2J.1;
25 (b) a share buy-back in accordance with Division 2 of Part 2J.1;
26 (c) assistance given under a court order;
27 (d) a discharge on ordinary commercial terms of a liability that
28 the company incurred as a result of a transaction entered into
29 on ordinary commercial terms.

30 **260D Consequences of failing to comply with section 260A**

- 31 (1) If a company provides financial assistance in contravention of
32 section 260A:

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- 1 (a) the contravention does not affect the validity of the financial
2 assistance or of any contract or transaction connected with it;
3 and
4 (b) the company is not guilty of an offence.
- 5 (2) Any person who is involved in a company's contravention of
6 section 260A contravenes this subsection.
- 7 Note 1: Subsection (2) is a civil penalty provision (see section 1317E).
8 Note 2: Section 79 defines *involved*.
- 9 (3) A person commits an offence if they are involved in a company's
10 contravention of section 260A and the involvement is dishonest.

Section 260E

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**Part 2J.4—Interaction with general directors’
duties**

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260E General duties still apply

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A director is not relieved from any of their duties under this Act (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.

1
2 **Chapter 2K—Charges**

3 **Part 2K.1—Preliminary**
4

5 **261 Interpretation and application**

6 (1) In this Chapter, unless the contrary intention appears:

7 *document of title* means a document:

- 8 (a) used in the ordinary course of business as proof of possession
9 or control, or of the right to possession or control, of property
10 other than land; or
11 (b) authorising or purporting to authorise, whether by
12 endorsement or delivery, the possessor of the document to
13 transfer or receive property other than land;

14 and includes:

- 15 (c) a bill of lading; and
16 (d) a warehousekeeper's certificate; and
17 (e) a wharfinger's certificate; and
18 (f) a warrant or order for the delivery of goods; and
19 (g) a document that is, or evidences title to, a marketable
20 security.

21 *present liability*, in relation to a charge, means a liability that has
22 arisen, being a liability the extent or amount of which is fixed or
23 capable of being ascertained, whether or not the liability is
24 immediately due to be met.

25 *property*:

- 26 (a) of a company—means property that is held by the company
27 (whether or not as trustee) wherever the property is situated
28 (whether in Australia or elsewhere); or
29 (b) of a foreign company—means property that is held by the
30 company (whether or not as trustee) and that is in this
31 jurisdiction or in an external Territory; or

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1 (c) of a registrable Australian body—means property that is held
2 by the body (whether or not as trustee) and that is in this
3 jurisdiction and outside the body’s place of origin.

4 **prospective liability**, in relation to a charge, means any liability that
5 may arise in the future, or any other liability, but does not include a
6 present liability.

7 **Register** means the Australian Register of Company Charges
8 referred to in section 265.

9 **registrable charge** means a charge in relation to which, by virtue
10 of section 262, the provisions of this Chapter mentioned in
11 subsection 262(1) apply.

12 (2) A charge referred to in subsection 263(3) or section 264 is, until
13 the charge is registered, treated for the purposes of this Chapter as
14 if it were not a registrable charge but, when the charge is so
15 registered, it has the priority accorded to a registered charge as
16 from the time of registration.

17 (3) The registration of a charge referred to in subsection 263(3) or
18 section 264 does not prejudice any priority that would have been
19 accorded to the charge under any other law (whether an Australian
20 law or not) if the charge had not been registered.

21 (4) For the purposes of this Chapter, a notice or other document is
22 taken to be lodged when it is received at an office of ASIC in this
23 jurisdiction by an officer authorised to receive it.

1
2 **Part 2K.2—Registration**
3

4 **262 Charges required to be registered**

5 (1) Subject to this section, the provisions of this Chapter relating to the
6 giving of notice in relation to, the registration of, and the priorities
7 of, charges apply in relation to the following charges (whether
8 legal or equitable) on property of a company and do not apply in
9 relation to any other charges:

- 10 (a) a floating charge on the whole or a part of the property,
11 business or undertaking of the company;
- 12 (b) a charge on uncalled share capital;
- 13 (c) a charge on a call on shares made but not paid;
- 14 (d) a charge on a personal chattel, including a personal chattel
15 that is unascertained or is to be acquired in the future, but not
16 including a ship registered in an official register kept under
17 an Australian law relating to title to ships;
- 18 (e) a charge on goodwill, on a patent or licence under a patent,
19 on a trade mark or service mark or a licence to use a trade
20 mark or service mark, on a copyright or a licence under a
21 copyright or on a registered design or a licence to use a
22 registered design;
- 23 (f) a charge on a book debt;
- 24 (g) a charge on a marketable security, not being:
- 25 (i) a charge created in whole or in part by the deposit of a
26 document of title to the marketable security; or
- 27 (ii) a mortgage under which the marketable security is
28 registered in the name of the chargee or a person
29 nominated by the chargee;
- 30 (h) a lien or charge on a crop, a lien or charge on wool or a stock
31 mortgage;
- 32 (j) a charge on a negotiable instrument other than a marketable
33 security.

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- 1 (2) The provisions of this Chapter mentioned in subsection (1) do not
2 apply in relation to:
- 3 (a) a charge, or a lien over property, arising by operation of law;
4 or
- 5 (b) a pledge of a personal chattel or of a marketable security; or
- 6 (c) a charge created in relation to a negotiable instrument or a
7 document of title to goods, being a charge by way of pledge,
8 deposit, letter of hypothecation or trust receipt; or
- 9 (d) a transfer of goods in the ordinary course of the practice of
10 any profession or the carrying on of any trade or business; or
- 11 (e) a dealing, in the ordinary course of the practice of any
12 profession or the carrying on of any trade or business, in
13 respect of goods outside Australia.
- 14 (3) The reference in paragraph (1)(d) to a charge on a personal chattel
15 is a reference to a charge on any article capable of complete
16 transfer by delivery, whether at the time of the creation of the
17 charge or at some later time, and includes a reference to a charge
18 on a fixture or a growing crop that is charged separately from the
19 land to which it is affixed or on which it is growing, but does not
20 include a reference to a charge on:
- 21 (a) a document evidencing title to land; or
- 22 (b) a chattel interest in land; or
- 23 (c) a marketable security; or
- 24 (d) a document evidencing a thing in action; or
- 25 (e) stock or produce on a farm or land that by virtue of a
26 covenant or agreement ought not to be removed from the
27 farm or land where the stock or produce is at the time of the
28 creation of the charge.
- 29 (4) The reference in paragraph (1)(f) to a charge on a book debt is a
30 reference to a charge on a debt due or to become due to the
31 company at some future time on account of or in connection with a
32 profession, trade or business carried on by the company, whether
33 entered in a book or not, and includes a reference to a charge on a
34 future debt of the same nature although not incurred or owing at
35 the time of the creation of the charge, but does not include a
36 reference to a charge on a marketable security, on a negotiable

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- 1 instrument or on a debt owing in respect of a mortgage, charge or
2 lease of land.
- 3 (5) The reference in paragraph (1)(h) to a lien or charge on a crop, a
4 lien or charge on wool or a stock mortgage includes a reference to
5 a security (however described) that is registrable under a
6 prescribed law of a State or Territory.
- 7 (6) For the purposes of this section, a company is taken to have
8 deposited a document of title to property with another person (in
9 this subsection referred to as the *chargee*) in a case where the
10 document of title is not in the possession of the company if:
11 (a) the person who holds the document of title acknowledges in
12 writing that the person holds the document of title on behalf
13 of the chargee; or
14 (b) a government, an authority or a body corporate that proposes
15 to issue a document of title in relation to the property agrees,
16 in writing, to deliver the document of title, when issued, to
17 the chargee.
- 18 (7) For the purposes of this section, a charge is taken to be a charge on
19 property of a kind to which a particular paragraph of subsection (1)
20 applies even though the instrument of charge also charges other
21 property of the company including other property that is of a kind
22 to which none of the paragraphs of that subsection applies.
- 23 (8) The provisions of this Chapter mentioned in subsection (1) do not
24 apply in relation to a charge on land.
- 25 (9) The provisions of this Chapter mentioned in subsection (1) do not
26 apply in relation to a charge on fixtures given by a charge on the
27 land to which they are affixed.
- 28 (10) The provisions of this Chapter mentioned in subsection (1) do not
29 apply in relation to a charge created by a company in its capacity
30 as legal personal representative of a deceased person or as trustee
31 of the estate of a deceased person.
- 32 (11) A charge on property of a company is not invalid merely because
33 of the failure to lodge with ASIC, or give to the company or

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1 another person, a notice or other document that is required by this
2 Part to be so lodged or given.

3 **263 Lodgment of notice of charge and copy of instrument**

4 (1) Where a company creates a charge, the company must ensure that
5 there is lodged, within 45 days after the creation of the charge:

6 (a) a notice in the prescribed form setting out the following
7 particulars:

8 (i) the name of the company and the date of the creation of
9 the charge;

10 (ii) whether the charge is a fixed charge, a floating charge
11 or both a fixed and floating charge;

12 (iii) if the charge is a floating charge—whether there is any
13 provision in the resolution or instrument creating or
14 evidencing the charge that prohibits or restricts the
15 creation of subsequent charges;

16 (iv) a short description of the liability (whether present or
17 prospective) secured by the charge;

18 (v) a short description of the property charged;

19 (vi) whether the charge is created or evidenced by a
20 resolution, by an instrument or by a deposit or other
21 conduct;

22 (vii) if the charge is constituted by the issue of a debenture or
23 debentures—the name of the trustee (if any) for
24 debenture holders;

25 (viii) if the charge is not constituted by the issue of a
26 debenture or debentures or there is no trustee for
27 debenture holders—the name of the chargee;

28 (ix) such other information as is prescribed; and

29 (b) if, pursuant to a resolution or resolutions passed by the
30 company, the company issues a series of debentures
31 constituting a charge to the benefit of which all the holders of
32 debentures in the series are entitled in equal priority, and the
33 charge is evidenced only by the resolution or resolutions and
34 the debentures—a copy of the resolution or of each of the
35 resolutions verified by a statement in writing to be a true

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- 1 copy, and a copy of the first debenture issued in the series
2 and a statement in writing verifying the execution of that first
3 debenture; and
- 4 (c) if, in a case to which paragraph (b) does not apply, the charge
5 was created or evidenced by an instrument or instruments:
6 (i) the instrument or each of the instruments; or
7 (ii) a copy of the instrument or of each of the instruments
8 verified by a statement in writing to be a true copy, and
9 a statement in writing verifying the execution of the
10 instrument or of each of the instruments.
- 11 (2) In a case to which paragraph (1)(b) applies:
12 (a) the charge is, for the purposes of subsection (1), taken to be
13 created when the first debenture in the series of debentures is
14 issued; and
15 (b) if, after the issue of the first debenture in the series, the
16 company passes a further resolution authorising the issue of
17 debentures in the series, the company must ensure that a copy
18 of that resolution, verified by a statement in writing to be a
19 true copy of that resolution, is lodged within 45 days after the
20 passing of that resolution.
- 21 (3) A body that applies for registration as a company under Part 5B.1,
22 or for registration under Part 5B.2, must lodge with the application
23 for registration the documents specified in subsection (4) in
24 relation to any charge on property of the body that would be
25 registrable under this Part if the body were already registered under
26 Part 5B.1, or Part 5B.2, as the case may be.
- 27 (4) The documents required to be lodged under subsection (3) in
28 relation to a charge on property of a body are the following
29 documents:
30 (a) a notice in the prescribed form:
31 (i) setting out the name of the body; and
32 (ii) if the charge was created by the body—specifying the
33 date of the creation of the charge; and

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- 1 (iii) if the charge was a charge existing on property acquired
2 by the body—setting out the date on which the property
3 was so acquired; and
4 (iv) otherwise complying with the requirements of
5 paragraph (1)(a);
6 (b) if the charge was created or evidenced as mentioned in
7 paragraph (1)(b):
8 (i) in the case of a charge created by the body—a copy of
9 the resolution or of each of the resolutions referred to in
10 that paragraph verified by a statement in writing to be a
11 true copy and a copy of the first debenture issued in the
12 series referred to in that paragraph and a statement in
13 writing verifying the execution of that first debenture; or
14 (ii) in the case of a charge that existed on property acquired
15 by the body—the copies referred to in subparagraph (i)
16 verified by statements in writing to be true copies;
17 (c) if the charge was created or evidenced by an instrument or
18 instruments (otherwise than as mentioned in
19 paragraph (1)(b)):
20 (i) in the case of a charge created by the body:
21 (A) the instrument or each of the instruments; or
22 (B) a copy of the instrument or of each of the
23 instruments verified by a statement in writing to
24 be a true copy, and a statement in writing
25 verifying the execution of the instrument or of
26 each of the instruments; or
27 (ii) in the case of a charge that existed on property acquired
28 by the body—a copy of the instrument or of each of the
29 instruments verified by a statement in writing to be a
30 true copy;
31 (d) if the charge was created or evidenced as mentioned in
32 paragraph (1)(b) and, after the issue of the first debenture in
33 the series, the body passed a further resolution or resolutions
34 authorising the issue of debentures in the series—a copy of
35 that resolution or of each of those resolutions verified by a
36 statement in writing to be a true copy.

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- 1 (5) A notice in relation to a charge, being a charge in relation to which
2 paragraph (1)(b) or (c) or (4)(b) or (c) applies, is not taken to have
3 been lodged under subsection (1) or (3) unless the notice is
4 accompanied by the documents specified in that paragraph.
- 5 (6) Where a notice with respect to an instrument creating a charge has
6 been lodged under subsection (1) or (3), being a charge in respect
7 of an issue of several debentures the holders of which are entitled
8 under the instrument in equal priority to the benefit of the charge,
9 sections 279 to 282 (inclusive) have effect as if any charges
10 constituted by those debentures were registered at the time when
11 the charge to which the notice relates was registered.
- 12 (7) Where a payment or discount has been made or allowed, either
13 directly or indirectly, by a company or registrable body to a person
14 in consideration of the person's subscribing or agreeing to
15 subscribe, whether absolutely or conditionally, for debentures, or
16 procuring or agreeing to procure subscriptions, whether absolute or
17 conditional, for debentures, the notice required to be lodged under
18 subsection (1) or (3) must include particulars as to the amount or
19 rate per centum of the payment or discount.
- 20 (8) Where a company or registrable body issues debentures as security
21 for a debt of the company or registrable body, the company or
22 registrable body is not thereby to be regarded, for the purposes of
23 subsection (7), as having allowed a discount in respect of the
24 debentures.

25 **264 Acquisition of property subject to charge**

- 26 (1) Where a company acquires property that is subject to a charge,
27 being a charge that would have been registrable when it was
28 created if it had been created by a company, the company must,
29 within 45 days after the acquisition of the property:
30 (a) ensure that there is lodged:
31 (i) a notice in the prescribed form in relation to the charge,
32 setting out the name of the company and the date on
33 which the property was so acquired and otherwise
34 complying with the requirements of paragraph
35 263(1)(a); and
-

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- 1 (ii) if the charge was created or evidenced as mentioned in
2 paragraph 263(1)(a)—a copy of the resolution or of
3 each of the resolutions referred to in that paragraph
4 verified by a statement in writing to be a true copy and a
5 copy of the first debenture issued in the series referred
6 to in that paragraph verified by a statement in writing to
7 be a true copy; and
- 8 (iii) if the charge was created or evidenced by an instrument
9 or instruments (otherwise than as mentioned in
10 paragraph 263(1)(b)):
- 11 (A) the instrument or each of the instruments; or
12 (B) a copy of the instrument or of each of the
13 instruments verified by a statement in writing to
14 be a true copy; and
- 15 (b) give to the chargee notice that it has acquired the property
16 and the date on which it was so acquired.
- 17 (2) A notice in relation to a charge, being a charge in relation to which
18 subparagraph (1)(a)(ii) or (iii) applies, is not taken to have been
19 lodged under subsection (1) unless it is accompanied by the
20 documents specified in that subparagraph.

21 **265 Registration of documents relating to charges**

- 22 (1) ASIC must keep a register to be known as the Australian Register
23 of Company Charges.
- 24 (2) Where a notice in respect of a charge on property of a company
25 that is required by section 263 or 264 to be lodged is lodged
26 (whether during or after the period within which the notice was
27 required to be lodged) and the notice contains all the particulars
28 required by the relevant section to be included in the notice, ASIC
29 must as soon as practicable cause to be entered in the Register the
30 time and date when the notice was lodged and the following
31 particulars in relation to the charge:
- 32 (a) if the charge is a charge created by the company, the date of
33 its creation or, if the charge was a charge existing on property
34 acquired by the company, the date on which the property was
35 so acquired;

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- 1 (b) a short description of the liability (whether present or
2 prospective) secured by the charge;
3 (c) a short description of the property charged;
4 (d) the name of the trustee for debenture holders or, if there is no
5 such trustee, the name of the chargee.
- 6 (3) Subject to subsection (9), where particulars in respect of a charge
7 are entered in the Register in accordance with subsection (2), the
8 charge is taken to be registered, and to have been registered from
9 and including the time and date entered in the Register under that
10 subsection.
- 11 (4) Where:
- 12 (a) a notice in respect of a charge on property of a company is
13 lodged under section 263 or 264 (whether during or after the
14 period within which the notice was required to be lodged);
15 and
16 (b) the notice is not accompanied by a certificate to the effect
17 that all documents accompanying the notice have been duly
18 stamped as required by any applicable law relating to stamp
19 duty;
- 20 ASIC must cause to be entered in the Register the time and date
21 when the notice was lodged and the particulars referred to in
22 paragraphs (2)(a), (b), (c) and (d), but must cause the word
23 “provisional” to be entered in the Register in relation to the entry
24 specifying that time and date.
- 25 (5) Where:
- 26 (a) in accordance with subsection (4), the word “provisional” is
27 entered in the Register in relation to an entry specifying the
28 time and date on which a notice in respect of a charge was
29 lodged; and

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- 1 (b) within a period of 30 days or such longer period as is
2 prescribed after the notice was lodged, or within such further
3 period as ASIC, if it considers it to be appropriate in a
4 particular case, allows, a certificate to the effect set out in
5 paragraph (4)(b) has been produced to ASIC;
6 ASIC must delete the word “provisional” that was so entered in
7 relation to the entry relating to that charge, but if such a certificate
8 is not produced within the period, or the further period, referred to
9 in paragraph (b), ASIC must delete from the Register all the
10 particulars that were entered in relation to the charge.
- 11 (6) Where a document that purports to be a notice in respect of a
12 charge on property of a company for the purposes of section 263 or
13 264 is lodged (whether during or after the period within which the
14 notice was required to be lodged) and the document contains the
15 name of the company concerned and the particulars referred to in
16 subparagraph 263(1)(a)(vii) or (viii), as the case requires, but does
17 not contain some or all of the other particulars that are required to
18 be included in the notice or is otherwise defective:
- 19 (a) ASIC must cause to be entered in the Register the time and
20 date when the document was lodged and such of the
21 particulars referred to in paragraphs (2)(a), (b), (c) and (d) as
22 are ascertainable from the document, but must cause the
23 word “provisional” to be entered in the Register in relation to
24 the entry specifying that time and date; and
- 25 (b) ASIC must, by notice in writing to the person who lodged the
26 document, direct the person to ensure that there is lodged, on
27 or before the day specified in the notice, a notice in relation
28 to the charge that complies with the requirements of
29 section 263 or 264, as the case may be, but the giving by
30 ASIC of a direction to the person under this paragraph does
31 not affect any liability that the company may have incurred
32 or may incur by reason of a contravention of section 263 or
33 264.
- 34 (7) Where ASIC gives a direction to a person under paragraph (6)(b)
35 in relation to a charge:
- 36 (a) if the direction is complied with on or before the day
37 specified in the notice containing the direction, ASIC must:

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- 1 (i) delete from the Register the word “provisional” that was
2 inserted pursuant to paragraph (6)(a); and
3 (ii) cause to be entered in the Register in relation to the
4 charge any particulars referred to in subsection (2) that
5 have not previously been entered; and
6 (b) if the direction is not complied with on or before that day—
7 ASIC must delete from the Register all the particulars that
8 were entered in relation to the charge; and
9 (c) if the direction is complied with after that day—ASIC must
10 cause to be entered in the Register in relation to the charge
11 the time at which and day on which the direction was
12 complied with and the particulars referred to in
13 paragraphs (2)(a), (b), (c) and (d).
- 14 (8) ASIC may enter in the Register in relation to a charge, in addition
15 to the particulars expressly required by this section to be entered,
16 such other particulars as ASIC thinks fit.
- 17 (9) If the word “provisional” is entered in the Register in relation to an
18 entry specifying a time and day in relation to a charge, the charge
19 is taken not to have been registered but:
20 (a) where the word “provisional” is deleted from the Register
21 pursuant to subsection (5) or paragraph (7)(a)—the charge is
22 taken to be registered and to have been registered from and
23 including the time and day specified in the Register pursuant
24 to subsection (4) or paragraph (6)(a), as the case may be; or
25 (b) where the particulars in relation to the charge are deleted
26 from the Register pursuant to paragraph (7)(b) and those
27 particulars and a time and day are subsequently entered in the
28 Register in relation to the charge pursuant to
29 paragraph (7)(c)—the charge is taken to be registered from
30 and including that last-mentioned time and day.
- 31 (10) Where, pursuant to subsection 263(3), a registrable body lodges
32 notices relating to 2 or more charges on the same property of the
33 registrable body, the time and day that must be entered in the
34 Register in relation to each of those charges are the time and day
35 when the first notice was lodged.

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- 1 (11) Where, in accordance with subsection (10), the time and day that
2 are entered in the Register are the same in relation to 2 or more
3 charges on property of a registrable body, those charges have, as
4 between themselves, the respective priorities that they would have
5 had if they had not been registered under this Part.
- 6 (12) Where, pursuant to section 264, a company lodges notices relating
7 to 2 or more charges on the same property acquired by the
8 company (being charges that are not already registered under this
9 Part), the time and day that must be entered in the Register in
10 relation to each of those charges are the time and day when the first
11 notice was lodged.
- 12 (13) Where, in accordance with subsection (12), the time and day that
13 are entered in the Register are the same in relation to 2 or more
14 charges on property acquired by a company, those charges have, as
15 between themselves, the respective priorities that they would have
16 had if they had not been registered under this Part.
- 17 (14) Where a notice is lodged under section 268 (whether during or
18 after the period within which it was required to be lodged), ASIC
19 must as soon as practicable cause to be entered in the Register the
20 time and day when the notice was so lodged and the particulars set
21 out in the notice.

22 **265A Standard time for the purposes of section 265**

- 23 (1) ASIC may, by *Gazette* notice, declare a specified standard time to
24 be the standard time for the purposes of section 265.
- 25 (2) Where a notice is in force under subsection (1) of this section, a
26 reference in subsection 265(2) or (4), paragraph 265(6)(a) or (7)(c),
27 or subsection 265(10), (12) or (14), to entering the time when a
28 particular event happened is a reference to entering that time as
29 expressed in terms of the standard time specified in the notice.

30 **266 Certain charges void against liquidator or administrator**

- 31 (1) Where:

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- 1 (a) an order is made, or a resolution is passed, for the winding up
2 of a company; or
3 (b) an administrator of a company is appointed under
4 section 436A, 436B or 436C; or
5 (ba) a company executes a deed of company arrangement;
6 a registrable charge on property of the company is void as a
7 security on that property as against the liquidator, the administrator
8 of the company, or the deed's administrator, as the case may be,
9 unless:
10 (c) a notice in respect of the charge was lodged under
11 section 263 or 264, as the case requires:
12 (i) within the relevant period; or
13 (ii) at least 6 months before the critical day; or
14 (d) in relation to a charge other than a charge to which
15 subsection 263(3) applies—the period within which a notice
16 in respect of the charge (other than a notice under
17 section 268) is required to be lodged, being the period
18 specified in the relevant section or that period as extended by
19 the Court under subsection (4), has not ended at the start of
20 the critical day and the notice is lodged before the end of that
21 period; or
22 (e) in relation to a charge to which subsection 263(3) applies—
23 the period of 45 days after the chargee becomes aware that
24 the registrable body has been registered as a company under
25 Part 5B.1, or registered under Part 5B.2, has not ended at the
26 start of the critical day and the notice is lodged before the end
27 of that period; or
28 (f) in relation to a charge to which section 264 applies—the
29 period of 45 days after the chargee becomes aware that the
30 property charged has been acquired by a company has not
31 ended at the start of the critical day and the notice is lodged
32 before the end of that period.
- 33 (2) The reference in paragraph (1)(c) to the relevant period is to be
34 construed as a reference to:
35 (a) in relation to a charge to which subsection 263(1) applies—
36 the period of 45 days specified in that subsection, or that
-

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- 1 period as extended by the Court under subsection (4) of this
2 section; or
- 3 (b) in relation to a charge to which subsection 263(3) applies—
4 the period of 45 days after the chargee becomes aware that
5 the registrable body has been registered as a company under
6 Part 5B.1 or registered under Part 5B.2; or
- 7 (c) in relation to a charge to which section 264 applies—the
8 period of 45 days after the chargee becomes aware that the
9 property has been acquired by a company.
- 10 (3) Where, after there has been a variation in the terms of a registrable
11 charge on property of a company having the effect of increasing
12 the amount of the debt or increasing the liabilities (whether present
13 or prospective) secured by the charge:
- 14 (a) an order is made, or a resolution is passed, for the winding up
15 of the company; or
- 16 (b) an administrator of a company is appointed under
17 section 436A, 436B or 436C; or
- 18 (ba) a company executes a deed of company arrangement;
19 the registrable charge is void as a security on that property to the
20 extent that it secures the amount of the increase in that debt or
21 liability unless:
- 22 (c) a notice in respect of the variation was lodged under
23 section 268:
- 24 (i) within the period of 45 days specified in subsection
25 268(2) or that period as extended by the Court under
26 subsection (4) of this section; or
- 27 (ii) not later than 6 months before the critical day; or
- 28 (d) the period of 45 days specified in subsection 268(2), or that
29 period as extended by the Court under subsection (4) of this
30 section, has not ended at the start of the critical day and the
31 notice is lodged before the end of that period.
- 32 (4) The Court, if it is satisfied that the failure to lodge a notice in
33 respect of a charge, or in respect of a variation in the terms of a
34 charge, as required by any provision of this Part:
- 35 (a) was accidental or due to inadvertence or some other
36 sufficient cause; or

1 (b) is not of a nature to prejudice the position of creditors or
2 shareholders;
3 or that on other grounds it is just and equitable to grant relief, may,
4 on the application of the company or any person interested and on
5 such terms and conditions as seem to the Court just and expedient,
6 by order, extend the period for such further period as is specified in
7 the order.

8 (5) Where:

9 (a) a registrable charge (in this subsection referred to as the *later*
10 *charge*) is created before the end of 45 days after the creation
11 of an unregistered registrable charge (in this subsection
12 referred to as the *earlier charge*); and

13 (b) the later charge relates to all or any of the property to which
14 the earlier charge related; and

15 (c) the later charge is given as a security for the same liability as
16 is secured by the earlier charge or any part of that liability;

17 the later charge, to the extent to which it is a security for the same
18 liability or part thereof, and so far as it relates to the property
19 comprised in the earlier charge, is void as a security on that
20 property as against a liquidator or administrator of the company, or
21 an administrator of a deed of company arrangement executed by
22 the company, even if a notice in respect of the later charge was
23 lodged under section 263 within a period mentioned in
24 paragraph (1)(c) or (d) of this section, unless it is proved to the
25 satisfaction of the Court that the later charge was given in good
26 faith for the purpose of correcting some material error in the earlier
27 charge or under other proper circumstances and not for the
28 purposes of avoiding or evading the provisions of this Part.

29 (6) Nothing in subsection (1) or (3) operates to affect the title of a
30 person to property purchased for value from a chargee or from a
31 receiver appointed by a chargee in the exercise of powers conferred
32 by the charge or implied by law if that person purchased the
33 property in good faith and without notice of:

34 (a) the filing of an application for an order for the winding up of
35 the company; or

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- 1 (b) the passing of a resolution for the voluntary winding up of
2 the company; or
3 (c) an administrator of the company being appointed under
4 section 436A, 436B or 436C; or
5 (d) the company executing a deed of company arrangement.
- 6 (7) The onus of proving that a person purchased property in good faith
7 and without notice of any of the matters referred to in
8 paragraphs (6)(a), (b), (c) and (d) is on the person asserting that the
9 property was so purchased.
- 10 (8) In this section:
- 11 *critical day*, in relation to a company, means:
- 12 (a) if the company is being wound up—the day when the
13 winding up began; or
14 (b) if the company is under administration—the section 513C
15 day in relation to the administration; or
16 (c) if the company has executed a deed of company
17 arrangement—the section 513C day in relation to the
18 administration that ended when the deed was executed.

19 **267 Charges in favour of certain persons void in certain cases**

- 20 (1) Where:
- 21 (a) a company creates a charge on property of the company in
22 favour of a person who is, or in favour of persons at least one
23 of whom is, a relevant person in relation to the charge; and
24 (b) within 6 months after the creation of the charge, the chargee
25 purports to take a step in the enforcement of the charge
26 without the Court having, under subsection (3), given leave
27 for the charge to be enforced;
- 28 the charge, and any powers purported to be conferred by an
29 instrument creating or evidencing the charge, are, and are taken
30 always to have been, void.
- 31 (2) Without limiting the generality of subsection (1), a person who:

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- 1 (a) appoints a receiver of property of a company under powers
2 conferred by an instrument creating or evidencing a charge
3 created by the company; or
4 (b) whether directly or by an agent, enters into possession or
5 assumes control of property of a company for the purposes of
6 enforcing a charge created by the company;
7 is taken, for the purposes of subsection (1), to take a step in the
8 enforcement of the charge.
- 9 (3) On application by the chargee under a charge, the Court may, if it
10 is satisfied that:
11 (a) immediately after the creation of the charge, the company
12 that created the charge was solvent; and
13 (b) in all the circumstances of the case, it is just and equitable for
14 the Court to do so;
15 give leave for the charge to be enforced.
- 16 (4) Nothing in subsection (1) affects a debt, liability or obligation of a
17 company that would, if that subsection had not been enacted, have
18 been secured by a charge created by the company.
- 19 (5) Nothing in subsection (1) operates to affect the title of a person to
20 property (other than the charge concerned or an interest in the
21 charge concerned) purchased for value from a chargee under a
22 charge, from an agent of a chargee under a charge, or from a
23 receiver appointed by a chargee under a charge in the exercise of
24 powers conferred by the charge or implied by law, if that person
25 purchased the property in good faith and without notice that the
26 charge was created in favour of a person who is, or in favour of
27 persons at least one of whom is, as the case may be, a relevant
28 person in relation to the charge.
- 29 (6) The onus of proving that a person purchased property in good faith
30 and without notice that a charge was created as mentioned in
31 subsection (5) is on the person asserting that the property was so
32 purchased.
- 33 (7) In this section:
34 *chargee*, in relation to a charge, means:
-

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- 1 (a) in any case—the holder, or all or any of the holders, of the
2 charge; or
3 (b) in the case of a charge that is an agreement to give or execute
4 a charge in favour of a person or persons, whether upon
5 demand or otherwise—that person, or all or any of those
6 persons.

7 *officer*, in relation to a company, includes, in the case of a
8 registered foreign company, a local agent of the foreign company.

9 *receiver* includes a receiver and manager.

10 *relevant person*, in relation to a charge created by a company,
11 means:

- 12 (a) a person who is at the time when the charge is created, or
13 who has been at any time during the period of 6 months
14 ending at that time, an officer of the company; or
15 (b) a person associated, in relation to the creation of the charge,
16 with a person of a kind referred to in paragraph (a).

17 **268 Assignment and variation of charges**

- 18 (1) Where, after a registrable charge on property of a company has
19 been created, a person other than the original chargee becomes the
20 holder of the charge, the person who becomes the holder of the
21 charge must, within 45 days after he, she or it becomes the holder
22 of the charge:
23 (a) lodge a notice stating that he, she or it has become the holder
24 of the charge; and
25 (b) give the company a copy of the notice.
- 26 (2) Where, after a registrable charge on property of a company has
27 been created, there is a variation in the terms of the charge having
28 the effect of:
29 (a) increasing the amount of the debt or increasing the liabilities
30 (whether present or prospective) secured by the charge; or

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- 1 (b) prohibiting or restricting the creation of subsequent charges
2 on the property;
3 the company must, within 45 days after the variation occurs, ensure
4 that there is lodged a notice setting out particulars of the variation
5 and accompanied by the instrument (if any) effecting the variation
6 or a certified copy of that instrument.
- 7 (3) Where a charge created by a company secures a debt of an
8 unspecified amount or secures a debt of a specified amount and
9 further advances, a payment or advance made by the chargee to the
10 company in accordance with the terms of the charge is not taken,
11 for the purposes of subsection (2), to be a variation in the terms of
12 the charge having the effect of increasing the amount of the charge
13 or the liabilities (whether present or prospective) secured by the
14 charge.
- 15 (4) A reference in this section to the chargee in relation to a charge is,
16 if the charge is constituted by a debenture and debentures and there
17 is a trustee for debenture holders, to be construed as a reference to
18 the trustee for debenture holders.
- 19 (5) Nothing in section 263 requires the lodgment of a notice under that
20 section in relation to a charge merely because of the fact that the
21 terms of the charge are varied only in a manner mentioned in this
22 section.

23 **269 Satisfaction of, and release of property from, charges**

- 24 (1) Where, with respect to a charge registered under this Part:
25 (a) the debt or other liability the payment or discharge of which
26 was secured by the charge has been paid or discharged in
27 whole or in part; or
28 (b) the property charged or part of that property is released from
29 the charge;
30 the person who was the holder of the charge at the time when the
31 debt or other liability was so paid or discharged or the property or
32 part of the property was released must, within 14 days after receipt
33 of a request in writing made by the company on whose property the
34 charge exists, give to the company a memorandum in the

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- 1 prescribed form acknowledging that the debt or other liability has
2 been paid or discharged in whole or in part or that the property or
3 that part of it is no longer subject to the charge, as the case may be.
- 4 (2) The company may lodge the memorandum and, upon the
5 memorandum being lodged, ASIC must enter in the Register
6 particulars of the matters stated in the memorandum.
- 7 (3) The reference in subsection (1) to the person who was the holder of
8 a charge at the time when the debt or other liability was so paid or
9 discharged or the property or part of the property was released is, if
10 the charge was constituted by a debenture or debentures and there
11 was a trustee for debenture holders, to be construed as a reference
12 to the person who was, at that time, the trustee for debenture
13 holders.

14 **270 Lodgment of notices, offences etc.**

- 15 (1) Where a notice in respect of a charge on property of a company is
16 required to be lodged under section 263 or 264 or subsection
17 268(2), the notice may be lodged by the company or by any
18 interested person.
- 19 (2) Where default is made in complying with section 263 or 264 or
20 subsection 268(2) in relation to a registrable charge on property of
21 a company, the company and any officer of the company who is in
22 default each contravene this subsection.
- 23 (3) Where a person who becomes the holder of a registrable charge
24 fails to comply with subsection 268(1), the person and, if the
25 person is a body corporate, any officer of the body corporate who
26 is in default, each contravene this subsection.
- 27 (4) Where a document required by this Part other than subsection
28 268(1) to be lodged is lodged by a person other than the company
29 concerned, that person:
30 (a) must, within 7 days after the lodgment of the document, give
31 to the company a copy of the document; and

- 1 (b) is entitled to recover from the company the amount of any
2 fees properly paid by the person on lodgment of the
3 document.

4 **271 Company to keep documents relating to charges and register of**
5 **charges**

- 6 (1) A company must keep, at the place where the register referred to in
7 subsection (2) is kept, a copy of:
8 (a) every document relating to a charge on property of the
9 company that was or is lodged under this Part; and
10 (b) a copy of every document given to the company under this
11 Part.
- 12 (2) A company must keep a register and must, upon the creation of a
13 charge (whether registrable or not) on property of the company, or
14 upon the acquisition of property subject to a charge (whether
15 registrable or not), as soon as practicable enter in the register
16 particulars of the charge, giving in each case:
17 (a) if the charge is a charge created by the company, the date of
18 its creation or, if the charge was a charge existing on property
19 acquired by the company, the date on which the property was
20 so acquired; and
21 (b) a short description of the liability (whether present or
22 prospective) secured by the charge; and
23 (c) a short description of the property charged; and
24 (d) the name of the trustee for debenture holders or, if there is no
25 such trustee, the name of the chargee; and
26 (e) the name of the person whom the company believes to be the
27 holder of the charge.
- 28 (3) A register kept by a company pursuant to subsection (2) must be
29 open for inspection:
30 (a) by any creditor or member of the company—without charge;
31 and
32 (b) by any other person—on payment for each inspection of such
33 amount, not exceeding the prescribed amount, as the

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- 1 company requires or, where the company does not require the
2 payment of an amount, without charge.
- 3 (4) A person may request a company to furnish the person with a copy
4 of the register or any part of the register and, where such a request
5 is made, the company must send the copy to that person:
6 (a) if the company requires payment of an amount not exceeding
7 the prescribed amount—within 21 days after payment of the
8 amount is received by the company or within such longer
9 period as ASIC approves; or
10 (b) in a case to which paragraph (a) does not apply—within 21
11 days after the request is made or within such longer period as
12 ASIC approves.
- 13 (5) If default is made in complying with any provision of this section,
14 the company and any officer of the company who is in default are
15 each guilty of an offence.

16 **272 Certificates**

- 17 (1) Where particulars of a charge are entered in the Register in
18 accordance with this Part, ASIC must, on request by any person,
19 issue to that person a certificate under the common seal of ASIC
20 setting out those particulars and stating the time and day when a
21 notice in respect of the charge containing those particulars was
22 lodged with ASIC and, if the word “provisional” appears in the
23 Register in relation to the reference to that time and day, stating
24 that fact.
- 25 (2) A certificate issued under subsection (1) is prima facie evidence of
26 the matters stated in the certificate.
- 27 (3) Where particulars of a charge are entered in the Register in
28 accordance with this Part, and the word “provisional” does not
29 appear in the register in relation to the reference to the time and
30 day when a notice in respect of the charge was lodged, ASIC must,
31 on request by any person, issue to that person a certificate under
32 the common seal of ASIC stating that particulars of the charge are
33 entered in the Register in accordance with this Part.

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- 1 (4) A certificate issued under subsection 272(3) is conclusive evidence
2 that the requirements of Part 2K.2 as to registration (other than the
3 requirements relating to the period after the creation of the charge
4 within which notice in respect of the charge is required to be
5 lodged) have been complied with.

6 **273A Application of State and Territory laws to charges required to**
7 **be registered under this Part**

- 8 (1) This section deals with how particular State or Territory laws apply
9 to a charge if notice of the charge must be lodged under this Part
10 (whether before or after the prescribed time). The laws are called
11 *specified laws* and are identified in subsections (4) and (5).

12 Note: Section 273E provides that this section does not apply to certain joint
13 charges.

- 14 (2) A failure to register the charge under a specified law does not
15 affect the validity, or limit the effect, of the charge.
- 16 (3) The priority of the charge is to be determined under this Chapter
17 and not under a specified law.
- 18 (4) The *specified laws* are the State or Territory laws that are:
19 (a) specified in the following table; or
20 (b) specified by the regulations for the purposes of this section.
21

Specified laws for the purposes of this section

	Law	State or Territory
1	<i>Bills of Sale Act 1898</i>	New South Wales
2	<i>Liens on Crops and Wool and Stock Mortgages Act 1898</i>	New South Wales
3	<i>Instruments Act 1958</i>	Victoria
4	<i>Bills of Sale and Other Instruments Act 1955</i>	Queensland
5	<i>Liens on Crops of Sugar Cane Act 1931</i>	Queensland
6	<i>Bills of Sale Act 1886</i>	South Australia

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Specified laws for the purposes of this section		
	Law	State or Territory
7	<i>Liens on Fruit Act 1923</i>	South Australia
8	<i>Stock Mortgages and Wool Liens Act 1924</i>	South Australia
9	<i>Bills of Sale Act 1899</i>	Western Australia
10	<i>Bills of Sale Act 1900</i>	Tasmania
11	<i>Stock, Wool, and Crop Mortgages Act 1930</i>	Tasmania
12	<i>Instruments Act 1933</i>	Australian Capital Territory
13	<i>Instruments Act</i>	Northern Territory

- 1 (5) The regulations may provide that a law specified in the table in
2 subsection (4) is not a specified law for the purposes of this
3 section.

4 **273B Application of State and Territory laws to transfers,**
5 **assignments or giving of charges registered under this**
6 **Part**

- 7 (1) This section deals with how particular State and Territory laws
8 apply to a transfer, assignment or giving of a security by a
9 company that is registrable under those laws if:
10 (a) notice in relation to the transfer, assignment or giving of
11 security must be lodged under this Part; and
12 (b) the transfer, assignment or giving of security is registered
13 under this Part.

14 The laws are called *specified laws* and are identified in
15 subsections (3) and (4). The particular specified law under which
16 the transfer, assignment or giving of security is registrable is called
17 the *applicable registration law*.

18 Note: Section 273E provides that this section does not apply to certain joint
19 charges.

- 20 (2) The transfer, assignment or giving of security is, subject to
21 subsection 273A(3), as valid and effectual as if it had been duly
22 registered under the applicable registration law.

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- 1 (3) The *specified laws* are the State or Territory laws that are:
2 (a) specified in the following table; or
3 (b) specified by the regulations for the purposes of this section.
4

Specified laws for the purposes of this section		
	Law	Jurisdiction
1	<i>Bills of Sale Act 1898</i>	New South Wales
2	<i>Bills of Sale and Other Instruments Act 1955</i> Part II	Queensland
3	<i>Bills of Sale Act 1886</i>	South Australia
4	<i>Bills of Sale Act 1899</i>	Western Australia
5	<i>Bills of Sale Act 1900</i>	Tasmania
6	<i>Instruments Act 1933</i> Part III	Australian Capital Territory
7	<i>Instruments Act</i> Part II	Northern Territory

- 5 (4) The regulations may provide that a law specified in the table in
6 subsection (3) is not a specified law for the purposes of this
7 section.
- 8 (5) The *specified provisions* are the provisions of State or Territory
9 laws that are:
10 (a) specified in the following table; or
11 (b) specified by the regulations for the purposes of this section.
12

Specified provisions for the purposes of this section			
	Provisions	Law	Jurisdiction
1	all the provisions	<i>Bills of Sale Act 1899</i>	New South Wales
2	all the provisions	<i>Bills of Sale and Other Instruments Act 1955</i> Part II	Queensland
3	all the provisions	<i>Bills of Sale Act 1886</i>	South Australia

Section 273C

Specified provisions for the purposes of this section

	Provisions	Law	Jurisdiction
4	all the provisions	<i>Bills of Sale Act 1899</i>	Western Australia
5	all the provisions	<i>Bills of Sale Act 1900</i>	Tasmania
6	all the provisions	<i>Instruments Act 1933</i> Part III	Australian Capital Territory
7	all the provisions	<i>Instruments Act</i> Part II	Northern Territory

- 1 (6) The regulations may provide that a provision specified in the table
2 in subsection (5) is not a specified provision for the purposes of
3 this section.

4 **273C Application of specified State and Territory laws to crop liens,
5 wool liens and stock mortgages registered under this Part**

- 6 (1) This section deals with how particular State and Territory laws
7 apply to a crop lien, wool lien or stock mortgage given by a
8 company that is registrable under those laws if:
9 (a) notice in relation to the lien or stock mortgage is required to
10 be lodged under this Part; and
11 (b) the lien or mortgage is registered under this Part.
12 The laws are called *specified laws* and are identified in
13 subsections (3) and (4). The particular specified law under which
14 the lien or mortgage is registrable is called the *applicable*
15 *registration law*.
16 Note: Section 273E provides that this section does not apply to certain joint
17 charges.
18 (2) The lien or mortgage is, subject to subsection 273A(3), as valid
19 and effectual as if it had been duly registered under the applicable
20 registration law.
21 (3) The *specified laws* are the State or Territory laws that are:
22 (a) specified in the following table; or
23 (b) specified by the regulations for the purposes of this section.
24

Section 273C

Specified laws for the purposes of this section		
	Law	Jurisdiction
1	<i>Liens on Crops and Wool and Stock Mortgages Act 1898</i> Parts II and III	New South Wales
2	<i>Instruments Act 1958</i> Parts VII and VIII	Victoria
3	<i>Bills of Sale and Other Instruments Act 1955</i> Part II	Queensland
4	<i>Liens on Crops of Sugar Cane Act 1931</i>	Queensland
5	<i>Liens on Fruit Act 1923</i>	South Australia
6	<i>Stock Mortgages and Wool Liens Act 1924</i>	South Australia
7	<i>Bills of Sale Act 1899</i> sections 7, 8 and 37	Western Australia
8	<i>Stock, Wool, and Crop Mortgages Act 1930</i>	Tasmania
9	<i>Instruments Act 1933</i> Parts IV and V	Australian Capital Territory
10	<i>Instruments Act</i> Parts III and IV	Northern Territory

- 1 (4) The regulations may provide that a law specified in the table in
2 subsection (3) is not a specified law for the purposes of this
3 section.
- 4 (5) The *specified provisions* are the provisions of State or Territory
5 laws that are:
6 (a) specified in the following table; or
7 (b) specified by the regulations for the purposes of this section.
8

Section 273C

Specified provisions for the purposes of this section		
Provision	Law	Jurisdiction
1 Sections 5, 6, 7, 10, 12, 15, 19 and 20	<i>Liens on Crops and Wool and Stock Mortgages Act 1898</i>	New South Wales
2 Sections 62, 63, 64, 65, 67, 71, 75, 77 and 81	<i>Instruments Act 1958</i>	Victoria
3 Sections 27 and 30, subsections 32(2) and (3) and sections 35 and 36	<i>Bills of Sale and Other Instruments Act 1955</i>	Queensland
4 Sections 8, 9, 15 and 19	<i>Liens on Crops of Sugar Cane Act 1931</i>	Queensland
5 Sections 4, 5, 6, 6a, 7 and 9	<i>Liens on Fruit Act 1923</i>	South Australia
6 Sections 6, 15 and 16 Section 25 (applying sections 20 and 37 of the <i>Bills of Sale Act 1886</i>)	<i>Stock Mortgages and Wool Liens Act 1924</i>	South Australia
7 sections 7, 38, 39, 41, 42 and 43	<i>Bills of Sale Act 1899</i>	Western Australia
8 Subsections 3(3), 4(2), 4(4), 4(5) and 5(4) and sections 7 and 9 Paragraph 11(e) (applying section 37 of the <i>Bills of Sale Act 1900</i>)	<i>Stock, Wool, and Crop Mortgages Act 1930</i>	Tasmania
9 Sections 18, 19 and 20, subsection 21(1), sections 24 and 26, subsection 29(1) and sections 33 and 34	<i>Instruments Act 1933</i>	Australian Capital Territory
10 Parts III and IV	<i>Instruments Act</i>	Northern Territory

- 1 (6) The regulations may provide that a provision specified in the table
2 in subsection (5) is not a specified provision for the purposes of
3 this section.

1 **273D Sections 273A to 273C do not apply to charges given by**
2 **company jointly with person who is not a company**

3 Nothing in section 273A, 273B or 273C applies in relation to a
4 charge given by a company jointly with another person who is not,
5 or other persons at least one of whom is not, a company.

6 **274 Power of Court to rectify Register**

7 Where the Court is satisfied:

8 (a) that a particular with respect to a registrable charge on
9 property of a company has been omitted from, or misstated
10 in, the Register or a memorandum referred to in section 269;
11 and

12 (b) that the omission or misstatement:

13 (i) was accidental or due to inadvertence or to some other
14 sufficient cause; or

15 (ii) is not of a nature to prejudice the position of creditors or
16 shareholders;

17 or that on other grounds it is just and equitable to grant relief;

18 the Court may, on the application of the company or any person
19 interested and on such terms and conditions as seem to the Court
20 just and expedient, order that the omission or mis-statement be
21 rectified.

22 **277 Power to exempt from compliance with certain requirements of**
23 **Division**

24 (1) ASIC may, by instrument in writing, exempt a person, as specified
25 in the instrument and subject to such conditions (if any) as are
26 specified in the instrument, from compliance with such of the
27 requirements of section 263, 264 or 268 relating to:

28 (a) the particulars to be contained in a notice under the relevant
29 section; or

30 (b) the documents (other than the notice) to be lodged under the
31 relevant section; or

Section 277

- 1 (c) the verification of any document required to be lodged under
2 the relevant section;
3 as are specified in the instrument.
- 4 (2) A person who is exempted by ASIC, subject to a condition, from
5 compliance with a requirement of section 263, 264 or 268 must not
6 contravene the condition.
- 7 (3) Where a person has contravened or failed to comply with a
8 condition to which an exemption under this section is subject, the
9 Court may, on the application of ASIC, order the person to comply
10 with the condition.

1
2 **Part 2K.3—Order of priority**
3

4 **278 Definitions**

5 (1) In this Part:

6 *priority time*, in relation to a registered charge, means:

7 (a) except as provided by paragraph (b) or (c)—the time and date
8 appearing in the Register in relation to the charge, being a
9 time and day entered in the Register pursuant to section 265;
10 and

11 (b) where a notice has been lodged under section 264 in relation
12 to a charge on property, being a charge that, at the time when
13 the notice was lodged, was already registered under
14 Part 2K.2—the earlier or earliest time and day appearing in
15 the Register in relation to the charge, being a time and day
16 entered in the Register pursuant to section 264; and

17 (c) to the extent that the charge has effect as varied by a
18 variation notice of which was required to be lodged under
19 subsection 268(2)—the time and day entered in the Register
20 in relation to the charge pursuant to subsection 265(14).

21 *prior registered charge*, in relation to another registered charge,
22 means a charge the priority time of which is earlier than the
23 priority time of the other charge.

24 *registered charge* means a charge that is registered under Part K.2.

25 *subsequent registered charge*, in relation to another registered
26 charge, means a charge the priority time of which is later than the
27 priority time of the other registered charge.

28 *unregistered charge* means a charge that is not registered under
29 Part 2K.2 but does not include a charge that is not a registrable
30 charge.

Section 279

- 1 (2) A reference in this Part to a person having notice of a charge
2 includes a reference to a person having constructive notice of the
3 charge.
- 4 (3) Where, by virtue of the definition of *priority time* in subsection (1),
5 a registered charge has 2 or more priority times each of which
6 relates to a particular liability secured by the charge, each of those
7 liabilities is, for the purposes of this Part, taken to be secured by a
8 separate registered charge the priority time of which is the priority
9 time of the first-mentioned registered charge that relates to the
10 liability concerned.

11 **279 Priorities of charges**

- 12 (1) Subject to this section, sections 280 to 282, inclusive, have effect
13 with respect to the priorities, in relation to each other, of registrable
14 charges on the property of a company.
- 15 (2) The application, in relation to particular registrable charges, of the
16 order of priorities of charges set out in sections 280 to 282,
17 inclusive, is subject to:
- 18 (a) any consent (express or implied) that varies the priorities in
19 relation to each other of those charges, being a consent given
20 by the holder of one of those charges, being a charge that
21 would otherwise be entitled to priority over the other charge;
22 and
- 23 (b) any agreement between those chargees that affects the
24 priorities in relation to each other of the charges in relation to
25 which those persons are the chargees.
- 26 (3) The holder of a registered charge, being a floating charge, on
27 property of a company is taken, for the purposes of subsection (2),
28 to have consented to that charge being postponed to a subsequent
29 registered charge, being a fixed charge that is created before the
30 floating charge becomes fixed, on any of that property unless:
- 31 (a) the creation of the subsequent registered charge contravened
32 a provision of the instrument or resolution creating or
33 evidencing the floating charge; and

Section 280

- 1 (b) a notice in respect of the floating charge indicating the
2 existence of the provision referred to in paragraph (a) was
3 lodged with ASIC under section 263, 264 or 268 before the
4 creation of the subsequent registered charge.
- 5 (4) Where a charge relates to property of a kind or kinds to which a
6 particular paragraph or paragraphs of subsection 262(1) applies or
7 apply and also relates to other property, sections 280 to 282,
8 inclusive, apply so as to affect the priority of the charge only in so
9 far as it relates to the first-mentioned property and do not affect the
10 priority of the charge in so far as it relates to the other property.
- 11 (5) Sections 280 to 282, inclusive, do not apply so as to affect the
12 operation of:
13 (a) the *Copyright Act 1968*; or
14 (b) the *Designs Act 1906*; or
15 (c) the *Life Insurance Act 1995*; or
16 (d) the *Patents Act 1952*; or
17 (e) the *Trade Marks Act 1955*.

18 **280 General priority rules in relation to registered charges**

- 19 (1) A registered charge on property of a company has priority over:
20 (a) a subsequent registered charge on the property, unless the
21 subsequent registered charge was created before the creation
22 of the prior registered charge and the chargee in relation to
23 the subsequent registered charge proves that the chargee in
24 relation to the prior registered charge had notice of the
25 subsequent registered charge at the time when the prior
26 registered charge was created; and
27 (b) an unregistered charge on the property created before the
28 creation of the registered charge, unless the chargee in
29 relation to the unregistered charge proves that the chargee in
30 relation to the registered charge had notice of the
31 unregistered charge at the time when the registered charge
32 was created; and
33 (c) an unregistered charge on the property created after the
34 creation of the registered charge.

Section 281

- 1 (2) A registered charge on property of a company is postponed to:
2 (a) a subsequent registered charge on the property, where the
3 subsequent registered charge was created before the creation
4 of the prior registered charge and the chargee in relation to
5 the subsequent registered charge proves that the chargee in
6 relation to the prior registered charge had notice of the
7 subsequent registered charge at the time when the prior
8 registered charge was created; and
9 (b) an unregistered charge on the property created before the
10 creation of the registered charge, where the chargee in
11 relation to the unregistered charge proves that the chargee in
12 relation to the registered charge had notice of the
13 unregistered charge at the time when the registered charge
14 was created.

15 **281 General priority rule in relation to unregistered charges**

- 16 An unregistered charge on property of a company has priority over:
17 (a) a registered charge on the property that was created after the
18 creation of the unregistered charge and does not have priority
19 over the unregistered charge under subsection 280(1); and
20 (b) another unregistered charge on the property created after the
21 first-mentioned unregistered charge.

22 **282 Special priority rules**

- 23 (1) Except as provided by this section, any priority accorded by this
24 Part to a charge over another charge does not extend to any liability
25 that, at the priority time in relation to the first-mentioned charge, is
26 not a present liability.
- 27 (2) Where a registered charge on property of a company secures:
28 (a) a present liability and a prospective liability of an unspecified
29 amount; or
30 (b) a prospective liability of an unspecified amount;
31 any priority accorded by this Part to the charge over another charge
32 of which the chargee in relation to the first-mentioned charge does
33 not have actual knowledge extends to the prospective liability,

Section 282

- 1 whether the prospective liability became a present liability before
2 or after the registration of the first-mentioned charge.
- 3 (3) Where a registered charge on property of a company secures:
- 4 (a) a present liability and a prospective liability up to a specified
5 maximum amount; or
- 6 (b) a prospective liability up to a specified maximum amount;
7 and the notice lodged under section 263 or 264 in relation to the
8 charge sets out the nature of the prospective liability and the
9 amount so specified, then any priority accorded by this Part to the
10 charge over another charge extends to any prospective liability
11 secured by the first-mentioned charge to the extent of the
12 maximum amount so specified, whether the prospective liability
13 became a present liability before or after the registration of the
14 first-mentioned charge and notwithstanding that the chargee in
15 relation to the first-mentioned charge had actual knowledge of the
16 other charge at the time when the prospective liability became a
17 present liability.
- 18 (4) Where:
- 19 (a) a registered charge on property of a company secures:
- 20 (i) a present liability and a prospective liability up to a
21 specified maximum amount; or
- 22 (ii) a prospective liability up to a specified maximum
23 amount;
- 24 but the notice lodged under section 263 or 264 in relation to
25 the charge does not set out the nature of the prospective
26 liability or the maximum amount so specified; or
- 27 (b) a registered charge on property of a company secures a
28 prospective liability of an unspecified amount;
- 29 the following paragraphs have effect:
- 30 (c) any priority accorded by this Part to the charge over another
31 charge of which the chargee in relation to the first-mentioned
32 charge has actual knowledge extends to any prospective
33 liability secured by the first-mentioned charge that had
34 become a present liability at the time when the chargee in
35 relation to the first-mentioned charge first obtained actual
36 knowledge of the other charge;
-

Section 282

- 1 (d) any priority accorded by this Part to the charge over another
2 charge of which the chargee in relation to the first-mentioned
3 charge has actual knowledge extends to any prospective
4 liability secured by the first-mentioned charge that became a
5 present liability, as the result of the making of an advance,
6 after the time when the chargee in relation to the
7 first-mentioned charge first obtained actual knowledge of the
8 other charge if, at that time, the terms of the first-mentioned
9 charge required the chargee in relation to that charge to make
10 the advance after that time, and so extends to that prospective
11 liability whether the advance was made before or after the
12 registration of the first-mentioned charge and
13 notwithstanding that the chargee in relation to the
14 first-mentioned charge had actual knowledge of the other
15 charge at the time when the advance was made.

1
2 **Chapter 2L—Debentures**

3 **Part 2L.1—Requirement for trust deed and trustee**
4

5 **283AA Requirement for trust deed and trustee**

6 (1) Before a body:

- 7 (a) makes an offer of debentures in this jurisdiction that needs
8 disclosure to investors under Chapter 6D, or does not need
9 disclosure to investors under Chapter 6D because of
10 subsection 708(14) (disclosure document exclusion for
11 debenture roll overs); or
12 (b) makes an offer of debentures in this jurisdiction or elsewhere
13 as consideration for the acquisition of securities under an
14 off-market takeover bid; or
15 (c) issues debentures in this jurisdiction or elsewhere under a
16 compromise or arrangement under Part 5.1 approved at a
17 meeting held as a result of an order under subsection 411(1)
18 or (1A);

19 regardless of where any resulting issue, sale or transfer occurs, the
20 body must enter into a trust deed that complies with section 283AB
21 and appoint a trustee that complies with section 283AC.

22 Note: For rules about when an offer of debentures will need disclosure to
23 investors under Chapter 6D, see sections 706, 707 and 708.

24 (2) The body may revoke the trust deed after it has repaid all amounts
25 payable under the debentures in accordance with the debentures'
26 terms and the trust deed.

27 (3) The body must comply with this Chapter.

28 Note: Sections 168 and 601CZB require a register of debenture holders to be
29 set up and kept.

30 **283AB Trust deed**

31 The trust deed must provide that the following are held in trust by
32 the trustee for the benefit of the debenture holders:

Section 283AC

- 1 (a) the right to enforce the borrower's duty to repay;
- 2 (b) any charge or security for repayment;
- 3 (c) the right to enforce any other duties that the borrower and
- 4 any guarantor have under:
- 5 (i) the terms of the debentures; or
- 6 (ii) the provisions of the trust deed or this Chapter.

7 Note: For information about the duties that the borrower and any guarantor

8 body have under this Chapter, see sections 283BB to 283CE.

9 **283AC Who can be a trustee**

10 *Who can be trustee*

- 11 (1) The trustee must be:
- 12 (a) the Public Trustee of any State or Territory; or
- 13 (b) a body corporate authorised by a law of any State or
- 14 Territory to take in its own name a grant of probate of the
- 15 will, or letters of administration of the estate, of a deceased
- 16 person; or
- 17 (c) a body corporate registered under the *Life Insurance Act*
- 18 *1995*; or
- 19 (d) an Australian ADI; or
- 20 (e) a body corporate, all of whose shares are held beneficially by
- 21 a body corporate or bodies corporate of the kind referred to
- 22 in paragraph (b), (c) or (d) if that body or those bodies:
- 23 (i) are liable for all of the liabilities incurred, or to be
- 24 incurred, by the trustee as trustee; or
- 25 (ii) have subscribed for and beneficially hold shares in the
- 26 trustee and there is an uncalled liability of at least
- 27 \$500,000 in respect of those shares that can only be
- 28 called up if the trustee becomes an
- 29 externally-administered body corporate (see
- 30 section 254N); or
- 31 (f) a body corporate approved by ASIC (see section 283GB).

32 Note: Section 283BD provides that if the borrower becomes aware that the

33 trustee cannot be a trustee, the trustee must be replaced.

Section 283AD

1 *Circumstances in which a person cannot be trustee*

- 2 (2) A person may only be appointed or act as trustee (except to the
3 extent provided for by section 283AD) if the appointment or acting
4 will not result in a conflict of interest or duty. This subsection is
5 not intended to affect any rule of law or equity.

6 **283AD Existing trustee continues to act until new trustee takes office**

7 An existing trustee continues to act as the trustee until a new
8 trustee is appointed and has taken office as trustee, despite any rule
9 of law or equity to the contrary.

10 Note: This section applies even if the existing trustee resigns.

11 **283AE Replacement of trustee**

12 *Related party of existing trustee may be appointed as a new trustee*

- 13 (1) In addition to any other powers of appointment under the terms of
14 the debentures or provisions of the trust deed, the borrower may
15 appoint a body corporate that is related to the existing trustee as
16 trustee in place of the existing trustee if:
17 (a) the body corporate can be a trustee under section 283AC; and
18 (b) the existing trustee consents in writing to the appointment.
19 The appointment has effect despite any terms of the debentures or
20 provisions of the trust deed.

21 *Appointment by Court*

- 22 (2) The Court may:
23 (a) appoint a person who may be a trustee under section 283AC
24 as trustee on the application of the borrower, a debenture
25 holder or ASIC if:
26 (i) a trustee has not been validly appointed; or
27 (ii) the trustee has ceased to exist; or
28 (b) terminate the existing trustee's appointment and appoint a
29 person who may be a trustee under section 283AC as trustee
30 in the existing trustee's place on the application of the
31 borrower, the existing trustee, a debenture holder or ASIC if:
-

Section 283AE

- 1 (i) the existing trustee cannot be trustee under
- 2 section 283AC; or
- 3 (ii) the existing trustee fails, or refuses, to act.

1

2 **Part 2L.2—Duties of borrower**

3

4 **283BA Duties of borrower**

5 A borrower that is required to enter into a trust deed under
6 section 283AA has the duties imposed by this Part.

7 **283BB General duties**

8 The borrower must:

- 9 (a) carry on and conduct its business in a proper and efficient
10 manner; and
11 (b) provide a copy of the trust deed to:
12 (i) a debenture holder; or
13 (ii) the trustee;
14 if they request a copy; and
15 (c) make all of its financial and other records available for
16 inspection by:
17 (i) the trustee; or
18 (ii) an officer or employee of the trustee authorised by the
19 trustee to carry out the inspection; or
20 (iii) a registered company auditor appointed by the trustee to
21 carry out the inspection;
22 and give them any information, explanations or other
23 assistance that they require about matters relating to those
24 records.

25 Note: The borrower also has a duty to call a meeting of debenture holders in
26 certain circumstances (see section 283EA).

27 **283BC Duty to notify ASIC of name of trustee**

28 The borrower must lodge with ASIC a notice of the name of a
29 trustee within 14 days after they are appointed. The notice must be
30 in the prescribed form.

Section 283BD

1 **283BD Duty to replace trustee**

2 The borrower must take all reasonable steps to replace the trustee
3 under section 283AE as soon as practicable after the borrower
4 becomes aware that the trustee:

- 5 (a) has ceased to exist; or
6 (b) has not been validly appointed; or
7 (c) cannot be a trustee under section 283AC; or
8 (d) has failed or refused to act as trustee.

9 **283BE Duty to inform trustee about charges**

10 If the borrower creates a charge, it must:

- 11 (a) give the trustee written details of the charge within 21 days
12 after it is created; and
13 (b) if the total amount to be advanced on the security of the
14 charge is indeterminate and the advances are not merged in a
15 current account with bankers, trade creditors or anyone
16 else—give the trustee written details of the amount of each
17 advance within 7 days after it is made.

18 Note: If the advances are merged in a current account the borrower must
19 give the trustee the details in the quarterly report (see subsection
20 283BF(4)).

21 **283BF Duty to give trustee and ASIC quarterly reports**

22 *Quarterly reports*

- 23 (1) Within 1 month after the end of each quarter, the borrower must:
24 (a) give the trustee a quarterly report that sets out the
25 information required by subsections (4), (5) and (6); and
26 (b) lodge a copy of the report with ASIC (see section 351).

27 *First quarter*

- 28 (2) The first quarter is the period of 3 months ending on a day fixed by
29 the borrower, by written notice to the trustee. The day must be less
30 than 6 months after the first issue of a debenture under the trust
31 deed.

Section 283BF

1 *Subsequent quarters*

- 2 (3) Each of the subsequent quarters are periods of 3 months. The
3 trustee may allow a particular quarter to be a period of less than 3
4 months if the trustee is satisfied that special circumstances justify
5 doing so.

6 *Content of quarterly report*

- 7 (4) The report for a quarter must include details of:
- 8 (a) any failure by the borrower and each guarantor to comply
9 with the terms of the debentures or the provisions of the trust
10 deed or this Chapter during the quarter; and
- 11 (b) any event that has happened during the quarter that has
12 caused, or could cause, 1 or more of the following:
- 13 (i) any amount deposited or lent under the debentures to
14 become immediately payable;
- 15 (ii) the debentures to become immediately enforceable;
- 16 (iii) any other right or remedy under the terms of the
17 debenture or provisions of the trust deed to become
18 immediately enforceable; and
- 19 (c) any circumstances that have occurred during the quarter that
20 materially prejudice:
- 21 (i) the borrower, any of its subsidiaries, or any of the
22 guarantors; or
- 23 (ii) any security or charge included in or created by the
24 debentures or the trust deed; and
- 25 (d) any substantial change in the nature of the business of the
26 borrower, any of its subsidiaries, or any of the guarantors that
27 has occurred during the quarter; and
- 28 (e) any of the following events that happened in the quarter:
- 29 (i) the appointment of a guarantor;
- 30 (ii) the cessation of liability of a guarantor body for the
31 payment of the whole or part of the money for which it
32 was liable under the guarantee;

Section 283BF

- 1 (iii) a change of name of a guarantor (if this happens, the
2 report must also disclose the guarantor's new name);
3 and
4 (f) the net amount outstanding on any advances at the end of the
5 quarter if the borrower has created a charge where:
6 (i) the total amount to be advanced on the security of the
7 charge is indeterminate; and
8 (ii) the advances are merged in a current account with
9 bankers, trade creditors or anyone else; and
10 (g) any other matters that may materially prejudice any security
11 or the interests of the debenture holders.
- 12 Note: Paragraph (f)—the borrower has a duty to inform the trustee about
13 charges as they are created (see section 283BE).
- 14 (5) If the borrower has deposited money with, or lent money to, a
15 related body corporate during the quarter, the report must also
16 include details of:
17 (a) the total of the money deposited with, or lent to, the related
18 body corporate during the quarter (see subsection (7)); and
19 (b) the total amount of money owing to the borrower at the end
20 of the quarter in respect of the deposits or loans to the related
21 body corporate.
22 Disregard any amount that the borrower deposits with an ADI in
23 the normal course of the borrower's business.
- 24 (6) If the borrower has assumed a liability of a related body corporate
25 during the quarter, the report must also include details of the extent
26 of the liability assumed during the quarter and the extent of the
27 liability as at the end of the quarter.
- 28 (7) For the purposes of subsections (5) and (6), the report:
29 (a) must distinguish between deposits, loans and assumptions of
30 liability that are secured and those that are unsecured; and
31 (b) may exclude any deposit, loan or assumption of liability on
32 behalf of the related body corporate if it has:
33 (i) guaranteed the repayment of the debentures of the
34 borrower; and

Section 283BG

- 1 (ii) secured the guarantee by a charge over all of its
2 property in favour of the trustee.

3 *Formalities*

- 4 (8) The report must:
5 (a) be made in accordance with a resolution of the directors; and
6 (b) specify the date on which the report is made.

7 **283BG Exceptions**

8 Sections 283BE and 283BF do not apply in respect of the borrower
9 while:

- 10 (a) it is under external administration; or
11 (b) a receiver, or a receiver and manager, of property of the
12 borrower has been appointed and has not ceased to act under
13 that appointment.

14 **283BH How debentures may be described**

- 15 (1) The borrower may describe or refer to the debentures in:
16 (a) any disclosure in relation to the offer of the debentures; or
17 (b) any other document constituting or relating to the offer of the
18 debentures; or
19 (c) the debentures themselves;
20 only in accordance with the following table:
21

How debentures may be described		
Item	Description	When description may be used
1	mortgage debenture	only if the circumstances set out in subsection (2) are satisfied
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

Section 283BI

1 **283BI Offences for failure to comply with statutory duties**

2 The borrower commits an offence if it intentionally or recklessly
3 contravenes section 283BB, 283BC, 283BD, 283BE, 283BF or
4 283EA.

Section 283CA

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Part 2L.3—Duties of guarantor

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283CA Duties of guarantor

5

If a borrower is required to enter into a trust deed under section 283AA in relation to debentures, a guarantor in respect of the debentures has the duties imposed by this Part.

6

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8

283CB General duties

9

The guarantor must:

10

(a) carry on and conduct its business in a proper and efficient manner; and

11

12

(b) make all of its financial and other records available for inspection by:

13

14

(i) the trustee; or

15

(ii) an officer or employee of the trustee authorised by the trustee to carry out the inspection; or

16

17

(iii) a registered company auditor appointed by the trustee to carry out the inspection;

18

19

and give them any information, explanations or other assistance that they require about matters relating to those records.

20

21

22

283CC Duty to inform trustee about charges

23

If the guarantor creates a charge, it must:

24

(a) give the trustee written details of the charge within 21 days after it is created; and

25

26

(b) if the total amount to be advanced on the security of the charge is indeterminate, give the trustee written details of:

27

28

(i) the amount of each advance made within 7 days after it is made; or

29

30

(ii) where the advances are merged in a current account with bankers, trade creditors or anyone else—the net

31

Section 283CD

1 amount outstanding on the advances at the end of every
2 3 months.

3 **283CD Exceptions**

4 Section 283CC does not apply in respect of the guarantor while:
5 (a) it is under external administration; or
6 (b) a receiver, or a receiver and manager, of property of the
7 guarantor has been appointed and has not ceased to act under
8 that appointment.

9 **283CE Offences for failure to comply with statutory duties**

10 The guarantor commits an offence if it intentionally or recklessly
11 contravenes paragraph 283CB(b) or section 283CC.

Section 283DA

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Part 2L.4—Trustee

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283DA Trustee's duties

5

The trustee of a trust deed entered into under section 283AA must:

6

(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

7

8

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11

(b) exercise reasonable diligence to ascertain whether the borrower or any guarantor has committed any breach of:

12

13

14

(i) the terms of the debentures; or

(ii) the provisions of the trust deed or this Chapter; and

15

16

(c) do everything in its power to ensure that the borrower or a guarantor remedies any breach known to the trustee of:

17

18

19

20

21

(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

22

23

(d) ensure that the borrower and each guarantor complies with Part 2K to the extent that it applies to the debentures; and

24

(e) notify ASIC as soon as practicable if:

25

26

27

(i) the borrower has not complied with section 283BE, 283BF or subsection 318(1) or (4); or

(ii) a guarantor has not complied with section 283CC; and

28

29

30

(f) notify ASIC and the borrower as soon as practicable if the trustee discovers that it cannot be a trustee under section 283AC; and

31

32

33

(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:

Section 283DB

- 1 (i) the Court calls in relation to a scheme under subsection
2 411(1) or (1A); or
3 (ii) the trustee calls under subsection 283EB(1); and
4 (h) comply with any directions given to it at a debenture holders'
5 meeting referred to in section 283EA, 283EB or 283EC
6 unless:
7 (i) the trustee is of the opinion that the direction is
8 inconsistent with the terms of the debentures or the
9 provisions of the trust deed or this Act or is otherwise
10 objectionable; and
11 (ii) has either obtained, or is in the process of obtaining, an
12 order from the Court under section 283HA setting aside
13 or varying the direction; and
14 (i) apply to the Court for an order under section 283HB if the
15 borrower requests it to do so.

16 Note 1: Paragraph (g)—Section 411 relates to compromises and arrangements.

17 Note 2: Section 283DC deals with indemnification in respect of a trustee's
18 liability to the debenture holders.

19 **283DB Exemptions and indemnifications of trustee from liability**

- 20 (1) A term of a debenture, provision of a trust deed or a term of a
21 contract with holders of debentures secured by a trust deed, is void
22 in so far as the term or provision would have the effect of:
23 (a) exempting a trustee from liability for breach of
24 section 283DA for failure to show the degree of care and
25 diligence required of it as trustee; or
26 (b) indemnifying the trustee against that liability;
27 unless the term or provision:
28 (c) releases the trustee from liability for something done or
29 omitted to be done before the release is given; or
30 (d) enables a meeting of debenture holders to approve the release
31 of the trustee from liability for something done or omitted to
32 be done before the release is given.
33 (2) For the purposes of paragraph (1)(d):

Section 283DC

- 1 (a) a release is approved if the debenture holders who vote for
2 the resolution hold 75% of the nominal value of the
3 debentures held by all the debenture holders who attend the
4 meeting and vote on the resolution; and
5 (b) a debenture holder attends the meeting and votes on the
6 resolution if:
7 (i) they attend the meeting in person and vote on the
8 resolution; or
9 (ii) if proxies are permitted—they are represented at the
10 meeting by a proxy and the proxy votes on the
11 resolution.

12 **283DC Indemnity**

13 The trustee is not liable for anything done or omitted to be done in
14 accordance with a direction given to it by the debenture holders at
15 any meeting called under section 283EA, 283EB or 283 EC.

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Part 2L.5—Meetings of debenture holders

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283EA Borrower's duty to call meeting

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Duty to call meeting

6

(1) The borrower must call a meeting of debenture holders if:

7

(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

8

9

10

(b) the direction is given to the borrower in writing at its registered office; and

11

12

(c) the purpose of the meeting is to:

13

(i) consider the financial statements that were laid before the last AGM of the borrower; or

14

15

(ii) give the trustee directions in relation to the exercise of any of its powers.

16

17

Note: The trustee usually must comply with any directions given to it by the debenture holders at the meeting (see paragraph 283DA(h)).

18

19

Duty to give notification of meeting

20

(2) If the borrower is required to call a meeting, it must give notice of the time and place of the meeting to:

21

22

(a) the trustee; and

23

(b) the borrower's auditor; and

24

(c) each of the debenture holders whose names are entered on the register of debenture holders.

25

26

Notice to joint holders of a debenture must be given to the joint holder named first in the register of debenture holders.

27

28

(3) The borrower may give the notice to a debenture holder:

29

(a) personally; or

30

(b) by sending it by post to the address for the debenture holder in the register of debenture holders; or

31

Section 283EB

- 1 (c) by sending it to the fax number or electronic address (if any)
2 nominated by the debenture holder; or
3 (d) by any other means that the trust deed or the terms of the
4 debentures permit.

5 Note: A defect in the notice may not invalidate a meeting (see section 1322).

6 *When notice by post or fax is given*

- 7 (4) A notice of meeting sent to a debenture holder is taken to be given:
8 (a) 3 days after it is posted, if it is posted; or
9 (b) on the business day after it is sent, if it is sent by fax or other
10 electronic means;
11 unless the trust deed or the terms of the debentures provide
12 otherwise.

13 **283EB Trustee's power to call meeting**

14 *Trustee may call meeting in event of breach*

- 15 (1) If the borrower or a guarantor fails to remedy any breach of the
16 terms of the debentures or provisions of the trust deed or this
17 Chapter when required by the trustee, the trustee may:
18 (a) call a meeting of debenture holders; and
19 (b) inform the debenture holders of the failure at the meeting;
20 and
21 (c) submit proposals for protection of the debenture holders'
22 interests to the meeting; and
23 (d) ask for directions from the debenture holders in relation to
24 the matter.

25 *Trustee may appoint person to chair meeting*

- 26 (2) The trustee may appoint a person to chair a meeting of debenture
27 holders called under subsection (1). If the trustee does not exercise
28 this power, the debenture holders present at the meeting may
29 appoint a person to chair the meeting.

1 **283EC Court may order meeting**

2 (1) Without limiting section 283HA or 283HB, the Court may make an
3 order under either of those sections for a meeting of all or any of
4 the debenture holders to be held to give directions to the trustee.

5 The order may direct the trustee to:

6 (a) place before the debenture holders any information
7 concerning their interests; and

8 (b) place before the debenture holders any proposals to protect
9 their interests that the Court directs or the trustee considers
10 appropriate; and

11 (c) obtain the debenture holders' directions concerning the
12 protection of their interests.

13 (2) The meeting is to be held and conducted in the manner the Court
14 directs. The trustee may appoint a person to chair the meeting. If
15 the trustee does not exercise this power, the debenture holders
16 present at the meeting may appoint a person to chair the meeting.

Section 283F

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Part 2L.6—Civil liability

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283F Civil liability for contravening this Chapter

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(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:

6

7

8

(a) the person who contravened the provision; or

9

(b) a person involved in the contravention.

10

This is so even if the person did not commit, and was not involved in, the contravention.

11

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(2) An action under subsection (1) may begin at any time within 6 years after the day on which the cause of action arose.

13

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(3) This Part does not affect any liability that a person has under any other law.

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Part 2L.7—ASIC powers

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283GA ASIC's power to exempt and modify

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(1) ASIC may:

6

(a) exempt a person from a provision of this Chapter; or

7

(b) declare that this Chapter applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.

8

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10

(2) The exemption or declaration may do all or any of the following:

11

(a) apply to all or specified provisions of this Chapter;

12

(b) apply to all persons, specified persons, or a specified class of persons;

13

14

(c) relate to all debentures, specified debentures or a specified class of debentures;

15

16

(d) relate to any other matter generally or as specified.

17

(3) An exemption may apply unconditionally or subject to specified

18

conditions. A person to whom a condition specified in an

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exemption applies must comply with the condition. The Court may

20

order the person to comply with the condition in a specified way.

21

Only ASIC may apply to the Court for the order.

22

(4) The exemption or declaration must be in writing and ASIC must

23

publish notice of it in the *Gazette*.

24

(5) For the purposes of this section, the *provisions of this Chapter* include:

25

26

(a) regulations made for the purposes of this Chapter; and

27

(b) definitions in this Act or the regulations as they apply to references in:

28

29

(i) this Chapter; or

30

(ii) regulations made for the purposes of this Chapter; and

31

(c) the old Division 12 of Part 11.2 transitionals.

Section 283GB

1 **283GB ASIC may approve body corporate to be trustee**

2 (1) ASIC may approve a body corporate in writing to be a trustee for
3 the purposes of paragraph 283AC(1)(f). The approval may allow
4 the body corporate to act as trustee:

5 (a) in any circumstances; or

6 (b) in relation to a particular borrower or particular class of
7 borrower; or

8 (c) in relation to a particular trust deed;

9 and may be given subject to conditions.

10 (2) ASIC must publish notice of the approval in the *Gazette*.

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Part 2L.8—Court

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283HA General Court power to give directions and determine questions

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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.

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Note: Under this section, the Court may order a meeting of debenture holders to be held, see section 283EC.

14

283HB Specific Court powers

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(1) If the trustee or ASIC applies to the Court, the Court may make any or all of the following orders:

16

17

(a) an order staying an action or other civil proceedings before a court by or against the borrower or a guarantor body;

18

19

(b) an order restraining the borrower from paying any money to the debenture holders or any holders of any other class of debentures;

20

21

22

(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);

23

24

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26

(d) an order appointing a receiver of any property constituting security for the debentures;

27

28

(e) an order restricting advertising by the borrower for deposits or loans;

29

30

(f) an order restricting borrowing by the borrower;

31

32

(g) any other order that the Court considers appropriate to protect the interests of existing or prospective debenture holders.

33

Section 283HB

- 1 (2) In deciding whether to make an order under subsection (1), the
2 Court must have regard to:
- 3 (a) the ability of the borrower and each guarantor to repay the
 - 4 amount deposited or lent as and when it becomes due; and
 - 5 (b) any contravention of section 283GA by the borrower; and
 - 6 (c) the interests of the borrower's members and creditors; and
 - 7 (d) the interests of the members of each of the guarantors.
- 8 Note: The Court may order a meeting of debenture holders to be held (see
9 section 283EC).

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Part 2L.9—Location of other debenture provisions

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283I Signpost to other debenture provisions

5

There are other rules relating to debentures in paragraph 124(1)(b)
and section 563AAA.

6

1
2 **Chapter 2M—Financial reports and audit**

3 **Part 2M.1—Overview**
4

5 **285 Overview of obligations under this Chapter**

6 *Obligations under this Chapter*

- 7 (1) Under this Chapter, all companies, registered schemes and
8 disclosing entities must keep financial records (see sections
9 286-291)—and some must prepare financial reports (see
10 sections 292-323D). All those that have to prepare financial reports
11 have to prepare them annually; disclosing entities have to prepare
12 half-year financial reports as well. The following table sets out
13 what is involved in annual financial reporting:
14

Annual financial reporting		
steps	sections	comments
1 prepare financial report	s. 295	The financial report includes: <ul style="list-style-type: none">• financial statements• disclosures and notes• directors' declaration.
2 prepare directors' report	s. 298	The report has both a general component (s. 299) and a specific component (s. 300).

Annual financial reporting		
steps	sections	comments
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 the relevant Part 10.1 transitionals do not have to lodge.
6 [public companies only] lay financial report, directors' report and auditor's report before AGM	s. 317	For the AGM deadline see s. 250N.

1 *Application to disclosing entities*

2 (2) This Chapter covers all disclosing entities:

Section 285

- 1 (a) incorporated or formed in Australia (whether or not
2 incorporated or formed in this jurisdiction); and
3 (b) whether or not they are companies or registered schemes.

4 *Application to registered schemes*

- 5 (3) For the purposes of applying this Chapter to a registered scheme:
6 (a) the scheme's responsible entity is responsible for the
7 performance of obligations in respect of the scheme; and
8 (b) the directors and officers of the responsible entity are taken
9 to be the directors and officers of the scheme; and
10 (c) the debts incurred in operating the scheme are taken to be the
11 debts of the scheme.

1
2 **Part 2M.2—Financial records**
3

4 **286 Obligation to keep financial records**

- 5 (1) A company, registered scheme or disclosing entity must keep
6 written financial records that:
7 (a) correctly record and explain its transactions and financial
8 position and performance; and
9 (b) would enable true and fair financial statements to be prepared
10 and audited.

11 The obligation to keep financial records of transactions extends to
12 transactions undertaken as trustee.

13 Note: Section 9 defines *financial records*.

14 *Period for which records must be retained*

- 15 (2) The financial records must be retained for 7 years after the
16 transactions covered by the records are completed.

17 **287 Language requirements**

- 18 (1) The financial records may be kept in any language.
19 (2) An English translation of financial records not kept in English must
20 be made available within a reasonable time to a person who:
21 (a) is entitled to inspect the records; and
22 (b) asks for the English translation.

23 **288 Physical format**

24 If financial records are kept in electronic form, they must be
25 convertible into hard copy. Hard copy must be made available
26 within a reasonable time to a person who is entitled to inspect the
27 records.

Section 289

1 **289 Place where records are kept**

- 2 (1) A company, registered scheme or disclosing entity may decide
3 where to keep the financial records.

4 *Records kept outside this jurisdiction*

- 5 (2) If financial records about particular matters are kept outside this
6 jurisdiction, sufficient written information about those matters
7 must be kept in this jurisdiction to enable true and fair financial
8 statements to be prepared. The company, registered scheme or
9 disclosing entity must give ASIC written notice in the prescribed
10 form of the place where the information is kept.

- 11 (3) ASIC may direct a company, registered scheme or disclosing entity
12 to produce specified financial records that are kept outside this
13 jurisdiction.

- 14 (4) The direction must:

- 15 (a) be in writing; and
16 (b) specify a place in this jurisdiction where the records are to be
17 produced (the place must be reasonable in the
18 circumstances); and
19 (c) specify a day (at least 14 days after the direction is given) by
20 which the records are to be produced.

21 **290 Director access**

22 *Personal access*

- 23 (1) A director of a company, registered scheme or disclosing entity has
24 a right of access to the financial records at all reasonable times.

25 *Court order for inspection on director's behalf*

- 26 (2) On application by a director, the Court may authorise a person to
27 inspect the financial records on the director's behalf.
28 (3) A person authorised to inspect records may make copies of the
29 records unless the Court orders otherwise.

Section 291

- 1 (4) The Court may make any other orders it consider appropriate,
2 including either or both of the following:
3 (a) an order limiting the use that a person who inspects the
4 records may make of information obtained during the
5 inspection;
6 (b) an order limiting the right of a person who inspects the
7 records to make copies in accordance with subsection (3).

8 **291 Signposts to other relevant provisions**

9 The following table sets out other provisions that are relevant to
10 access to financial records.
11

Other provisions relevant to access to financial records

		members
1	section 247A	A member may apply to the Court for an order to inspect the records.
		auditor
2	section 310	The auditor has a right of access to the records.
		controllers
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.
		ASIC
4	sections 28 to 39 of the ASIC Act	ASIC has power to inspect the records. It also has power under subsection 289(3) of this Act to call for the production of financial records kept outside this jurisdiction.

Section 291

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