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No. , 2001

(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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1 **Part 2M.3—Financial reporting**

2 **Division 1—Annual financial reports and directors' reports**

3 **292 Who has to prepare annual financial reports and directors'**
4 **reports**

- 5 (1) A financial report and a directors' report must be prepared for each
6 financial year by:
7 (a) all disclosing entities; and
8 (b) all public companies; and
9 (c) all large proprietary companies; and
10 (d) all registered schemes.

11 Note: This Chapter only applies to disclosing entities incorporated or formed
12 in Australia (see subsection 285(2)).

- 13 (2) A small proprietary company has to prepare the financial report
14 and directors' report only if:
15 (a) it is directed to do so under section 293 or 294; or
16 (b) it was controlled by a foreign company for all or part of the
17 year and it is not consolidated for that period in financial
18 statements for that year lodged with ASIC by:
19 (i) a registered foreign company; or
20 (ii) a company, registered scheme or disclosing entity.

21 The rest of this Part does not apply to any other small proprietary
22 company.

23 **293 Small proprietary company—shareholder direction**

- 24 (1) Shareholders with at least 5% of the votes in a small proprietary
25 company may give the company a direction to:
26 (a) prepare a financial report and directors' report for a financial
27 year; and
28 (b) send them to all shareholders.
29 (2) The direction must be:

- 1 (a) signed by the shareholders giving the direction; and
2 (b) made no later than 12 months after the end of the financial
3 year concerned.
- 4 (3) The direction may specify all or any of the following:
5 (a) that the financial report does not have to comply with some
6 or all of the accounting standards;
7 (b) that a directors' report or a part of that report need not be
8 prepared;
9 (c) that the financial report is to be audited.

10 **294 Small proprietary company—ASIC direction**

- 11 (1) ASIC may give a small proprietary company a direction to comply
12 with requirements of this Division and Divisions 3, 4, 5 and 6 for a
13 financial year.
- 14 (2) The direction may be general or may specify the particular
15 requirements that the company is to comply with.
- 16 (3) The direction must specify the date by which the documents have
17 to be prepared, sent or lodged. The date must be a reasonable one
18 in view of the nature of the direction.
- 19 (4) The direction must:
20 (a) be made in writing; and
21 (b) specify the financial year concerned; and
22 (c) be made no later than 6 years after the end of that financial
23 year.

24 **295 Contents of annual financial report**

25 *Basic contents*

- 26 (1) The financial report for a financial year consists of:
27 (a) the financial statements for the year; and
28 (b) the notes to the financial statements; and
29 (c) the directors' declaration about the statements and notes.

1 *Financial statements*

- 2 (2) The financial statements for the year are:
- 3 (a) a profit and loss statement for the year; and
- 4 (b) a balance sheet as at the end of the year; and
- 5 (c) a statement of cash flows for the year; and
- 6 (d) if required by the accounting standards—a consolidated
- 7 profit and loss statement, balance sheet and statement of cash
- 8 flows.

9 *Notes to financial statements*

- 10 (3) The notes to the financial statements are:
- 11 (a) disclosures required by the regulations; and
- 12 (b) notes required by the accounting standards; and
- 13 (c) any other information necessary to give a true and fair view
- 14 (see section 297).

15 *Directors' declaration*

- 16 (4) The directors' declaration is a declaration by the directors:
- 17 (a) that the financial statements, and the notes referred to in
- 18 paragraph (3)(b), comply with the accounting standards; and
- 19 (b) that the financial statements and notes give a true and fair
- 20 view (see section 297); and
- 21 (c) whether, in the directors' opinion, there are reasonable
- 22 grounds to believe that the company, registered scheme or
- 23 disclosing entity will be able to pay its debts as and when
- 24 they become due and payable; and
- 25 (d) whether, in the directors' opinion, the financial statement and
- 26 notes are in accordance with this Act, including:
- 27 (i) section 296 (compliance with accounting standards);
- 28 and
- 29 (ii) section 297 (true and fair view).

30 Note: See paragraph 285(3)(c) for the reference to the debts of a registered

31 scheme.

- 32 (5) The declaration must:

- 1 (a) be made in accordance with a resolution of the directors; and
2 (b) specify the date on which the declaration is made; and
3 (c) be signed by a director.

4 **296 Compliance with accounting standards and regulations**

- 5 (1) The financial report for a financial year must comply with the
6 accounting standards. However, a small proprietary company's
7 report does not have to comply with particular accounting
8 standards if:
9 (a) the report is prepared in response to a shareholder direction
10 under section 293; and
11 (b) the direction specifies that the report does not have to comply
12 with those accounting standards.
13 (2) The financial report must comply with any further requirements in
14 the regulations.

15 **297 True and fair view**

- 16 The financial statements and notes for a financial year must give a
17 true and fair view of:
18 (a) the financial position and performance of the company,
19 registered scheme or disclosing entity; and
20 (b) if consolidated financial statements are required—the
21 financial position and performance of the consolidated entity.
22 This section does not affect the obligation under section 296 for a
23 financial report to comply with accounting standards.
24 Note: If the financial statements and notes prepared in compliance with the
25 accounting standards would not give a true and fair view, additional
26 information must be included in the notes to the financial statements
27 under paragraph 295(3)(c).

28 **298 Annual directors' report**

- 29 (1) The company, registered scheme or disclosing entity must prepare
30 a directors' report for each financial year. The report must include:
31 (a) the general information required by section 299; and
32 (b) the specific information required by section 300.

- 1 (2) The report must:
- 2 (a) be made in accordance with a resolution of the directors; and
- 3 (b) specify the date on which the report is made; and
- 4 (c) be signed by a director.
- 5 (3) A small proprietary company does not have to comply with
- 6 subsection (1) for a financial year if:
- 7 (a) it is preparing financial statements for that year in response to
- 8 a shareholder direction under section 293; and
- 9 (b) the direction specified that a directors' report need not be
- 10 prepared.

11 **299 Annual directors' report—general information**

12 *General information about operations and activities*

- 13 (1) The directors' report for a financial year must:
- 14 (a) contain a review of operations during the year of the entity
- 15 reported on and the results of those operations; and
- 16 (b) give details of any significant changes in the entity's state of
- 17 affairs during the year; and
- 18 (c) state the entity's principal activities during the year and any
- 19 significant changes in the nature of those activities during the
- 20 year; and
- 21 (d) give details of any matter or circumstance that has arisen
- 22 since the end of the year that has significantly affected, or
- 23 may significantly affect:
- 24 (i) the entity's operations in future financial years; or
- 25 (ii) the results of those operations in future financial years;
- 26 or
- 27 (iii) the entity's state of affairs in future financial years; and
- 28 (e) refer to likely developments in the entity's operations in
- 29 future financial years and the expected results of those
- 30 operations; and
- 31 (f) if the entity's operations are subject to any particular and
- 32 significant environmental regulation under a law of the

1 Commonwealth or of a State or Territory—give details of the
2 entity's performance in relation to environmental regulation.

- 3 (2) The entity reported on is:
4 (a) the company, registered scheme or disclosing entity (if
5 consolidated financial statements are not required); or
6 (b) the consolidated entity (if consolidated financial statements
7 are required).

8 *Prejudicial information need not be disclosed*

- 9 (3) The report may omit material that would otherwise be included
10 under paragraph (1)(e) if it is likely to result in unreasonable
11 prejudice to:
12 (a) the company, registered scheme or disclosing entity; or
13 (b) if consolidated financial statements are required—the
14 consolidated entity or any entity (including the company,
15 registered scheme or disclosing entity) that is part of the
16 consolidated entity.

17 If material is omitted, the report must say so.

18 **300 Annual directors' report—specific information**

- 19 (1) The directors' report for a financial year must include details of:
20 (a) dividends or distributions paid to members during the year;
21 and
22 (b) dividends or distributions recommended or declared for
23 payment to members, but not paid, during the year; and
24 (c) the name of each person who has been a director of the
25 company, registered scheme or disclosing entity at any time
26 during or since the end of the year and the period for which
27 they were a director; and
28 (d) options that are:
29 (i) granted over unissued shares or unissued interests
30 during or since the end of the year; and
31 (ii) granted to any of the directors or any of the 5 most
32 highly remunerated officers of the company; and
33 (iii) granted to them as part of their remuneration;

- 1 (see subsections (3), (4) and (5)); and
2 (e) unissued shares or interests under option as at the day the
3 report is made (see subsections (3) and (6)); and
4 (f) shares or interests issued during or since the end of the year
5 as a result of the exercise of an option over unissued shares
6 or interests (see subsections (3) and (7)); and
7 (g) indemnities given and insurance premiums paid during or
8 since the end of the year for a person who is or has been an
9 officer or auditor (see subsections (8) and (9)).
10 Public companies, listed companies and registered schemes must
11 include additional information under subsections (10), (11), (12)
12 and (13).
- 13 (2) Details do not have to be included in the directors' report under
14 this section if they are included in the company's financial report
15 for the financial year.
- 16 (3) Paragraphs (1)(d), (e) and (f) cover:
17 (a) options over unissued shares and interests of the company,
18 registered scheme or disclosing entity; and
19 (b) if consolidated financial statements are required—options
20 over unissued shares and interests of any controlled entity
21 that is a company, registered scheme or disclosing entity.

22 *Options details*

- 23 (5) The details of an option granted are:
24 (a) the company, registered scheme or disclosing entity granting
25 the option; and
26 (b) the name of the person to whom the option is granted; and
27 (c) the number and class of shares or interests over which the
28 option is granted.
- 29 (6) The details of unissued shares or interests under option are:
30 (a) the company, registered scheme or disclosing entity that will
31 issue shares or interests when the options are exercised; and
32 (b) the number and classes of those shares or interests; and

- 1 (c) the issue price, or the method of determining the issue price,
2 of those shares or interests; and
3 (d) the expiry date of the options; and
4 (e) any rights that option holders have under the options to
5 participate in any share issue or interest issue of the
6 company, registered scheme or disclosing entity or of any
7 other body corporate or registered scheme.

8 *Shares or interests issued as a result of exercise of option*

- 9 (7) The details of shares or interests issued as a result of the exercise
10 of an option are:
11 (a) the company, registered scheme or disclosing entity issuing
12 the shares or interests; and
13 (b) the number of shares or interests issued; and
14 (c) if the company, registered scheme or disclosing entity has
15 different classes of shares or interests—the class to which
16 each of those shares or interests belongs; and
17 (d) the amount unpaid on each of those shares or interests; and
18 (e) the amount paid, or agreed to be considered as paid, on each
19 of those shares or interests.

20 *Indemnities and insurance premiums for officers or auditors*

- 21 (8) The report for a company must include details of:
22 (a) any indemnity that is given to a current or former officer or
23 auditor against a liability and that is covered by subsection
24 199A(2) or (3), or any relevant agreement under which an
25 officer or auditor may be given an indemnity of that kind;
26 and
27 (b) any premium that is paid, or agreed to be paid, for insurance
28 against a current or former officer's or auditor's liability for
29 legal costs.

30 Note: Sections 199A and 199B contain general prohibitions against giving
31 certain indemnities and paying certain insurance premiums. This
32 subsection requires transactions that are exceptions to these
33 prohibitions to be reported.

- 34 (9) The details required under subsection (8) are:

- 1 (a) for an officer—their name or the class of officer to which
2 they belong or belonged; and
3 (b) for an auditor—their name; and
4 (c) the nature of the liability; and
5 (d) for an indemnity given—the amount the company paid and
6 any other action the company took to indemnify the officer or
7 auditor; and
8 (e) for an agreement to indemnify—the amount that the relevant
9 agreement requires the company to pay and any other action
10 the relevant agreement requires the company to take to
11 indemnify the officer or auditor; and
12 (f) for an insurance premium—the amount of the premium.

13 The report need not give details of the nature of the liability
14 covered by, or the amount of the premium payable under, a
15 contract of insurance to the extent that disclosure of those details is
16 prohibited by the insurance contract.

17 *Special rules for public companies*

- 18 (10) The report for a public company that is not a wholly-owned
19 subsidiary of another company must also include details of:
20 (a) each director's qualifications, experience and special
21 responsibilities; and
22 (b) the number of meetings of the board of directors held during
23 the year and each director's attendance at those meetings;
24 and
25 (c) the number of meetings of each board committee held during
26 the year and each director's attendance at those meetings.

27 *Special rules for listed companies*

- 28 (11) The report for a listed company must also include the following
29 details for each director:
30 (a) their relevant interests in shares of the company or a related
31 body corporate;
32 (b) their relevant interests in debentures of, or interests in a
33 registered scheme made available by, the company or a
34 related body corporate;

1 (c) their rights or options over shares in, debentures of or
2 interests in a registered scheme made available by, the
3 company or a related body corporate;

4 (d) contracts:

5 (i) to which the director is a party or under which the
6 director is entitled to a benefit; and

7 (ii) that confer a right to call for or deliver shares in, or
8 debentures of or interests in a registered scheme made
9 available by the company or a related body corporate.

10 Note: Directors must also disclose interests of these kinds to the ASX under
11 section 205G as they are acquired.

12 *Special rules for listed registered schemes*

13 (12) The report for a registered scheme whose interests are quoted on a
14 stock market of a securities exchange must also include the
15 following details for each director of the company that is the
16 responsible entity for the scheme:

17 (a) their relevant interests in interests in the scheme;

18 (b) their rights or options over interests in the scheme;

19 (c) contracts to which the director is a party or under which the
20 director is entitled to a benefit and that confer a right to call
21 for or deliver interests in the scheme.

22 *Special rules for registered schemes*

23 (13) The report for a registered scheme must also include details of:

24 (a) the fees paid to the responsible entity and its associates out of
25 scheme property during the financial year; and

26 (b) the number of interests in the scheme held by the responsible
27 entity or its associates as at the end of the financial year; and

28 (c) interests in the scheme issued during the financial year; and

29 (d) withdrawals from the scheme during the financial year; and

30 (e) the value of the scheme's assets as at the end of the financial
31 year, and the basis for the valuation; and

32 (f) the number of interests in the scheme as at the end of the
33 financial year.

1 *Proceedings on behalf of a company*

- 2 (14) The report for a company must also include the following details of
3 any application for leave under section 237 made in respect of the
4 company:
5 (a) the applicant's name; and
6 (b) a statement whether leave was granted.
- 7 (15) The report for a company must also include the following details of
8 any proceedings that a person has brought or intervened in on
9 behalf of the company with leave under section 237:
10 (a) the person's name;
11 (b) the names of the parties to the proceedings;
12 (c) sufficient information to enable members to understand the
13 nature and status of the proceedings (including the cause of
14 action and any orders made by the court).

15 **300A Annual directors' report—specific information to be provided**
16 **by listed companies**

- 17 (1) The directors' report for a financial year for a company must also
18 include:
19 (a) discussion of board policy for determining the nature and
20 amount of emoluments of board members and senior
21 executives of the company; and
22 (b) discussion of the relationship between such policy and the
23 company's performance; and
24 (c) details of the nature and amount of each element of the
25 emolument of each director and each of the 5 named officers
26 of the company receiving the highest emolument.
- 27 (2) This section applies only to a company that is included in an
28 official list of the Exchange.
- 29 (3) This section applies despite anything in the company's
30 constitution.

1 **301 Audit of annual financial report**

- 2 (1) A company, registered scheme or disclosing entity must have the
3 financial report for a financial year audited in accordance with
4 Division 3 and obtain an auditor's report.
- 5 (2) A small proprietary company's financial report for a financial year
6 does not have to be audited if:
- 7 (a) the report is prepared in response to a direction under
8 section 293; and
9 (b) the direction did not ask for the financial report to be audited.

1

2 **Division 2—Half-year financial report and directors’**
3 **report**

4 **302 Disclosing entity must prepare half-year financial report and**
5 **directors’ report**

6 A disclosing entity must:

- 7 (a) prepare a financial report and directors’ report for each
8 half-year; and
9 (b) have the financial report audited or reviewed in accordance
10 with Division 3 and obtain an auditor’s report; and
11 (c) lodge the financial report, the directors’ report and the
12 auditor’s report on the financial report with ASIC;

13 unless the entity is not a disclosing entity when lodgment is due.

14 Note 1: This Chapter only applies to disclosing entities incorporated or formed
15 in Australia (see subsection 285(2)).

16 Note 2: See section 320 for the time for lodgment with ASIC.

17 Note 3: Subsection 318(4) requires disclosing entities that are borrowers in
18 relation to debentures to also report to the trustee for debenture
19 holders.

20 **303 Contents of half-year financial report**

21 *Basic contents*

- 22 (1) The financial report for a half-year consists of:
23 (a) the financial statements for the half-year; and
24 (b) the notes to the financial statements; and
25 (c) the directors’ declaration about the statements and notes.

26 *Financial statements*

- 27 (2) The financial statements for the half-year are:
28 (a) except where paragraph (b) applies:
29 (i) a profit and loss statement for the half-year; and
30 (ii) a balance sheet as at the end of the half-year; and

- 1 (iii) a statement of cash flows for the half-year; and
2 (b) if required by the accounting standards—a consolidated
3 profit and loss statement, balance sheet and statement of cash
4 flows.

5 *Notes to financial statements*

- 6 (3) The notes to the financial statements are:
7 (a) disclosures required by the regulations; and
8 (b) notes required by the accounting standards; and
9 (c) any other information necessary to give a true and fair view
10 (see section 305).

11 *Directors' declaration*

- 12 (4) The directors' declaration is a declaration by the directors:
13 (a) that the financial statements, and the notes referred to in
14 paragraph (3)(b), comply with the accounting standards; and
15 (b) that the financial statements and notes give a true and fair
16 view (see section 305); and
17 (c) whether, in the directors' opinion, there are reasonable
18 grounds to believe that the disclosing entity will be able to
19 pay its debts as and when they become due and payable.

20 Note: See paragraph 285(3)(c) for the reference to the debts of a disclosing
21 entity that is a registered scheme.

- 22 (5) The declaration must:
23 (a) be made in accordance with a resolution of the directors; and
24 (b) specify the day on which the declaration is made; and
25 (c) be signed by a director.

26 **304 Compliance with accounting standards and regulations**

27 The financial report for a half-year must comply with the
28 accounting standards and any further requirements in the
29 regulations.

1 **305 True and fair view**

2 The financial statements and notes for a half-year must give a true
3 and fair view of:

- 4 (a) the financial position and performance of the disclosing
5 entity; or
6 (b) if consolidated financial statements are required—the
7 financial position and performance of the consolidated entity.

8 This section does not affect the obligation under section 304 for
9 financial reports to comply with accounting standards.

10 Note: If the financial statements prepared in compliance with the accounting
11 standards would not give a true and fair view, additional information
12 must be included in the notes to the financial statements under
13 paragraph 303(3)(c).

14 **306 Half-year directors' report**

15 The directors of the disclosing entity must prepare a directors'
16 report for each half-year that consists of:

- 17 (a) a review of the entity's operations during the half-year and
18 the results of those operations; and
19 (b) the name of each person who has been a director of the
20 disclosing entity at any time during or since the end of the
21 half-year and the period for which they were a director.

22 If consolidated financial statements are required, the review under
23 paragraph (a) must cover the consolidated entity.

1

2 **Division 3—Audit and auditor's report**

3 **307 Audit**

4 An auditor who conducts an audit of the financial report for a
5 financial year or half-year must form an opinion about:

6 (a) whether the financial report is in accordance with this Act,
7 including:

8 (i) section 296 or 304 (compliance with accounting
9 standards); and

10 (ii) section 297 or 305 (true and fair view); and

11 (b) whether the auditor has been given all information,
12 explanation and assistance necessary for the conduct of the
13 audit; and

14 (c) whether the company, registered scheme or disclosing entity
15 has kept financial records sufficient to enable a financial
16 report to be prepared and audited; and

17 (d) whether the company, registered scheme or disclosing entity
18 has kept other records and registers as required by this Act.

19 **308 Auditor's report on annual financial report**

20 (1) An auditor who audits the financial report for a financial year must
21 report to members on whether the auditor is of the opinion that the
22 financial report is in accordance with this Act, including:

23 (a) section 296 (compliance with accounting standards); and

24 (b) section 297 (true and fair view).

25 If not of that opinion, the auditor's report must say why.

26 (2) If the auditor is of the opinion that the financial report does not
27 comply with an accounting standard, the auditor's report must, to
28 the extent it is practicable to do so, quantify the effect that
29 non-compliance has on the financial report. If it is not practicable
30 to quantify the effect fully, the report must say why.

31 (3) The auditor's report must describe:

32 (a) any defect or irregularity in the financial report; and

1 (b) any deficiency, failure or shortcoming in respect of the
2 matters referred to in paragraph 307(b), (c) or (d).

3 (4) The report must specify the date on which it is made.

4 **309 Auditor's report on half-year financial report**

5 *Audit of financial report*

6 (1) An auditor who audits the financial report for a half-year must
7 report to members on whether the auditor is of the opinion that the
8 financial report is in accordance with this Act, including:
9 (a) section 304 (compliance with accounting standards); and
10 (b) section 305 (true and fair view).

11 If not of that opinion, the auditor's report must say why.

12 (2) If the auditor is of the opinion that the financial report does not
13 comply with an accounting standard, the auditor's report must, to
14 the extent that it is practicable to do so, quantify the effect that
15 non-compliance has on the financial report. If it is not practicable
16 to quantify the effect fully, the report must say why.

17 (3) The auditor's report must describe:
18 (a) any defect or irregularity in the financial report; and
19 (b) any deficiency, failure or shortcoming in respect of the
20 matters referred to in paragraph 307(b), (c) or (d).

21 *Review of financial report*

22 (4) An auditor who reviews the financial report for a half-year must
23 report to members on whether the auditor became aware of any
24 matter in the course of the review that makes the auditor believe
25 that the financial report does not comply with Division 2.

26 (5) A report under subsection (4) must:
27 (a) describe any matter referred to in subsection (4); and
28 (b) say why that matter makes the auditor believe that the
29 financial report does not comply with Division 2.

1 *Report to specify day made*

2 (6) A report under subsection (1) or (4) must specify the date on which
3 it is made.

4 **310 Auditor's power to obtain information**

5 The auditor:

- 6 (a) has a right of access at all reasonable times to the books of
7 the company, registered scheme or disclosing entity; and
8 (b) may require any officer to give the auditor information,
9 explanations or other assistance for the purposes of the audit
10 or review.

11 A request under paragraph (b) must be a reasonable one.

12 **311 Reporting to ASIC**

13 The auditor conducting an audit or review must, as soon as
14 possible, notify ASIC in writing if the auditor:

- 15 (a) has reasonable grounds to suspect that a contravention of this
16 Act has occurred; and
17 (b) believes that the contravention has not been or will not be
18 adequately dealt with by commenting on it in the auditor's
19 report or bringing it to the attention of the directors.

20 Note: Section 1289 gives an auditor qualified privilege for a notification to
21 ASIC under this section.

22 **312 Assisting auditor**

23 An officer of a company, registered scheme or disclosing entity
24 must:

- 25 (a) allow the auditor access to the books of the company, scheme
26 or entity; and
27 (b) give the auditor any information, explanation or assistance
28 required under section 310.

29 Note: Books include registers and documents generally (not only the
30 accounting "books"): see the definition of *books* in section 9.

1 **313 Special provisions on audit of debenture issuers and guarantors**

2 *Auditor to give trustee for debenture holders copies of reports,*
3 *certificates etc.*

4 (1) The auditor of a borrower in relation to debentures must give the
5 trustee for debenture holders:

6 (a) a copy of any report, certificate or other document that the
7 auditor must give the borrower or its members under this
8 Act, the debentures or the trust deed; and

9 (b) a copy of any document that accompanies it.

10 The copies must be given within 7 days after the auditor gives the
11 originals to the borrower or its members.

12 *Auditor to report on matters prejudicial to debenture holders'*
13 *interests*

14 (2) The auditor of a borrower, or guarantor, in relation to debentures
15 must give the borrower or guarantor a written report about any
16 matter that:

17 (a) the auditor became aware of in conducting the audit or
18 review; and

19 (b) in the auditor's opinion, is or is likely to be prejudicial to the
20 interests of debenture holders; and

21 (c) in the auditor's opinion, is relevant to the exercise of the
22 powers of the trustee for debenture holders, or the
23 performance of the trustee's duties, under this Act or the trust
24 deed.

25 The auditor must give a copy of the report to the trustee for
26 debenture holders. The report and the copy must be given within 7
27 days after the auditor becomes aware of the matter.

1

2 **Division 4—Annual financial reporting to members**

3 **314 Annual financial reporting to members**

4 *Full or concise report to members*

- 5 (1) A company, registered scheme or disclosing entity must report to
6 members for a financial year by either:
7 (a) sending members copies of:
8 (i) the financial report for the year; and
9 (ii) the directors' report for the year (see sections 298-300);
10 and
11 (iii) the auditor's report on the financial report; or
12 (b) sending members a concise report for the year that complies
13 with subsection (2).

14 *Concise report*

- 15 (2) A concise report for a financial year consists of:
16 (a) a concise financial report for the year drawn up in accordance
17 with accounting standards made for the purposes of this
18 paragraph; and
19 (b) the directors' report for the year (see sections 298-300); and
20 (c) a statement by the auditor:
21 (i) that the financial report has been audited; and
22 (ii) whether, in the auditor's opinion, the concise financial
23 report complies with the accounting standards made for
24 the purposes of paragraph (a); and
25 (d) a copy of any qualification in, and of any statements included
26 in the emphasis of matter section of, the auditor's report on
27 the financial report; and
28 (e) a statement that the report is a concise report and that the full
29 financial report and auditor's report will be sent to the
30 member free of charge if the member asks for them.

- 1 (3) If the accounting standards made for the purposes of
2 paragraph (2)(a) require a discussion and analysis to be included in
3 a concise financial report:
4 (a) the auditor must report on whether the discussion and
5 analysis complies with the requirements that the accounting
6 standards lay down for the discussion and analysis; and
7 (b) the auditor does not otherwise need to audit the statements
8 made in the discussion and analysis.

9 **315 Deadline for reporting to members**

10 *Public companies and disclosing entities that are not registered*
11 *schemes*

- 12 (1) A public company, or a disclosing entity that is not a registered
13 scheme, must report to members under section 314 by the earlier
14 of:
15 (a) 21 days before the next AGM after the end of the financial
16 year; or
17 (b) 4 months after the end of the financial year.

18 Note: For the deadline for holding an AGM, see section 250N.

19 *Small proprietary companies (shareholder direction under*
20 *section 293)*

- 21 (2) If a shareholder direction is given to a small proprietary company
22 under section 293 after the end of the financial year, the company
23 must report to members under section 314 by the later of:
24 (a) 2 months after the date on which the direction is given; and
25 (b) 4 months after the end of the financial year.

26 *Registered schemes*

- 27 (3) A registered scheme must report to members under section 314
28 within 3 months after the end of the financial year.

1 *Other proprietary companies*

2 (4) A proprietary company that is not covered by subsection (1) or (2)
3 must report to members under section 314 within 4 months after
4 the end of the financial year.

5 **316 Member's choices for annual financial information**

6 (1) A member may request the company, registered scheme or
7 disclosing entity:
8 (a) not to send them the material required by section 314; or
9 (b) to send them a full financial report and the directors' report
10 and auditor's report.

11 A request may be a standing request or for a particular financial
12 year. The member is not entitled to a report for a financial year
13 earlier than the one before the financial year in which the request is
14 made.

15 (2) The time for complying with a request under paragraph (1)(b) is:
16 (a) 7 days after the request is received; or
17 (b) the deadline for reporting under section 315;
18 whichever is later.

19 (3) A full financial report, directors' report and auditor's report are to
20 be sent free of charge unless the member has already received a
21 copy of them free of charge.

22 **317 Consideration of reports at AGM**

23 The directors of a public company that is required to hold an AGM
24 must lay before the AGM:

25 (a) the financial report; and
26 (b) the directors' report; and
27 (c) the auditor's report;

28 for the last financial year that ended before the AGM.

29 Note 1: If the company's first AGM is held before the end of its first financial
30 year, there will be no reports to lay before the meeting.

1 Note 2: A public company that has only 1 member is not required to hold an
2 AGM (see section 250N).

3 **318 Additional reporting by debenture issuers**

- 4 (1) A company or disclosing entity that was a borrower in relation to
5 debentures at the end of a financial year must give a copy of the
6 annual financial report, directors' report and auditor's report to the
7 trustee for debenture holders by the deadline for the financial year
8 set by section 315.
- 9 (2) A debenture holder may ask the company or disclosing entity that
10 issued the debenture for copies of:
- 11 (a) the last reports sent to members under section 314; or
12 (b) the full financial report and the directors' report and auditor's
13 report for the last financial year.
- 14 (3) The company or entity must give the debenture holder the copies
15 as soon as practicable after the request and free of charge.
- 16 (4) A disclosing entity that was a borrower in relation to debentures at
17 the end of a half-year must give a copy of the half-year financial
18 report, directors' report and auditor's report to the trustee for
19 debenture holders within 75 days after the end of the half-year.

1

2 **Division 5—Lodging reports with ASIC**

3 **319 Lodgment of annual reports with ASIC**

4

(1) A company, registered scheme or disclosing entity that has to
prepare or obtain a report for a financial year under Division 1
must lodge the report with ASIC. This obligation extends to a
concise report sent to members under section 314.

5

6

7

8

(2) Subsection (1) does not apply to a small proprietary company that
prepares a report in response to a shareholder direction under
section 293 or an ASIC direction under section 294.

9

10

11

(3) The time for lodgment is:

12

(a) within 3 months after the end of the financial year for a
disclosing entity or registered scheme; and

13

14

(b) within 4 months after the end of the financial year for anyone
else.

15

16

(5) A company that has the benefit of subsection (4) must lodge with
ASIC notice of any of the following events:

17

18

(a) the resignation or retirement of the company's auditor;

19

(b) the appointment of a new auditor (including details of the
new auditor).

20

21

The notice must be lodged within 14 days after the resignation,
retirement or appointment.

22

23

(6) For the purposes of paragraph (4)(d), the deadline for reporting to
members is:

24

25

(a) for a financial year ending after 1 July 1998—the deadline
for reporting to members under section 315; and

26

27

(b) for an earlier financial year—the deadline for that year within
the meaning of the old Corporations Law for a State or
Territory in this jurisdiction as in force immediately before
1 July 1998.

28

29

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1 **320 Lodgment of half-year reports with ASIC**

2 A disclosing entity that has to prepare or obtain a report for a
3 half-year under Division 2 must lodge the report with ASIC within
4 75 days after the end of the half-year.

5 **321 ASIC power to require lodgment**

6 (1) ASIC may give a company, registered scheme or disclosing entity
7 a direction to lodge with ASIC a copy of reports prepared or
8 obtained by it under Division 1 or 2.

9 (2) The direction must:

- 10 (a) be made in writing; and
11 (b) specify the period or periods concerned; and
12 (c) be made no later than 6 years after the end of the period or
13 periods; and
14 (d) specify the date by which the documents have to be lodged.
15 The date specified under paragraph (d) must be at least 14 days
16 after the date on which the direction is given.

17 **322 Relodgment if financial statements or directors' reports**
18 **amended after lodgment**

- 19 (1) If a financial report or directors' report is amended after it is
20 lodged with ASIC, the company, registered scheme or disclosing
21 entity must:
22 (a) lodge the amended report with ASIC within 14 days after the
23 amendment; and
24 (b) give a copy of the amended report free of charge to any
25 member who asks for it.
- 26 (2) If the amendment is a material one, the company, registered
27 scheme or disclosing entity must also notify members as soon as
28 practicable of:
29 (a) the nature of the amendment; and
30 (b) their right to obtain a copy of the amended report under
31 subsection (1).

1

2 **Division 6—Special provisions about consolidated financial**
3 **statements**

4 **323 Directors and officers of controlled entity to give information**

5 If a company, registered scheme or disclosing entity has to prepare
6 consolidated financial statements, a director or officer of a
7 controlled entity must give the company, registered scheme or
8 disclosing entity all information requested that is necessary to
9 prepare the consolidated financial statements and the notes to those
10 statements.

11 **323A Auditor’s power to obtain information from controlled entity**

- 12 (1) An auditor who audits or reviews a financial report that includes
13 consolidated financial statements:
- 14 (a) has a right of access at all reasonable times to the books of
15 any controlled entity; and
 - 16 (b) may require any officer of the entity to give the auditor
17 information, explanations or other assistance for the purposes
18 of the audit or review.

19 A request under paragraph (b) must be a reasonable one.

- 20 (2) The information, explanations or other assistance required under
21 paragraph (1)(b) is to be given at the expense of the company,
22 registered scheme or disclosing entity whose financial report is
23 being audited or reviewed.

24 **323B Controlled entity to assist auditor**

25 If a company, registered scheme or disclosing entity has to prepare
26 a financial report that includes consolidated financial statements,
27 an officer or auditor of a controlled entity must:

- 28 (a) allow the auditor for the company, scheme or entity access to
29 the controlled entity’s books; and
- 30 (b) give the auditor any information, explanation or assistance
31 required under section 323A.

1 **323C Application of Division to entity that has ceased to be**
2 **controlled**

3 Sections 323, 323A and 323B apply to the preparation or audit of a
4 financial report that covers a controlled entity even if the entity is
5 no longer controlled by the company, registered scheme or
6 disclosing entity whose financial report is being prepared or
7 audited.

1

2 **Division 7—Financial years and half-years**

3 **323D Financial years and half-years**

4 *First financial year*

- 5 (1) The first financial year for a company, registered scheme or
6 disclosing entity starts on the day on which it is registered or
7 incorporated. It lasts for 12 months or the period (not longer than
8 18 months) determined by the directors.

9 *Financial years after first year*

- 10 (2) Subject to subsection (4), subsequent financial years must:
11 (a) start at the end of the previous financial year; and
12 (b) be 12 months long.

13 The directors may determine that the financial year is to be shorter
14 or longer (but not by more than 7 days).

15 *Synchronisation of financial years where consolidated financial*
16 *statements are required*

- 17 (3) A company, registered scheme or disclosing entity that has to
18 prepare consolidated financial statements must do whatever is
19 necessary to ensure that the financial years of the consolidated
20 entities are synchronised with its own financial years. It must
21 achieve this synchronisation by the end of 12 months after the
22 situation that calls for consolidation arises.
- 23 (4) To facilitate this synchronisation, the financial year for a controlled
24 entity may be extended or shortened. The extended financial year
25 cannot be longer than 18 months.

26 *Half-years*

- 27 (5) A half-year for a company, registered scheme or disclosing entity
28 is the first 6 months of a financial year. The directors may
29 determine that the half-year is to be shorter or longer (but not by
30 more than 7 days).

1

2 **Division 8—Disclosure by listed companies of information**
3 **filed overseas**

4 **323DA Listed companies to disclose information filed overseas**

- 5 (1) A company that discloses information to, or as required by:
6 (a) the Securities and Exchange Commission of the United
7 States of America; or
8 (b) the New York Stock Exchange; or
9 (c) a prescribed securities exchange in a foreign country;
10 must disclose that information in English to the Exchange on the
11 next business day after doing so.
- 12 (2) This section applies only to a company that is included in an
13 official list of the Exchange.
- 14 (3) This section applies despite anything in the company's
15 constitution.

1

2 **Part 2M.4—Appointment and removal of auditors**

3 **Division 1—Companies**

4 **324 Qualifications of auditors**

5 (1) Subject to this section, a person must not:

- 6 (a) consent to be appointed as auditor of a company;
- 7 (b) act as auditor of a company; or
- 8 (c) prepare a report required by this Act to be prepared by a
- 9 registered company auditor or by an auditor of a company;

10 if:

- 11 (d) the person is not a registered company auditor;
- 12 (e) the person, or a body corporate in which the person has a
- 13 substantial holding, owes more than \$5,000 to the company,
- 14 to a related body corporate or to an entity that the company
- 15 controls; or
- 16 (f) except where the company is a proprietary company, the
- 17 person:
- 18 (i) is an officer of the company; or
- 19 (ii) is a partner, employer or employee of an officer of the
- 20 company; or
- 21 (iii) is a partner or employee of an employee of an officer of
- 22 the company.

23 (2) Subject to this section, a firm must not:

- 24 (a) consent to be appointed as auditor of a company; or
- 25 (b) act as auditor of a company; or
- 26 (c) prepare a report required by this Act to be prepared by a
- 27 registered company auditor or by an auditor of a company;

28 unless:

- 29 (d) at least 1 member of the firm is a registered company auditor
- 30 who is ordinarily resident in Australia; and
- 31 (e) the business name under which the firm is carrying on
- 32 business is registered under a law of a State or Territory

- 1 relating to the registration of business names or a return in
2 the prescribed form has been lodged showing, in relation to
3 each member of the firm, the member's full name and
4 address as at the time when the firm so consents, acts or
5 prepares a report; and
- 6 (f) no member of the firm, and no body corporate in which a
7 member of the firm has a substantial holding, owes more
8 than \$5,000 to the company, to a related body corporate or to
9 an entity that the company controls; and
- 10 (g) except where the company is a proprietary company, no
11 member of the firm is:
- 12 (i) an officer of the company; or
13 (ii) a partner, employer or employee of an officer of the
14 company; or
15 (iii) a partner or employee of an employee of an officer of
16 the company; and
- 17 (h) except where the company is a proprietary company, no
18 officer of the company receives any remuneration from the
19 firm for acting as a consultant to it on accounting or auditing
20 matters.
- 21 (3) For the purposes of paragraphs (1)(e) and (2)(f), disregard a debt
22 owed by a natural person to a body corporate or entity if:
- 23 (a) the body corporate or entity is:
- 24 (i) an Australian ADI; or
25 (ii) a body corporate registered under the *Life Insurance Act*
26 *1995*; and
- 27 (b) the debt arose because of a loan that the body corporate or
28 entity made to the person in the ordinary course of its
29 ordinary business; and
- 30 (c) the person used the amount of the loan to pay the whole or
31 part of the purchase price of premises that the person uses as
32 their principal place of residence.
- 33 (4) For the purposes of subsections (1) and (2), a person is taken to be
34 an officer of a company if:
- 35 (a) the person is an officer of a related body corporate or of an
36 entity that the company controls; or

- 1 (b) except where ASIC, if it thinks fit in the circumstances of the
2 case, directs that this paragraph is not apply in relation to the
3 person in relation to the company—the person has, at any
4 time within the immediately preceding period of 12 months,
5 been an officer or promoter of the company, of a related body
6 corporate or of an entity that the company controlled at that
7 time.
- 8 (5) For the purposes of this section, a person is not taken to be an
9 officer of a company by reason only of being or having been the
10 liquidator of that company, of a related body corporate or of an
11 entity that that company controls or has controlled.
- 12 (6) For the purposes of this section, a person is not taken to be an
13 officer of a company merely because of one or more of the
14 following:
- 15 (a) having been appointed as auditor of the company, of a related
16 body corporate or of an entity that the company controls or
17 has controlled;
- 18 (b) having been appointed, for any purpose relating to taxation,
19 as public officer of a body corporate, an unincorporated body
20 or a trust estate;
- 21 (c) being or having been authorised to accept, on behalf of the
22 company, a related body corporate or an entity that the
23 company controls or has controlled, service of process or
24 notices.
- 25 (7) The appointment of a firm as auditor of a company is taken to be
26 an appointment of all persons who are members of the firm and are
27 registered company auditors, whether resident in Australia or not,
28 at the date of the appointment.
- 29 (8) Where a firm that has been appointed as auditor of a company is
30 reconstituted by reason of the death, retirement or withdrawal of a
31 member or members or by reason of the admission of a new
32 member or new members, or both:
- 33 (a) a person who was taken under subsection (7) to be an auditor
34 of the company and who has so retired or withdrawn from
35 the firm as previously constituted is taken to have resigned as

- 1 auditor of the company as from the day of his or her
2 retirement or withdrawal but, unless that person was the only
3 member of the firm who was a registered company auditor
4 and, after the retirement or withdrawal of that person, there is
5 no member of the firm who is a registered company auditor,
6 section 329 does not apply to that resignation; and
- 7 (b) a person who is a registered company auditor and who is so
8 admitted to the firm is taken to have been appointed as an
9 auditor of the company as from the day of his or her
10 admission; and
- 11 (c) the reconstitution of the firm does not affect the appointment
12 of the continuing members of the firm who are registered
13 company auditors as auditors of the company;
14 but nothing in this subsection affects the operation of
15 subsection (2).
- 16 (9) Except as provided by subsection (8), the appointment of the
17 members of a firm as auditors of a company that is taken by
18 subsection (7) to have been made by reason of the appointment of
19 the firm as auditor of the company is not affected by the
20 dissolution of the firm.
- 21 (10) A report or notice that purports to be made or given by a firm
22 appointed as auditor of a company is not taken to be duly made or
23 given unless it is signed in the firm name and in his or her own
24 name by a member of the firm who is a registered company
25 auditor.
- 26 (11) Without limiting the generality of section 1311, if, in contravention
27 of this section, a firm consents to be appointed, or acts as, auditor
28 of a company or prepares a report required by this Act to be
29 prepared by an auditor of a company, each member of the firm is
30 guilty of an offence.
- 31 (12) Where it is, in the opinion of ASIC, impracticable for a proprietary
32 company to obtain the services of a registered company auditor as
33 auditor of the company by reason of the place where the company
34 carries on business, a person who is, in the opinion of ASIC,
35 suitably qualified or experienced and is approved by ASIC for the
36 purposes of this Act in relation to the audit of the company's

- 1 financial reports may be appointed as auditor of the company,
2 subject to such terms and conditions as are specified in the
3 approval.
- 4 (13) A person appointed in accordance with subsection (12) is, in
5 relation to the auditing of the company's financial reports (if any),
6 but subject to the terms and conditions of the approval under that
7 subsection, taken to be a registered company auditor and the
8 provisions of this Act apply, with the necessary modifications, in
9 relation to the person accordingly.
- 10 (14) Where a person approved by ASIC under subsection (12) is acting
11 as auditor of a company, ASIC may at any time, by notice in
12 writing given to the company:
13 (a) amend, revoke or vary the terms and conditions of its
14 approval; or
15 (b) terminate the appointment of that person as auditor of the
16 company.
- 17 (15) A notice under subsection (14) terminating the appointment of a
18 person as auditor of a company takes effect as if, on the date on
19 which the notice is received by the company, the company had
20 received from the person notice of the person's resignation as
21 auditor taking effect from that date.
- 22 (16) A person must not:
23 (a) if the person has been appointed auditor of a company—
24 knowingly disqualify himself or herself while the
25 appointment continues from acting as auditor of the
26 company; or
27 (b) if the person is a member of a firm that has been appointed
28 auditor of a company—knowingly disqualify the firm while
29 the appointment continues from acting as auditor of the
30 company.

31 **325 Appointment of auditor by proprietary company**

32 The directors of a proprietary company may appoint an auditor for
33 the company if an auditor has not been appointed by the company
34 in general meeting.

1 **327 Appointment of auditors**

2 (1A) Only subsections (6) to (10) of this section apply to a proprietary
3 company.

4 (1) Within 1 month after the day on which a company is incorporated,
5 the directors of the company must appoint, unless the company at a
6 general meeting has appointed, a person or persons, a firm or firms,
7 or a person or persons and a firm or firms, as auditor or auditors of
8 the company.

9 (2) A person or firm appointed as auditor of a company under
10 subsection (1) holds office, subject to this Part, until the first
11 annual general meeting of the company.

12 (3) A company must:

- 13 (a) at its first annual general meeting, appoint a person or
14 persons, a firm or firms, or a person or persons and a firm or
15 firms, as auditor or auditors of the company; and
16 (b) at each subsequent annual general meeting, if there is a
17 vacancy in the office of auditor of the company, appoint a
18 person or persons, a firm or firms, or a person or persons and
19 a firm or firms, to fill the vacancy.

20 (4) A person or firm appointed as auditor under subsection (3) holds
21 office until death or removal or resignation from office in
22 accordance with section 329 or until ceasing to be capable of
23 acting as auditor by reason of subsection 324(1) or (2).

24 (5) If:

- 25 (a) a vacancy occurs in the office of auditor of the company
26 (other than a vacancy caused by the removal of an auditor
27 from office); and
28 (b) there is no surviving or continuing auditor of the company;
29 the directors must, within 1 month after the vacancy occurs,
30 appoint a person or persons, a firm or firms, or a person or persons
31 or a firm or firms, to fill the vacancy unless the company at a
32 general meeting has appointed a person or persons, a firm or firms,
33 or a person or persons and a firm or firms, to fill the vacancy.

- 1 (6) While a vacancy in the office of auditor continues, the surviving or
2 continuing auditor or auditors (if any) may act.
- 3 (7) A company or the directors of a company must not appoint a
4 person or firm as auditor of the company unless that person or firm
5 has, before the appointment, consented by notice in writing given
6 to the company or to the directors to act as auditor and has not
7 withdrawn his, her or its consent by notice in writing given to the
8 company or to the directors.
- 9 (8) A notice under subsection (7) given by a firm must be signed in the
10 firm name and in his or her own name by a member of the firm
11 who is a registered company auditor.
- 12 (9) If a company appoints a person or firm as auditor of a company in
13 contravention of subsection (7), the purported appointment does
14 not have any effect and the company and any officer of the
15 company who is in default are each guilty of an offence.
- 16 (10) Where an auditor of a company is removed from office at a general
17 meeting in accordance with section 329:
- 18 (a) the company may at that meeting (without adjournment), by
19 a resolution passed by a majority of not less than
20 three-quarters of such members of the company as, being
21 entitled so to do, vote in person or, where proxies are
22 allowed, by proxy, forthwith appoint as auditor or auditors a
23 person or persons, a firm or firms, or a person or persons and
24 a firm or firms, to whom or which has been sent a copy of the
25 notice of nomination in accordance with subsection 328(3);
26 or
- 27 (b) if such a resolution is not passed or, by reason only that such
28 a copy of the notice of nomination has not been sent to a
29 person, could not be passed, the meeting may be adjourned to
30 a day not earlier than 20 days and not later than 30 days after
31 the day of the meeting and the company may, at the
32 adjourned meeting, by ordinary resolution appoint as auditor
33 or auditors a person or persons, a firm or firms, or a person or
34 persons and a firm or firms, notice of whose nomination for
35 appointment as auditor has been received by the company

- 1 from a member of the company at least 14 clear days before
2 the day to which the meeting is adjourned.
- 3 (11) Where, after the removal from office of an auditor of a company,
4 the company fails to appoint an auditor under subsection (10), the
5 company must, within the period of 7 days commencing on the day
6 of the failure, give to ASIC notice of the failure, and, subject to
7 subsection (12), ASIC:
- 8 (a) in a case where the company, before the end of that period,
9 gives to ASIC notice of the failure—must, upon receiving the
10 notice; or
- 11 (b) in any other case:
- 12 (i) may, at any time after the end of that period and before
13 ASIC receives from the company notice of the failure;
14 and
- 15 (ii) if the company, after the end of that period, gives to
16 ASIC notice of the failure—must, upon receiving the
17 notice;
- 18 appoint as auditor or auditors of the company a person or persons,
19 a firm or firms, or a person or persons and a firm or firms, who or
20 which consents or consent to be so appointed.
- 21 (12) Where, after the removal from office of an auditor of a company,
22 the company fails to appoint an auditor under subsection (10),
23 ASIC must not appoint an auditor of the company under
24 subsection (11):
- 25 (a) in any case—if there is another auditor of the company
26 whom ASIC believes to be able to carry out the
27 responsibilities of auditor alone and who agrees to continue
28 as auditor; or
- 29 (c) in a case where, at the end of the period of 7 days
30 commencing on the day of the failure, the company has not
31 given to ASIC notice of the failure—if ASIC has, at any time
32 after the end of that period, already appointed an auditor of
33 the company under subsection (11).
- 34 (13) Subject to subsection (11), if a company does not appoint an
35 auditor when required by this Act to do so, ASIC may, on the
36 application in writing of a member of the company, appoint as

- 1 auditor or auditors of the company a person or persons, a firm or
2 firms, or a person or persons and a firm or firms, who or which
3 consents or consent to be so appointed.
- 4 (14) A person or firm appointed as auditor of a company under
5 subsection (5), (10), (11) or (13) holds office, subject to this Part,
6 until the next annual general meeting of the company.
- 7 (15) Notwithstanding subsection (4), a person or firm who holds the
8 office of auditor of a company that begins to be controlled by a
9 corporation must, unless the person or firm sooner vacates that
10 office, retire at the annual general meeting of the company next
11 held after it begins to be controlled by the corporation but, subject
12 to this Part, is eligible for re-appointment.
- 13 (16) If a director of a company fails to take all reasonable steps to
14 comply with, or to secure compliance with, subsection (1) or (5),
15 he or she is guilty of an offence.

16 **328 Nomination of auditors**

- 17 (1) Subject to this section, a company is not entitled to appoint a
18 person or a firm as auditor of the company at its annual general
19 meeting, not being a meeting at which an auditor is removed from
20 office, unless notice in writing of his, her or its nomination as
21 auditor was given to the company by a member of the company:
22 (a) before the meeting was convened; or
23 (b) not less than 21 days before the meeting.
- 24 (2) If a company purports to appoint a person or firm as auditor of the
25 company in contravention of subsection (1), the purported
26 appointment is of no effect and the company and any officer of the
27 company who is in default are each guilty of an offence.
- 28 (3) Where notice of nomination of a person or firm for appointment as
29 auditor of a company is received by the company, whether for
30 appointment at a meeting or an adjourned meeting referred to in
31 subsection 327(10) or at an annual general meeting, the company
32 must:
33 (a) not less than 7 days before the meeting; or

- 1 (b) at the time notice of the meeting is given;
2 send a copy of the notice of nomination to each person or firm
3 nominated, to each auditor of the company and to each person
4 entitled to receive notice of general meetings of the company.

5 **329 Removal and resignation of auditors**

- 6 (1) An auditor of a company may be removed from office by
7 resolution of the company at a general meeting of which notice
8 under subsection (1A) has been given, but not otherwise.
- 9 (1A) 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(4)).
- 17 (2) Where notice under subsection (1A) of a resolution to remove an
18 auditor is received by a company, it must as soon as possible send
19 a copy of the notice to the auditor and lodge a copy of the notice.
- 20 (3) Within 7 days after receiving a copy of the notice, the auditor may
21 make representations in writing, not exceeding a reasonable length,
22 to the company and request that, before the meeting at which the
23 resolution is to be considered, a copy of the representations be sent
24 by the company at its expense to every member of the company to
25 whom notice of the meeting is sent.
- 26 (4) Unless ASIC on the application of the company otherwise orders,
27 the company must send a copy of the representations in accordance
28 with the auditor's request, and the auditor may, without prejudice
29 to his or her right to be heard orally or, where a firm is the auditor,
30 to have a member of the firm heard orally on its behalf, require that
31 the representations be read out at the meeting.
- 32 (5) An auditor of a company may, by notice in writing given to the
33 company, resign as auditor of the company if:

- 1 (a) the auditor has, by notice in writing given to ASIC, applied
2 for consent to the resignation and stated the reasons for the
3 application and, at or about the same time as the notice was
4 given to ASIC, notified the company in writing of the
5 application to ASIC; and
6 (b) the consent of ASIC has been given.
- 7 (6) ASIC must, as soon as practicable after receiving a notice from an
8 auditor under subsection (5), notify the auditor and the company
9 whether it consents to the resignation of the auditor.
- 10 (7) A statement made by an auditor in an application to ASIC under
11 subsection (5) or in answer to an inquiry by ASIC relating to the
12 reasons for the application:
13 (a) is not admissible in evidence in any civil or criminal
14 proceedings against the auditor; and
15 (b) may not be made the ground of a prosecution, action or suit
16 against the auditor;
17 and a certificate by ASIC that the statement was made in the
18 application or in the answer to the inquiry by ASIC is conclusive
19 evidence that the statement was so made.
- 20 (8) Subject to subsection (9), the resignation of an auditor takes effect:
21 (a) on the day (if any) specified for the purpose in the notice of
22 resignation; or
23 (b) on the day on which ASIC gives its consent to the
24 resignation; or
25 (c) on the day (if any) fixed by ASIC for the purpose;
26 whichever last occurs.
- 27 (9) The resignation of an auditor of a proprietary company does not
28 require the consent of ASIC under subsection (5), and takes effect:
29 (a) on the day (if any) specified for the purpose in the notice of
30 resignation; or
31 (b) on the day on which the notice is received by the company;
32 whichever is the later.
- 33 (10) Where on the retirement or withdrawal from a firm of a member
34 the firm will no longer be capable, by reason of the provisions of

1 paragraph 324(2)(d) of acting as auditor of a company, the member
2 so retiring or withdrawing is (if not disqualified from acting as
3 auditor of the company) taken to be the auditor of the company
4 until he or she obtains the consent of ASIC to his or her retirement
5 or withdrawal.

6 (11) Within 14 days after:

- 7 (a) the removal from office of an auditor of a company; or
8 (b) the receipt of a notice of resignation from an auditor of a
9 company;

10 the company must:

- 11 (c) lodge with ASIC a notice of the removal or resignation in the
12 prescribed form; and
13 (d) where there is a trustee for the holders of debentures of the
14 company—give to the trustee a copy of the notice lodged
15 with ASIC.

16 **330 Effect of winding up on office of auditor**

17 An auditor of a company ceases to hold office if:

- 18 (a) a special resolution is passed for the voluntary winding up of
19 the company; or
20 (b) in a case to which paragraph (a) does not apply—an order is
21 made by the Court for the winding up of the company.

22 **331 Fees and expenses of auditors**

23 The reasonable fees and expenses of an auditor of a company are
24 payable by the company.

1

2 **Division 2—Registered schemes**

3 **331AA Qualifications of auditors**

4 (1) Subject to this section, a person must not:

- 5 (a) consent to be appointed as auditor of a registered scheme; or
6 (b) act as auditor of a registered scheme; or
7 (c) prepare a report required by this Act to be prepared by a
8 registered company auditor or by an auditor of a registered
9 scheme;

10 if:

- 11 (d) the person is not a registered company auditor; or
12 (e) the person, or a body corporate in which the person has a
13 substantial holding, owes more than \$5,000 to the scheme's
14 responsible entity, to a related body corporate or to an entity
15 that the responsible entity controls; or
16 (f) the person:
17 (i) is an officer of the responsible entity; or
18 (ii) is a partner, employer or employee of an officer of the
19 responsible entity; or
20 (iii) is a partner or employee of an employee of an officer of
21 the responsible entity.

22 (2) Subject to this section, a firm must not:

- 23 (a) consent to be appointed as auditor of a registered scheme; or
24 (b) act as auditor of a registered scheme; or
25 (c) prepare a report required by this Act to be prepared by a
26 registered company auditor or by an auditor of a registered
27 scheme;

28 unless:

- 29 (d) at least 1 member of the firm is a registered company auditor
30 who is ordinarily resident in Australia; and
31 (e) the business name under which the firm is carrying on
32 business is registered under a law of a State or Territory
33 relating to the registration of business names or a return in
34 the prescribed form has been lodged showing, in relation to

- 1 each member of the firm, the member's full name and
2 address as at the time when the firm so consents, acts or
3 prepares a report; and
4 (f) no member of the firm, and no body corporate in which a
5 member of the firm has a substantial holding, owes more
6 than \$5,000 to the scheme's responsible entity or to an entity
7 that the responsible entity controls; and
8 (g) no member of the firm is:
9 (i) an officer of the responsible entity; or
10 (ii) a partner, employer or employee of an officer of the
11 responsible entity; or
12 (iii) a partner or employee of an employee of an officer of
13 the responsible entity; and
14 (h) no officer of the responsible entity receives any remuneration
15 from the firm for acting as a consultant to it on accounting or
16 auditing matters.
- 17 (3) Subsections 324(3), (4), (5) and (6) apply in relation to a registered
18 scheme as if:
19 (a) those subsections were part of this section; and
20 (b) references in those subsections to a company were instead
21 references to the registered scheme's responsible entity.
- 22 (4) Subsections 324(7), (8), (9), (10), (11) and (16) apply in relation to
23 a registered scheme as if:
24 (a) those subsections were part of this subsection; and
25 (b) references in those subsections to a company were instead
26 references to the registered scheme.

27 **331AB Appointment of auditors**

- 28 (1) Within 1 month after the day on which a registered scheme is
29 registered, the responsible entity must appoint a person or persons,
30 a firm or firms, or a person or persons and a firm or firms, as
31 auditor or auditors of the scheme.
- 32 (2) Within 1 month after a vacancy occurs in the office of auditor of a
33 registered scheme, if there is no surviving or continuing auditor of

- 1 the scheme, the responsible entity must appoint a person or
2 persons, a firm or firms, or a person or persons and a firm or firms,
3 to fill the vacancy.
- 4 (3) While a vacancy in the office of auditor of a registered scheme
5 continues, the surviving or continuing auditor or auditors (if any)
6 may act.
- 7 (4) The responsible entity of a registered scheme must not appoint a
8 person or firm as auditor of the scheme unless that person or firm
9 has, before the appointment, consented to act as auditor by notice
10 in writing given to the responsible entity and has not withdrawn
11 that consent by notice in writing given to the responsible entity.
- 12 (5) A notice given by a firm under subsection (4) is to be signed by a
13 member of the firm who is a registered company auditor:
14 (a) in the firm's name; and
15 (b) in the member's name.
- 16 (6) If the responsible entity of a registered scheme appoints a person or
17 firm as auditor of the scheme in contravention of subsection (4),
18 the purported appointment does not have any effect and the
19 responsible entity, and any officer of the responsible entity who is
20 in default, are each guilty of an offence.
- 21 (7) If the responsible entity of a registered scheme does not appoint an
22 auditor when required by this Act to do so, ASIC may, on
23 application in writing by a member of the scheme, appoint as
24 auditor or auditors of the scheme a person or persons, a firm or
25 firms, or a person or persons and a firm or firms. An appointment
26 can only be made with the consent of the person or firm concerned.
- 27 (8) If a director of the responsible entity of a registered scheme fails to
28 take all reasonable steps to secure compliance with subsection (1)
29 or (2), the director is guilty of an offence.

30 **331AC Removal and resignation of auditors**

- 31 (1) The responsible entity of a registered scheme may, with ASIC's
32 consent, remove the auditor of the scheme from office.

- 1 (2) An auditor of a registered scheme may, by notice in writing given
2 to the responsible entity, resign as auditor of the scheme if:
3 (a) the auditor:
4 (i) has, by notice in writing given to ASIC, applied for
5 consent to the resignation and stated the reasons for the
6 application; and
7 (ii) has, at or about the same time as giving the notice to
8 ASIC, given the responsible entity notice in writing of
9 the application to ASIC; and
10 (b) ASIC has given its consent.
- 11 (3) As soon as practicable after ASIC receives a notice from an auditor
12 under subsection (2), ASIC must notify the auditor, and the
13 responsible entity of the registered scheme, whether it consents to
14 the resignation.
- 15 (4) A statement made by an auditor in an application to ASIC under
16 subsection (2) or in answer to an inquiry by ASIC relating to the
17 reasons for the application:
18 (a) is not admissible in evidence in any civil or criminal
19 proceedings against the auditor; and
20 (b) must not be made the ground of a prosecution, action or suit
21 against the auditor.
- 22 A certificate by the ASIC that the statement was made in the
23 application or in answer to the inquiry by ASIC is conclusive
24 evidence that the statement was so made.
- 25 (5) The resignation of an auditor takes effect:
26 (a) on the day (if any) specified for the purpose in the notice of
27 resignation; or
28 (b) on the day on which ASIC gives its consent to the
29 resignation; or
30 (c) on the day (if any) fixed by ASIC for the purpose;
31 whichever occurs last.
- 32 (6) If, on the retirement or withdrawal of a member of a firm, the firm
33 will no longer be capable of acting as auditor of a registered
34 scheme because of paragraph 331AA(2)(d), the member is (if not

1 disqualified from acting as auditor of the scheme) taken to be the
2 auditor of the scheme until he or she obtains the consent of ASIC
3 to his or her retirement or withdrawal.

4 (7) Within 14 days after:

- 5 (a) the removal from office of an auditor of a registered scheme;
6 or
7 (b) the receipt of a notice of resignation from an auditor of a
8 registered scheme;

9 the responsible entity must lodge with ASIC a notice of the
10 removal or resignation in the prescribed form.

11 **331AD Effect of winding up an office of auditor**

12 An auditor of a registered scheme ceases to hold office if:

- 13 (a) the scheme's constitution provides that the scheme is to be
14 wound up at a specified time, in specified circumstances or
15 on the happening of a specified event, and that time is
16 reached, those circumstances occur or that event occurs; or
17 (b) the members pass a resolution directing the responsible entity
18 to wind up the scheme; or
19 (c) the Court makes an order directing the responsible entity to
20 wind up the scheme; or
21 (d) the members pass a resolution to remove the responsible
22 entity but do not, at the same meeting, pass a resolution
23 choosing a company to be the new responsible entity that
24 consents to becoming the scheme's responsible entity.

25 **331AE Fees and expenses of auditors**

26 The reasonable fees and expenses of an auditor of a registered
27 scheme are payable by the responsible entity.

1

2

Part 2M.5—Accounting standards

3

4

334 Accounting standards

5

AASB's power to make accounting standards

6

(1) The AASB may make accounting standards for the purposes of this Act. The standards must be in writing and must not be inconsistent with this Act or the regulations.

7

8

9

(2) A standard made under subsection (1) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

10

11

Note: Section 5C provides that the *Acts Interpretation Act 1901* (as in force on 1 November 2000) applies to this Act.

12

13

(4) An accounting standard applies to:

14

(a) periods ending after the commencement of the standard; or

15

(b) periods ending, or starting, on or after a later date specified in the standard.

16

17

(5) A company, registered scheme or disclosing entity may elect to apply the accounting standard to an earlier period unless the standard says otherwise. The election must be made in writing by the directors.

18

19

20

21

335 Equity accounting

22

This Chapter (and, in particular, the provisions on consolidation of financial statements) does not prevent accounting standards from incorporating equity accounting principles.

23

24

25

337 Interpretation of accounting standards

26

In interpreting an accounting standard, unless the contrary intention appears:

27

28

(a) expressions used in the standard have the same meaning as they have in this Chapter; and

29

- 1 (b) the provisions of Part 1.2 apply as if the standard's
2 provisions were provisions of this Chapter.

3 **339 Evidence of text of accounting standard**

- 4 (1) This section applies to a document that purports to be published by
5 or on behalf of the AASB or ASIC and to set out the text of:
6 (a) a specified standard as in force at a specified time under
7 section 334; or
8 (b) a specified provision of a standard of that kind.
9 It also applies to a copy of a document of that kind.
- 10 (2) In the absence of evidence to the contrary, a document to which
11 this section applies is proof in proceedings under this Act that:
12 (a) the specified standard was in force at that time under that
13 section; and
14 (b) the text set out in the document is the text of the standard
15 referred to in paragraph (1)(a) or the provision referred to in
16 paragraph (1)(b).

1

2

Part 2M.6—Exemptions and modifications

3

4

340 ASIC's power to make specific exemption orders

5

- (1) On an application made in accordance with subsection (3) in relation to a company, registered scheme or disclosing entity, ASIC may make an order in writing relieving any of the following from all or specified requirements of Parts 2M.2, 2M.3 and 2M.4:

6

7

8

9

(a) the directors;

10

(b) the company, scheme or entity;

11

(c) the auditor.

12

Note: For the criteria for making orders under this section, see section 342.

13

- (2) The order may:

14

(a) be expressed to be subject to conditions; and

15

(b) be indefinite or limited to a specified period.

16

- (3) The application must be:

17

(a) authorised by a resolution of the directors; and

18

(b) in writing and signed by a director; and

19

(c) lodged with ASIC.

20

- (4) ASIC must give the applicant written notice of the making, revocation or suspension of the order.

21

22

341 ASIC's power to make class orders

23

- (1) ASIC may make an order in writing in respect of a specified class of companies, registered schemes or disclosing entities, relieving any of the following from all or specified requirements of Parts 2M.2, 2M.3 and 2M.4:

24

25

26

27

(a) directors;

28

(b) the companies, registered schemes or disclosing entities themselves;

29

30

(c) auditors of the companies, registered schemes or disclosing entities.

31

1 Note: For the criteria for making orders under this section, see section 342.

2 (2) The order may:

- 3 (a) be expressed to be subject to conditions; and
4 (b) be indefinite or limited to a specified period.

5 (3) Notice of the making, revocation or suspension of the order must
6 be published in the *Gazette*.

7 **342 Criteria for specific exemption orders and class orders**

8 (1) To make an order under section 340 or 341, ASIC must be satisfied
9 that complying with the relevant requirements of Parts 2M.2, 2M.3
10 and 2M.4 would:

- 11 (a) make the financial report or other reports misleading; or
12 (b) be inappropriate in the circumstances; or
13 (c) impose unreasonable burdens.

14 (2) In deciding for the purposes of subsection (1) whether the audit
15 requirements for a proprietary company, or a class of proprietary
16 companies, would impose an unreasonable burden on the company
17 or companies, ASIC is to have regard to:

- 18 (a) the expected costs of complying with the audit requirements;
19 and
20 (b) the expected benefits of having the company or companies
21 comply with the audit requirements; and
22 (c) any practical difficulties that the company or companies face
23 in complying effectively with the audit requirements (in
24 particular, any difficulties that arise because a financial year
25 is the first one for which the audit requirements apply or
26 because the company or companies are likely to move
27 frequently between the small and large proprietary company
28 categories from one financial year to another); and
29 (d) any unusual aspects of the operation of the company or
30 companies during the financial year concerned; and
31 (e) any other matters that ASIC considers relevant.

32 (3) In assessing expected benefits under subsection (2), ASIC is to
33 take account of:

- 1 (a) the number of creditors and potential creditors; and
2 (b) the position of creditors and potential creditors (in particular,
3 their ability to independently obtain financial information
4 about the company or companies); and
5 (c) the nature and extent of the liabilities of the company or
6 companies.

7 **343 Modification by regulations**

8 The regulations may modify the operation of this Chapter in
9 relation to:

- 10 (a) a specified company, registered scheme or disclosing entity;
11 or
12 (b) all companies, registered schemes or disclosing entities of a
13 specified kind.

1

2 **Part 2M.7—Sanctions for contraventions of**
3 **Chapter**
4

5 **344 Contravention of Part 2M.2 or 2M.3**

6 (1) A director of a company, registered scheme or disclosing entity
7 contravenes this section if they fail to take all reasonable steps to
8 comply with, or to secure compliance with, Part 2M.2 or 2M.3.

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

10 (2) A person commits an offence if they contravene subsection (1) and
11 the contravention is dishonest.

12 (3) Subsection (1) does not apply to section 310, 312, 323A or 323B.

13 (4) This section does not affect the application of the provisions of
14 Part 2M.2 or 2M.3 to a director as an officer.

1
2 **Chapter 2N—Annual return and lodgments**
3 **with ASIC**

4 **Part 2N.1—Annual returns**
5

6 **345 Deadline for lodging annual return**

7 *Companies*

- 8 (1) A company must lodge an annual return with the ASIC by
9 31 January each year, unless ASIC and the company agree to a
10 different lodgment date (see subsection (3)).

11 *Responsible entities of registered schemes*

- 12 (2) The responsible entity of a registered scheme must lodge an annual
13 return for the scheme with ASIC. The return for a scheme must be
14 lodged within 3 months after the end of the scheme's financial year
15 unless ASIC and the responsible entity agree to a different
16 lodgment date (see subsection (3)).

17 *Agreed lodgment date*

- 18 (3) ASIC and the company or ASIC and the responsible entity may
19 agree to a different lodgment date. The agreement must be in
20 writing and may cover 1 or more years. The annual return must be
21 lodged by the agreed date.

22 *Company's obligation to lodge some notices ceases on lodgment of*
23 *annual return*

- 24 (4) A company's obligation to lodge a notice under section 142, 146,
25 242 or 254X, ceases when:
26 (a) the company lodges an annual return; and
27 (b) the annual return sets out the information required by the
28 notice.

1 This subsection does not affect the company's liability for late
2 lodgment fees incurred before the annual return is lodged or
3 continuing offences committed before that time.

4 Note: ASIC has a practice of sending out partly completed annual returns.
5 The partly completed return may be used to comply with the
6 obligation to lodge an annual return by correcting any information in
7 it that is not accurate, completing the rest and lodging it with ASIC.

8 **346 Solvency resolution—companies**

9 (1) Within 1 month before the annual return is lodged, the directors of
10 a company must resolve whether, in their opinion, there are
11 reasonable grounds to believe that the company will be able to pay
12 its debts as and when they become due and payable.

13 (2) Subsection (1) does not apply to a company that has lodged a
14 financial report of the company with ASIC under Chapter 2M
15 within 12 months before the annual return is lodged.

16 **347 Lodging annual return with ASIC**

17 An annual return may be lodged with ASIC:

- 18 (a) in writing in the form approved by ASIC and signed in
19 accordance with section 351; or
20 (b) electronically in accordance with section 352.

21 **348 Contents of annual return—companies**

22 A company's annual return must contain the information set out in
23 the following table, current as at the date when the annual return is
24 signed or authenticated. It must also contain any other information
25 required by the regulations.
26

Contents of annual return—companies	[operative table]
1 ACN	
2 name	
3 address of registered office	
4 address of principal place of business in this jurisdiction	

Contents of annual return—companies		[operative table]
5	each director and company secretary	<ul style="list-style-type: none"> • name and address • date and place of birth. <p><i>The address must be the person's usual residential address. However, if the person is entitled to have an alternative address under subsection 205D(2), the annual return may contain that address.</i></p>
6	issued shares	<p>The classes into which the shares are divided and for each class of share issued:</p> <ul style="list-style-type: none"> • the number of shares in the class • the total amount paid up for the class • the total amount unpaid for the class.
7	options granted	<p>The number of unissued shares in each class that are subject to options.</p>
8	<p>all members (if company has 20 or fewer members)</p> <p>OR</p> <p>the top 20 members in each class (if company has more than 20 members)</p> <p><i>The requirement to list the top 20 members does not apply to a company limited only by guarantee.</i></p>	<ul style="list-style-type: none"> • the names and addresses of the members <p>If the company has a share capital:</p> <ul style="list-style-type: none"> • the total number of shares in each class held by each of them • whether or not the shares are fully paid • unless the company is a listed corporation—whether or not the shares are beneficially owned. <p><i>If 2 or more members in the top 20 members in a class of shares each hold the same number of shares, the company must include the details set out above for each of them.</i></p>
9	<p>company solvency</p> <p><i>Not necessary if company lodged a financial report with ASIC within last 12 months.</i></p>	<p>Statement whether the directors have resolved within the last month under section 346 that, in their opinion, there are reasonable grounds to believe that the company will be able to pay its debts as and when they become due and payable.</p>

Contents of annual return—companies [operative table]

10	ultimate holding company	<ul style="list-style-type: none"> • name either: <ul style="list-style-type: none"> • its ACN or ARBN if registered in this jurisdiction OR • the place at which it was incorporated or formed if not registered in this jurisdiction.
----	--------------------------	---

Note: If the details referred to in items 3, 4, 5 and 6 change after the annual return is lodged, the company must notify ASIC of the change (see section 142 (registered office), section 146 (principal place of business), section 205B (director and company secretary) and section 254X (issued shares)).

349 Contents of annual return—registered schemes

An annual return for a registered scheme must contain the information set out in the following table, current as at the date when the annual return is signed or authenticated. It must also contain any other information required by the regulations.

Contents of annual return—registered schemes [operative table]

1	registration number of scheme	
2	name of scheme	
3	name and ACN of the responsible entity	
4	issued interests in a managed investment scheme <i>Only if the scheme is a unit trust.</i>	The classes into which the interests are divided and for each class of interest issued: <ul style="list-style-type: none"> • the number of interests in the class • the total amount paid up for the class • the total amount unpaid for the class.
5	issued interests in a managed investment scheme <i>Only if 4 does not apply.</i>	<ul style="list-style-type: none"> • a description of the nature of the interests (for example, interest in a limited partnership, right to participate in a timesharing scheme) • the number of those interests • the total amount paid for those interests • the total amount unpaid for those interests.

Contents of annual return—registered schemes		[operative table]
6	options granted	<ul style="list-style-type: none">• the number of unissued managed investment interests that are subject to options• for each of the classes of interests that is subject to options—the average exercise price.
7	all interest holders (if scheme has 20 or fewer interest holders) OR the top 20 interest holders in each class (if scheme has more than 20 interest holders)	<ul style="list-style-type: none">• the names and addresses of the interest holders• the total number of interests in each class held by each of them• whether or not the interests are fully paid. <p><i>If 2 or more interest holders in the top 20 interest holders in a class each hold the same number of interests, the responsible entity must include the details set out above for each of them.</i></p>

1

2 **Part 2N.2—Lodgments with ASIC**
3

4 **350 Forms for documents to be lodged with ASIC**

5 A document that this Act requires to be lodged with the ASIC in a
6 prescribed form must be:

- 7 (a) if a form for the document is prescribed in the regulations—
8 in the prescribed form; or
9 (b) if a form for the document is not prescribed in regulations but
10 the ASIC has approved a form for the document—in the
11 approved form.

12 **351 Signing documents lodged with ASIC**

- 13 (1) A document lodged with ASIC in writing by, or on behalf of, a
14 body or a registered scheme must be signed by a director or
15 secretary of the body or of the responsible entity of the registered
16 scheme. If the body is a foreign company, it may be signed by:
17 (a) its local agent; or
18 (b) if the local agent is a company—a director or secretary of the
19 company.
- 20 (2) An individual who lodges a document with ASIC in writing must
21 sign it.
- 22 (3) The person's name must be printed next to the signature.

23 **352 Documents lodged with ASIC electronically**

- 24 (1) A document may be lodged with ASIC electronically only if:
25 (a) ASIC and the person seeking to lodge it (either on their own
26 behalf or as agent) have agreed, in writing, that it may be
27 lodged electronically; or
28 (b) ASIC has approved, in writing, the electronic lodgment of
29 documents of that kind.

Clause 352

- 1 The document is taken to be lodged with ASIC if it is lodged in
2 accordance with the agreement or approval (including any
3 requirements of the agreement or approval as to authentication).
- 4 (2) Any agreement or approval must provide for a signed copy of the
5 document to be held by the person lodging the document and for
6 the person to make the signed copy of the document available to
7 the ASIC if required.

1
2 **Chapter 5—External administration**

3 **Part 5.1—Arrangements and reconstructions**
4

5 **410 Interpretation**

6 A reference in this Part, in relation to a Part 5.1 body, to the
7 directors is a reference to the directors of the body or any one or
8 more of them.

9 **411 Administration of compromises etc.**

10 (1) Where a compromise or arrangement is proposed between a
11 Part 5.1 body and its creditors or any class of them or between a
12 Part 5.1 body and its members or any class of them, the Court may,
13 on the application in a summary way of the body or of any creditor
14 or member of the body, or, in the case of a body being wound up,
15 of the liquidator, order a meeting or meetings of the creditors or
16 class of creditors or of the members of the body or class of
17 members to be convened in such manner, and to be held in such
18 place or places (in this jurisdiction or elsewhere), as the Court
19 directs and, where the Court makes such an order, the Court may
20 approve the explanatory statement required by paragraph 412(1)(a)
21 to accompany notices of the meeting or meetings.

22 (1A) Where:

23 (a) a compromise or arrangement is proposed:

24 (i) between 30 or more Part 5.1 bodies that are
25 wholly-owned subsidiaries of a holding company and
26 the creditors or a class of the creditors of each of those
27 subsidiaries; and

28 (ii) between the holding company and the creditors or a
29 class of the creditors of the holding company; and

30 (b) the proposed compromise or arrangement in relation to each
31 subsidiary includes a term that orders will be sought under
32 section 413 transferring the whole of the undertaking and of

1 the property and liabilities of the subsidiary to the holding
2 company; and
3 (c) the Court is satisfied, on the application in a summary way:
4 (i) of the holding company or of a creditor of the holding
5 company; or
6 (ii) if the holding company is being wound up—of the
7 liquidator;
8 that the number of meetings that would be required between
9 creditors in order to consider the proposed compromises or
10 arrangements would be so great as to result in a significant
11 impediment to the timely and effective consideration by
12 those creditors of the terms of the compromises or
13 arrangements;
14 the Court may order a meeting or meetings, on a consolidated
15 basis, of the creditors of the holding company and of each of the
16 subsidiaries or of such class or classes of those creditors as the
17 Court determines and, where the Court makes such an order, the
18 Court may approve the explanatory statement required by
19 paragraph 412(1)(a) to accompany notices of the meeting or
20 meetings.

21 (1B) Where:

- 22 (a) there are fewer than 30 wholly-owned subsidiaries of the
23 holding company but the matters referred to in
24 paragraphs (1A)(b) and (c) are satisfied; and
25 (b) the Court considers that circumstances exist that would
26 justify its doing so;
27 the Court may make an order under subsection (1A) in relation to
28 the proposed compromise or arrangement.

29 (1C) Where an order is made under subsection (1A) in relation to a
30 proposed compromise or arrangement, the succeeding provisions
31 of this Part apply to the compromise or arrangement as if:

- 32 (a) references in this Part to a company included references to all
33 of the Part 5.1 bodies to which the order relates; and
34 (b) references in this Part to creditors of a company included
35 references to the creditors of all the Part 5.1 bodies to which
36 the order relates; and

- 1 (c) references in this Part to a class of the creditors of a company
2 were references to the relevant class of creditors of all of the
3 Part 5.1 bodies to which the order relates.
- 4 (2) The Court must not make an order pursuant to an application under
5 subsection (1) or (1A) unless:
- 6 (a) 14 days notice of the hearing of the application, or such
7 lesser period of notice as the Court or ASIC permits, has
8 been given to ASIC; and
- 9 (b) the Court is satisfied that ASIC has had a reasonable
10 opportunity:
- 11 (i) to examine the terms of the proposed compromise or
12 arrangement to which the application relates and a draft
13 explanatory statement relating to the proposed
14 compromise or arrangement; and
- 15 (ii) to make submissions to the Court in relation to the
16 proposed compromise or arrangement and the draft
17 explanatory statement.
- 18 (3) In subsection (2), *draft explanatory statement*, in relation to a
19 proposed compromise or arrangement between a body and its
20 creditors or any class of them or between a body and its members
21 or any class of them, means a statement:
- 22 (a) explaining the effect of the proposed compromise or
23 arrangement and, in particular, stating any material interests
24 of the directors of the body, whether as directors, as members
25 or creditors of the body or otherwise, and the effect on those
26 interests of the proposed compromise or arrangement in so
27 far as that effect is different from the effect on the like
28 interests of other persons; and
- 29 (b) setting out such information as is prescribed and any other
30 information that is material to the making of a decision by a
31 creditor or member of the body whether or not to agree to the
32 proposed compromise or arrangement, being information that
33 is within the knowledge of the directors of the body and has
34 not previously been disclosed to the creditors or members of
35 the body.

- 1 (3A) In considering whether to make an order under subsection (1) or
2 (1A) for a meeting to be held outside this jurisdiction, the Court
3 must have regard to where the creditors or members, or the
4 creditors or members included in the class concerned, as the case
5 requires, reside.
- 6 (4) A compromise or arrangement is binding on the creditors, or on a
7 class of creditors, or on the members, or on a class of members, as
8 the case may be, of the body and on the body or, if the body is in
9 the course of being wound up, on the liquidator and contributories
10 of the body, if, and only if:
- 11 (a) at a meeting convened in accordance with an order of the
12 Court under subsection (1) or (1A):
- 13 (i) in the case of a compromise or arrangement between a
14 body and its creditors or a class of creditors—the
15 compromise or arrangement is agreed to by a majority
16 in number of the creditors, or of the creditors included
17 in that class of creditors, present and voting, either in
18 person or by proxy, being a majority whose debts or
19 claims against the company amount in the aggregate to
20 at least 75% of the total amount of the debts and claims
21 of the creditors present and voting in person or by
22 proxy, or of the creditors included in that class present
23 and voting in person or by proxy, as the case may be;
24 and
- 25 (ii) in the case of a compromise or arrangement between a
26 body and its members or a class of members—a
27 resolution in favour of the compromise or arrangement
28 is:
- 29 (A) passed by a majority in number of the members,
30 or members in that class, present and voting
31 (either in person or by proxy); and
- 32 (B) if the body has a share capital—passed by 75%
33 of the votes cast on the resolution; and
- 34 (b) it is approved by order of the Court.
- 35 (5) Where the Court orders 2 or more meetings of creditors or of a
36 class of creditors, or 2 or more meetings of members or of a class

- 1 of members, to be held in relation to the proposed compromise or
2 arrangement:
- 3 (a) in the case of meetings of creditors—the meetings is, for the
4 purposes of subsection (4), taken together to constitute a
5 single meeting and the votes in favour of the proposed
6 compromise or arrangement cast at each of the meetings are
7 to be aggregated, and the votes against the proposed
8 compromise or arrangement cast at each of the meetings are
9 to be aggregated, accordingly; or
- 10 (b) in the case of meetings of members—the meetings is, for the
11 purposes of subsection (4), taken together to constitute a
12 single meeting and the votes in favour of the proposed
13 compromise or arrangement cast at each of the meetings is to
14 be aggregated, and the votes against the proposed
15 compromise or arrangement cast at each of the meetings is to
16 be aggregated, accordingly.
- 17 (6) The Court may grant its approval to a compromise or arrangement
18 subject to such alterations or conditions as it thinks just.
- 19 (7) Except with the leave of the Court, a person must not be appointed
20 to administer, and must not administer, a compromise or
21 arrangement approved under this Act between a body and its
22 creditors or any class of them or between a body and its members
23 or any class of them, whether by the terms of that compromise or
24 arrangement or pursuant to a power given by the terms of a
25 compromise or arrangement, if the person:
- 26 (a) is a mortgagee of any property of the body; or
27 (b) is an auditor or an officer of the body; or
28 (c) is an officer of a body corporate that is a mortgagee of
29 property of the body; or
30 (d) is not a registered liquidator; or
31 (e) is an officer of a body corporate related to the body; or
32 (f) unless ASIC directs in writing that this paragraph does not
33 apply in relation to the person in relation to the body—has at
34 any time within the last 12 months been an officer or
35 promoter of the body or of a related body corporate.

- 1 (8) Paragraph (7)(d) does not apply in relation to a body corporate
2 authorised by or under a law of a State or Territory in this
3 jurisdiction to administer the compromise or arrangement
4 concerned.
- 5 (8A) Subsection (7) does not disqualify a person from administering a
6 compromise or arrangement under an appointment validly made
7 before 1 January 1991.
- 8 (9) Where a person is or persons are appointed by, or under a power
9 given by, the terms of a compromise or arrangement, to administer
10 the compromise or arrangement:
- 11 (a) section 425, subsections 427(2) and (4) and sections 428, 432
12 and 434 apply in relation to that person or those persons as if:
- 13 (i) the appointment of the person or persons to administer
14 the compromise or arrangement were an appointment of
15 the person or persons as a receiver and manager, or as
16 receivers and managers, of property of the body; and
- 17 (ii) a reference in any of those sections or subsections to a
18 receiver, or to a receiver of property, of a corporation
19 were a reference to that person or to those persons; and
- 20 (b) section 536 applies in relation to that person or those persons
21 as if:
- 22 (i) the appointment of the person or persons to administer
23 the compromise or arrangement were an appointment of
24 the person or persons as a liquidator of the body; and
- 25 (ii) a reference in that section to a liquidator were a
26 reference to that person or to those persons.
- 27 (10) An order of the Court made for the purposes of paragraph (4)(b)
28 does not have any effect until an office copy of the order is lodged
29 with ASIC, and upon being so lodged, the order takes effect, or is
30 taken to have taken effect, on and from the date of lodgment or
31 such earlier date as the Court determines and specifies in the order.
- 32 (11) Subject to subsection (12), a copy of every order of the Court made
33 for the purposes of paragraph (4)(b) must be annexed to every copy
34 of the constitution of the body issued after the order has been
35 made.

- 1 (12) The Court may, by order, exempt a body from compliance with
2 subsection (11) or determine the period during which the body
3 must comply with that subsection.
- 4 (13) Where a compromise or arrangement referred to in subsection (1)
5 or (1A) (whether or not for the purposes of or in connection with a
6 scheme for the reconstruction of a body or bodies or the
7 amalgamation of any 2 or more bodies) has been proposed, the
8 directors of the body must:
- 9 (a) if a meeting of the members of the body by resolution so
10 directs—instruct such accountants or solicitors or both as are
11 named in the resolution to report on the proposals and send
12 their report or reports to the directors as soon as practicable;
13 and
- 14 (b) if a report or reports is or are obtained pursuant to
15 paragraph (a)—make the report or reports available at the
16 registered office of the body for inspection by the
17 shareholders and creditors of the body at least 7 days before
18 the day of the meeting ordered by the Court to be convened
19 as provided in subsection (1) or (1A), as the case may be.
- 20 (14) If default is made in complying with subsection (11), the body
21 contravenes this subsection.
- 22 (15) If default is made in complying with subsection (13), each director
23 of the body contravenes this subsection.
- 24 (16) Where no order has been made or resolution passed for the
25 winding up of a Part 5.1 body and a compromise or arrangement
26 has been proposed between the body and its creditors or any class
27 of them, the Court may, in addition to exercising any of its other
28 powers, on the application in a summary way of the body or of any
29 member or creditor of the body, restrain further proceedings in any
30 action or other civil proceeding against the body except by leave of
31 the Court and subject to such terms as the Court imposes.
- 32 (17) The Court must not approve a compromise or arrangement under
33 this section unless:

- 1 (a) it is satisfied that the compromise or arrangement has not
2 been proposed for the purpose of enabling any person to
3 avoid the operation of any of the provisions of Chapter 6; or
4 (b) there is produced to the Court a statement in writing by ASIC
5 stating that ASIC has no objection to the compromise or
6 arrangement;
7 but the Court need not approve a compromise or arrangement
8 merely because a statement by ASIC stating that ASIC has no
9 objection to the compromise or arrangement has been produced to
10 the Court as mentioned in paragraph (b).

11 **412 Information as to compromise with creditors**

- 12 (1) Where a meeting is convened under section 411, the body must:
13 (a) with every notice convening the meeting that is sent to a
14 creditor or member, send a statement (in this section called
15 the *explanatory statement*):
16 (i) explaining the effect of the compromise or arrangement
17 and, in particular, stating any material interests of the
18 directors, whether as directors, as members or creditors
19 of the body or otherwise, and the effect on those
20 interests of the compromise or arrangement in so far as
21 that effect is different from the effect on the like
22 interests of other persons; and
23 (ii) setting out such information as is prescribed and any
24 other information that is material to the making of a
25 decision by a creditor or member whether or not to
26 agree to the compromise or arrangement, being
27 information that is within the knowledge of the directors
28 and has not previously been disclosed to the creditors or
29 members; and
30 (b) in every notice convening the meeting that is given by
31 advertisement, include either a copy of the explanatory
32 statement or a notification of the place at which and the
33 manner in which creditors or members entitled to attend the
34 meeting may obtain copies of the explanatory statement.

- 1 (2) In the case of a creditor whose debt does not exceed \$200,
2 paragraph (1)(a) does not apply unless the Court otherwise orders
3 but the notice convening the meeting that is sent to such a creditor
4 must specify a place at which a copy of the explanatory statement
5 can be obtained on request and, where the creditor makes such a
6 request, the body must as soon as practicable comply with the
7 request.
- 8 (3) Where the compromise or arrangement affects the rights of
9 debenture holders, the explanatory statement must specify any
10 material interests of the trustees for the debenture holders, whether
11 as such trustees, as members or creditors of the body or otherwise,
12 and the effect on those interests of the compromise or arrangement
13 in so far as that effect is different from the effect on the like
14 interests of other persons.
- 15 (4) Where a notice given by advertisement includes a notification that
16 copies of the explanatory statement can be obtained in a particular
17 manner, every creditor or member entitled to attend the meeting
18 must, on making application in that matter, be furnished by the
19 body free of charge with a copy of the explanatory statement.
- 20 (5) Each person who is a director or trustee for debenture holders must
21 give notice to the body of such matters relating to the person as are
22 required to be included in the explanatory statement.
- 23 (6) In the case of a compromise or arrangement that is not, or does not
24 include, a compromise or arrangement between a Part 5.1 body and
25 its creditors or any class of them, the body must not send out an
26 explanatory statement pursuant to subsection (1) unless a copy of
27 that statement has been registered by ASIC.
- 28 (7) Where an explanatory statement sent out under subsection (1) is
29 not required by subsection (6) to be registered by ASIC, the Court
30 must not make an order approving the compromise or arrangement
31 unless it is satisfied that ASIC has had a reasonable opportunity to
32 examine the explanatory statement and to make submissions to the
33 Court in relation to that statement.
- 34 (8) Where a copy of an explanatory statement is lodged with ASIC for
35 registration under subsection (6), ASIC must not register the copy

1 of the statement unless the statement appears to comply with this
2 Act and ASIC is of the opinion that the statement does not contain
3 any matter that is false in a material particular or materially
4 misleading in the form or context in which it appears.

5 (9) Where a body contravenes this section, a person involved in the
6 contravention contravenes this subsection.

7 (10) It is a defence to a prosecution for a contravention of this section if
8 it is proved that the contravention was due to the failure of a person
9 (other than the defendant), being a director of the body or a trustee
10 for debenture holders of the body, to supply for the purposes of the
11 explanatory statement particulars of the person's interests.

12 **413 Provisions for facilitating reconstruction and amalgamation of**
13 **Part 5.1 bodies**

14 (1) Where an application is made to the Court under this Part for the
15 approval of a compromise or arrangement and it is shown to the
16 Court that the compromise or arrangement has been proposed for
17 the purposes of, or in connection with, a scheme for the
18 reconstruction of a Part 5.1 body or Part 5.1 bodies or the
19 amalgamation of 2 or more Part 5.1 bodies and that, under the
20 scheme, the whole or any part of the undertaking or of the property
21 of a body concerned in the scheme (in this section called the
22 *transferor body*) is to be transferred to a company (in this section
23 called the *transferee company*), the Court may, either by the order
24 approving the compromise or arrangement or by a later order,
25 provide for all or any of the following matters:

26 (a) the transfer to the transferee company of the whole or a part
27 of the undertaking and of the property or liabilities of the
28 transferor body;

29 (b) the allotting or appropriation by the transferee company of
30 shares, debentures, policies or other interests in that company
31 that, under the compromise or arrangement, are to be allotted
32 or appropriated by that company to or for any person;

33 (c) the continuation by or against the transferee company of any
34 legal proceedings pending by or against the transferor body;

- 1 (d) if the transferor body is a company—the deregistration by
2 ASIC, without winding up, of the transferor body;
- 3 (e) the provision to be made for any persons who, within such
4 time and in such manner as the Court directs, dissent from
5 the compromise or arrangement;
- 6 (f) the transfer or allotment of any interest in property to any
7 person concerned in the compromise or arrangement;
- 8 (g) such incidental, consequential and supplemental matters as
9 are necessary to ensure that the reconstruction or
10 amalgamation is fully and effectively carried out.
- 11 (2) Where an order made under this section provides for the transfer of
12 property or liabilities, then, by virtue of the order, that property is
13 transferred to and vests in, and those liabilities are transferred to
14 and become the liabilities of, the transferee company, free, in the
15 case of any particular property if the order so directs, from any
16 charge that is, by virtue of the compromise or arrangement, to
17 cease to have effect.
- 18 (3) Where an order is made under this section, each body to which the
19 order relates must, within 14 days after the making of the order,
20 lodge with ASIC an office copy of the order.
- 21 (4) In this section:
- 22 *liabilities* includes duties of any description, including duties that
23 are of a personal character or are incapable under the general law
24 of being assigned or performed vicariously.
- 25 *property* includes rights and powers of any description, including
26 rights and powers that are of a personal character and are incapable
27 under the general law of being assigned or performed vicariously.

28 **414 Acquisition of shares of shareholders dissenting from scheme or**
29 **contract approved by majority**

- 30 (1) In this section:
- 31 *dissenting shareholder*, in relation to a scheme or contract, means
32 a shareholder who has not assented to the scheme or contract or

1 who has failed to transfer his, her or its shares in accordance with
2 the scheme or contract.

3 ***excluded shares***, in relation to a scheme or contract involving a
4 transfer to a person of shares in a class of shares in a company,
5 means shares in that class that, when the offer relating to the
6 scheme or contract is made, are held by:

- 7 (a) in any case—the person or a nominee of the person; or
8 (b) if the person is a body corporate—a subsidiary of the body.

9 (2) Where a scheme or contract (not being a scheme or contract arising
10 out of the making of offers under a takeover bid) involving a
11 transfer of shares in a class of shares in a company (in this section
12 called the ***transferor company***) to a person (in this section called
13 the ***transferee***) has, within 4 months after the making of the offer
14 relating to the scheme or contract by the transferee, been approved
15 by members holding shares in that class carrying at least 90% of
16 the votes attached to shares in that class (other than excluded
17 shares), the transferee may, within 2 months after the offer has
18 been so approved, give notice as prescribed to a dissenting
19 shareholder that the transferee wishes to acquire the shares held by
20 that shareholder.

21 (3) Where such a notice is given, then, unless the Court orders
22 otherwise on an application by a dissenting shareholder made
23 within one month after the day on which the notice was given or
24 within 14 days after a statement is supplied under subsection (7) to
25 a dissenting shareholder, whichever is the later, the transferee is
26 entitled and bound, subject to this section, to acquire those shares
27 on the terms on which, under the scheme or contract, the shares of
28 the approving shareholders are to be transferred to the transferee.

29 (4) Where alternative terms were offered to the approving
30 shareholders, the dissenting shareholder is entitled to elect not later
31 than the end of one month after the date on which the notice is
32 given under subsection (2) or 14 days after a statement is supplied
33 under subsection (7), whichever is the later, which of those terms
34 he, she or it prefers and, if he, she or it fails to make the election
35 within the time allowed by this subsection, the transferee may,
36 unless the Court otherwise orders, determine which of those terms

- 1 is to apply to the acquisition of the shares of the dissenting
2 shareholder.
- 3 (5) Despite subsections (3) and (4), if the number of votes attached to
4 the excluded shares is more than 10% of the votes attached to the
5 excluded shares and the shares (other than excluded shares) to be
6 transferred under the scheme or contract, those subsections do not
7 apply unless:
- 8 (a) the transferee offers the same terms to all holders of the
9 shares (other than excluded shares) to be transferred under
10 the scheme or contract; and
- 11 (b) the holders who approve the scheme or contract hold shares
12 to which are attached at least 90% of the votes attached to the
13 shares (other than excluded shares) to be transferred under
14 the scheme or contract and are also at least 75% in number of
15 the holders of those shares.
- 16 (6) For the purposes of paragraph (5)(b), 2 or more persons registered
17 as holding shares jointly are to be counted as one person.
- 18 (7) When a notice is given under subsection (2), the dissenting
19 shareholder may, by written notice given to the transferee within
20 one month after the day on which the notice was given under
21 subsection (2), ask for a statement in writing of the names and
22 addresses of all other dissenting shareholders as shown in the
23 register of members.
- 24 (8) Where a notice is given under subsection (7), the transferee must
25 comply with it.
- 26 (9) Where, under a scheme or contract referred to in subsection (2), the
27 transferee becomes beneficially entitled to shares in the transferor
28 company which, together with any other shares in the transferor
29 company to which the transferee or, where the transferee is a body
30 corporate, a body corporate related to the transferee is beneficially
31 entitled, have attached to them at least 90% of the votes attached to
32 the shares included in the class of shares concerned, then:
- 33 (a) the transferee must, within one month after the date on which
34 he, she or it becomes beneficially entitled to those shares
35 (unless in relation to the scheme or contract he, she or it has

- 1 already complied with this requirement), give notice of the
2 fact as prescribed to the holders of the remaining shares
3 included in that class who, when the notice was given, had
4 not assented to the scheme or contract or been given notice
5 by the transferee under subsection (2); and
- 6 (b) such a holder may, within 3 months after the giving of the
7 notice to him, her or it by notice to the transferee, require the
8 transferee to acquire his, her or its share and, where
9 alternative terms were offered to the approving shareholders,
10 elect which of those terms he, she or it will accept.
- 11 (10) Where a shareholder gives notice under paragraph (9)(b) with
12 respect to his, her or its shares, the transferee is entitled and bound
13 to acquire those shares:
- 14 (a) on the terms on which under the scheme or contract the
15 shares of the approving shareholders were transferred to him,
16 her or it and, where alternative terms were offered to those
17 shareholders, on the terms for which the shareholder has
18 elected, or where he, she or it has not so elected, for
19 whichever of the terms the transferee determines; or
- 20 (b) on such other terms as are agreed or as the Court, on the
21 application of the transferee or of the shareholder, thinks fit
22 to order.
- 23 (11) Subsections (12) and (13) apply where a notice has been given
24 under subsection (1) unless the Court, on an application made by
25 the dissenting shareholder, orders to the contrary.
- 26 (12) The transferee must, within 14 days after:
- 27 (a) the end of one month after the day on which the notice was
28 given; or
- 29 (b) the end of 14 days after a statement under subsection (7) is
30 supplied; or
- 31 (c) if an application has been made to the Court by a dissenting
32 shareholder—the application is disposed of;
- 33 whichever last happens:
- 34 (d) send a copy of the notice to the transferor company together
35 with an instrument of transfer that relates to the shares that

- 1 the transferee is entitled to acquire under this section and is
2 executed, on the shareholder's behalf, by a person appointed
3 by the transferee and, on the transferee's own behalf, by the
4 transferee; and
- 5 (e) pay, allot or transfer to the transferor company the
6 consideration for the shares.
- 7 (13) When the transferee has complied with subsection (12), the
8 transferor company must register the transferee as the holder of the
9 shares.
- 10 (14) All sums received by the transferor company under this section
11 must be paid into a separate bank account and those sums, and any
12 other consideration so received, must be held by that company in
13 trust for the several persons entitled to the shares in respect of
14 which they were respectively received.
- 15 (15) Where a sum or other property received by a company under this
16 section has been held in trust by the company for a person for at
17 least 2 years (whether or not that period began before the
18 commencement of this Act), the company must, before the end of
19 10 years after the day on which the sum was paid, or the
20 consideration was allotted or transferred, to the company, pay the
21 sum or transfer the consideration, and any accretions to it and any
22 property that may become substituted for it or for part of it, to
23 ASIC to be dealt with under Part 9.7.

24 **415 Notification of appointment of scheme manager and power of**
25 **Court to require report**

- 26 (1) Within 14 days after being appointed to administer a compromise
27 or arrangement approved under this Part, a person must lodge a
28 notice in writing of the appointment.
- 29 (2) Where an application is made to the Court under this Part in
30 relation to a proposed compromise or arrangement, the Court may:
31 (a) before making any order on the application, require ASIC or
32 another person specified by the Court to give to the Court a
33 report as to the terms of the compromise or arrangement or of
34 the scheme for the purposes of or in connection with which

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- 1 the compromise or arrangement has been proposed, the
2 conduct of the officers of the body or bodies concerned and
3 any other matters that, in the opinion of ASIC or that person,
4 ought to be brought to the attention of the Court;
5 (b) in deciding the application, have regard to anything
6 contained in the report; and
7 (c) make such order or orders as to the payment of the costs of
8 preparing and giving the report as the Court thinks fit.

1
2 **Part 5.2—Receivers, and other controllers, of**
3 **property of corporations**
4

5 **416 Definitions**

6 In this Part, unless the contrary intention appears:

7 *officer*, in relation to a registered foreign company, includes a local
8 agent of the foreign company.

9 *property*, in relation to a corporation, means property:

- 10 (a) in the case of a company—in Australia or outside Australia;
11 or
12 (b) in the case of a registered foreign company—in this
13 jurisdiction or an external Territory; or
14 (c) in the case of a registrable Australian body—in this
15 jurisdiction but outside the body's place of origin.

16 *receiver*, in relation to property of a corporation, includes a
17 receiver and manager.

18 **417 Application of Part**

19 Except so far as the contrary intention appears in this Part or
20 Part 11.2, this Part applies in relation to a receiver of property of a
21 corporation who is appointed after 1 January 1991, even if the
22 appointment arose out of a transaction entered into, or an act or
23 thing done, before 1 January 1991.

24 **418 Persons not to act as receivers**

- 25 (1) A person is not qualified to be appointed, and must not act, as
26 receiver of property of a corporation if the person:
27 (a) is a mortgagee of property of the corporation; or
28 (b) is an auditor or an officer of the corporation; or
29 (c) is an officer of a body corporate that is a mortgagee of
30 property of the corporation; or

- 1 (d) is not a registered liquidator; or
2 (e) is an officer of a body corporate related to the corporation; or
3 (f) unless ASIC directs in writing that this paragraph does not
4 apply in relation to the person in relation to the corporation—
5 has at any time within the last 12 months been an officer or
6 promoter of the corporation or of a related body corporate.
- 7 (2) In subsection (1):
- 8 *officer*, in relation to a body corporate, does not include a receiver,
9 appointed under an instrument whether before or after the
10 commencement of this Act.
- 11 (3) Paragraph (1)(d) does not apply in relation to a body corporate
12 authorised by or under a law of the Commonwealth, of a State or of
13 a Territory to act as receiver of property of the corporation
14 concerned.

15 **418A Court may declare whether controller is validly acting**

- 16 (1) Where there is doubt, on a specific ground, about:
- 17 (a) whether a purported appointment of a person, after 23 June
18 1993, as receiver of property of a corporation is valid; or
19 (b) whether a person who has entered into possession, or
20 assumed control, of property of a corporation after 23 June
21 1993 did so validly under the terms of a charge on that
22 property;
- 23 the person, the corporation or any of the corporation's creditors
24 may apply to the Court for an order under subsection (2).
- 25 (2) On an application, the Court may make an order declaring whether
26 or not:
- 27 (a) the purported appointment was valid; or
28 (b) the person entered into possession, or assumed control,
29 validly under the terms of the charge;
- 30 as the case may be, on the ground specified in the application or on
31 some other ground.

1 **419 Liability of controller**

2 (1) A receiver, or any other authorised person, who, whether as agent
3 for the corporation concerned or not, enters into possession or
4 assumes control of any property of a corporation for the purpose of
5 enforcing any charge is, notwithstanding any agreement to the
6 contrary, but without prejudice to the person's rights against the
7 corporation or any other person, liable for debts incurred by the
8 person in the course of the receivership, possession or control for
9 services rendered, goods purchased or property hired, leased, used
10 or occupied.

11 (2) Subsection (1) does not constitute the person entitled to the charge
12 a mortgagee in possession.

13 (3) Where:

14 (a) a person (in this subsection called the *controller*) enters into
15 possession or assumes control of property of a corporation;
16 and

17 (b) the controller purports to have been properly appointed as a
18 receiver in respect of that property under a power contained
19 in an instrument, but has not been properly so appointed; and

20 (c) civil proceedings in an Australian court arise out of an act
21 alleged to have been done by the controller;

22 the court may, if it is satisfied that the controller believed on
23 reasonable grounds that the controller had been properly so
24 appointed, order that:

25 (d) the controller be relieved in whole or in part of a liability that
26 the controller has incurred but would not have incurred if the
27 controller had been properly so appointed; and

28 (e) a person who purported to appoint the controller as receiver
29 be liable in respect of an act, matter or thing in so far as the
30 controller has been relieved under paragraph (d) of liability
31 in respect of that act, matter or thing.

32 **419A Liability of controller under pre-existing agreement about**
33 **property used by corporation**

34 (1) This section applies if:

- 1 (a) under an agreement made before the control day in relation to
2 a controller of property of a corporation, the corporation
3 continues after that day to use or occupy, or to be in
4 possession of, property (*the third party property*) of which
5 someone else is the owner or lessor; and
6 (b) the controller is controller of the third party property.
- 7 (2) Subject to subsections (4) and (7), the controller is liable for so
8 much of the rent or other amounts payable by the corporation
9 under the agreement as is attributable to a period:
10 (a) that begins more than 7 days after the control day; and
11 (b) throughout which:
12 (i) the corporation continues to use or occupy, or to be in
13 possession of, the third party property; and
14 (ii) the controller is controller of the third party property.
- 15 (3) Within 7 days after the control day, the controller may give to the
16 owner or lessor a notice that specifies the third party property and
17 states that the controller does not propose to exercise rights in
18 relation to that property as controller of the property, whether on
19 behalf of the corporation or anyone else.
- 20 (4) Despite subsection (2), the controller is not liable for so much of
21 the rent or other amounts payable by the corporation under the
22 agreement as is attributable to a period during which a notice under
23 subsection (3) is in force, but such a notice does not affect a
24 liability of the corporation.
- 25 (5) A notice under subsection (3) ceases to have effect if:
26 (a) the controller revokes it by writing given to the owner or
27 lessor; or
28 (b) the controller exercises, or purports to exercise, a right in
29 relation to the third party property as controller of the
30 property, whether on behalf of the corporation or anyone
31 else.
- 32 (6) For the purposes of subsection (5), the controller does not exercise,
33 or purport to exercise, a right as mentioned in paragraph (5)(b)

- 1 merely because the controller continues to be in possession, or to
2 have control, of the third party property, unless the controller:
- 3 (a) also uses the property; or
4 (b) asserts a right, as against the owner or lessor, so to continue.
- 5 (7) Subsection (2) does not apply in so far as a court, by order, excuses
6 the controller from liability, but an order does not affect a liability
7 of the corporation.
- 8 (8) The controller is not taken because of subsection (2):
9 (a) to have adopted the agreement; or
10 (b) to be liable under the agreement otherwise than as mentioned
11 in subsection (2).

12 **420 Powers of receiver**

- 13 (1) Subject to this section, a receiver of property of a corporation has
14 power to do, in Australia and elsewhere, all things necessary or
15 convenient to be done for or in connection with, or as incidental to,
16 the attainment of the objectives for which the receiver was
17 appointed.
- 18 (2) Without limiting the generality of subsection (1), but subject to any
19 provision of the court order by which, or the instrument under
20 which, the receiver was appointed, being a provision that limits the
21 receiver's powers in any way, a receiver of property of a
22 corporation has, in addition to any powers conferred by that order
23 or instrument, as the case may be, or by any other law, power, for
24 the purpose of attaining the objectives for which the receiver was
25 appointed:
- 26 (a) to enter into possession and take control of property of the
27 corporation in accordance with the terms of that order or
28 instrument; and
29 (b) to lease, let on hire or dispose of property of the corporation;
30 and
31 (c) to grant options over property of the corporation on such
32 conditions as the receiver thinks fit; and
33 (d) to borrow money on the security of property of the
34 corporation; and

- 1 (e) to insure property of the corporation; and
- 2 (f) to repair, renew or enlarge property of the corporation; and
- 3 (g) to convert property of the corporation into money; and
- 4 (h) to carry on any business of the corporation; and
- 5 (j) to take on lease or on hire, or to acquire, any property
- 6 necessary or convenient in connection with the carrying on of
- 7 a business of the corporation; and
- 8 (k) to execute any document, bring or defend any proceedings or
- 9 do any other act or thing in the name of and on behalf of the
- 10 corporation; and
- 11 (m) to draw, accept, make and indorse a bill of exchange or
- 12 promissory note; and
- 13 (n) to use a seal of the corporation; and
- 14 (o) to engage or discharge employees on behalf of the
- 15 corporation; and
- 16 (p) to appoint a solicitor, accountant or other professionally
- 17 qualified person to assist the receiver; and
- 18 (q) to appoint an agent to do any business that the receiver is
- 19 unable to do, or that it is unreasonable to expect the receiver
- 20 to do, in person; and
- 21 (r) where a debt or liability is owed to the corporation—to prove
- 22 the debt or liability in a bankruptcy, insolvency or winding
- 23 up and, in connection therewith, to receive dividends and to
- 24 assent to a proposal for a composition or a scheme of
- 25 arrangement; and
- 26 (s) if the receiver was appointed under an instrument that created
- 27 a charge on uncalled share capital of the corporation:
 - 28 (i) to make a call in the name of the corporation for the
 - 29 payment of money unpaid on the corporation's shares;
 - 30 or
 - 31 (ii) on giving a proper indemnity to a liquidator of the
 - 32 corporation—to make a call in the liquidator's name for
 - 33 the payment of money unpaid on the corporation's
 - 34 shares; and

- 1 (t) to enforce payment of any call that is due and unpaid,
2 whether the calls were made by the receiver or otherwise;
3 and
4 (u) to make or defend an application for the winding up of the
5 corporation; and
6 (w) to refer to arbitration any question affecting the corporation.
- 7 (3) The conferring by this section on a receiver of powers in relation to
8 property of a corporation does not affect any rights in relation to
9 that property of any other person other than the corporation.
- 10 (4) In this section, a reference, in relation to a receiver, to property of a
11 corporation is, unless the contrary intention appears, a reference to
12 the property of the corporation in relation to which the receiver
13 was appointed.

14 **420A Controller's duty of care in exercising power of sale**

- 15 (1) In exercising a power of sale in respect of property of a
16 corporation, a controller must take all reasonable care to sell the
17 property for:
18 (a) if, when it is sold, it has a market value—not less than that
19 market value; or
20 (b) otherwise—the best price that is reasonably obtainable,
21 having regard to the circumstances existing when the
22 property is sold.
- 23 (2) Nothing in subsection (1) limits the generality of anything in
24 section 180, 181, 182, 183 or 184.

25 **420B Court may authorise managing controller to dispose of**
26 **property despite prior charge**

- 27 (1) On the application of a managing controller of property of a
28 corporation, the Court may by order authorise the controller to sell,
29 or to dispose of in some other specified way, specified property of
30 the corporation, even though it is subject to a charge (in this
31 section called the *prior charge*) that has priority over a charge (in

- 1 this section called the *controller's charge*) on that property that the
2 controller is enforcing.
- 3 (2) However, the Court may only make an order if satisfied that:
- 4 (a) apart from the existence of the prior charge, the controller
5 would have power to sell, or to so dispose of, the property;
6 and
- 7 (b) the controller has taken all reasonable steps to obtain the
8 consent of the holder of the prior charge to the sale or
9 disposal, but has not obtained that consent; and
- 10 (c) sale or disposal of the property under the order is in the best
11 interests of the corporation's creditors and of the corporation;
12 and
- 13 (d) sale or disposal of the property under the order will not
14 unreasonably prejudice the rights or interests of the holder of
15 the prior charge.
- 16 (3) The Court is to have regard to the need to protect adequately the
17 rights and interests of the holder of the prior charge.
- 18 (4) If the property would be sold or disposed of together with other
19 property that is subject to the controller's charge, the Court may
20 have regard to:
- 21 (a) the amount (if any) by which it is reasonable to expect that
22 the net proceeds of selling or disposing of that other property
23 otherwise than together with the first-mentioned property
24 would be less than so much of the net proceeds of selling or
25 disposing of all the property together as would be attributable
26 to that other property; and
- 27 (b) the amount (if any) by which it is reasonable to expect that
28 the net proceeds of selling or disposing of the first-mentioned
29 property otherwise than together with the other property
30 would be greater than so much of the net proceeds of selling
31 or disposing of all the property together as would be
32 attributable to the first-mentioned property.
- 33 (5) Nothing in subsection (3) or (4) limits the matters to which the
34 Court may have regard for the purposes of subsection (2).

- 1 (6) An order may be made subject to conditions, for example (but
2 without limitation):
3 (a) a condition that:
4 (i) the net proceeds of the sale or disposal; and
5 (ii) the net proceeds of the sale or disposal of such other
6 property (if any) as is specified in the condition and is
7 subject to the controller's charge;
8 or a specified part of those net proceeds, be applied in
9 payment of specified amounts secured by the prior charge; or
10 (b) a condition that the controller apply a specified amount in
11 payment of specified amounts secured by the prior charge.

12 **420C Receiver's power to carry on corporation's business during**
13 **winding up**

- 14 (1) A receiver of property of a corporation that is being wound up
15 may:
16 (a) with the written approval of the corporation's liquidator or
17 with the approval of the Court, carry on the corporation's
18 business either generally or as otherwise specified in the
19 approval; and
20 (b) do whatever is necessarily incidental to carrying on that
21 business under paragraph (a).
- 22 (2) Subsection (1) does not:
23 (a) affect a power that the receiver has otherwise than under that
24 subsection; or
25 (b) empower the receiver to do an act that he or she would not
26 have power to do if the corporation were not being wound
27 up.
- 28 (3) A receiver of property of a corporation who carries on the
29 corporation's business under subsection (1) does so:
30 (a) as agent for the corporation; and
31 (b) in his or her capacity as receiver of property of the
32 corporation.

- 1 (4) The consequences of subsection (3) include, but are not limited to,
2 the following:
3 (a) for the purposes of subsection 419(1), a debt that the receiver
4 incurs in carrying on the business as mentioned in
5 subsection (3) of this section is incurred in the course of the
6 receivership;
7 (b) a debt or liability that the receiver incurs in so carrying on the
8 business is not a cost, charge or expense of the winding up.

9 **421 Controller's duties in relation to bank accounts and financial**
10 **records**

- 11 (1) A controller of property of a corporation must:
12 (a) open and maintain an account, with an Australian ADI,
13 bearing:
14 (i) the controller's own name; and
15 (ii) in the case of a receiver of the property—the title
16 "receiver"; and
17 (iii) otherwise—the title "controller"; and
18 (iv) the corporation's name;
19 or 2 or more such accounts; and
20 (b) within 3 business days after money of the corporation comes
21 under the control of the controller, pay that money into such
22 an account that the controller maintains; and
23 (c) ensure that no such account that the controller maintains
24 contains money other than money of the corporation that
25 comes under the control of the controller; and
26 (d) keep such financial records as correctly record and explain
27 all transactions that the controller enters into as the
28 controller.
29 (2) Any director, creditor or member of a corporation may, unless the
30 Court otherwise orders, personally or by an agent, inspect records
31 kept by a controller of property of the corporation for the purposes
32 of paragraph (1)(d).

1 **421A Managing controller to report within 2 months about**
2 **corporation's affairs**

- 3 (1) A managing controller of property of a corporation must prepare a
4 report about the corporation's affairs that is in the prescribed form
5 and is made up to a day not later than 30 days before the day when
6 it is prepared.
- 7 (2) The managing controller must prepare and lodge the report within
8 2 months after the control day.
- 9 (3) As soon as practicable, and in any event within 14 days, after
10 lodging the report, the managing controller must cause to be
11 published in a national newspaper, or in each State or Territory in a
12 daily newspaper that circulates generally in that State or Territory,
13 a notice stating:
14 (a) that the report has been prepared; and
15 (b) that a person can, on paying the prescribed fee, inspect the
16 report at specified offices of ASIC.
- 17 (4) If, in the managing controller's opinion, it would seriously
18 prejudice:
19 (a) the corporation's interests; or
20 (b) the achievement of the objectives for which the controller
21 was appointed, or entered into possession or assumed control
22 of property of the corporation, as the case requires;
23 if particular information that the controller would otherwise
24 include in the report were made available to the public, the
25 controller need not include the information in the report.
- 26 (5) If the managing controller omits information from the report as
27 permitted by subsection (4), the controller must include instead a
28 notice:
29 (a) stating that certain information has been omitted from the
30 report; and
31 (b) summarising what the information is about, but without
32 disclosing the information itself.

1 **422 Reports by receiver**

2 (1) If it appears to the receiver of property of a corporation that:

3 (a) a past or present officer, or a member, of the corporation may
4 have been guilty of an offence in relation to the corporation;
5 or

6 (b) a person who has taken part in the formation, promotion,
7 administration, management or winding up of the
8 corporation:

9 (i) may have misapplied or retained, or may have become
10 liable or accountable for, any money or property
11 (whether the property is in Australia or elsewhere) of
12 the corporation; or

13 (ii) may have been guilty of any negligence, default, breach
14 of duty or breach of trust in relation to the corporation;

15 the receiver must:

16 (c) lodge as soon as practicable a report about the matter; and

17 (d) give to ASIC such information, and such access to and
18 facilities for inspecting and taking copies of any documents,
19 as ASIC requires.

20 (2) The receiver may also lodge further reports specifying any other
21 matter that, in the receiver's opinion, it is desirable to bring to the
22 notice of ASIC.

23 (3) If it appears to the Court:

24 (a) that a past or present officer, or a member, of a corporation in
25 respect of property of which a receiver has been appointed
26 has been guilty of an offence under a law referred to in
27 paragraph (1)(a) in relation to the corporation; or

28 (b) that a person who has taken part in the formation, promotion,
29 administration, management or winding up of a corporation
30 in respect of property of which a receiver has been appointed
31 has engaged in conduct referred to in paragraph (1)(b) in
32 relation to the corporation;

33 and that the receiver has not lodged a report about the matter, the
34 Court may, on the application of a person interested in the

1 appointment of the receiver, direct the receiver to lodge such a
2 report.

3 **423 Supervision of controller**

4 (1) If:

- 5 (a) it appears to the Court or to ASIC that a controller of
6 property of a corporation has not faithfully performed, or is
7 not faithfully performing, the controller's functions or has
8 not observed, or is not observing, a requirement of:
9 (i) in the case of a receiver—the order by which, or the
10 instrument under which, the receiver was appointed; or
11 (ii) otherwise—an instrument under which the controller
12 entered into possession, or took control, of that
13 property; or
14 (iii) in any case—the Court; or
15 (iv) in any case—this Act, the regulations or the rules; or
16 (b) a person complains to the Court or to ASIC about an act or
17 omission of a controller of property of a corporation in
18 connection with performing or exercising any of the
19 controller's functions and powers;

20 the Court or ASIC, as the case may be, may inquire into the matter
21 and, where the Court or ASIC so inquires, the Court may take such
22 action as it thinks fit.

23 (2) ASIC may report to the Court any matter that in its opinion is a
24 misfeasance, neglect or omission on the part of a controller of
25 property of a corporation and the Court may order the controller to
26 make good any loss that the estate of the corporation has sustained
27 thereby and may make such other order or orders as it thinks fit.

28 (3) The Court may at any time:

- 29 (a) require a controller of property of a corporation to answer
30 questions about the performance or exercise of any of the
31 controller's functions and powers as controller; or
32 (b) examine a person about the performance or exercise by such
33 a controller of any of the controller's functions and powers as
34 controller; or

- 1 (c) direct an investigation to be made of such a controller's
2 books.

3 **424 Controller may apply to Court**

- 4 (1) A controller of property of a corporation may apply to the Court
5 for directions in relation to any matter arising in connection with
6 the performance or exercise of any of the controller's functions and
7 powers as controller.
- 8 (2) In the case of a receiver of property of a corporation, subsection (1)
9 applies only if the receiver was appointed under a power contained
10 in an instrument.

11 **425 Court's power to fix receiver's remuneration**

- 12 (1) The Court may by order fix the amount to be paid by way of
13 remuneration to any person who, under a power contained in an
14 instrument, has been appointed as receiver of property of a
15 corporation.
- 16 (2) The power of the Court to make an order under this section:
17 (a) extends to fixing the remuneration for any period before the
18 making of the order or the application for the order; and
19 (b) is exercisable even if the receiver has died, or ceased to act,
20 before the making of the order or the application for the
21 order; and
22 (c) if the receiver has been paid or has retained for the receiver's
23 remuneration for any period before the making of the order
24 any amount in excess of that fixed for that period—extends
25 to requiring the receiver or the receiver's personal
26 representatives to account for the excess or such part of the
27 excess as is specified in the order.
- 28 (3) The power conferred by paragraph (2)(c) must not be exercised in
29 respect of any period before the making of the application for the
30 order unless, in the opinion of the Court, there are special
31 circumstances making it proper for the power to be so exercised.

- 1 (4) The Court may from time to time vary or amend an order under
2 this section.
- 3 (5) An order under this section may be made, varied or amended on
4 the application of:
- 5 (a) a liquidator of the corporation; or
6 (b) an administrator of the corporation; or
7 (c) an administrator of a deed of company arrangement executed
8 by the corporation; or
9 (d) ASIC.
- 10 (6) An order under this section may be varied or amended on the
11 application of the receiver concerned.
- 12 (7) An order under this section may be made, varied or amended only
13 as provided in subsections (5) and (6).

14 **426 Controller has qualified privilege in certain cases**

15 A controller of property of a corporation has qualified privilege in
16 respect of:

- 17 (a) a matter contained in a report that the controller lodges under
18 section 421A or 422; or
19 (b) a comment that the controller makes under paragraph
20 429(2)(c).

21 **427 Notification of matters relating to controller**

- 22 (1) A person who obtains an order for the appointment of a receiver of
23 property of a corporation, or who appoints such a receiver under a
24 power contained in an instrument, must:
- 25 (a) within 7 days after obtaining the order or making the
26 appointment, lodge notice that the order has been obtained,
27 or that the appointment has been made, as the case may be;
28 and
29 (b) within 21 days after obtaining the order or making the
30 appointment, cause notice that the order has been obtained,
31 or that the appointment has been made, as the case may be, to
32 be published in the *Gazette*.

- 1 (1A) A person who appoints another person to enter into possession, or
2 take control, of property of a corporation (whether or not as agent
3 for the corporation) for the purpose of enforcing a charge otherwise
4 than as receiver of that property must:
- 5 (a) within 7 days after making the appointment, lodge notice of
6 the appointment; and
7 (b) within 21 days after making the appointment, cause notice of
8 the appointment to be published in the *Gazette*.
- 9 (1B) A person who enters into possession, or takes control, as
10 mentioned in subsection (1A) must:
- 11 (a) within 7 days after so entering into possession or taking
12 control, lodge notice that the person has done so; and
13 (b) within 21 days after so entering into possession or taking
14 control, cause to be published in the *Gazette* notice that the
15 person has done so;
- 16 unless another person:
- 17 (c) appointed the first-mentioned person so to enter into
18 possession or take control; and
19 (d) complies with subsection (1A) in relation to the appointment.
- 20 (2) Within 14 days after becoming a controller of property of a
21 corporation, a person must lodge notice in the prescribed form of
22 the address of the person's office.
- 23 (3) A controller of property of a corporation must, within 14 days after
24 a change in the situation of the controller's office, lodge notice in
25 the prescribed form of the change.
- 26 (4) A person who ceases to be a controller of property of a corporation
27 must:
- 28 (a) within 7 days after so ceasing, lodge notice that the person
29 has so ceased; and
30 (b) within 21 days after so ceasing, cause notice that the person
31 has so ceased to be published in the *Gazette*.

1 **428 Statement that receiver appointed or other controller acting**

- 2 (1) Where a receiver of property (whether in or outside this
3 jurisdiction or in or outside Australia) of a corporation has been
4 appointed, the corporation must set out, in every public document,
5 and in every negotiable instrument, of the corporation, after the
6 name of the corporation where it first appears, a statement that a
7 receiver, or a receiver and manager, as the case requires, has been
8 appointed.
- 9 (2) Where there is a controller (other than a receiver) of property
10 (whether in Australia or elsewhere) of a corporation, the
11 corporation must set out, in every public document, and in every
12 negotiable instrument, of the corporation, after the corporation's
13 name where it first appears, a statement that a controller is acting.

14 **429 Officers to report to controller about corporation's affairs**

- 15 (1) In this section:
- 16 *reporting officer*, in relation to a corporation in respect of property
17 of which a person is controller, means a person who was:
- 18 (a) in the case of a company or registrable Australian body—a
19 director or secretary of the company or registrable Australian
20 body; or
21 (b) in the case of a foreign company—a local agent of the
22 foreign company;
23 on the control day.
- 24 (2) Where a person becomes a controller of property of a corporation:
- 25 (a) the person must serve on the corporation as soon as
26 practicable notice that the person is a controller of property
27 of the corporation; and
28 (b) within 14 days after the corporation receives the notice, the
29 reporting officers must make out and submit to the person a
30 report in the prescribed form about the affairs of the
31 corporation as at the control day; and
32 (c) the person must, within one month after receipt of the report:

- 1 (i) lodge a copy of the report and a notice setting out any
2 comments the person sees fit to make relating to the
3 report or, if the person does not see fit to make any
4 comment, a notice stating that the person does not see
5 fit to make any comment; and
6 (ii) send to the corporation a copy of the notice lodged in
7 accordance with subparagraph (i); and
8 (iii) if the person became a controller of the property:
9 (A) because of an appointment as receiver of the
10 property that was made by or on behalf of the
11 holder of debentures of the corporation; or
12 (B) by entering into possession, or taking control,
13 of the property for the purpose of enforcing a
14 charge securing such debentures;
15 and there are trustees for the holders of those
16 debentures—send to those trustees a copy of the report
17 and a copy of the notice lodged under subparagraph (i).
- 18 (3) Where notice has been served on a corporation under
19 paragraph (2)(a), the reporting officers may apply to the controller
20 or to the Court to extend the period within which the report is to be
21 submitted and:
22 (a) if application is made to the controller—if the controller
23 believes that there are special reasons for so doing, the
24 controller may, by notice in writing given to the reporting
25 officers, extend that period until a specified day; and
26 (b) if application is made to the Court—if the Court believes that
27 there are special reasons for so doing, the Court may, by
28 order, extend that period until a specified day.
- 29 (4) As soon as practicable after granting an extension under
30 paragraph (3)(a), the controller must lodge a copy of the notice.
- 31 (5) As soon as practicable after the Court grants an extension under
32 paragraph (3)(b), the reporting officers must lodge a copy of the
33 order.
- 34 (6) Subsections (2), (3) and (4) do not apply in a case where a person
35 becomes a controller of property of a corporation:

- 1 (a) to act with an existing controller of property of the
2 corporation; or
3 (b) in place of a controller of such property who has died or
4 ceased to be a controller of such property.
- 5 (6A) However, if subsection (2) applies in a case where a controller of
6 property of a corporation dies, or ceases to be a controller of
7 property of the corporation, before subsection (2) is fully complied
8 with, then:
9 (a) the references in paragraphs (2)(b) and (c) to the person; and
10 (b) the references in subsections (3) and (4) to the controller;
11 include references to the controller's successor and to any
12 continuing controller.
- 13 (7) Where a corporation is being wound up, this section (including
14 subsection (6A)) and section 430 apply even if the controller and
15 the liquidator are the same person, but with any necessary
16 modifications arising from that fact.

17 **430 Controller may require reports**

- 18 (1) A controller of property of a corporation may, by notice given to
19 the person or persons, require one or more persons included in one
20 or more of the following classes of persons to make out as required
21 by the notice, verify by a statement in writing in the prescribed
22 form, and submit to the controller, a report, containing such
23 information as is specified in the notice as to the affairs of the
24 corporation or as to such of those affairs as are specified in the
25 notice, as at a date specified in the notice:
26 (a) persons who are or have been officers of the corporation;
27 (b) where the corporation was incorporated within one year
28 before the control day—persons who have taken part in the
29 formation of the corporation;
30 (c) persons who are employed by the corporation or have been
31 so employed within one year before the control day and are,
32 in the opinion of the controller, capable of giving the
33 information required;

- 1 (d) persons who are, or have been within one year before the
2 control day, officers of, or employed by, a corporation that is,
3 or within that year was, an officer of the corporation.
- 4 (2) Without limiting the generality of subsection (1), a notice under
5 that subsection may specify the information that the controller
6 requires as to affairs of the corporation by reference to information
7 that this Act requires to be included in any other report, statement
8 or notice under this Act.
- 9 (3) A person making a report and verifying it as required by
10 subsection (1) must, subject to the regulations, be allowed, and
11 must be paid by the controller (or the controller's successor) out of
12 the controller's receipts, such costs and expenses incurred in and
13 about the preparation and making of the report and the verification
14 of the report as the controller (or the controller's successor)
15 considers reasonable.
- 16 (4) A person must comply with a requirement made under
17 subsection (1).
- 18 (5) A reference in this section to the controller's successor includes a
19 reference to a continuing controller.

20 **431 Controller may inspect books**

21 A controller of property of a corporation is entitled to inspect at
22 any reasonable time any books of the corporation that relate to that
23 property and a person must not fail to allow the controller to
24 inspect such books at such a time.

25 **432 Lodging controller's accounts**

- 26 (1) A controller of property of a corporation must lodge an account:
27 (a) within one month after the end of:
28 (i) 6 months, or such shorter period as the controller
29 determines, after the day when the controller became a
30 controller of property of the corporation; and

- 1 (ii) each subsequent period of 6 months throughout which
2 the controller is a controller of property of the
3 corporation; and
4 (b) within one month after the controller ceases to be a controller
5 of property of the corporation.
- 6 (1A) An account must be in the prescribed form and show:
- 7 (a) the controller's receipts and payments during:
- 8 (i) in the case of an account under paragraph (1)(a)—the 6
9 months or shorter period, as the case requires; or
10 (ii) in the case of an account under paragraph (1)(b)—the
11 period beginning at the end of the period to which the
12 last account related, or on the control day, as the case
13 requires, and ending on the day when the controller so
14 ceased; and
- 15 (b) except in the case of an account lodged under
16 subparagraph (1)(a)(i)—the respective aggregates of the
17 controller's receipts and payments since the control day; and
18 (c) in the case of:
- 19 (i) a receiver appointed under a power contained in an
20 instrument; or
21 (ii) anyone else who is in possession, or has control, of
22 property of the corporation for the purpose of enforcing
23 a charge;
- 24 the following:
- 25 (iii) the amount (if any) owing under that instrument or
26 charge:
- 27 (A) in the case of an account lodged under
28 subparagraph (1)(a)(i)—at the end of the
29 control day and at the end of the period to
30 which the account relates; or
31 (B) otherwise—at the end of the period to which
32 the account relates;
- 33 (iv) the controller's estimate of the total value, at the end of
34 the period to which the account relates, of the property
35 of the corporation that is subject to the instrument or
36 charge.

- 1 (2) ASIC may, of its own motion or on the application of the
2 corporation or a creditor of the corporation, cause the accounts
3 lodged in accordance with subsection (1) to be audited by a
4 registered company auditor appointed by ASIC and, for the
5 purpose of the audit, the controller must furnish the auditor with
6 such books and information as the auditor requires.
- 7 (3) Where ASIC causes the accounts to be audited on the request of
8 the corporation or a creditor, ASIC may require the corporation or
9 creditor, as the case may be, to give security for the payment of the
10 cost of the audit.
- 11 (4) The costs of an audit under subsection (2) must be fixed by ASIC
12 and ASIC may if it thinks fit make an order declaring that, for the
13 purposes of subsection 419(1), those costs are taken to be a debt
14 incurred by the controller as mentioned in subsection 419(1) and,
15 where such an order is made, the controller is liable accordingly.
- 16 (5) A person must comply with a requirement made under this section.

17 **433 Payment of certain debts, out of property subject to floating**
18 **charge, in priority to claims under charge**

- 19 (2) This section applies where:
- 20 (a) a receiver is appointed on behalf of the holders of any
21 debentures of a company or registered body that are secured
22 by a floating charge, or possession is taken or control is
23 assumed, by or on behalf of the holders of any debentures of
24 a company or registered body, of any property comprised in
25 or subject to a floating charge; and
- 26 (b) at the date of the appointment or of the taking of possession
27 or assumption of control (in this section called the *relevant*
28 *date*):
- 29 (i) the company or registered body has not commenced to
30 be wound up voluntarily; and
- 31 (ii) the company or registered body has not been ordered to
32 be wound up by the Court.

- 1 (3) In the case of a company, the receiver or other person taking
2 possession or assuming control of property of the company must
3 pay, out of the property coming into his, her or its hands, the
4 following debts or amounts in priority to any claim for principal or
5 interest in respect of the debentures:
- 6 (a) first, any amount that in a winding up is payable in priority to
7 unsecured debts pursuant to section 562;
- 8 (b) next, if an auditor of the company had applied to ASIC under
9 subsection 329(6) for consent to his, her or its resignation as
10 auditor and ASIC had refused that consent before the
11 relevant date—the reasonable fees and expenses of the
12 auditor incurred during the period beginning on the day of
13 the refusal and ending on the relevant date;
- 14 (c) subject to subsections (6) and (7), next, any debt or amount
15 that in a winding up is payable in priority to other unsecured
16 debts pursuant to paragraph 556(1)(e), (g) or (h) or
17 section 560.
- 18 (4) In the case of a registered body, the receiver or other person taking
19 possession or assuming control of property of the registered body
20 must pay, out of the property of the registered body coming into
21 his, her or its hands, the following debts or amounts in priority to
22 any claim for principal or interest in respect of the debentures:
- 23 (a) first, any amount that in a winding up is payable in priority to
24 unsecured debts pursuant to section 562;
- 25 (b) next, any debt or amount that in a winding up is payable in
26 priority to other unsecured debts pursuant to paragraph
27 556(1)(e), (g) or (h) or section 560.
- 28 (5) The receiver or other person taking possession or assuming control
29 of property must pay debts and amounts payable pursuant to
30 paragraph (3)(c) or (4)(b) in the same order of priority as is
31 prescribed by Division 6 of Part 5.6 in respect of those debts and
32 amounts.
- 33 (6) In the case of a company, if an auditor of the company had applied
34 to ASIC under subsection 329(6) for consent to his, her or its
35 resignation as auditor and ASIC had, before the relevant date,
36 refused that consent, a receiver must, when property comes to the

- 1 receiver's hands, before paying any debt or amount referred to in
2 paragraph (3)(c), make provision out of that property for the
3 reasonable fees and expenses of the auditor incurred after the
4 relevant date but before the date on which the property comes into
5 the receiver's hands, being fees and expenses in respect of which
6 provision has not already been made under this subsection.
- 7 (7) If an auditor of the company applies to ASIC under subsection
8 329(6) for consent to his, her or its resignation as auditor and, after
9 the relevant date, ASIC refuses that consent, the receiver must, in
10 relation to property that comes into the receiver's hands after the
11 refusal, before paying any debt or amount referred to in
12 paragraph (3)(c), make provision out of that property for the
13 reasonable fees and expenses of the auditor incurred after the
14 refusal and before the date on which the property comes into the
15 receiver's hands, being fees and expenses in respect of which
16 provision has not already been made under this subsection.
- 17 (8) A receiver must make provision in respect of reasonable fees and
18 expenses of an auditor in respect of a particular period as required
19 by subsection (6) or (7) whether or not the auditor has made a
20 claim for fees and expenses for that period, but where the auditor
21 has not made a claim, the receiver may estimate the reasonable fees
22 and expenses of the auditor for that period and make provision in
23 accordance with the estimate.
- 24 (9) For the purposes of this section, the references in Division 6 of
25 Part 5.6 to the relevant date are to be read as references to the date
26 of the appointment of the receiver, or of possession being taken or
27 control being assumed, as the case may be.

28 **434 Enforcing controller's duty to make returns**

- 29 (1) If a controller of property of a corporation:
30 (a) who has made default in making or lodging any return,
31 account or other document or in giving any notice required
32 by law fails to make good the default within 14 days after the
33 service on the controller, by any member or creditor of the
34 corporation or trustee for debenture holders, of a notice
35 requiring the controller to do so; or

- 1 (b) who has become a controller of property of the corporation
2 otherwise than by being appointed a receiver of such
3 property by a court and who has, after being required at any
4 time by the liquidator of the corporation so to do, failed to
5 render proper accounts of, and to vouch, the controller's
6 receipts and payments and to pay over to the liquidator the
7 amount properly payable to the liquidator;
8 the Court may make an order directing the controller to make good
9 the default within such time as is specified in the order.
- 10 (2) An application under subsection (1) may be made:
11 (a) if paragraph (1)(a) applies—by a member or creditor of the
12 corporation or by a trustee for debenture holders; and
13 (b) if paragraph (1)(b) applies—by the liquidator of the
14 corporation.

15 **434A Court may remove controller for misconduct**

16 Where, on the application of a corporation, the Court is satisfied
17 that a controller of property of the corporation has been guilty of
18 misconduct in connection with performing or exercising any of the
19 controller's functions and powers, the Court may order that, on and
20 after a specified day, the controller cease to act as receiver or give
21 up possession or control, as the case requires, of property of the
22 corporation.

23 **434B Court may remove redundant controller**

- 24 (1) The Court may order that, on and after a specified day, a controller
25 of property of a corporation:
26 (a) cease to act as receiver, or give up possession or control, as
27 the case requires, of property of the corporation; or
28 (b) act as receiver, or continue in possession or control, as the
29 case requires, only of specified property of the corporation.
- 30 (2) However, the Court may only make an order under subsection (1)
31 if satisfied that the objectives for which the controller was
32 appointed, or entered into possession or took control of property of
33 the corporation, as the case requires, have been achieved, so far as

- 1 is reasonably practicable, except in relation to any property
2 specified in the order under paragraph (1)(b).
- 3 (3) For the purposes of subsection (2), the Court must have regard to:
4 (a) the corporation's interests; and
5 (b) the interests of the holder of the charge that the controller is
6 enforcing; and
7 (c) the interests of the corporation's other creditors; and
8 (d) any other relevant matter.
- 9 (4) The Court may only make an order under subsection (1) on the
10 application of a liquidator appointed for the purposes of winding
11 up the corporation in insolvency.
- 12 (5) An order under subsection (1) may also prohibit the holder of the
13 charge from doing any or all of the following, except with the
14 leave of the Court:
15 (a) appointing a person as receiver of property of the corporation
16 under a power contained in an instrument relating to the
17 charge;
18 (b) entering into possession, or taking control, of such property
19 for the purpose of enforcing the charge;
20 (c) appointing a person so to enter into possession or take control
21 (whether as agent for the chargee or for the corporation).

22 **434C Effect of sections 434A and 434B**

- 23 (1) Except as expressly provided in section 434A or 434B, an order
24 under that section does not affect a charge on property of a
25 corporation.
- 26 (2) Nothing in section 434A or 434B limits any other power of the
27 Court to remove, or otherwise deal with, a controller of property of
28 a corporation (for example, the Court's powers under section 423).

1

2 **Part 5.3A—Administration of a company's affairs**
3 **with a view to executing a deed of company**
4 **arrangement**

4

5 **Division 1—Preliminary**

6 **435A Object of Part**

7

The object of this Part is to provide for the business, property and
affairs of an insolvent company to be administered in a way that:

8

9

(a) maximises the chances of the company, or as much as
possible of its business, continuing in existence; or

10

11

(b) if it is not possible for the company or its business to
continue in existence—results in a better return for the
company's creditors and members than would result from an
immediate winding up of the company.

12

13

14

15 **435B Definitions**

16

In this Part, unless the contrary intention appears:

17

receiver includes a receiver and manager.

18 **435C When administration begins and ends**

19

(1) The administration of a company:

20

(a) begins when an administrator of the company is appointed
under section 436A, 436B or 436C; and

21

22

(b) ends on the happening of whichever event of a kind referred
to in subsection (2) or (3) happens first after the
administration begins.

23

24

25

(2) The normal outcome of the administration of a company is that:

26

(a) a deed of company arrangement is executed by both the
company and the deed's administrator; or

27

- 1 (b) the company's creditors resolve under paragraph 439C(b)
2 that the administration should end; or
3 (c) the company's creditors resolve under paragraph 439C(c)
4 that the company be wound up.
- 5 (3) However, the administration of a company may also end because:
6 (a) the Court orders, under section 447A or otherwise, that the
7 administration is to end, for example, because the Court is
8 satisfied that the company is solvent; or
9 (b) the convening period, as fixed by subsection 439A(5), for a
10 meeting of the company's creditors ends:
11 (i) without the meeting being convened in accordance with
12 section 439A; and
13 (ii) without an application being made for the Court to
14 extend under subsection 439A(6) the convening period
15 for the meeting; or
16 (c) an application for the Court to extend under subsection
17 439A(6) the convening period for such a meeting is finally
18 determined or otherwise disposed of otherwise than by the
19 Court extending the convening period; or
20 (d) the convening period, as extended under subsection 439A(6),
21 for such a meeting ends without the meeting being convened
22 in accordance with section 439A; or
23 (e) such a meeting convened under section 439A ends (whether
24 or not it was earlier adjourned) without a resolution under
25 section 439C being passed at the meeting; or
26 (f) the company contravenes subsection 444B(2) by failing to
27 execute a proposed deed of company arrangement; or
28 (g) the Court appoints a provisional liquidator of the company,
29 or orders that the company be wound up.
- 30 (4) During the administration of a company, the company is taken to
31 be under administration.

1

2 **Division 2—Appointment of administrator and first**
3 **meeting of creditors**

4 **436A Company may appoint administrator if board thinks it is or**
5 **will become insolvent**

- 6 (1) A company may, by writing, appoint an administrator of the
7 company if the board has resolved to the effect that:
8 (a) in the opinion of the directors voting for the resolution, the
9 company is insolvent, or is likely to become insolvent at
10 some future time; and
11 (b) an administrator of the company should be appointed.
- 12 (2) Subsection (1) does not apply to a company that is already being
13 wound up.

14 **436B Liquidator may appoint administrator**

- 15 (1) A liquidator or provisional liquidator of a company may by writing
16 appoint an administrator of the company if he or she thinks that the
17 company is insolvent, or is likely to become insolvent at some
18 future time.
- 19 (2) With the leave of the Court, a liquidator or provisional liquidator of
20 a company may appoint himself or herself under subsection (1).
- 21 (3) Subsection (2) has effect subject to Division 14.

22 **436C Chargee may appoint administrator**

- 23 (1) A person who is entitled to enforce a charge on the whole, or
24 substantially the whole, of a company's property may by writing
25 appoint an administrator of the company if the charge has become,
26 and is still, enforceable.
- 27 (2) Subsection (1) does not apply to a company that is already being
28 wound up.

1 **436D Company already under administration**

2 An administrator cannot be appointed under section 436A, 436B or
3 436C if the company is already under administration.

4 **436E Purpose and timing of first meeting of creditors**

5 (1) The administrator of a company under administration must
6 convene a meeting of the company's creditors in order to
7 determine:

- 8 (a) whether to appoint a committee of creditors; and
9 (b) if so, who are to be the committee's members.

10 (2) The meeting must be held within 5 business days after the
11 administration begins.

12 (3) The administrator must convene the meeting by:

- 13 (a) giving written notice of the meeting to as many of the
14 company's creditors as reasonably practicable; and
15 (b) causing notice of the meeting to be published:
16 (i) in a national newspaper; or
17 (ii) in each State or Territory in which the company has its
18 registered office or carries on business, in a daily
19 newspaper that circulates generally in that State or
20 Territory;

21 at least 2 business days before the meeting.

22 (4) At the meeting, the company's creditors may also, by resolution:

- 23 (a) remove the administrator from office; and
24 (b) appoint someone else as administrator of the company.

25 **436F Functions of committee of creditors**

26 (1) The functions of a committee of creditors of a company under
27 administration are:

- 28 (a) to consult with the administrator about matters relating to the
29 administration; and
30 (b) to receive and consider reports by the administrator.

- 1 (2) A committee cannot give directions to the administrator, except as
2 provided in subsection (3).
- 3 (3) As and when a committee reasonably requires, the administrator
4 must report to the committee about matters relating to the
5 administration.

6 **436G Membership of committee**

- 7 A person can be a member of a committee of creditors of a
8 company under administration if, and only if, he or she is:
- 9 (a) a creditor of the company; or
- 10 (b) the attorney of such a creditor because of a general power of
11 attorney; or
- 12 (c) authorised in writing by such a creditor to be such a member.

1

2 **Division 3—Administrator assumes control of company's**
3 **affairs**

3

4 **437A Role of administrator**

5

- (1) While a company is under administration, the administrator:
- 6 (a) has control of the company's business, property and affairs;
 - 7 and
 - 8 (b) may carry on that business and manage that property and
 - 9 those affairs; and
 - 10 (c) may terminate or dispose of all or part of that business, and
 - 11 may dispose of any of that property; and
 - 12 (d) may perform any function, and exercise any power, that the
 - 13 company or any of its officers could perform or exercise if
 - 14 the company were not under administration.

15

- (2) Nothing in subsection (1) limits the generality of anything else in
- 16 it.

16

17 **437B Administrator acts as company's agent**

18

When performing a function, or exercising a power, as
19 administrator of a company under administration, the administrator
20 is taken to be acting as the company's agent.

20

21 **437C Powers of other officers suspended**

22

- (1) While a company is under administration, a person (other than the
23 administrator) cannot perform or exercise, and must not purport to
24 perform or exercise, a function or power as an officer of the
25 company, except with the administrator's written approval.

26

- (2) Subsection (1) does not remove an officer of a company from his
27 or her office.

27

28

- (3) Section 437D does not limit the generality of subsection (1) of this
29 section.

29

- 1 (4) In this section:
- 2 *officer*, in relation to a company under administration, includes:
- 3 (a) a receiver who is not also a manager; and
- 4 (b) a receiver and manager appointed by a court; and
- 5 (c) a liquidator or provisional liquidator appointed by the Court
- 6 before the administration began.
- 7 (5) However, a person is not an officer of a company for the purposes
- 8 of this section merely because he or she is an employee of the
- 9 company.

10 **437D Only administrator can deal with company's property**

- 11 (1) This section applies where:
- 12 (a) a company under administration purports to enter into; or
- 13 (b) a person purports to enter into, on behalf of a company under
- 14 administration;
- 15 a transaction or dealing affecting property of the company.
- 16 (2) The transaction or dealing is void unless:
- 17 (a) the administrator entered into it on the company's behalf; or
- 18 (b) the administrator consented to it in writing before it was
- 19 entered into; or
- 20 (c) it was entered into under an order of the Court.
- 21 (3) Subsection (2) does not apply to a payment made:
- 22 (a) by an Australian ADI out of an account kept by the company
- 23 with the ADI; and
- 24 (b) in good faith and in the ordinary course of the ADI's banking
- 25 business; and
- 26 (c) after the administration began and on or before the day on
- 27 which:
- 28 (i) the administrator gives to the ADI (under subsection
- 29 450A(3) or otherwise) written notice of the appointment
- 30 that began the administration; or

- 1 (ii) the administrator complies with paragraph 450A(1)(b)
2 in relation to that appointment;
3 whichever happens first.
- 4 (4) Subsection (2) has effect subject to an order that the Court makes
5 after the purported transaction or dealing.
- 6 (5) If, because of subsection (2), the transaction or dealing is void, or
7 would be void apart from subsection (4), an officer of the company
8 who:
9 (a) purported to enter into the transaction or dealing on the
10 company's behalf; or
11 (b) was in any other way, by act or omission, directly or
12 indirectly, knowingly concerned in, or party to, the
13 transaction or dealing;
14 contravenes this subsection.

15 **437E Order for compensation where officer involved in void**
16 **transaction**

- 17 (1) Where:
18 (a) a court finds a person guilty of an offence constituted by a
19 contravention of subsection 437D(5) (including such an
20 offence that is taken to have been committed because of
21 section 5 of the *Crimes Act 1914*); and
22 (b) the court is satisfied that the company or another person has
23 suffered loss or damage because of the act or omission
24 constituting the offence;
25 the court may (whether or not it imposes a penalty) order the
26 first-mentioned person to pay compensation to the company or
27 other person, as the case may be, of such amount as the order
28 specifies.
- 29 Note: Section 73A defines when a court is taken to find a person guilty of an
30 offence.
- 31 (2) An order under subsection (1) may be enforced as if it were a
32 judgment of the court.

- 1 (3) The power of a court under section 1318 to relieve a person from
2 liability as mentioned in that section extends to relieving a person
3 from liability to be ordered under this section to pay compensation.

4 **437F Effect of administration on company's members**

5 A transfer of shares in a company, or an alteration in the status of
6 members of a company, that is made during the administration of
7 the company is void except so far as the Court otherwise orders.

1

2 **Division 4—Administrator investigates company's affairs**

3 **438A Administrator to investigate affairs and consider possible**
4 **courses of action**

5 As soon as practicable after the administration of a company
6 begins, the administrator must:

- 7 (a) investigate the company's business, property, affairs and
8 financial circumstances; and
9 (b) form an opinion about each of the following matters:
10 (i) whether it would be in the interests of the company's
11 creditors for the company to execute a deed of company
12 arrangement;
13 (ii) whether it would be in the creditors' interests for the
14 administration to end;
15 (iii) whether it would be in the creditors' interests for the
16 company to be wound up.

17 **438B Directors to help administrator**

18 (1) As soon as practicable after the administration of a company
19 begins, each director must:

- 20 (a) deliver to the administrator all books in the director's
21 possession that relate to the company, other than books that
22 the director is entitled, as against the company and the
23 administrator, to retain; and
24 (b) if the director knows where other books relating to the
25 company are—tell the administrator where those books are.

26 (2) Within 7 days after the administration of a company begins or such
27 longer period as the administrator allows, the directors must give to
28 the administrator a statement about the company's business,
29 property, affairs and financial circumstances.

30 (3) A director of a company under administration must:

- 31 (a) attend on the administrator at such times; and

1 (b) give the administrator such information about the company's
2 business, property, affairs and financial circumstances;
3 as the administrator reasonably requires.

4 (4) A person must not, without reasonable excuse, fail to comply with
5 subsection (1), (2) or (3).

6 **438C Administrator's rights to company's books**

7 (1) A person is not entitled, as against the administrator of a company
8 under administration:

9 (a) to retain possession of books of the company; or

10 (b) to claim or enforce a lien on such books;

11 but such a lien is not otherwise prejudiced.

12 (2) Paragraph (1)(a) does not apply in relation to books of which a
13 secured creditor of the company is entitled to possession otherwise
14 than because of a lien, but the administrator is entitled to inspect,
15 and make copies of, such books at any reasonable time.

16 (3) The administrator of a company under administration may give to a
17 person a written notice requiring the person to deliver to the
18 administrator, as specified in the notice, books so specified that are
19 in the person's possession.

20 (4) A notice under subsection (3) must specify a period of at least 3
21 business days as the period within which the notice must be
22 complied with.

23 (5) A person must comply with a notice under subsection (3) except so
24 far as the person is entitled, as against the company and the
25 administrator, to retain possession of the books.

26 **438D Reports by administrator**

27 (1) If it appears to the administrator of a company under
28 administration that:

29 (a) a past or present officer, or a member, of the company may
30 have been guilty of an offence in relation to the company; or

- 1 (b) a person who has taken part in the formation, promotion,
2 administration, management or winding up of the company:
3 (i) may have misapplied or retained, or may have become
4 liable or accountable for, money or property (in
5 Australia or elsewhere) of the company; or
6 (ii) may have been guilty of negligence, default, breach of
7 duty or breach of trust in relation to the company;
8 the administrator must:
9 (c) lodge a report about the matter as soon as practicable; and
10 (d) give ASIC such information, and such access to and facilities
11 for inspecting and taking copies of documents, as ASIC
12 requires.
- 13 (2) The administrator may also lodge further reports specifying any
14 other matter that, in his or her opinion, it is desirable to bring to
15 ASIC's notice.
- 16 (3) If it appears to the Court:
17 (a) that a past or present officer, or a member, of a company
18 under administration has been guilty of an offence in relation
19 to the company; or
20 (b) that a person who has taken part in the formation, promotion,
21 administration, management or winding up of a company
22 under administration has engaged in conduct of a kind
23 referred to in paragraph (1)(b) in relation to the company;
24 and that the administrator has not lodged a report about the matter,
25 the Court may, on the application of an interested person, direct the
26 administrator to lodge such a report.

1

2 **Division 5—Meeting of creditors decides company's future**

3 **439A Administrator to convene meeting and inform creditors**

4 (1) The administrator of a company under administration must
5 convene a meeting of the company's creditors within the
6 convening period as fixed by subsection (5) or extended under
7 subsection (6).

8 Note: For body corporate representatives' powers at a meeting of the
9 company's creditors, see section 250D.

10 (2) The meeting must be held within 5 business days after the end of
11 the convening period.

12 (3) The administrator must convene the meeting by:

13 (a) giving written notice of the meeting to as many of the
14 company's creditors as reasonably practicable; and

15 (b) causing notice of the meeting to be published:

16 (i) in a national newspaper; or

17 (ii) in each State or Territory in which the company has its
18 registered office or carries on business, in a daily
19 newspaper that circulates generally in that State or
20 Territory;

21 at least 5 business days before the meeting.

22 (4) The notice given to a creditor under paragraph (3)(a) must be
23 accompanied by a copy of:

24 (a) a report by the administrator about the company's business,
25 property, affairs and financial circumstances; and

26 (b) a statement setting out the administrator's opinion about each
27 of the following matters:

28 (i) whether it would be in the creditors' interests for the
29 company to execute a deed of company arrangement;

30 (ii) whether it would be in the creditors' interests for the
31 administration to end;

- 1 (iii) whether it would be in the creditors' interests for the
2 company to be wound up;
3 and his or her reasons for those opinions; and
4 (c) if a deed of company arrangement is proposed—a statement
5 setting out details of the proposed deed.
- 6 (5) The convening period is:
7 (a) if the administration begins on a day that is in December, or
8 is less than 28 days before Good Friday—the period of 28
9 days beginning on that day; or
10 (b) otherwise—the period of 21 days beginning on the day when
11 the administration begins.
- 12 (6) The Court may extend the convening period on an application
13 made within the period referred to in paragraph (5)(a) or (b), as the
14 case requires.

15 **439B Conduct of meeting**

- 16 (1) At a meeting convened under section 439A, the administrator is to
17 preside.
- 18 (2) A meeting convened under section 439A may be adjourned from
19 time to time, but cannot be adjourned to a day that is more than 60
20 days after the first day on which the meeting was held, even if no
21 resolution under section 439C has been passed at the meeting.

22 **439C What creditors may decide**

- 23 At a meeting convened under section 439A, the creditors may
24 resolve:
- 25 (a) that the company execute a deed of company arrangement
26 specified in the resolution (even if it differs from the
27 proposed deed (if any) details of which accompanied the
28 notice of meeting); or
29 (b) that the administration should end; or
30 (c) that the company be wound up.

1

2 **Division 6—Protection of company's property during**
3 **administration**

3

4 **440A Winding up company**

5

(1) A company under administration cannot be wound up voluntarily,
6 except as provided by section 446A.

7

(2) The Court is to adjourn the hearing of an application for an order to
8 wind up a company if the company is under administration and the
9 Court is satisfied that it is in the interests of the company's
10 creditors for the company to continue under administration rather
11 than be wound up.

12

(3) The Court is not to appoint a provisional liquidator of a company if
13 the company is under administration and the Court is satisfied that
14 it is in the interests of the company's creditors for the company to
15 continue under administration rather than have a provisional
16 liquidator appointed.

17

440B Charge unenforceable

18

During the administration of a company, a person cannot enforce a
19 charge on property of the company, except:

20

(a) with the administrator's written consent; or

21

(b) with the leave of the Court.

22

440C Owner or lessor cannot recover property used by company

23

During the administration of a company, the owner or lessor of
24 property that is used or occupied by, or is in the possession of, the
25 company cannot take possession of the property or otherwise
26 recover it, except:

27

(a) with the administrator's written consent; or

28

(b) with the leave of the Court.

1 **440D Stay of proceedings**

2 (1) During the administration of a company, a proceeding in a court
3 against the company or in relation to any of its property cannot be
4 begun or proceeded with, except:

- 5 (a) with the administrator's written consent; or
6 (b) with the leave of the Court and in accordance with such
7 terms (if any) as the Court imposes.

8 (2) Subsection (1) does not apply to:

- 9 (a) a criminal proceeding; or
10 (b) a prescribed proceeding.

11 **440E Administrator not liable in damages for refusing consent**

12 A company's administrator is not liable to an action or other
13 proceeding for damages in respect of a refusal to give an approval
14 or consent for the purposes of this Division.

15 **440F Suspension of enforcement process**

16 During the administration of a company, no enforcement process in
17 relation to property of the company can be begun or proceeded
18 with, except:

- 19 (a) with the leave of the Court; and
20 (b) in accordance with such terms (if any) as the Court imposes.

21 **440G Duties of court officer in relation to property of company**

22 (1) This section applies where an officer of a court (in this section
23 called the *court officer*), being:

- 24 (a) a sheriff; or
25 (b) the registrar or other appropriate officer of the court;

26 receives written notice of the fact that a company is under
27 administration.

28 (2) During the administration, the court officer cannot:

- 29 (a) take action to sell property of the company under a process of
30 execution; or

- 1 (b) pay to a person (other than the administrator):
2 (i) proceeds of selling property of the company (at any
3 time) under a process of execution; or
4 (ii) money of the company seized (at any time) under a
5 process of execution; or
6 (iii) money paid (at any time) to avoid seizure or sale of
7 property of the company under a process of execution;
8 or
9 (c) take action in relation to the attachment of a debt due to the
10 company; or
11 (d) pay to a person (other than the administrator) money received
12 because of the attachment of such a debt.
- 13 (3) The court officer must deliver to the administrator any property of
14 the company that is in the court officer's possession under a
15 process of execution (whenever begun).
- 16 (4) The court officer must pay to the administrator all proceeds or
17 money of a kind referred to in paragraph (2)(b) or (d) that:
18 (a) are in the court officer's possession; or
19 (b) have been paid into the court and have not since been paid
20 out.
- 21 (5) The costs of the execution or attachment are a first charge on
22 property delivered under subsection (3) or proceeds or money paid
23 under subsection (4).
- 24 (6) In order to give effect to a charge under subsection (5) on proceeds
25 or money, the court officer may retain, on behalf of the person
26 entitled to the charge, so much of the proceeds or money as the
27 court officer thinks necessary.
- 28 (7) The Court may, if it is satisfied that it is appropriate to do so,
29 permit the court officer to take action, or to make a payment, that
30 subsection (2) would otherwise prevent.
- 31 (8) A person who buys property in good faith under a sale under a
32 process of execution gets a good title to the property as against the
33 company and the administrator, despite anything else in this
34 section.
-

1 **440H Lis pendens taken to exist**

- 2 (1) This section has effect only for the purposes of a law about the
3 effect of a lis pendens on purchasers or mortgagees.
- 4 (2) During the administration of a company, an application to wind up
5 the company is taken to be pending.
- 6 (3) An application that is taken because of subsection (2) to be
7 pending constitutes a lis pendens.

8 **440J Administration not to trigger liability of director or relative**
9 **under guarantee of company's liability**

- 10 (1) During the administration of a company:
- 11 (a) a guarantee of a liability of the company cannot be enforced,
12 as against:
- 13 (i) a director of the company who is a natural person; or
14 (ii) a spouse, de facto spouse or relative of such a director;
15 and
- 16 (b) without limiting paragraph (a), a proceeding in relation to
17 such a guarantee cannot be begun against such a director,
18 spouse, de facto spouse or relative;
- 19 except with the leave of the Court and in accordance with such
20 terms (if any) as the Court imposes.
- 21 (2) While subsection (1) prevents a person (*the creditor*) from:
- 22 (a) enforcing as against another person (*the guarantor*) a
23 guarantee of a liability of a company; or
- 24 (b) beginning a proceeding against another person (*the*
25 *guarantor*) in relation to such a guarantee;
- 26 section 1323 applies in relation to the creditor and the guarantor as
27 if:
- 28 (c) a civil proceeding against the guarantor had begun under this
29 Act; and
- 30 (d) the creditor were the only person of a kind referred to in that
31 section as an aggrieved person.

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Note: Under section 1323 the Court can make a range of orders to ensure that a person can meet the person's liabilities.

(3) The effect that section 1323 has because of a particular application of subsection (2) is additional to, and does not prejudice, the effect the section otherwise has.

(4) In this section:

guarantee, in relation to a liability of a company, includes a relevant agreement (as defined in section 9) because of which a person other than the company has incurred, or may incur, whether jointly with the company or otherwise, a liability in respect of the liability of the company.

liability means a debt, liability or other obligation.

1

2 **Division 7—Rights of chargee, owner or lessor**

3 **441A Where chargee acts before or during decision period**

4

(1) This section applies where:

5

(a) the whole, or substantially the whole, of the property of a company under administration is subject to a charge; and

6

7

(b) before or during the decision period, the chargee enforced the charge in relation to all property of the company subject to the charge, whether or not the charge was enforced in the same way in relation to all that property.

8

9

10

11

(2) This section also applies where:

12

(a) a company is under administration; and

13

(b) the same person is the chargee in relation to each of 2 or more charges on property of the company; and

14

15

(c) the property of the company (in this subsection called the **charged property**) subject to the respective charges together constitutes the whole, or substantially the whole, of the company's property; and

16

17

18

(d) before or during the decision period, the chargee enforced the charges in relation to all the charged property:

19

20

21

(i) whether or not the charges were enforced in the same way in relation to all the charged property; and

22

23

(ii) whether or not any of the charges was enforced in the same way in relation to all the property of the company subject to that charge; and

24

25

(iii) in so far as the charges were enforced in relation to property of the company in a way referred to in paragraph (a), (b) or (d) of the definition of **enforce** in section 9—whether or not the same person was appointed in respect of all of the last-mentioned property.

26

27

28

29

30

31

32

(3) Nothing in section 437C or 440B, or in an order under subsection 444F(2), prevents any of the following from enforcing the charge, or any of the charges:

33

34

- 1 (a) the chargee;
- 2 (b) a receiver or person appointed as mentioned in paragraph (a),
- 3 (b) or (d) of the definition of *enforce* in section 9 as that
- 4 definition applies in relation to the charge, or any of the
- 5 charges (even if appointed after the decision period).
- 6 (4) Section 437D does not apply in relation to a transaction or dealing
- 7 that affects property of the company and is entered into by:
- 8 (a) the chargee; or
- 9 (b) a receiver or person of a kind referred to in paragraph (3)(b)
- 10 of this section;
- 11 in the performance or exercise of a function or power as chargee,
- 12 or as such a receiver or person, as the case may be.

13 **441B Where enforcement of charge begins before administration**

- 14 (1) This section applies if, before the beginning of the administration
- 15 of a company, a chargee, receiver or other person:
- 16 (a) entered into possession, or assumed control, of property of
- 17 the company; or
- 18 (b) entered into an agreement to sell such property; or
- 19 (c) made arrangements for such property to be offered for sale
- 20 by public auction; or
- 21 (d) publicly invited tenders for the purchase of such property; or
- 22 (e) exercised any other power in relation to such property;
- 23 for the purpose of enforcing a charge on that property.
- 24 (2) Nothing in section 437C or 440B prevents the chargee, receiver or
- 25 other person from enforcing the charge in relation to that property.
- 26 (3) Section 437D does not apply in relation to a transaction or dealing
- 27 that affects that property and is entered into:
- 28 (a) in the exercise of a power of the chargee as chargee; or
- 29 (b) in the performance or exercise of a function or power of the
- 30 receiver or other person;
- 31 as the case may be.

1 **441C Charge on perishable property**

- 2 (1) This section applies where perishable property of a company under
3 administration is subject to a charge.
- 4 (2) Nothing in section 437C or 440B prevents:
- 5 (a) the chargee; or
- 6 (b) a receiver or person appointed (at any time) as mentioned in
7 paragraph (a), (b) or (d) of the definition of *enforce* in
8 section 9;
- 9 from enforcing the charge, so far as it is a charge on perishable
10 property.
- 11 (3) Section 437D does not apply in relation to a transaction or dealing
12 that affects perishable property of the company and is entered into
13 by:
- 14 (a) the chargee; or
- 15 (b) a receiver or person appointed (at any time) as mentioned in
16 paragraph (a), (b) or (d) of the definition of *enforce* in
17 section 9;
- 18 in the performance or exercise of a function or power as chargee,
19 or as such a receiver or person, as the case may be.

20 **441D Court may limit powers of chargee etc. in relation to charged**
21 **property**

- 22 (1) This section applies if:
- 23 (a) for the purpose of enforcing a charge on property of a
24 company, the chargee, or a receiver or other person, does an
25 act of a kind referred to in a paragraph of subsection
26 441B(1); and
- 27 (b) the company is under administration when the chargee,
28 receiver or other person does the act, or the company later
29 begins to be under administration;
- 30 but does not apply in a case where section 441A applies.
- 31 (2) On application by the administrator, the Court may order the
32 chargee, receiver or other person not to perform specified

Clause 441E

1 functions, or exercise specified powers, except as permitted by the
2 order.

3 (3) The Court may only make an order if satisfied that what the
4 administrator proposes to do during the administration will
5 adequately protect the chargee's interests.

6 (4) An order may only be made, and only has effect, during the
7 administration.

8 (5) An order has effect despite sections 441B and 441C.

9 **441E Giving a notice under a charge**

10 Nothing in section 437C or 440B prevents a person from giving a
11 notice under the provisions of a charge.

12 **441F Where recovery of property begins before administration**

13 (1) This section applies if, before the beginning of the administration
14 of a company, a receiver or other person:

15 (a) entered into possession, or assumed control, of property used
16 or occupied by, or in the possession of, the company; or

17 (b) exercised any other power in relation to such property;
18 for the purpose of enforcing a right of the owner or lessor of the
19 property to take possession of the property or otherwise recover it.

20 (2) Nothing in section 437C or 440C prevents the receiver or other
21 person from performing a function, or exercising a power, in
22 relation to the property.

23 (3) Section 437D does not apply in relation to a transaction or dealing
24 that affects the property and is entered into in the performance or
25 exercise of a function or power of the receiver or other person.

26 **441G Recovering perishable property**

27 (1) Nothing in section 437C or 440C prevents a person from taking
28 possession of, or otherwise recovering, perishable property.

- 1 (2) Section 437D does not apply in relation to a transaction or dealing
2 that affects perishable property and is entered into for the purpose
3 of enforcing a right of the owner or lessor of the property to take
4 possession of the property or otherwise recover it.

5 **441H Court may limit powers of receiver etc. in relation to property**
6 **used by company**

- 7 (1) This section applies if:
8 (a) for the purpose of enforcing a right of the owner or lessor of
9 property used or occupied by, or in the possession of, a
10 company to take possession of the property or otherwise
11 recover it, a person:
12 (i) enters into possession, or assumes control, of the
13 property; or
14 (ii) exercises any other power in relation to the property;
15 and
16 (b) the company is under administration when the person does
17 so, or the company later begins to be under administration.
- 18 (2) On application by the administrator, the Court may order the
19 person not to perform specified functions, or exercise specified
20 powers, in relation to the property, except as permitted by the
21 order.
- 22 (3) The Court may only make an order if satisfied that what the
23 administrator proposes to do during the administration will
24 adequately protect the interests of the owner or lessor.
- 25 (4) An order may only be made, and only has effect, during the
26 administration.
- 27 (5) An order has effect despite sections 441F and 441G.

28 **441J Giving a notice under an agreement about property**

- 29 Nothing in section 437C or 440C prevents a person from giving a
30 notice to a company under an agreement relating to property that is
31 used or occupied by, or is in the possession of, the company.

1 **441K Effect of Division**

2 Except as expressly provided, nothing in this Division limits the
3 generality of anything else in it.

1

2 **Division 8—Powers of administrator**

3 **442A Additional powers of administrator**

4 Without limiting section 437A, the administrator of a company
5 under administration has power to do any of the following:

- 6 (a) remove from office a director of the company;
7 (b) appoint a person as such a director, whether to fill a vacancy
8 or not;
9 (c) execute a document, bring or defend proceedings, or do
10 anything else, in the company's name and on its behalf;
11 (d) whatever else is necessary for the purposes of this Part.

12 **442B Dealing with property subject to a floating charge that has**
13 **crystallised**

- 14 (1) This section applies where a charge on property of a company
15 under administration was a floating charge when created but has
16 since become a fixed or specific charge.
- 17 (2) Subject to sections 442C and 442D, the administrator may deal
18 with any of that property as if the charge were still a floating
19 charge.

20 **442C When administrator may dispose of encumbered property**

- 21 (1) The administrator of a company under administration or of a deed
22 of company arrangement must not dispose of:
23 (a) property of the company that is subject to a charge; or
24 (b) property that is used or occupied by, or is in the possession
25 of, the company but of which someone else is the owner or
26 lessor.
- 27 (2) Subsection (1) does not prevent a disposal:
28 (a) in the ordinary course of the company's business; or
29 (b) with the written consent of the chargee, owner or lessor, as
30 the case may be; or

1 (c) with the leave of the Court.

2 (3) The Court may only give leave under paragraph (2)(c) if satisfied
3 that arrangements have been made to protect adequately the
4 interests of the chargee, owner or lessor, as the case may be.

5 **442D Administrator's powers subject to powers of chargee, receiver**
6 **etc.**

7 (1) Where section 441A applies, the administrator's functions and
8 powers are subject to the functions and powers of a person as:

- 9 (a) the chargee; or
10 (b) a receiver or person of a kind referred to in paragraph
11 441A(3)(b) (even if appointed after the decision period).

12 (2) Where section 441C applies, then, so far as concerns perishable
13 property of the company, the administrator's functions and powers
14 are subject to the functions and powers of a person as:

- 15 (a) the chargee; or
16 (b) a receiver or person appointed (at any time) as mentioned in
17 paragraph (a), (b) or (d) of the definition of *enforce* in
18 section 9.

19 (3) Where section 441B, 441F or 441G applies, then, so far as
20 concerns the property referred to in subsection 441B(1), 441F(1) or
21 441G(1), the administrator's functions and powers are subject to
22 the functions and powers of the chargee, receiver or other person.

23 **442E Administrator has qualified privilege**

24 A person who is or has been the administrator of a company under
25 administration has qualified privilege in respect of a statement that
26 he or she has made, whether orally or in writing, in the course of
27 performing or exercising any of his or her functions and powers as
28 administrator of the company.

29 **442F Protection of persons dealing with administrator**

30 (1) Sections 128 and 129 apply in relation to a company under
31 administration as if:

- 1 (a) a reference in those sections to the company, or to an officer
2 of the company, included a reference to the administrator;
3 and
4 (b) a reference in those sections to an assumption referred to in
5 section 129 included a reference to an assumption that the
6 administrator is:
7 (i) acting within his or her functions and powers as
8 administrator; and
9 (ii) in particular, is complying with this Act.
- 10 (2) The effect that sections 128 and 129 have because of subsection (1)
11 of this section is additional to, and does not prejudice, the effect
12 that sections 128 and 129 otherwise have in relation to a company
13 under administration.

1

2 **Division 9—Administrator's liability and indemnity for**
3 **debts of administration**

3

4 **Subdivision A—Liability**

4

5 **443A General debts**

5

6 (1) The administrator of a company under administration is liable for
7 debts he or she incurs, in the performance or exercise, or purported
8 performance or exercise, of any of his or her functions and powers
9 as administrator, for:

- 10 (a) services rendered; or
11 (b) goods bought; or
12 (c) property hired, leased, used or occupied.

13 (2) Subsection (1) has effect despite any agreement to the contrary, but
14 without prejudice to the administrator's rights against the company
15 or anyone else.

16 **443B Payments for property used or occupied by, or in the**
17 **possession of, the company**

17

18 (1) This section applies if, under an agreement made before the
19 administration of a company began, the company continues to use
20 or occupy, or to be in possession of, property of which someone
21 else is the owner or lessor.

22 (2) Subject to this section, the administrator is liable for so much of
23 the rent or other amounts payable by the company under the
24 agreement as is attributable to a period:

- 25 (a) that begins more than 7 days after the administration began;
26 and
27 (b) throughout which:
28 (i) the company continues to use or occupy, or to be in
29 possession of, the property; and
30 (ii) the administration continues.

30

- 1 (3) Within 7 days after the beginning of the administration, the
2 administrator may give to the owner or lessor a notice that
3 specifies the property and states that the company does not propose
4 to exercise rights in relation to the property.
- 5 (4) Despite subsection (2), the administrator is not liable for so much
6 of the rent or other amounts payable by the company under the
7 agreement as is attributable to a period during which a notice under
8 subsection (3) is in force, but such a notice does not affect a
9 liability of the company.
- 10 (5) A notice under subsection (3) ceases to have effect if:
11 (a) the administrator revokes it by writing given to the owner or
12 lessor; or
13 (b) the company exercises, or purports to exercise, a right in
14 relation to the property.
- 15 (6) For the purposes of subsection (5), the company does not exercise,
16 or purport to exercise, a right in relation to the property merely
17 because the company continues to occupy, or to be in possession
18 of, the property, unless the company:
19 (a) also uses the property; or
20 (b) asserts a right, as against the owner or lessor, so to continue.
- 21 (7) Subsection (2) does not apply in relation to so much of a period as
22 elapses after:
23 (a) a receiver of the property is appointed; or
24 (b) a chargee appoints an agent, under the provisions of a charge
25 on the property, to enter into possession, or to assume
26 control, of the property; or
27 (c) a chargee takes possession, or assumes control, of the
28 property under the provisions of a charge on the property;
29 but this subsection does not affect a liability of the company.
- 30 (8) Subsection (2) does not apply in so far as a court, by order, excuses
31 the administrator from liability, but an order does not affect a
32 liability of the company.
- 33 (9) The administrator is not taken because of subsection (2):

- 1 (a) to have adopted the agreement; or
2 (b) to be liable under the agreement otherwise than as mentioned
3 in subsection (2).

4 **443BA Certain taxation liabilities**

- 5 (1) The administrator of a company is liable to pay to the
6 Commissioner of Taxation:
7 (a) each amount payable under a remittance provision because of
8 a deduction made by the administrator; and
9 (b) without limiting paragraph (a), so much of each amount
10 payable under a remittance provision because of a deduction
11 made by the company during the administration as equals so
12 much of the deduction as is attributable to a period
13 throughout which the administration continued;
14 even if the amount became payable after the end of the
15 administration.

- 16 (2) In this section:

17 *remittance provision* means any of the following provisions of the
18 *Income Tax Assessment Act 1936*:

- 19 (a) section 221F (except subsection 221F(12)) or section 221G
20 (except subsection 221G(4A));
21 (b) subsection 221YHDC(2);
22 (c) subsection 221YHZD(1) or (1A);
23 (d) subsection 221YN(1);

24 and any of the provisions of Subdivision 16-B in Schedule 1 to the
25 *Taxation Administration Act 1953*.

26 *unpaid amount*, in relation to an estimate, has the same meaning
27 as in Division 8 of Part VI of the *Income Tax Assessment Act 1936*.

28 **443C Administrator not otherwise liable for company's debts**

29 The administrator of a company under administration is not liable
30 for the company's debts except under this Subdivision.

1 **Subdivision B—Indemnity**

2 **443D Right of indemnity**

3 The administrator of a company under administration is entitled to
4 be indemnified out of the company's property for:

- 5 (a) debts for which the administrator is liable under Subdivision
6 A or a remittance provision as defined in subsection
7 443BA(3); and
8 (b) his or her remuneration as fixed under section 449E.

9 **443E Right of indemnity has priority over other debts**

10 (1) Subject to section 556, a right of indemnity under section 443D has
11 priority over:

- 12 (a) all the company's unsecured debts; and
13 (b) subject to subsections (2) and (3) of this section, debts of the
14 company secured by a floating charge on property of the
15 company.

16 (2) Where:

- 17 (a) debts of a company under administration are secured by a
18 floating charge on property of the company; and
19 (b) before the beginning of the administration, the chargee:
20 (i) appointed a receiver of property of the company under a
21 power contained in an instrument relating to the charge;
22 or
23 (ii) obtained an order for the appointment of a receiver of
24 property of the company for the purpose of enforcing
25 the charge; or
26 (iii) entered into possession, or assumed control, of property
27 of the company for that purpose; or
28 (iv) appointed a person so to enter into possession or assume
29 control (whether as agent for the chargee or for the
30 company); and

1 (c) the receiver or person is still in office, or the chargee is still
2 in possession or control of the property;
3 the right of indemnity of the administrator under section 443D does
4 not have priority over those debts, except so far as the chargee
5 agrees.

6 (3) Where:

- 7 (a) debts of a company under administration are secured by a
8 floating charge on property of the company; and
9 (b) during the administration, the chargee, consistently with this
10 Part:
11 (i) appoints a receiver of property of the company under a
12 power contained in an instrument relating to the charge;
13 or
14 (ii) obtains an order for the appointment of a receiver of
15 property of the company for the purpose of enforcing
16 the charge; or
17 (iii) enters into possession, or assumes control, of property
18 of the company for that purpose; or
19 (iv) appoints a person so to enter into possession or assume
20 control (whether as agent for the chargee or for the
21 company);

22 the right of indemnity of the administrator under section 443D has
23 priority over those debts only in so far as it is a right of indemnity
24 for debts incurred, or remuneration accruing, before written notice
25 of the appointment, or of the entering into possession or assuming
26 of control, as the case may be, was given to the administrator.

27 **443F Lien to secure indemnity**

- 28 (1) To secure a right of indemnity under section 443D, the
29 administrator has a lien on the company's property.
30 (2) A lien under subsection (1) has priority over a charge only in so far
31 as the right of indemnity under section 443D has priority over
32 debts secured by the charge.

1

2 **Division 10—Execution and effect of deed of company**
3 **arrangement**

4 **444A Effect of creditors' resolution**

- 5 (1) This section applies where, at a meeting convened under
6 section 439A, a company's creditors resolve that the company
7 execute a deed of company arrangement.
- 8 (2) The administrator of the company is to be the administrator of the
9 deed, unless the creditors, by resolution passed at the meeting,
10 appoint someone else to be administrator of the deed.
- 11 (3) The administrator of the deed must prepare an instrument setting
12 out the terms of the deed.
- 13 (4) The instrument must also specify the following:
- 14 (a) the administrator of the deed;
- 15 (b) the property of the company (whether or not already owned
16 by the company when it executes the deed) that is to be
17 available to pay creditors' claims;
- 18 (c) the nature and duration of any moratorium period for which
19 the deed provides;
- 20 (d) to what extent the company is to be released from its debts;
- 21 (e) the conditions (if any) for the deed to come into operation;
- 22 (f) the conditions (if any) for the deed to continue in operation;
- 23 (g) the circumstances in which the deed terminates;
- 24 (h) the order in which proceeds of realising the property referred
25 to in paragraph (b) are to be distributed among creditors
26 bound by the deed;
- 27 (i) the day (not later than the day when the administration
28 began) on or before which claims must have arisen if they are
29 to be admissible under the deed.
- 30 (5) The instrument is taken to include the prescribed provisions, except
31 so far as it provides otherwise.

1 **444B Execution of deed**

- 2 (1) This section applies where an instrument is prepared under
3 section 444A.
- 4 (2) The company must execute the instrument within:
5 (a) 21 days after the end of the meeting of creditors; or
6 (b) such further period as the Court allows on an application
7 made within those 21 days.
- 8 (3) The board of the company may, by resolution, authorise the
9 instrument to be executed by or on behalf of the company.
- 10 (4) Subsection (3) has effect despite section 437C, but does not limit
11 the functions and powers of the administrator of the company.
- 12 (5) The administrator of the deed must execute the instrument before,
13 or as soon as practicable after, the company executes it.
- 14 (6) When executed by both the company and the deed's administrator,
15 the instrument becomes a deed of company arrangement.
- 16 (7) Division 12 provides for consequences of the company
17 contravening subsection (2).

18 **444C Creditor etc. not to act inconsistently with deed before its**
19 **execution**

- 20 (1) Where, at a meeting convened under section 439A, a company's
21 creditors resolve that the company execute a deed of company
22 arrangement, this section applies until:
23 (a) the deed is executed by both the company and the deed's
24 administrator; or
25 (b) the period within which subsection 444B(2) requires the
26 company to execute the deed ends;
27 whichever happens sooner.
- 28 (2) In so far as a person would be bound by the deed if it had already
29 been so executed, the person:

- 1 (a) must not do anything inconsistent with the deed, except with
2 the leave of the Court; and
3 (b) is subject to section 444E.

4 **444D Effect of deed on creditors**

- 5 (1) A deed of company arrangement binds all creditors of the
6 company, so far as concerns claims arising on or before the day
7 specified in the deed under paragraph 444A(4)(i).
- 8 (2) Subsection (1) does not prevent a secured creditor from realising or
9 otherwise dealing with the security, except so far as:
- 10 (a) the deed so provides in relation to a secured creditor who
11 voted in favour of the resolution of creditors because of
12 which the company executed the deed; or
13 (b) the Court orders under subsection 444F(2).
- 14 (3) Subsection (1) does not affect a right that an owner or lessor of
15 property has in relation to that property, except so far as:
- 16 (a) the deed so provides in relation to an owner or lessor of
17 property who voted in favour of the resolution of creditors
18 because of which the company executed the deed; or
19 (b) the Court orders under subsection 444F(4).

20 **444E Protection of company's property from persons bound by deed**

- 21 (1) Until a deed of company arrangement terminates, this section
22 applies to a person bound by the deed.
- 23 (2) The person cannot:
- 24 (a) make an application for an order to wind up the company; or
25 (b) proceed with such an application made before the deed
26 became binding on the person.
- 27 (3) The person cannot:
- 28 (a) begin or proceed with a proceeding against the company or in
29 relation to any of its property; or

- 1 (b) begin or proceed with enforcement process in relation to
2 property of the company;
3 except:
4 (c) with the leave of the Court; and
5 (d) in accordance with such terms (if any) as the Court imposes.

6 (4) In subsection (3):

7 *property*, in relation to the company, includes property used or
8 occupied by, or in the possession of, the company.

9 **444F Court may limit rights of secured creditor or owner or lessor**

- 10 (1) This section applies where:
11 (a) it is proposed that a company execute a deed of company
12 arrangement; or
13 (b) a company has executed such a deed.
- 14 (2) Subject to subsection 441A(3), the Court may order a secured
15 creditor of the company not to realise or otherwise deal with the
16 security, except as permitted by the order.
- 17 (3) The Court may only make an order under subsection (2) if satisfied
18 that:
19 (a) for the creditor to realise or otherwise deal with the security
20 would have a material adverse effect on achieving the
21 purposes of the deed; and
22 (b) having regard to:
23 (i) the terms of the deed; and
24 (ii) the terms of the order; and
25 (iii) any other relevant matter;
26 the creditor's interests will be adequately protected.
- 27 (4) The Court may order the owner or lessor of property that is used or
28 occupied by, or is in the possession of, the company not to take
29 possession of the property or otherwise recover it.
- 30 (5) The Court may only make an order under subsection (4) if satisfied
31 that:

- 1 (a) for the owner or lessor to take possession of the property or
2 otherwise recover it would have a material adverse effect on
3 achieving the purposes of the deed; and
4 (b) having regard to:
5 (i) the terms of the deed; and
6 (ii) the terms of the order; and
7 (iii) any other relevant matter;
8 the interests of the owner or lessor will be adequately
9 protected.
- 10 (6) An order under this section may be made subject to conditions.
- 11 (7) An order under this section may only be made on the application
12 of:
13 (a) if paragraph (1)(a) applies—the administrator of the
14 company; or
15 (b) if paragraph (1)(b) applies—the deed's administrator.

16 **444G Effect of deed on company, officers and members**

17 A deed of company arrangement also binds:

- 18 (a) the company; and
19 (b) its officers and members; and
20 (c) the deed's administrator.

21 **444H Extent of release of company's debts**

22 A deed of company arrangement releases the company from a debt
23 only in so far as:

- 24 (a) the deed provides for the release; and
25 (b) the creditor concerned is bound by the deed.

1

2 **Division 11—Variation, termination and avoidance of deed**

3 **445A Variation of deed by creditors**

4 A deed of company arrangement may be varied by a resolution
5 passed at a meeting of the company's creditors convened under
6 section 445F, but only if the variation is not materially different
7 from a proposed variation set out in the notice of the meeting.

8 **445B Court may cancel variation**

9 (1) Where a deed of company arrangement is varied under
10 section 445A, a creditor of the company may apply to the Court for
11 an order cancelling the variation.

12 (2) On an application, the Court:

13 (a) may make an order cancelling the variation, or confirming it,
14 either wholly or in part, on such conditions (if any) as the
15 order specifies; and

16 (b) may make such other orders as it thinks appropriate.

17 **445C When deed terminates**

18 A deed of company arrangement terminates when:

19 (a) the Court makes under section 445D an order terminating the
20 deed; or

21 (b) the company's creditors pass a resolution terminating the
22 deed at a meeting that was convened under section 445F by a
23 notice setting out the proposed resolution; or

24 (c) if the deed specifies circumstances in which it is to
25 terminate—those circumstances exist;

26 whichever happens first.

27 **445D When Court may terminate deed**

28 (1) The Court may make an order terminating a deed of company
29 arrangement if satisfied that:

Clause 445E

- 1 (a) information about the company's business, property, affairs
2 or financial circumstances that:
3 (i) was false or misleading; and
4 (ii) can reasonably be expected to have been material to
5 creditors of the company in deciding whether to vote in
6 favour of the resolution that the company execute the
7 deed;
8 was given to the administrator of the company or to such
9 creditors; or
10 (b) such information was contained in a report or statement
11 under subsection 439A(4) that accompanied a notice of the
12 meeting at which the resolution was passed; or
13 (c) there was an omission from such a report or statement and
14 the omission can reasonably be expected to have been
15 material to such creditors in so deciding; or
16 (d) there has been a material contravention of the deed by a
17 person bound by the deed; or
18 (e) effect cannot be given to the deed without injustice or undue
19 delay; or
20 (f) the deed or a provision of it is, an act or omission done or
21 made under the deed was, or an act or omission proposed to
22 be so done or made would be:
23 (i) oppressive or unfairly prejudicial to, or unfairly
24 discriminatory against, one or more such creditors; or
25 (ii) contrary to the interests of the creditors of the company
26 as a whole; or
27 (g) the deed should be terminated for some other reason.
28 (2) An order may be made on the application of:
29 (a) a creditor of the company; or
30 (b) the company; or
31 (c) any other interested person.

**445E Creditors may terminate deed and resolve that company be
wound up**

34 Where:

- 1 (a) at a meeting convened under section 445F, the company's
2 creditors pass a resolution terminating the deed; and
3 (b) the notice of the meeting set out a proposed resolution that
4 the company be wound up;
5 the creditors may also resolve at the meeting that the company be
6 wound up.

7 **445F Meeting of creditors to consider proposed variation or**
8 **termination of deed**

- 9 (1) The administrator of a deed of company arrangement:
10 (a) may at any time convene a meeting of the company's
11 creditors; and
12 (b) must convene such a meeting if so requested in writing by
13 creditors the value of whose claims against the company is
14 not less than 10% of the value of all the creditors' claims
15 against the company.
- 16 (2) A meeting under this section must be convened by the deed's
17 administrator:
18 (a) giving written notice of the meeting to as many of the
19 company's creditors as reasonable practicable; and
20 (b) causing notice of the meeting to be published:
21 (i) in a national newspaper; or
22 (ii) in each State or Territory in which the company has its
23 registered office or carries on business, in a daily
24 newspaper that circulates generally in that State or
25 Territory;
26 at least 5 business days before the meeting.
- 27 (3) The notice given to a creditor under paragraph (2)(a) must:
28 (a) set out each resolution (if any) under section 445A or
29 paragraph 445C(b) that the deed's administrator proposes
30 that the meeting vote on; and
31 (b) if the meeting is convened under paragraph (1)(b) of this
32 section—set out each proposed resolution under
33 section 445A or paragraph 445C(b) that is set out in the
34 request.

- 1 (4) At a meeting convened under this section, the deed's administrator
2 is to preside.
- 3 (5) A meeting convened under this section may be adjourned from
4 time to time.

5 **445G When Court may void or validate deed**

- 6 (1) Where there is doubt, on a specific ground, whether a deed of
7 company arrangement was entered into in accordance with this
8 Part or complies with this Part, the administrator of the deed, a
9 member or creditor of the company, or ASIC, may apply to the
10 Court for an order under this section.
- 11 (2) On an application, the Court may make an order declaring the
12 deed, or a provision of it, to be void or not to be void, as the case
13 requires, on the ground specified in the application or some other
14 ground.
- 15 (3) On an application, the Court may declare the deed, or a provision
16 of it, to be valid, despite a contravention of a provision of this Part,
17 if the Court is satisfied that:
- 18 (a) the provision was substantially complied with; and
19 (b) no injustice will result for anyone bound by the deed if the
20 contravention is disregarded.
- 21 (4) Where the Court declares a provision of a deed of company
22 arrangement to be void, the Court may by order vary the deed, but
23 only with the consent of the deed's administrator.

24 **445H Effect of termination or avoidance**

25 The termination or avoidance, in whole or in part, of a deed of
26 company arrangement does not affect the previous operation of the
27 deed.

1

2 **Division 12—Transition to creditors' voluntary winding up**

3 **446A Administrator becomes liquidator in certain cases**

4 (1) This section applies if:

- 5 (a) the creditors of a company under administration resolve at a
6 particular time under paragraph 439C(c) that the company be
7 wound up; or
8 (b) a company under administration contravenes subsection
9 444B(2) at a particular time; or
10 (c) at a meeting convened under section 445F, a company's
11 creditors:
12 (i) pass a resolution terminating a deed of company
13 arrangement executed by the company; and
14 (ii) also resolve at a particular time under section 445E that
15 the company be wound up.

16 (2) The company is taken:

- 17 (a) to have passed, at the time referred to in paragraph (1)(a) or
18 (b) or subparagraph (1)(c)(ii), as the case may be, a special
19 resolution under section 491 that the company be wound up
20 voluntarily; and
21 (b) to have done so without a declaration having been made and
22 lodged under section 494.

23 (3) Section 497 is taken to have been complied with in relation to the
24 winding up.

25 (4) For the purposes of subsection 499(1):

- 26 (a) the company is taken to have nominated:
27 (i) if paragraph (1)(a) or (b) of this section applies—the
28 administrator of the company; or
29 (ii) if paragraph (1)(c) of this section applies—the
30 administrator of the deed;
31 to be liquidator for the purposes of the winding up; and
32 (b) the creditors are taken not to have so nominated anyone.

- 1 (5) The liquidator must:
- 2 (a) within 7 days after the day on which the company is taken to
- 3 have passed the resolution, lodge a written notice stating that
- 4 the company is taken because of this section to have passed
- 5 such a resolution and specifying that day; and
- 6 (b) cause a notice of that kind to be published, within 21 days
- 7 after that day:
- 8 (i) in a national newspaper; or
- 9 (ii) in each State or Territory in which the company has its
- 10 registered office or carries on business, in a daily
- 11 newspaper that circulates generally in that State or
- 12 Territory.
- 13 (6) Section 482 applies in relation to the winding up as if it were a
- 14 winding up in insolvency or by the Court.
- 15 Note: Section 482 empowers the Court to stay or terminate a winding up and
- 16 give consequential directions.
- 17 (7) An application under section 482 as applying because of
- 18 subsection (6) may be made:
- 19 (a) despite subsection 499(4), by the company pursuant to a
- 20 resolution of the board; or
- 21 (b) by the liquidator; or
- 22 (c) by a creditor; or
- 23 (d) by a contributory.

24 **446B Regulations may provide for transition in other cases**

- 25 (1) The regulations may prescribe cases where:
- 26 (a) a company under administration; or
- 27 (b) a company that has executed a deed of company arrangement
- 28 (even if the deed has terminated);
- 29 is taken to have passed a special resolution under section 491 that
- 30 the company be wound up voluntarily.
- 31 (2) The regulations may provide for Part 5.5 to apply with prescribed
- 32 modifications in cases prescribed for the purposes of
- 33 subsection (1).

Clause 446B

- 1 (3) Without limiting subsection (2), the regulations may provide, in
2 relation to such cases, for matters of a kind provided for by any of
3 subsections 446A(2) to (7), inclusive.
- 4 (4) Regulations in force for the purposes of this section have effect
5 accordingly.

1

2 **Division 13—Powers of Court**

3 **447A General power to make orders**

4 (1) The Court may make such order as it thinks appropriate about how
5 this Part is to operate in relation to a particular company.

6 (2) For example, if the Court is satisfied that the administration of a
7 company should end:

- 8 (a) because the company is solvent; or
- 9 (b) because provisions of this Part are being abused; or
- 10 (c) for some other reason;

11 the Court may order under subsection (1) that the administration is
12 to end.

13 (3) An order may be made subject to conditions.

14 (4) An order may be made on the application of:

- 15 (a) the company; or
- 16 (b) a creditor of the company; or
- 17 (c) in the case of a company under administration—the
18 administrator of the company; or
- 19 (d) in the case of a company that has executed a deed of
20 company arrangement—the deed's administrator; or
- 21 (e) ASIC; or
- 22 (f) any other interested person.

23 **447B Orders to protect creditors during administration**

24 (1) On the application of ASIC, the Court may make such order as it
25 thinks necessary to protect the interests of a company's creditors
26 while the company is under administration.

27 (2) On the application of a creditor of a company, the Court may make
28 such order as it thinks necessary to protect the creditor's interests
29 while the company is under administration.

30 (3) An order may be made subject to conditions.

1 **447C Court may declare whether administrator validly appointed**

2 (1) If there is doubt, on a specific ground, about whether a purported
3 appointment of a person as administrator of a company, or of a
4 deed of company arrangement, is valid, the person, the company or
5 any of the company's creditors may apply to the Court for an order
6 under subsection (2).

7 (2) On an application, the Court may make an order declaring whether
8 or not the purported appointment was valid on the ground specified
9 in the application or on some other ground.

10 **447D Administrator may seek directions**

11 (1) The administrator of a company under administration, or of a deed
12 of company arrangement, may apply to the Court for directions
13 about a matter arising in connection with the performance or
14 exercise of any of the administrator's functions and powers.

15 (2) The administrator of a deed of company arrangement may apply to
16 the Court for directions about a matter arising in connection with
17 the operation of, or giving effect to, the deed.

18 **447E Supervision of administrator of company or deed**

19 (1) Where the Court is satisfied that the administrator of a company
20 under administration, or of a deed of company arrangement:
21 (a) has managed, or is managing, the company's business,
22 property or affairs in a way that is prejudicial to the interests
23 of some or all of the company's creditors or members; or
24 (b) has done an act, or made an omission, or proposes to do an
25 act, or to make an omission, that is or would be prejudicial to
26 such interests;
27 the Court may make such order as it thinks just.

28 (2) Where the Court is satisfied that:
29 (a) a company is under administration but:
30 (i) there is a vacancy in the office of administrator of the
31 company; or

Clause 447F

- 1 (ii) no administrator of the company is acting; or
2 (b) a deed of company arrangement has not yet terminated but:
3 (i) there is a vacancy in the office of administrator of the
4 deed; or
5 (ii) no administrator of the deed is acting;
6 the Court may make such order as it thinks just.
7 (3) An order may only be made on the application of ASIC or of a
8 creditor or member of the company.

9 **447F Effect of Division**

10 Nothing in this Division limits the generality of anything else in it.

1

2 **Division 14—Qualifications of administrators**

3 **448A Appointee must consent**

4 A person cannot be appointed as administrator of a company or of
5 a deed of company arrangement unless:

- 6 (a) the person has consented in writing to the appointment; and
7 (b) as at the time of the appointment, the person has not
8 withdrawn the consent.

9 **448B Administrator must be registered liquidator**

10 A person must not consent to be appointed, and must not act, as
11 administrator of a company or of a deed of company arrangement
12 unless he or she is a registered liquidator.

13 **448C Disqualification of person connected with company**

14 (1) Subject to this section, a person must not, except with the leave of
15 the Court, seek or consent to be appointed as, or act as,
16 administrator of a company or of a deed of company arrangement
17 if:

- 18 (a) the person, or a body corporate in which the person has a
19 substantial holding, is indebted in an amount exceeding
20 \$5,000 to the company or to a body corporate related to the
21 company; or
22 (b) the person is, otherwise than in a capacity as administrator or
23 liquidator of, or as administrator of a deed of company
24 arrangement executed by, the company or a related body
25 corporate, a creditor of the company or of a related body
26 corporate in an amount exceeding \$5,000; or
27 (c) the person is an officer of the company (otherwise than
28 because of being an administrator or liquidator of, or an
29 administrator of a deed of company arrangement executed
30 by, a body corporate related to the company); or
31 (d) the person is an officer of a body corporate that is a
32 mortgagee of property of the company; or

Clause 448D

- 1 (e) the person is an auditor of the company; or
2 (f) the person is a partner or employee of an auditor of the
3 company; or
4 (g) the person is a partner, employer or employee of an officer of
5 the company; or
6 (h) the person is a partner or employee of an employee of an
7 officer of the company.
- 8 (2) For the purposes of paragraph (1)(a), disregard a debt owed by a
9 natural person to a body corporate if:
10 (a) the body corporate is:
11 (i) an Australian ADI; or
12 (ii) a body corporate registered under the *Life Insurance Act*
13 *1995*; and
14 (b) the debt arose because of a loan that the body corporate or
15 entity made to the person in the ordinary course of its
16 ordinary business; and
17 (c) the person used the amount of the loan to pay the whole or
18 part of the purchase price of premises that the person uses as
19 their principal place of residence.
- 20 (3) For the purposes of subsection (1), a person is taken to be an
21 officer or auditor of a company if:
22 (a) the person is an officer or auditor of the company or of a
23 related body corporate; or
24 (b) except where ASIC, if it thinks fit in the circumstances of the
25 case, directs that this paragraph not apply in relation to the
26 person—the person has, within the last 2 years, been an
27 officer, auditor or promoter of the company or of a related
28 body corporate.

29 **448D Disqualification of insolvent under administration**

30 A person must not consent to be appointed, and must not act, as
31 administrator of a company or of a deed of company arrangement
32 if he or she is an insolvent under administration.

1

2 **Division 15—Removal, replacement and remuneration of**
3 **administrator**

3

4 **449A Appointment of administrator cannot be revoked**

5

The appointment of a person as administrator of a company or of a
6 deed of company arrangement cannot be revoked.

6

7 **449B Court may remove administrator**

8

On the application of ASIC or of a creditor of the company
9 concerned, the Court may:

9

10

(a) remove from office the administrator of a company under
administration or of a deed of company arrangement; and

11

12

(b) appoint someone else as administrator of the company or
13 deed.

13

14 **449C Vacancy in office of administrator of company**

15

(1) Where the administrator of a company under administration:

16

(a) dies; or

17

(b) becomes prohibited from acting as administrator of the
company; or

18

19

(c) resigns by notice in writing given to his or her appointer and
to the company;

20

his or her appointer may appoint someone else as administrator of
the company.

21

22

23

(2) In subsection (1):

24

appointer, in relation to the administrator of a company under
administration, means:

25

26

(a) if the administrator was appointed by the Court under
section 449B or subsection (6) of this section—the Court; or

27

28

(b) otherwise:

29

(i) if the administration began because of an appointment
under section 436A—the company; or

30

- 1 (ii) if the administration began because of an appointment
2 under section 436B—a liquidator or provisional
3 liquidator of the company; or
4 (iii) if the administration began because of an appointment
5 under section 436C—a person who is entitled, or would
6 apart from section 440B or 441D be entitled, to enforce
7 the charge.
- 8 (3) An appointment under subsection (1) by the company under
9 administration must be made pursuant to a resolution of the board.
- 10 (4) Within 5 business days after being appointed under subsection (1)
11 as administrator of a company otherwise than by the Court, a
12 person must convene a meeting of the company's creditors so that
13 they may:
14 (a) determine whether to remove the person from office; and
15 (b) if so, appoint someone else as administrator of the company.
- 16 (5) A person must convene a meeting under subsection (4) by:
17 (a) giving written notice of the meeting to as many of the
18 company's creditors as reasonably practicable; and
19 (b) causing notice of the meeting to be published:
20 (i) in a national newspaper; or
21 (ii) in each State or Territory in which the company has its
22 registered office or carries on business, in a daily
23 newspaper that circulates generally in that State or
24 Territory;
25 at least 2 business days before the meeting.
- 26 (6) Where a company is under administration, but for some reason no
27 administrator is acting, the Court may appoint a person as
28 administrator on the application of ASIC or of an officer, member
29 or creditor of the company.
- 30 (7) Subsections (3) and (6) have effect despite section 437C.

1 **449D Vacancy in office of administrator of deed of company**
2 **arrangement**

- 3 (1) Where the administrator of a deed of company arrangement:
4 (a) dies; or
5 (b) becomes prohibited from acting as administrator of the deed;
6 or
7 (c) resigns by notice in writing given to the company;
8 the Court may appoint someone else as administrator of the deed.
- 9 (2) Where a deed of company arrangement has not yet terminated, but
10 for some reason no administrator of the deed is acting, the Court
11 may appoint a person as administrator of the deed.
- 12 (3) An appointment may be made on the application of ASIC or of an
13 officer, member or creditor of the company.

14 **449E Remuneration of administrator**

- 15 (1) The administrator of a company under administration, or of a deed
16 of company arrangement, is entitled to:
17 (a) such remuneration as is fixed by a resolution of the
18 company's creditors passed at a meeting convened under
19 section 439A, or under section 439A or 445F, as the case
20 may be; or
21 (b) if no remuneration is so fixed—such remuneration as the
22 Court fixes on the application of the administrator.
- 23 (2) Where remuneration is fixed under paragraph (1)(a), the Court
24 may, on the application of the administrator or of an officer,
25 member or creditor of the company:
26 (a) review the remuneration; and
27 (b) confirm, increase or reduce it.
- 28 (3) Subsection (2) has effect despite section 437C.

1

2 **Division 16—Notices about steps taken under Part**

3 **450A Appointment of administrator**

- 4 (1) Where an administrator of a company is appointed under
5 section 436A, 436B or 436C, the administrator must:
- 6 (a) lodge a notice of the appointment before the end of the next
7 business day after the appointment; and
- 8 (b) cause such a notice to be published, within 3 business days
9 after the appointment:
- 10 (i) in a national newspaper; or
- 11 (ii) in each State or Territory in which the company has its
12 registered office or carries on business, in a daily
13 newspaper that circulates generally in that State or
14 Territory.
- 15 (2) As soon as practicable, and in any event before the end of the next
16 business day, after appointing an administrator of a company under
17 section 436C, a person must give to the company a written notice
18 of the appointment.
- 19 (3) As soon as practicable, and in any event before the end of the next
20 business day, after an administrator of a company is appointed
21 under section 436A, 436B or 436C, he or she must give a written
22 notice of the appointment to:
- 23 (a) each person who holds a charge on the whole, or
24 substantially the whole, of the company's property; and
- 25 (b) each person who holds 2 or more charges on property of the
26 company where the property of the company subject to the
27 respective charges together constitutes the whole, or
28 substantially the whole, of the company's property.
- 29 (4) An administrator need not give a notice under subsection (3) to the
30 person who appointed the administrator.

1 **450B Execution of deed of company arrangement**

- 2 As soon as practicable after a deed of company arrangement is
3 executed, the deed's administrator must:
- 4 (a) send to each creditor of the company a written notice of the
5 execution of the deed; and
 - 6 (b) cause such a notice to be published:
 - 7 (i) in a national newspaper; or
 - 8 (ii) in each State or Territory in which the company has its
9 registered office or carries on business, in a daily
10 newspaper that circulates generally in that State or
11 Territory; and
 - 12 (c) lodge a copy of the deed.

13 **450C Failure to execute deed of company arrangement**

- 14 As soon as practicable after a company contravenes subsection
15 444B(2), the deed's administrator must:
- 16 (a) lodge a notice that the company has failed to execute the
17 instrument within the required period; and
 - 18 (b) cause a notice of the failure to be published as prescribed.

19 **450D Termination of deed of company arrangement**

- 20 Where a deed of company arrangement terminates because of
21 paragraph 445C(b), the deed's administrator must:
- 22 (a) lodge a notice of the termination; and
 - 23 (b) send such a notice to each of the company's creditors; and
 - 24 (c) cause such a notice to be published as prescribed.

25 **450E Notice in public documents etc. of company**

- 26 (1) A company under administration must set out, in every public
27 document, and in every negotiable instrument, of the company,
28 after the company's name where it first appears, the expression
29 ("administrator appointed").

- 1 (2) Until a deed of company arrangement terminates, the company
2 must set out, in every public document, and in every negotiable
3 instrument, of the company, after the company's name where it
4 first appears, the expression ("subject to deed of company
5 arrangement").

6 **450F Effect of contravention of this Division**

- 7 A contravention of this Division does not affect the validity of
8 anything done or omitted under this Part, except so far as the Court
9 otherwise orders.

1

2 **Division 17—Miscellaneous**

3 **451A Appointment of 2 or more administrators of company**

- 4 (1) Where a provision of this Act provides for an administrator of a
5 company to be appointed, 2 or more persons may be appointed as
6 administrators of the company.
- 7 (2) Where, because of subsection (1), there are 2 or more
8 administrators of a company:
- 9 (a) a function or power of an administrator of the company may
10 be performed or exercised by any one of them, or by any 2 or
11 more of them together, except so far as the instrument or
12 resolution appointing them otherwise provides; and
- 13 (b) a reference in this Act to an administrator, or to the
14 administrator, of a company is, in the case of the
15 first-mentioned company, a reference to whichever one or
16 more of those administrators the case requires.

17 **451B Appointment of 2 or more administrators of deed of company**
18 **arrangement**

- 19 (1) Where a provision of this Act provides for an administrator of a
20 deed of company arrangement to be appointed, 2 or more persons
21 may be appointed as administrators of the deed.
- 22 (2) Where, because of subsection (1), there are 2 or more
23 administrators of a deed of company arrangement:
- 24 (a) a function or power of an administrator of the deed may be
25 performed or exercised by any one of them, or by any 2 or
26 more of them together, except so far as the deed, or the
27 resolution or instrument appointing them, otherwise
28 provides; and
- 29 (b) a reference in this Act to an administrator, or to the
30 administrator, of a deed of company arrangement is, in the
31 case of the first-mentioned deed, a reference to whichever
32 one or more of those administrators the case requires.

1 **451C Effect of things done during administration of company**

2 A payment made, transaction entered into, or any other act or thing
3 done, in good faith, by, or with the consent of, the administrator of
4 a company under administration:

- 5 (a) is valid and effectual for the purposes of this Act; and
6 (b) is not liable to be set aside in a winding up of the company.

7 **451D Time for doing act does not run while act prevented by this**
8 **Part**

9 Where:

- 10 (a) for any purpose (for example, the purposes of a law,
11 agreement or instrument) an act must or may be done within
12 a particular period or before a particular time; and
13 (b) this Part prevents the act from being done within that period
14 or before that time;
15 the period is extended, or the time is deferred, because of this
16 section, according to how long this Part prevented the act from
17 being done.

1

2 **Part 5.4—Winding up in insolvency**

3 **Division 1—When company to be wound up in insolvency**

4 **459A Order that insolvent company be wound up in insolvency**

5 On an application under section 459P, the Court may order that an
6 insolvent company be wound up in insolvency.

7 **459B Order made on application under section 234, 462 or 464**

8 Where, on an application under section 234, 462 or 464, the Court
9 is satisfied that the company is insolvent, the Court may order that
10 the company be wound up in insolvency.

11 **459C Presumptions to be made in certain proceedings**

- 12 (1) This section has effect for the purposes of:
- 13 (a) an application under section 234, 459P, 462 or 464; or
- 14 (b) an application for leave to make an application under
- 15 section 459P.
- 16 (2) The Court must presume that the company is insolvent if, during or
- 17 after the 3 months ending on the day when the application was
- 18 made:
- 19 (a) the company failed (as defined by section 459F) to comply
- 20 with a statutory demand; or
- 21 (b) execution or other process issued on a judgment, decree or
- 22 order of an Australian court in favour of a creditor of the
- 23 company was returned wholly or partly unsatisfied; or
- 24 (c) a receiver, or receiver and manager, of property of the
- 25 company was appointed under a power contained in an
- 26 instrument relating to a floating charge on such property; or
- 27 (d) an order was made for the appointment of such a receiver, or
- 28 receiver and manager, for the purpose of enforcing such a
- 29 charge; or

- 1 (e) a person entered into possession, or assumed control, of such
2 property for such a purpose; or
3 (f) a person was appointed so to enter into possession or assume
4 control (whether as agent for the chargee or for the
5 company).
- 6 (3) A presumption for which this section provides operates except so
7 far as the contrary is proved for the purposes of the application.

8 **459D Contingent or prospective liability relevant to whether**
9 **company solvent**

- 10 (1) In determining, for the purposes of an application of a kind referred
11 to in subsection 459C(1), whether or not the company is solvent,
12 the Court may take into account a contingent or prospective
13 liability of the company.
- 14 (2) Subsection (1) does not limit the matters that may be taken into
15 account in determining, for a particular purpose, whether or not a
16 company is solvent.

1

2 **Division 2—Statutory demand**

3 **459E Creditor may serve statutory demand on company**

- 4 (1) A person may serve on a company a demand relating to:
- 5 (a) a single debt that the company owes to the person, that is due
- 6 and payable and whose amount is at least the statutory
- 7 minimum; or
- 8 (b) 2 or more debts that the company owes to the person, that are
- 9 due and payable and whose amounts total at least the
- 10 statutory minimum.
- 11 (2) The demand:
- 12 (a) if it relates to a single debt—must specify the debt and its
- 13 amount; and
- 14 (b) if it relates to 2 or more debts—must specify the total of the
- 15 amounts of the debts; and
- 16 (c) must require the company to pay the amount of the debt, or
- 17 the total of the amounts of the debts, or to secure or
- 18 compound for that amount or total to the creditor’s
- 19 reasonable satisfaction, within 21 days after the demand is
- 20 served on the company; and
- 21 (d) must be in writing; and
- 22 (e) must be in the prescribed form (if any); and
- 23 (f) must be signed by or on behalf of the creditor.
- 24 (3) Unless the debt, or each of the debts, is a judgment debt, the
- 25 demand must be accompanied by an affidavit that:
- 26 (a) verifies that the debt, or the total of the amounts of the debts,
- 27 is due and payable by the company; and
- 28 (b) complies with the rules.
- 29 (4) A person may make a demand under this section relating to a debt
- 30 even if the debt is owed to the person as assignee.
- 31 (5) A demand under this section may relate to a liability under any of
- 32 the following provisions of the *Income Tax Assessment Act 1936*:

- 1 (a) section 221F (except subsection 221F(12)), section 221G
2 (except subsection 221G(4A)) or section 221P;
3 (b) subsection 221YHDC(2);
4 (c) subsection 221YHZD(1) or (1A);
5 (d) subsection 221YN(1);
6 (e) section 222AHA;
7 and any of the provisions of Subdivision 16-B in Schedule 1 to the
8 *Taxation Administration Act 1953*, even if the liability arose before
9 1 January 1991.
- 10 (6) Subsection (5) is to avoid doubt and is not intended to limit the
11 generality of a reference in this Act to a debt.

12 **459F When company taken to fail to comply with statutory demand**

- 13 (1) If, as at the end of the period for compliance with a statutory
14 demand, the demand is still in effect and the company has not
15 complied with it, the company is taken to fail to comply with the
16 demand at the end of that period.
- 17 (2) The period for compliance with a statutory demand is:
- 18 (a) if the company applies in accordance with section 459G for
19 an order setting aside the demand:
- 20 (i) if, on hearing the application under section 459G, or on
21 an application by the company under this paragraph, the
22 Court makes an order that extends the period for
23 compliance with the demand—the period specified in
24 the order, or in the last such order, as the case requires,
25 as the period for such compliance; or
26 (ii) otherwise—the period beginning on the day when the
27 demand is served and ending 7 days after the
28 application under section 459G is finally determined or
29 otherwise disposed of; or
30 (b) otherwise—21 days after the demand is served.

1

2 **Division 3—Application to set aside statutory demand**

3 **459G Company may apply**

- 4 (1) A company may apply to the Court for an order setting aside a
5 statutory demand served on the company.
- 6 (2) An application may only be made within 21 days after the demand
7 is so served.
- 8 (3) An application is made in accordance with this section only if,
9 within those 21 days:
- 10 (a) an affidavit supporting the application is filed with the Court;
11 and
12 (b) a copy of the application, and a copy of the supporting
13 affidavit, are served on the person who served the demand on
14 the company.

15 **459H Determination of application where there is a dispute or**
16 **offsetting claim**

- 17 (1) This section applies where, on an application under section 459G,
18 the Court is satisfied of either or both of the following:
- 19 (a) that there is a genuine dispute between the company and the
20 respondent about the existence or amount of a debt to which
21 the demand relates;
- 22 (b) that the company has an offsetting claim.
- 23 (2) The Court must calculate the substantiated amount of the demand
24 in accordance with the formula:
- 25 Admitted total – Offsetting total
26 where:
- 27 ***admitted total*** means:
- 28 (a) the admitted amount of the debt; or
29 (b) the total of the respective admitted amounts of the debts;
30 as the case requires, to which the demand relates.

- 1 **offsetting total** means:
- 2 (a) if the Court is satisfied that the company has only one
- 3 offsetting claim—the amount of that claim; or
- 4 (b) if the Court is satisfied that the company has 2 or more
- 5 offsetting claims—the total of the amounts of those claims;
- 6 or
- 7 (c) otherwise—a nil amount.
- 8 (3) If the substantiated amount is less than the statutory minimum, the
- 9 Court must, by order, set aside the demand.
- 10 (4) If the substantiated amount is at least as great as the statutory
- 11 minimum, the Court may make an order:
- 12 (a) varying the demand as specified in the order; and
- 13 (b) declaring the demand to have had effect, as so varied, as
- 14 from when the demand was served on the company.
- 15 (5) In this section:
- 16 **admitted amount**, in relation to a debt, means:
- 17 (a) if the Court is satisfied that there is a genuine dispute
- 18 between the company and the respondent about the existence
- 19 of the debt—a nil amount; or
- 20 (b) if the Court is satisfied that there is a genuine dispute
- 21 between the company and the respondent about the amount
- 22 of the debt—so much of that amount as the Court is satisfied
- 23 is not the subject of such a dispute; or
- 24 (c) otherwise—the amount of the debt.
- 25 **offsetting claim** means a genuine claim that the company has
- 26 against the respondent by way of counterclaim, set-off or
- 27 cross-demand (even if it does not arise out of the same transaction
- 28 or circumstances as a debt to which the demand relates).
- 29 **respondent** means the person who served the demand on the
- 30 company.
- 31 (6) This section has effect subject to section 459J.

1 **459J Setting aside demand on other grounds**

- 2 (1) On an application under section 459G, the Court may by order set
3 aside the demand if it is satisfied that:
- 4 (a) because of a defect in the demand, substantial injustice will
5 be caused unless the demand is set aside; or
- 6 (b) there is some other reason why the demand should be set
7 aside.
- 8 (2) Except as provided in subsection (1), the Court must not set aside a
9 statutory demand merely because of a defect.

10 **459K Effect of order setting aside demand**

11 A statutory demand has no effect while there is in force under
12 section 459H or 459J an order setting aside the demand.

13 **459L Dismissal of application**

14 Unless the Court makes, on an application under section 459J, an
15 order under section 459H or 459J, the Court is to dismiss the
16 application.

17 **459M Order subject to conditions**

18 An order under section 459H or 459J may be made subject to
19 conditions.

20 **459N Costs where company successful**

21 Where, on an application under section 459G, the Court sets aside
22 the demand, it may order the person who served the demand to pay
23 the company's costs in relation to the application.

1

2 **Division 4—Application for order to wind up company in**
3 **insolvency**

4 **459P Who may apply for order under section 459A**

- 5 (1) Any one or more of the following may apply to the Court for a
6 company to be wound up in insolvency:
- 7 (a) the company;
 - 8 (b) a creditor (even if the creditor is a secured creditor or is only
9 a contingent or prospective creditor);
 - 10 (c) a contributory;
 - 11 (d) a director;
 - 12 (e) a liquidator or provisional liquidator of the company;
 - 13 (f) ASIC;
 - 14 (g) a prescribed agency.
- 15 (2) An application by any of the following, or by persons including
16 any of the following, may only be made with the leave of the
17 Court:
- 18 (a) a person who is a creditor only because of a contingent or
19 prospective debt;
 - 20 (b) a contributory;
 - 21 (c) a director;
 - 22 (d) ASIC.
- 23 (3) The Court may give leave if satisfied that there is a prima facie
24 case that the company is insolvent, but not otherwise.
- 25 (4) The Court may give leave subject to conditions.
- 26 (5) Except as permitted by this section, a person cannot apply for a
27 company to be wound up in insolvency.

1 **459Q Application relying on failure to comply with statutory**
2 **demand**

3 If an application for a company to be wound up in insolvency relies
4 on a failure by the company to comply with a statutory demand,
5 the application:

- 6 (a) must set out particulars of service of the demand on the
7 company and of the failure to comply with the demand; and
8 (b) must have attached to it:
9 (i) a copy of the demand; and
10 (ii) if the demand has been varied by an order under
11 subsection 459H(4)—a copy of the order; and
12 (c) unless the debt, or each of the debts, to which the demand
13 relates is a judgment debt—must be accompanied by an
14 affidavit that:
15 (i) verifies that the debt, or the total of the amounts of the
16 debts, is due and payable by the company; and
17 (ii) complies with the rules.

18 **459R Period within which application must be determined**

- 19 (1) An application for a company to be wound up in insolvency is to
20 be determined within 6 months after it is made.
- 21 (2) The Court may by order extend the period within which an
22 application must be determined, but only if:
23 (a) the Court is satisfied that special circumstances justify the
24 extension; and
25 (b) the order is made within that period as prescribed by
26 subsection (1), or as last extended under this subsection, as
27 the case requires.
- 28 (3) An application is, because of this subsection, dismissed if it is not
29 determined as required by this section.
- 30 (4) An order under subsection (2) may be made subject to conditions.

1 **459S Company may not oppose application on certain grounds**

- 2 (1) In so far as an application for a company to be wound up in
3 insolvency relies on a failure by the company to comply with a
4 statutory demand, the company may not, without the leave of the
5 Court, oppose the application on a ground:
6 (a) that the company relied on for the purposes of an application
7 by it for the demand to be set aside; or
8 (b) that the company could have so relied on, but did not so rely
9 on (whether it made such an application or not).
- 10 (2) The Court is not to grant leave under subsection (1) unless it is
11 satisfied that the ground is material to proving that the company is
12 solvent.

13 **459T Application to wind up joint debtors in insolvency**

- 14 (1) A single application may be made for 2 or more companies to be
15 wound up in insolvency if they are joint debtors, whether partners
16 or not.
- 17 (2) On such an application, the Court may order that one or more of
18 the companies be wound up in insolvency, even if it dismisses the
19 application in so far as it relates to another or others.

1
2 **Part 5.4A—Winding up by the Court on other**
3 **grounds**
4

5 **461 General grounds on which company may be wound up by Court**

- 6 (1) The Court may order the winding up of a company if:
7 (a) the company has by special resolution resolved that it be
8 wound up by the Court; or
9 (c) the company does not commence business within one year
10 from its incorporation or suspends its business for a whole
11 year; or
12 (d) the company has no members; or
13 (e) directors have acted in affairs of the company in their own
14 interests rather than in the interests of the members as a
15 whole, or in any other manner whatsoever that appears to be
16 unfair or unjust to other members; or
17 (f) affairs of the company are being conducted in a manner that
18 is oppressive or unfairly prejudicial to, or unfairly
19 discriminatory against, a member or members or in a manner
20 that is contrary to the interests of the members as a whole; or
21 (g) an act or omission, or a proposed act or omission, by or on
22 behalf of the company, or a resolution, or a proposed
23 resolution, of a class of members of the company, was or
24 would be oppressive or unfairly prejudicial to, or unfairly
25 discriminatory against, a member or members or was or
26 would be contrary to the interests of the members as a whole;
27 or
28 (h) ASIC has stated in a report prepared under Division 1 of
29 Part 3 of the ASIC Act that, in its opinion:
30 (i) the company cannot pay its debts and should be wound
31 up; or
32 (ii) it is in the interests of the public, of the members, or of
33 the creditors, that the company should be wound up;

- 1 (j) if the application was made by APRA—the Court is of
2 opinion that it is in the interests of the public, of the members
3 or of the creditors that the company should be wound up; or
4 (k) the Court is of opinion that it is just and equitable that the
5 company be wound up.
- 6 (2) A company must lodge a copy of a special resolution referred to in
7 paragraph (1)(a) with ASIC within 14 days after the resolution is
8 passed.

9 **462 Standing to apply for winding up**

- 10 (1) A reference in this section to an order to wind up a company is a
11 reference to an order to wind up the company on a ground provided
12 for by section 461.
- 13 (2) Subject to this section, any one or more of the following may apply
14 for an order to wind up a company:
- 15 (a) the company; or
16 (b) a creditor (including a contingent or prospective creditor) of
17 the company; or
18 (c) a contributory; or
19 (d) the liquidator of the company; or
20 (e) ASIC pursuant to section 464; or
21 (f) ASIC (in the circumstances set out in subsection (2A)); or
22 (h) APRA.
- 23 (2A) ASIC may apply for an order to wind up a company under
24 paragraph (2)(f) only if:
- 25 (a) the company has no members; and
26 (b) ASIC has given the company at least 1 month's written
27 notice of its intention to apply for the order.
- 28 (3) A person being, or persons including, APRA may only apply for an
29 order to wind up a company if:
- 30 (a) an inspector has been appointed to make an investigation in
31 respect of the company under section 52 of the *Insurance Act*
32 *1973*; and

- 1 (b) the company's liabilities within the meaning of Part III of
2 that Act exceed the company's assets within the meaning of
3 that Part.
- 4 (4) The Court must not hear an application by a person being, or
5 persons including, a contingent or prospective creditor of a
6 company for an order to wind up the company unless and until:
7 (a) such security for costs has been given as the Court thinks
8 reasonable; and
9 (b) a prima facie case for winding up the company has been
10 established to the Court's satisfaction.
- 11 (5) Except as permitted by this section, a person is not entitled to apply
12 for an order to wind up a company.

13 **464 Application for winding up in connection with investigation**
14 **under ASIC Act**

- 15 (1) Where ASIC is investigating, or has investigated, under Division 1
16 of Part 3 of the ASIC Act:
17 (a) matters being, or connected with, affairs of a company; or
18 (b) matters including such matters;
19 ASIC may apply to the Court for the winding up of the company.
- 20 (2) For the purposes of an application under subsection (1), this Act
21 applies, with such modifications as the circumstances require, as if
22 a winding up application had been made by the company.
- 23 (3) ASIC must give a copy of an application made under
24 subsection (1) to the company.

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2 **Part 5.4B—Winding up in insolvency or by the**
3 **Court**

3

4 **Division 1—General**

4

5 **465A Notice of application**

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6 A person who applies under section 459P, 462 or 464 for a
7 company to be wound up must:

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(a) lodge notice in the prescribed form that the application has
been made; and

(b) within 14 days after the application is made, serve a copy of
it on the company; and

(c) advertise the application as prescribed by the rules.

13

13 **465B Substitution of applicants**

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(1) The Court may by order substitute, as applicant or applicants in an
application under section 459P, 462 or 464 for a company to be
wound up, a person or persons who might otherwise have so
applied for the company to be wound up.

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(2) The Court may only make an order if the Court thinks it
appropriate to do so:

(a) because the application is not being proceeded with diligently
enough; or

(b) for some other reason.

23

24

25

(3) The substituted applicant may be, or the substituted applicants may
be or include, the person who was the applicant, or any of the
persons who were the applicants, before the substitution.

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(4) After an order is made, the application may proceed as if the
substituted applicant or applicants had been the original applicant
or applicants.

1 **465C Applicant to be given notice of grounds for opposing**
2 **application**

3 On the hearing of an application under section 459P, 462 or 464, a
4 person may not, without the leave of the Court, oppose the
5 application unless, within the period prescribed by the rules, the
6 person has filed, and served on the applicant:

- 7 (a) notice of the grounds on which the person opposes the
8 application; and
9 (b) an affidavit verifying the matters stated in the notice.

10 **466 Payment of preliminary costs etc.**

- 11 (1) The persons, other than the company itself or the liquidator of the
12 company, on whose application any winding up order is made
13 must, at their own cost, prosecute all proceedings in the winding up
14 until a liquidator has been appointed under this Part.
- 15 (2) The liquidator must, unless the Court orders otherwise, reimburse
16 the applicant out of the property of the company the taxed costs
17 incurred by the applicant in any such proceedings.
- 18 (3) Where the company has no property or does not have sufficient
19 property and, in the opinion of ASIC, a fraud has been committed
20 by any person in the promotion or formation of the company or by
21 any officer of the company in relation to the company since its
22 formation, the taxed costs or so much of them as is not reimbursed
23 under subsection (2) may be reimbursed by ASIC to an amount not
24 exceeding \$1,000.
- 25 (4) Where any winding up order is made upon the application of the
26 company or a liquidator of the company, the costs incurred must,
27 subject to any order of the Court, be paid out of the property of the
28 company in like manner as if they were the costs of any other
29 applicant.

30 **467 Court's powers on hearing application**

- 31 (1) Subject to subsection (2) and section 467A, on hearing a winding
32 up application the Court may:

- 1 (a) dismiss the application with or without costs, even if a
2 ground has been proved on which the Court may order the
3 company to be wound up on the application; or
4 (b) adjourn the hearing conditionally or unconditionally; or
5 (c) make any interim or other order that it thinks fit.
- 6 (2) The Court must not refuse to make a winding up order merely
7 because:
8 (a) the property of the company has been mortgaged to an
9 amount equal to or greater than the value or amount of that
10 property; or
11 (b) the company has no property.
- 12 (3) The Court may, on the application coming on for hearing or at any
13 time at the request of the applicant, the company or any person
14 who has given notice of intention to appear on the hearing of the
15 application:
16 (a) direct that any notices be given or any steps be taken before
17 or after the hearing of the application; and
18 (b) dispense with any notices being given or steps being taken
19 that are required by this Act, or by the rules, or by any prior
20 order of the Court; and
21 (c) direct that oral evidence be taken on the application or any
22 matter relating to the application; and
23 (d) direct a speedy hearing or trial of the application or of any
24 issue or matter; and
25 (e) allow the application to be amended or withdrawn; and
26 (f) give such directions as to the proceedings as the Court thinks
27 fit.
- 28 (4) Where the application is made by members as contributories on the
29 ground that it is just and equitable that the company should be
30 wound up or that the directors have acted in a manner that appears
31 to be unfair or unjust to other members, the Court, if it is of the
32 opinion that:
33 (a) the applicants are entitled to relief either by winding up the
34 company or by some other means; and

1 (b) in the absence of any other remedy it would be just and
2 equitable that the company should be wound up;
3 must make a winding up order unless it is also of the opinion that
4 some other remedy is available to the applicants and that they are
5 acting unreasonably in seeking to have the company wound up
6 instead of pursuing that other remedy.

7 (5) Notwithstanding any rule of law to the contrary, the Court must not
8 refuse to make an order for winding up on the application of a
9 contributory on the ground that, if the order were made, no
10 property of the company would be available for distribution among
11 the contributories.

12 (7) At any time after the filing of a winding up application and before
13 a winding up order has been made, the company or any creditor or
14 contributory may, where any action or other civil proceeding
15 against the company is pending, apply to the Court to stay or
16 restrain further proceedings in the action or proceeding, and the
17 Court may stay or restrain the proceedings accordingly on such
18 terms as it thinks fit.

19 **467A Effect of defect or irregularity on application under Part 5.4**
20 **or 5.4A**

21 An application under Part 5.4 or 5.4A must not be dismissed
22 merely because of one or more of the following:

23 (a) in any case—a defect or irregularity in connection with the
24 application;

25 (b) in the case of an application for a company to be wound up in
26 insolvency—a defect in a statutory demand;

27 unless the Court is satisfied that substantial injustice has been
28 caused that cannot otherwise be remedied (for example, by an
29 adjournment or an order for costs).

30 **467B Court may order winding up of company that is being wound**
31 **up voluntarily**

32 The Court may make an order under section 233, 459A, 459B or
33 461 even if the company is already being wound up voluntarily.

1 **468 Avoidance of dispositions of property, attachments etc.**

2 (1) Any disposition of property of the company, other than an exempt
3 disposition, and any transfer of shares or alteration in the status of
4 the members of the company made after the commencement of the
5 winding up by the Court is, unless the Court otherwise orders,
6 void.

7 (2) In subsection (1), *exempt disposition*, in relation to a company that
8 has commenced to be wound up by the Court, means:

9 (a) a disposition made by the liquidator, or by a provisional
10 liquidator, of the company pursuant to a power conferred on
11 him or her by:

12 (i) this Act; or

13 (ii) rules of the Court that appointed him or her; or

14 (iii) an order of the Court; or

15 (aa) a disposition made in good faith by, or with the consent of,
16 an administrator of the company; or

17 (ab) a disposition under a deed of company arrangement executed
18 by the company; or

19 (b) a payment of money by an Australian ADI out of an account
20 maintained by the company with the Australian ADI, being a
21 payment made by the Australian ADI:

22 (i) on or before the day on which the Court makes the order
23 for the winding up of the company; and

24 (ii) in good faith and in the ordinary course of the banking
25 business of the Australian ADI.

26 (3) Notwithstanding subsection (1), the Court may, where an
27 application for winding up has been filed but a winding up order
28 has not been made, by order:

29 (a) validate the making, after the filing of the application, of a
30 disposition of property of the company; or

- 1 (b) permit the business of the company or a portion of the
2 business of the company to be carried on, and such acts as
3 are incidental to the carrying on of the business or portion of
4 the business to be done, during the period before a winding
5 up order (if any) is made;
6 on such terms as it thinks fit.
- 7 (4) Any attachment, sequestration, distress or execution put in force
8 against the property of the company after the commencement of
9 the winding up by the Court is void.

10 **469 Application to be lis pendens**

11 An application for winding up a company constitutes a lis pendens
12 for the purposes of any law relating to the effect of a lis pendens
13 upon purchasers or mortgagees.

14 **470 Certain notices to be lodged**

- 15 (1) An applicant (other than ASIC) for the winding up of a company
16 must:
- 17 (a) lodge, not later than 10.30 am on the next business day after
18 the filing of the application, notice of the filing of the
19 application and of the date on which the application was
20 filed; and
- 21 (b) after an order for winding up is made—lodge, within 2
22 business days after the making of the order, notice of the
23 making of the order, of the date on which the order was made
24 and of the name and address of the liquidator; and
- 25 (c) if the application is withdrawn or dismissed—lodge, within 2
26 business days after the withdrawal or dismissal of the
27 application, notice of the withdrawal or dismissal of the
28 application and of the date on which the application was
29 withdrawn or dismissed.
- 30 (2) The applicant must, within 7 days after the passing and entering of
31 a winding up order:
- 32 (a) except where the applicant is ASIC—lodge an office copy of
33 the order; and

- 1 (b) serve an office copy of the order on the company or such
2 other person as the Court directs; and
3 (c) deliver to the liquidator an office copy of the order together
4 with a statement that the order has been served as mentioned
5 in paragraph (b).
- 6 (3) Where ASIC applies for the winding up of a company, ASIC must
7 enter in its records particulars of the application and, after the
8 passing and entering of a winding up order, an office copy of the
9 order, and subsection 1274(2) applies in relation to the document
10 containing those particulars and to the office copy as if they were
11 documents lodged with ASIC.

1

2 **Division 1A—Effect of winding up order**

3 **471 Effect on creditors and contributories**

4 An order for winding up a company operates in favour of all the
5 creditors and contributories of the company as if it had been made
6 on the joint application of all the creditors and contributories.

7 **471A Powers of other officers suspended during winding up**

8 (1) While a company is being wound up in insolvency or by the Court,
9 a person cannot perform or exercise, and must not purport to
10 perform or exercise, a function or power as an officer of the
11 company, except:

- 12 (a) as a liquidator appointed for the purposes of the winding up;
13 or
14 (b) as an administrator appointed for the purposes of an
15 administration of the company beginning after the winding
16 up order was made; or
17 (c) with the liquidator's written approval; or
18 (d) with the approval of the Court.

19 (2) While a provisional liquidator of a company is acting, a person
20 cannot perform or exercise, and must not purport to perform or
21 exercise, a function or power as an officer of the company, except:

- 22 (a) as a provisional liquidator of the company; or
23 (b) as an administrator appointed for the purposes of an
24 administration of the company beginning after the
25 provisional liquidator was appointed; or
26 (c) with the provisional liquidator's written approval; or
27 (d) with the approval of the Court.

28 (3) This section does not remove an officer of a company from office.

29 (4) For the purposes of this section, a person is not an officer of a
30 company merely because he or she is:

- 1 (a) a receiver and manager, appointed under a power contained
2 in an instrument, of property of the company; or
3 (b) an employee of the company.

4 **471B Stay of proceedings and suspension of enforcement process**

5 While a company is being wound up in insolvency or by the Court,
6 or a provisional liquidator of a company is acting, a person cannot
7 begin or proceed with:

- 8 (a) a proceeding in a court against the company or in relation to
9 property of the company; or
10 (b) enforcement process in relation to such property;
11 except with the leave of the Court and in accordance with such
12 terms (if any) as the Court imposes.

13 **471C Secured creditor's rights not affected**

14 Nothing in section 471A or 471B affects a secured creditor's right
15 to realise or otherwise deal with the security.

1

2 **Division 2—Court-appointed liquidators**

3 **472 Court to appoint official liquidator**

- 4 (1) On an order being made for the winding up of a company, the
5 Court may appoint an official liquidator to be liquidator of the
6 company.
- 7 (2) The Court may appoint an official liquidator provisionally at any
8 time after the filing of a winding up application and before the
9 making of a winding up order or, if there is an appeal against a
10 winding up order, before a decision in the appeal is made.
- 11 (3) A liquidator appointed provisionally has or may exercise such
12 functions and powers:
13 (a) as are conferred on him or her by this Act or by rules of the
14 Court that appointed him or her; or
15 (b) as the Court specifies in the order appointing him or her.
- 16 (4) A liquidator of a company appointed provisionally also has:
17 (a) power to carry on the company's business; and
18 (b) the powers that a liquidator of the company would have
19 under paragraph 477(1)(d), subsection 477(2) (except
20 paragraph 477(2)(m)) and subsection 477(3) if the company
21 were being wound up in insolvency or by the Court.
- 22 (5) Subsections 477(2A) and (2B) apply in relation to a company's
23 provisional liquidator, with such modifications (if any) as the
24 circumstances require, as if he or she were a liquidator appointed
25 for the purposes of a winding up in insolvency or by the Court.
- 26 (6) The exercise by a company's provisional liquidator of the powers
27 conferred by subsection (4) is subject to the control of the Court,
28 and a creditor or contributory, or ASIC, may apply to the Court in
29 relation to the exercise or proposed exercise of any of those
30 powers.

1 **473 General provisions about liquidators**

- 2 (1) A liquidator appointed by the Court may resign or, on cause
3 shown, be removed by the Court.
- 4 (2) A provisional liquidator is entitled to receive such remuneration by
5 way of percentage or otherwise as is determined by the Court.
- 6 (3) A liquidator is entitled to receive such remuneration by way of
7 percentage or otherwise as is determined:
8 (a) if there is a committee of inspection—by agreement between
9 the liquidator and the committee of inspection; or
10 (b) if there is no committee of inspection or the liquidator and
11 the committee of inspection fail to agree:
12 (i) by resolution of the creditors; or
13 (ii) if no such resolution is passed—by the Court.
- 14 (4) A meeting of creditors for the purposes of subsection (3) must be
15 convened by the liquidator by sending to each creditor a notice to
16 which is attached a statement of all receipts and expenditure by the
17 liquidator and of the amount of remuneration sought by him or her.
- 18 (5) Where the remuneration of a liquidator is determined in the manner
19 specified in paragraph (3)(a), the Court may, on the application of:
20 (a) a member or members whose shareholding or shareholdings
21 represents or represent in the aggregate at least 10% of the
22 issued capital of the company; or
23 (b) a creditor or creditors whose debts against the company that
24 have been admitted to proof amount in the aggregate to at
25 least 10% of the total amount of the debts of the creditors of
26 the company that have been admitted to proof; or
27 (c) ASIC;
28 review the liquidator's remuneration and may confirm, increase or
29 reduce that remuneration.
- 30 (6) Where the remuneration of a liquidator is determined in the manner
31 specified in subparagraph (3)(b)(i) the Court may, on the
32 application of the liquidator or of a member or members referred to

- 1 in subsection (5), review the liquidator's remuneration and may
2 confirm, increase or reduce that remuneration.
- 3 (7) A vacancy in the office of a liquidator appointed by the Court must
4 be filled by the Court.
- 5 (8) If more than one liquidator is appointed by the Court, the Court
6 must declare whether anything that is required or authorised by this
7 Act to be done by the liquidator is to be done by all or any one or
8 more of the persons appointed.
- 9 (9) Subject to this Act, the acts of a liquidator are valid
10 notwithstanding any defects that may afterwards be discovered in
11 his or her appointment or qualification.

12 **474 Custody and vesting of company's property**

- 13 (1) If a company is being wound up in insolvency or by the Court, or a
14 provisional liquidator of a company has been appointed, the
15 liquidator or provisional liquidator must take into his or her
16 custody or under his or her control all the property to which the
17 company is or appears to be entitled, and, if there is no liquidator,
18 all the property of the company is to be in the custody of the Court.
- 19 (2) The Court may, on the application of the liquidator, by order direct
20 that all or any part of the property of the company vests in the
21 liquidator and thereupon the property to which the order relates
22 vests accordingly and the liquidator may, after giving such
23 indemnity (if any) as the Court directs, bring, or may defend, any
24 action or other legal proceeding that relates to that property or that
25 it is necessary to bring or defend for the purpose of effectually
26 winding up the company and recovering its property.
- 27 (3) Where an order is made under this section, the liquidator of the
28 company to which the order relates must, within 14 days after the
29 making of the order, lodge with ASIC an office copy of the order.

30 **475 Report as to company's affairs to be submitted to liquidator**

- 31 (1A) In this section:

- 1 *liquidator* includes a provisional liquidator.
- 2 (1) There must be made out and verified by a statement in writing in
3 the prescribed form, and submitted to the liquidator, by the persons
4 who were, at the date of the winding up order or, if the liquidator
5 specifies an earlier date, that earlier date, the directors and
6 secretary of the company a report in the prescribed form as to the
7 affairs of the company as at the date concerned.
- 8 (2) The liquidator may, by notice in writing served personally or by
9 post addressed to the last known address of the person, require one
10 or more persons included in one or more of the following classes of
11 persons to make out as required by the notice, verify by a statement
12 in writing in the prescribed form, and submit to him or her, a
13 report, containing such information as is specified in the notice as
14 to the affairs of the company or as to such of those affairs as are
15 specified in the notice, as at a date specified in the notice:
- 16 (a) persons who are or have been officers of the company;
- 17 (b) where the company was formed within one year before the
18 date of the winding up order—persons who have taken part
19 in the formation of the company;
- 20 (c) persons who are employed by the company or have been
21 employed by the company within one year before the date of
22 the winding up order and are, in the opinion of the liquidator,
23 capable of giving the information required;
- 24 (d) persons who are, or have been within one year before the
25 date of the winding up order, officers of, or employed by, a
26 body corporate that is, or within that year was, an officer of
27 the company to the affairs of which the report relates;
- 28 (e) a person who was a provisional liquidator of the company.
- 29 (3) The liquidator may, in a notice under subsection (2), specify the
30 information that he or she requires as to affairs of the company by
31 reference to information required by this Act or the regulations to
32 be included in any other report, statement or notice under this Act.
- 33 (4) A report referred to in subsection (1) must, subject to
34 subsection (6), be submitted to the liquidator not later than 14 days
35 after the making of the winding up order.

- 1 (5) A person required to submit a report referred to in subsection (2)
2 must, subject to subsection (6), submit it not later than 14 days
3 after the liquidator serves notice of the requirement.
- 4 (6) Where the liquidator believes there are special reasons for so
5 doing, he or she may, on an application in writing made to him or
6 her before the end of the time limited by subsection (4) or (5) for
7 the submission by the applicant of a report under subsection (1) or
8 (2), grant, by notice in writing, an extension of that time.
- 9 (7) A liquidator:
10 (a) must, within 7 days after receiving a report under
11 subsection (1) or (2), cause a copy of the report to be filed
12 with the Court and a copy to be lodged; and
13 (b) must, where he or she gives a notice under subsection (6), as
14 soon as practicable lodge a copy of the notice.
- 15 (8) A person making or concurring in making a report required by this
16 section and verifying it as required by this section must, subject to
17 the rules, be allowed, and must be paid by the liquidator out of the
18 property of the company, such costs and expenses incurred in and
19 about the preparation and making of the report and the verification
20 of that report as the liquidator considers reasonable.
- 21 (9) A person must not, without reasonable excuse, contravene a
22 provision of this section other than subsection (7).
- 23 (10) A person must not, without reasonable excuse, contravene
24 subsection (7).

25 **476 Preliminary report by liquidator**

- 26 A liquidator of a company must, within 2 months, or such longer
27 period (if any) as ASIC allows, after receiving a report referred to
28 in subsection 475(1) or (2), lodge a preliminary report:
29 (a) in the case of a company having a share capital—as to the
30 amount of capital issued, subscribed and paid up; and
31 (b) as to the estimated amounts of assets and liabilities of the
32 company; and
33 (c) if the company has failed—as to the causes of the failure; and

- 1 (d) as to whether, in his or her opinion, further inquiry is
2 desirable with respect to a matter relating to the promotion,
3 formation or insolvency of the company or the conduct of the
4 business of the company.

5 **477 Powers of liquidator**

- 6 (1) Subject to this section, a liquidator of a company may:
7 (a) carry on the business of the company so far as is necessary
8 for the beneficial disposal or winding up of that business; and
9 (b) subject to the provisions of section 556, pay any class of
10 creditors in full; and
11 (c) make any compromise or arrangement with creditors or
12 persons claiming to be creditors or having or alleging that
13 they have any claim (present or future, certain or contingent,
14 ascertained or sounding only in damages) against the
15 company or whereby the company may be rendered liable;
16 and
17 (d) compromise any calls, liabilities to calls, debts, liabilities
18 capable of resulting in debts and any claims (present or
19 future, certain or contingent, ascertained or sounding only in
20 damages) subsisting or supposed to subsist between the
21 company and a contributory or other debtor or person
22 apprehending liability to the company, and all questions in
23 any way relating to or affecting the property or the winding
24 up of the company, on such terms as are agreed, and take any
25 security for the discharge of, and give a complete discharge
26 in respect of, any such call, debt, liability or claim.
- 27 (2) Subject to this section, a liquidator of a company may:
28 (a) bring or defend any legal proceeding in the name and on
29 behalf of the company; and
30 (b) appoint a solicitor to assist him or her in his or her duties;
31 and
32 (c) sell or otherwise dispose of, in any manner, all or any part of
33 the property of the company; and

- 1 (ca) exercise the Court's powers under subsection 483(3) (except
2 paragraph 483(3)(b)) in relation to calls on contributories;
3 and
4 (d) do all acts and execute in the name and on behalf of the
5 company all deeds, receipts and other documents and for that
6 purpose use when necessary a seal of the company; and
7 (e) subject to the *Bankruptcy Act 1966*, prove in the bankruptcy
8 of any contributory or debtor of the company or under any
9 deed executed under that Act; and
10 (f) draw, accept, make and indorse any bill of exchange or
11 promissory note in the name and on behalf of the company;
12 and
13 (g) obtain credit, whether on the security of the property of the
14 company or otherwise; and
15 (h) take out letters of administration of the estate of a deceased
16 contributory or debtor, and do any other act necessary for
17 obtaining payment of any money due from a contributory or
18 debtor, or his or her estate, that cannot be conveniently done
19 in the name of the company; and
20 (k) appoint an agent to do any business that the liquidator is
21 unable to do, or that it is unreasonable to expect the
22 liquidator to do, in person; and
23 (m) do all such other things as are necessary for winding up the
24 affairs of the company and distributing its property.
- 25 (2A) Except with the approval of the Court, of the committee of
26 inspection or of a resolution of the creditors, a liquidator of a
27 company must not compromise a debt to the company if the
28 amount claimed by the company is more than:
29 (a) if an amount greater than \$20,000 is prescribed—the
30 prescribed amount; or
31 (b) otherwise—\$20,000.
- 32 (2B) Except with the approval of the Court, of the committee of
33 inspection or of a resolution of the creditors, a liquidator of a
34 company must not enter into an agreement on the company's
35 behalf (for example, but without limitation, a lease or a charge) if:

- 1 (a) without limiting paragraph (b), the term of the agreement
2 may end; or
3 (b) obligations of a party to the agreement may, according to the
4 terms of the agreement, be discharged by performance;
5 more than 3 months after the agreement is entered into, even if the
6 term may end, or the obligations may be discharged, within those 3
7 months.
- 8 (3) A liquidator of a company is entitled to inspect at any reasonable
9 time any books of the company and a person who refuses or fails to
10 allow the liquidator to inspect such books at such a time is guilty of
11 an offence.
- 12 (5) For the purpose of enabling the liquidator to take out letters of
13 administration or recover money as mentioned in paragraph (2)(h),
14 the money due is taken to be due to the liquidator.
- 15 (6) The exercise by the liquidator of the powers conferred by this
16 section is subject to the control of the Court, and any creditor or
17 contributory, or ASIC, may apply to the Court with respect to any
18 exercise or proposed exercise of any of those powers.
- 19 (7) This section does not apply to calls on shares in a no liability
20 company.

21 **478 Application of property; list of contributories**

- 22 (1) As soon as practicable after the Court orders that a company be
23 wound up, the liquidator must:
24 (a) cause the company's property to be collected and applied in
25 discharging the company's liabilities; and
26 (b) consider whether subsection (1A) requires him or her to
27 settle a list of contributories.
- 28 (1A) A liquidator of a company that is being wound up in insolvency or
29 by the Court must settle a list of contributories if it appears to him
30 or her likely that:
31 (a) either:

- 1 (i) there are persons liable as members or past members to
2 contribute to the company's property on the winding up;
3 or
4 (ii) there will be a surplus available for distribution; and
5 (b) it will be necessary:
6 (i) to make calls on contributories; or
7 (ii) to adjust the rights of the contributories among
8 themselves.
- 9 (1B) A liquidator of such a company may rectify the register of
10 members so far as required under this Part.
- 11 (3) In settling the list of contributories the liquidator must distinguish
12 between persons who are contributories in their own right and
13 persons who are contributories by virtue of representing, or being
14 liable for the debts of, other persons.
- 15 (4) The list of contributories, when settled in accordance with the
16 regulations, is prima facie evidence of the liabilities of the persons
17 named in the list as contributories.
- 18 (5) Paragraph (1)(b) and subsections (1A), (1B), (3) and (4) do not
19 apply to a no liability company.

20 **479 Exercise and control of liquidator's powers**

- 21 (1) Subject to this Part, the liquidator must, in the administration of the
22 property of the company and in the distribution of the property
23 among its creditors, have regard to any directions given by
24 resolution of the creditors or contributories at any general meeting
25 or by the committee of inspection, and, in case of conflict, any
26 directions so given by the creditors or contributories override any
27 directions given by the committee of inspection.
- 28 (2) The liquidator may convene general meetings of the creditors or
29 contributories for the purpose of ascertaining their wishes, and he
30 or she must convene meetings at such times as the creditors or
31 contributories by resolution direct or whenever requested in writing
32 to do so by at least one-tenth in value of the creditors or
33 contributories.

- 1 (3) The liquidator may apply to the Court for directions in relation to
2 any particular matter arising under the winding up.
- 3 (4) Subject to this Part, the liquidator must use his or her own
4 discretion in the management of affairs and property of the
5 company and the distribution of its property.

6 **480 Release of liquidator and deregistration of company**

7 When the liquidator:

- 8 (a) has realised all the property of the company or so much of
9 that property as can in his or her opinion be realised without
10 needlessly protracting the winding up, and has distributed a
11 final dividend (if any) to the creditors and adjusted the rights
12 of the contributories among themselves and made a final
13 return (if any) to the contributories; or
14 (b) has resigned or has been removed from office;
15 he or she may apply to the Court:
16 (c) for an order that he or she be released; or
17 (d) for an order that he or she be released and that ASIC
18 deregister the company.

19 **481 Orders for release or deregistration**

- 20 (1) The Court:
21 (a) may cause a report on the accounts of the liquidator to be
22 prepared by the auditor appointed by ASIC under section 539
23 or by some other registered company auditor appointed by
24 the Court; and
25 (b) on the liquidator complying with all the requirements of the
26 Court—must take into consideration the report and any
27 objection against the release of the liquidator that is made by
28 the auditor or by any creditor, contributory or other person
29 interested; and
30 (c) must either grant or withhold the release accordingly.
- 31 (2) Where the release of a liquidator is withheld and the Court is
32 satisfied that the liquidator has been guilty of default, negligence,

- 1 breach of trust or breach of duty, the Court may order the
2 liquidator to make good any loss that the company has sustained by
3 reason of the default, negligence, breach of trust or breach of duty
4 and may make such other order as it thinks fit.
- 5 (3) An order of the Court releasing the liquidator discharges him or her
6 from all liability in respect of any act done or default made by him
7 or her in the administration of the affairs of the company or
8 otherwise in relation to his or her conduct as liquidator, but any
9 such order may be revoked on proof that it was obtained by fraud
10 or by suppression or concealment of any material fact.
- 11 (4) Where the liquidator has not previously resigned or been removed,
12 his or her release operates as a removal from office.
- 13 (5) Where the Court has made:
14 (a) an order that the liquidator be released; or
15 (b) an order that the liquidator be released and that ASIC
16 deregister the company;
17 the liquidator must, within 14 days after the making of the order,
18 lodge an office copy of the order.

1

2 **Division 3—General powers of Court**

3 **482 Power to stay or terminate winding up**

4 (1) At any time during the winding up of a company, the Court may,
5 on application, make an order staying the winding up either
6 indefinitely or for a limited time or terminating the winding up on a
7 day specified in the order.

8 (1A) An application may be made by:

9 (a) in any case—the liquidator, or a creditor or contributory, of
10 the company; or

11 (b) in the case of a company registered under the *Life Insurance*
12 *Act 1995*—APRA.

13 (2) On such an application, the Court may, before making an order,
14 direct the liquidator to give a report with respect to a relevant fact
15 or matter.

16 (3) Where the Court has made an order terminating the winding up, the
17 Court may give such directions as it thinks fit for the resumption of
18 the management and control of the company by its officers,
19 including directions for the convening of a general meeting of
20 members of the company to elect directors of the company to take
21 office upon the termination of the winding up.

22 (4) The costs of proceedings before the Court under this section and
23 the costs incurred in convening a meeting of members of the
24 company in accordance with an order of the Court under this
25 section, if the Court so directs, forms part of the costs, charges and
26 expenses of the winding up.

27 (5) Where an order is made under this section, the company must
28 lodge an office copy of the order within 14 days after the making
29 of the order.

1 **483 Delivery of property to liquidator**

2 (1) The Court may require a person who is a contributory, trustee,
3 receiver, banker, agent or officer of the company to pay, deliver,
4 convey, surrender or transfer to the liquidator or provisional
5 liquidator, as soon as practicable or within a specified period, any
6 money, property or books in the person's hands to which the
7 company is prima facie entitled.

8 (2) The Court may make an order directing any contributory for the
9 time being on the list of contributories to pay to the company in the
10 manner directed by the order any money due from the contributory
11 or from the estate of the person whom the contributory represents,
12 exclusive of any money payable by the contributory or the estate
13 by virtue of any call pursuant to this Act, and may:

14 (a) in the case of an unlimited company—allow to the
15 contributory by way of set-off any money due to the
16 contributory or to the estate that the contributory represents
17 from the company on any independent dealing or contract but
18 not any money due to the contributory as a member of the
19 company in respect of any dividend or profit; and

20 (b) in the case of a limited company—make to any director
21 whose liability is unlimited or to such a director's estate the
22 like allowance;

23 and, in the case of any company whether limited or unlimited,
24 when all the creditors are paid in full, any money due on any
25 account whatever to a contributory from the company may be
26 allowed to him, her or it by way of set-off against any subsequent
27 call.

28 (3) The Court may, either before or after it has ascertained the
29 sufficiency of the property of the company:

30 (a) make calls on all or any of the contributories for the time
31 being on the list of contributories, to the extent of their
32 liability, for payment of any money that the Court considers
33 necessary to satisfy the debts and liabilities of the company
34 and the costs, charges and expenses of winding up and for the
35 adjustment of the rights of the contributories among
36 themselves; and

- 1 (b) make an order for payment of any calls made by the Court or
2 the company's liquidator;
3 and, in making a call, may take into consideration the probability
4 that some of the contributories may partly or wholly fail to pay the
5 call.
- 6 (3A) Subsection (3) does not apply to a no liability company.
- 7 (4) The Court may order any contributory, purchaser or other person
8 from whom money is due to the company to pay the amount due
9 into a bank named in the order to the account of the liquidator
10 instead of to the liquidator, and any such order may be enforced in
11 the same manner as if it had directed payment to the liquidator.
- 12 (5) All money and securities paid or delivered into any bank under this
13 Division are subject in all respects to orders of the Court.
- 14 (6) An order made by the Court under this section is, subject to any
15 right of appeal, conclusive evidence that the money (if any)
16 thereby appearing to be due or ordered to be paid is due, and all
17 other pertinent matters stated in the order are taken to be truly
18 stated as against all persons and in all proceedings.

19 **484 Appointment of special manager**

- 20 (1) The liquidator may, if satisfied that the nature of the property or
21 business of the company, or the interests of the creditors or
22 contributories generally, requires or require the appointment of a
23 special manager of the property or business of the company other
24 than himself or herself, apply to the Court, and the Court may
25 appoint a special manager of the property or business to act during
26 such time as the Court directs with such powers, including any of
27 the powers of a receiver or manager, as are entrusted to him or her
28 by the Court.
- 29 (2) The special manager:
30 (a) must give such security and account in such manner as the
31 Court directs; and
32 (b) must receive such remuneration as is fixed by the Court; and

- 1 (c) may at any time resign by notice in writing addressed to the
2 liquidator or may, on cause shown, be removed by the Court.

3 **485 Claims of creditors and distribution of property**

- 4 (1) The Court may fix a day on or before which creditors are to prove
5 their debts or claims or after which they will be excluded from the
6 benefit of any distribution made before those debts are proved.
- 7 (2) The Court must adjust the rights of the contributories among
8 themselves and distribute any surplus among the persons entitled to
9 it.
- 10 (3) The Court may, in the event of the property being insufficient to
11 satisfy the liabilities, make an order as to the payment out of the
12 property of the costs, charges and expenses incurred in the winding
13 up in such order of priority as the Court thinks just.

14 **486 Inspection of books by creditors and contributories**

15 The Court may make such order for inspection of the books of the
16 company by creditors and contributories as the Court thinks just,
17 and any books in the possession of the company may be inspected
18 by creditors or contributories accordingly, but not further or
19 otherwise.

20 **486A Court may make order to prevent officer or related entity**
21 **from avoiding liability to company**

- 22 (1) On the application of a liquidator or provisional liquidator of a
23 company, the Court may make one or more of the following:
- 24 (a) an order prohibiting, either absolutely or subject to
25 conditions, an officer or related entity of the company from
26 taking or sending out of this jurisdiction, or out of Australia,
27 money or other property of the company or of the officer or
28 related entity;
- 29 (b) an order appointing:

- 1 (i) a receiver or trustee, with specified powers, of property
2 of an officer of the company, or of property of a related
3 entity of the company that is a natural person; or
4 (ii) a receiver, or a receiver and manager, with specified
5 powers, of property of a related entity of the company
6 that is not a natural person;
7 (c) an order requiring an officer of the company, or a related
8 entity of the company that is a natural person, to surrender to
9 the Court his or her passport and any other specified
10 documents;
11 (d) an order prohibiting an officer of the company, or a related
12 entity of the company that is a natural person, from leaving
13 this jurisdiction, or Australia, without the Court's consent.
- 14 (2) The Court may only make an order under subsection (1) if:
15 (a) the company is being wound up in insolvency or by the
16 Court, or an application has been made for the company to be
17 so wound up; and
18 (b) the Court is satisfied that there is at least a prima facie case
19 that the officer or related entity is or will become liable:
20 (i) to pay money to the company, whether in respect of a
21 debt, by way of damages or compensation or otherwise;
22 or
23 (ii) to account for property of the company; and
24 (c) the Court is also satisfied that there is substantial evidence
25 that the officer or related entity:
26 (i) has concealed or removed money or other property, has
27 tried to do so, or intends to do so; or
28 (ii) has tried to leave this jurisdiction or Australia, or
29 intends to do so;
30 in order to avoid that liability or its consequences; and
31 (d) the Court thinks it necessary or desirable to make the order in
32 order to protect the company's rights against the officer or
33 related entity.
- 34 (3) On hearing an application under subsection (1), the Court must
35 have regard to any relevant application under section 1323.

- 1 (4) Before considering an application under subsection (1), the Court
2 may, if in the Court's opinion it is desirable to do so, grant an
3 interim order of the kind applied for that is expressed to have effect
4 until the application is determined.
- 5 (5) The Court must not require an applicant under subsection (1) or
6 any other person, as a condition of granting an interim order under
7 subsection (4), to give an undertaking as to damages.
- 8 (6) On the application of a person who applied for, or is affected by,
9 an order under this section, the Court may make a further order
10 discharging or varying the first-mentioned order.
- 11 (7) An order under subsection (1) may be expressed to operate for a
12 specified period or until it is discharged by a further order.
- 13 (8) A person must not contravene an order under this section that is
14 applicable to the person.
- 15 (9) This section has effect subject to the *Bankruptcy Act 1966*.
- 16 (10) Nothing in this section affects any other powers of the Court.

17 **486B Warrant to arrest person who is absconding, or who has dealt**
18 **with property or books, in order to avoid obligations in**
19 **connection with winding up**

- 20 (1) The Court may issue a warrant for a person to be arrested and
21 brought before the Court if:
- 22 (a) a company is being wound up in insolvency or by the Court,
23 or an application has been made for a company to be so
24 wound up; and
- 25 (b) the Court is satisfied that the person:
- 26 (i) is about to leave this jurisdiction, or Australia, in order
27 to avoid:
- 28 (A) paying money payable to the company; or
29 (B) being examined about the company's affairs; or
30 (C) complying with an order of the Court, or some
31 other obligation, under this Chapter in
32 connection with the winding up; or

- 1 (ii) has concealed or removed property of the company in
2 order to prevent or delay the taking of the property into
3 the liquidator's custody or control; or
4 (iii) has destroyed, concealed or removed books of the
5 company or is about to do so.
- 6 (2) A warrant under subsection (1) may also provide for property or
7 books of the company in the person's possession to be seized and
8 delivered into the custody of a specified person.
- 9 (3) A warrant under subsection (1) may only be issued on the
10 application of:
11 (a) a liquidator or provisional liquidator of the company; or
12 (b) ASIC.

13 **487 Power to arrest absconding contributory**

14 The Court, at any time before or after making a winding up order,
15 on proof of probable cause for believing that a contributory is
16 about to leave this jurisdiction, or Australia, or otherwise to
17 abscond or to remove or conceal any of his or her property for the
18 purpose of evading payment of calls or of avoiding examination
19 respecting affairs of the company, may cause the contributory to be
20 arrested and held in custody and the books and movable personal
21 property of the contributory to be seized and safely kept until such
22 time as the Court orders.

23 **488 Delegation to liquidator of certain powers of Court**

- 24 (1) Provision may be made by rules or regulations for enabling or
25 requiring all or any of the powers and duties conferred and
26 imposed on the Court by this Part in respect of:
27 (a) the holding and conducting of meetings to ascertain the
28 wishes of creditors and contributories; and
29 (b) the paying, delivery, conveyance, surrender or transfer of
30 money, property or books to the liquidator; and
31 (c) the adjusting of the rights of contributories among
32 themselves and the distribution of any surplus among the
33 persons entitled to it; and

- 1 (d) the fixing of a time within which debts and claims must be
2 proved;
3 to be exercised or performed by the liquidator as an officer of the
4 Court and subject to the control of the Court.
- 5 (2) Despite anything in rules or regulations made for the purposes of
6 subsection (1), a liquidator may distribute a surplus only with the
7 Court's special leave.

8 **489 Powers of Court cumulative**

9 Any powers conferred on the Court by this Act are in addition to,
10 and not in derogation of, any existing powers of instituting
11 proceedings against any contributory or debtor of the company or
12 the property of any contributory or debtor for the recovery of any
13 call or other sums.

1

2 **Part 5.5—Voluntary winding up**

3 **Division 1—Resolution for winding up**

4 **490 When company cannot wind up voluntarily**

5 Except with the leave of the Court, a company cannot resolve that
6 it be wound up voluntarily if:

- 7 (a) an application for the company to be wound up in insolvency
8 has been filed; or
9 (b) the Court has ordered that the company be wound up in
10 insolvency, whether or not the order was made on such an
11 application.

12 **491 Circumstances in which company may be wound up voluntarily**

- 13 (1) Subject to section 490, a company may be wound up voluntarily if
14 the company so resolves by special resolution.
15 (2) A company must:
16 (a) within 7 days after the passing of a resolution for voluntary
17 winding up, lodge a printed copy of the resolution; and
18 (b) within 21 days after the passing of the resolution, cause
19 notice of the resolution to be published in the *Gazette*.

20 **493 Effect of voluntary winding up**

- 21 (1) The company must, from the passing of the resolution, cease to
22 carry on its business except so far as is in the opinion of the
23 liquidator required for the beneficial disposal or winding up of that
24 business, but the corporate state and corporate powers of the
25 company, notwithstanding anything to the contrary in its
26 constitution, continue until it is deregistered.
27 (2) Any transfer of shares, not being a transfer made to or with the
28 sanction of the liquidator, and any alteration in the status of the
29 members, made after the passing of the resolution are void.

1 **494 Declaration of solvency**

2 (1) Where it is proposed to wind up a company voluntarily, a majority
3 of the directors may, before the date on which the notices of the
4 meeting at which the resolution for the winding up of the company
5 is to be proposed are sent out, make a written declaration to the
6 effect that they have made an inquiry into the affairs of the
7 company and that, at a meeting of directors, they have formed the
8 opinion that the company will be able to pay its debts in full within
9 a period not exceeding 12 months after the commencement of the
10 winding up.

11 (2) There must be attached to the declaration a statement of affairs of
12 the company showing, in the prescribed form:

13 (a) the property of the company, and the total amount expected
14 to be realised from that property; and

15 (b) the liabilities of the company; and

16 (c) the estimated expenses of winding up;

17 made up to the latest practicable date before the making of the
18 declaration.

19 (3) A declaration so made has no effect for the purposes of this Act
20 unless:

21 (a) the declaration is made at the meeting of directors referred to
22 in subsection (1); and

23 (b) the declaration is lodged before the date on which the notices
24 of the meeting at which the resolution for the winding up of
25 the company is to be proposed are sent out or such later date
26 as ASIC, whether before, on or after the first-mentioned date,
27 allows; and

28 (c) the resolution for voluntary winding up is passed within the
29 period of 5 weeks after the making of the declaration or
30 within such further period after the making of that
31 declaration as ASIC, whether before or after the end of that
32 period of 5 weeks, allows.

33 (4) A director who makes a declaration under this section (including a
34 declaration that has no effect for the purposes of this Act by reason
35 of subsection (3)) without having reasonable grounds for his or her

1 opinion that the company will be able to pay its debts in full within
2 the period stated in the declaration is guilty of an offence.

3 (5) If the company is wound up pursuant to a resolution for voluntary
4 winding up passed within the period of 5 weeks after the making of
5 the declaration or, if pursuant to paragraph (3)(c) ASIC has
6 allowed a further period after the end of that period of 5 weeks,
7 within that further period, but its debts are not paid or provided for
8 in full within the period stated in the declaration, it is to be
9 presumed, unless the contrary is shown, that a director who made
10 the declaration did not have reasonable grounds for his or her
11 opinion.

1

2 **Division 2—Members' voluntary winding up**

3 **495 Liquidators**

- 4 (1) The company in general meeting must appoint a liquidator or
5 liquidators for the purpose of winding up the affairs and
6 distributing the property of the company and may fix the
7 remuneration to be paid to him, her or them.
- 8 (2) On the appointment of a liquidator, all the powers of the directors
9 cease except so far as the liquidator, or the company in general
10 meeting with the consent of the liquidator, approves the
11 continuance of any of those powers.
- 12 (3) If a vacancy occurs by death, resignation or otherwise in the office
13 of a liquidator, the company in general meeting may fill the
14 vacancy by the appointment of a liquidator and fix the
15 remuneration to be paid to him or her, and for that purpose a
16 general meeting may be convened by any contributory or, if there
17 were 2 or more liquidators, by the continuing liquidators.
- 18 (4) The meeting must be held in the manner provided by this Act or by
19 the company's constitution or in such manner as is, on application
20 by any contributory or by the continuing liquidators, determined by
21 the Court.

22 **496 Duty of liquidator where company turns out to be insolvent**

- 23 (1) Where a declaration has been made under section 494 and the
24 liquidator is at any time of the opinion that the company will not be
25 able to pay or provide for the payment of its debts in full within the
26 period stated in the declaration, he or she must do one of the
27 following as soon as practicable:
- 28 (a) apply under section 459P for the company to be wound up in
29 insolvency;
- 30 (b) appoint an administrator of the company under section 436B;

- 1 (c) convene a meeting of the company's creditors;
2 and if he or she convenes such a meeting, the following
3 subsections apply.
- 4 (2) The liquidator must send to each creditor with the notice convening
5 the meeting a list setting out the names of all creditors, the
6 addresses of those creditors and the estimated amounts of their
7 claims, as shown in the records of the company.
- 8 (3) Unless the Court otherwise orders, nothing in subsection (2)
9 requires the liquidator to send, to a creditor whose debt does not
10 exceed \$200, a list of creditors referred to in that subsection, but
11 the notice convening the meeting that is sent to a creditor to whom
12 the liquidator is not required to send such a list must specify a
13 place at which copies of the list referred to in that subsection can
14 be obtained on request made orally or in writing and, where such a
15 creditor so requests, the liquidator must as soon as practicable
16 comply with the request.
- 17 (4) The liquidator must lay before the meeting a statement of the assets
18 and liabilities of the company and the notice convening the
19 meeting must draw the attention of the creditors to the right
20 conferred upon them by subsection (5).
- 21 (5) The creditors may, at the meeting convened under subsection (1),
22 appoint some other person to be liquidator for the purpose of
23 winding up the affairs and distributing the property of the company
24 instead of the liquidator appointed by the company.
- 25 (6) If the creditors appoint some other person under subsection (5), the
26 winding up must thereafter proceed as if the winding up were a
27 creditors' voluntary winding up.
- 28 (7) The liquidator or, if another person is appointed by the creditors to
29 be liquidator, the person so appointed must, within 7 days after a
30 meeting has been held pursuant to subsection (1), lodge a notice in
31 the prescribed form.
- 32 (8) Where the liquidator has convened a meeting under subsection (1)
33 and the creditors do not appoint a liquidator instead of the
34 liquidator appointed by the company, the winding up must

1 thereafter proceed as if the winding up were a creditors' voluntary
2 winding up, but the liquidator is not required to convene an annual
3 meeting of creditors at the end of the first year from the
4 commencement of the winding up if the meeting held under
5 subsection (1) was held less than 3 months before the end of that
6 year.

1

2 **Division 3—Creditors' voluntary winding up**

3 **497 Meeting of creditors**

4 (1) The company must cause a meeting of the creditors of the
5 company to be convened for the day, or the day next following the
6 day, on which there is to be held the meeting at which the
7 resolution for voluntary winding up is to be proposed, and must
8 cause the notices of the meeting of creditors to be sent by post to
9 the creditors simultaneously with the sending of the notices of the
10 meeting of the company.

- 11 (2) The company must convene a meeting at a date, time and place
12 convenient to the majority in value of the creditors and must:
- 13 (a) give to the creditors at least 7 days notice by post of the
14 meeting; and
 - 15 (b) send to each creditor with the notice:
 - 16 (i) a summary of the affairs of the company in the
17 prescribed form; and
 - 18 (ii) a list setting out the names of all creditors, the addresses
19 of those creditors and the estimated amounts of their
20 claims, as shown in the records of the company;
 - 21 (c) lodge, not less than 7 days before the day fixed for the
22 holding of the meeting, a copy of the notice given under
23 paragraph (a) and of the documents that accompanied that
24 notice in accordance with paragraph (b); and
 - 25 (d) publish, not less than 7 days, nor more than 14 days, before
26 the day fixed for the holding of the meeting, a copy of the
27 notice given or to be given under paragraph (a) in each State,
28 Territory or external Territory in which the company carries
29 on business or has carried on business at any time during the
30 2 years immediately preceding that day in a daily newspaper
31 circulating generally in that State, Territory or external
32 Territory.
- 33 (3) Unless the Court otherwise orders, nothing in subsection (2)
34 requires the company to send, to a creditor whose debt does not

- 1 exceed \$200, a list of creditors referred to in
2 subparagraph (2)(b)(ii), but the notice convening the meeting that
3 is sent to a creditor to whom the company is not required to send
4 such a list must specify a place at which copies of the list referred
5 to in that subparagraph can be obtained on request made orally or
6 in writing and, where such a creditor so requests, the company
7 must as soon as practicable comply with the request.
- 8 (4) If the company contravenes subsection (1) or (2):
9 (a) the company is not guilty of an offence by virtue of this
10 section or section 1311; and
11 (b) a person involved in the contravention contravenes this
12 subsection.
- 13 (5) The directors of the company must:
14 (a) cause to be laid before the meeting of creditors a report in the
15 prescribed form, and verified by all the directors, as to the
16 affairs of the company, made up to the latest practicable date
17 before the notices of the meeting were sent; and
18 (b) appoint one of their number to attend the meeting.
- 19 (6) The director so appointed and a secretary (if the company has one)
20 must attend the meeting and disclose to the meeting the affairs of
21 the company and the circumstances leading up to the proposed
22 winding up. If the company has 2 or more directors, the director so
23 appointed must not also attend in the capacity of a secretary.
- 24 (7) The directors of the company must, not later than 7 days after the
25 report referred to in paragraph (5)(a) is laid before the meeting of
26 creditors as mentioned in that paragraph, lodge a copy of the report
27 with ASIC.
- 28 (8) The creditors may appoint one of their number or the director
29 appointed under subsection (5) to preside at the meeting.
- 30 (9) The chair must, at the meeting, determine whether the meeting has
31 been held at a date, time and place convenient to the majority in
32 value of the creditors and his or her decision is final.

- 1 (10) At a meeting of creditors held under this section the creditors may
2 determine the matters referred to in paragraphs 548(1)(a) and (b)
3 and, where the creditors so determine those matters, a meeting of
4 the creditors for the purposes of section 548 is taken to have been
5 held and the determinations are taken to have been made under that
6 section.

7 **498 Power to adjourn meeting**

- 8 (1) A meeting convened under section 497 may by resolution be
9 adjourned from time to time to a time and day specified in the
10 resolution but must not be adjourned to a day later than 21 days
11 after the day for which the meeting was originally convened.
- 12 (2) Where a meeting is adjourned, the adjourned meeting must, unless
13 it is otherwise provided by the resolution by which it is adjourned,
14 be held at the same place as the original meeting.
- 15 (3) Where a meeting is adjourned to a day more than 8 days after the
16 passing of the resolution by which it is adjourned, the company
17 must cause notice of the day, time and place of the resumption of
18 the meeting to be published, in a daily newspaper circulating
19 generally in the State or Territory in which the resumed meeting is
20 to be held, at least 7 days before that day.
- 21 (4) If the meeting of the company is adjourned and the resolution for
22 winding up is passed at an adjourned meeting, any resolution
23 passed at the meeting of the creditors has effect as if it had been
24 passed immediately after the passing of the resolution for winding
25 up.

26 **499 Liquidators**

- 27 (1) The company must, and the creditors may, at their respective
28 meetings nominate a person to be liquidator for the purpose of
29 winding up the affairs and distributing the property of the company
30 and, if the creditors and the company nominate different persons,
31 the person nominated by the creditors is to be liquidator but, if no
32 person is nominated by the creditors, the person nominated by the
33 company is to be liquidator.

- 1 (2) Notwithstanding the provisions of subsection (1), where different
2 persons are nominated, any director or member may, within 7 days
3 after the date on which the nomination was made by the creditors,
4 apply to the Court for an order directing that the person nominated
5 as liquidator by the company is to be liquidator instead of or jointly
6 with the person nominated by the creditors.
- 7 (3) The committee of inspection, or, if there is no such committee, the
8 creditors, may fix the remuneration to be paid to the liquidator.
- 9 (4) On the appointment of a liquidator, the powers of the directors
10 cease except so far as the committee of inspection, or, if there is no
11 such committee, the creditors, approve the continuance of any of
12 those powers.
- 13 (5) If a liquidator, other than a liquidator appointed by or by the
14 direction of the Court, dies, resigns or otherwise vacates his or her
15 office, the creditors may fill the vacancy and, for the purpose of so
16 doing, a meeting of the creditors may be convened by any 2 of
17 their number.

18 **500 Execution and civil proceedings**

- 19 (1) Any attachment, sequestration, distress or execution put in force
20 against the property of the company after the passing of the
21 resolution for voluntary winding up is void.
- 22 (2) After the passing of the resolution for voluntary winding up, no
23 action or other civil proceeding is to be proceeded with or
24 commenced against the company except by leave of the Court and
25 subject to such terms as the Court imposes.
- 26 (3) The Court may require any contributory, trustee, receiver, banker,
27 agent or officer of the company to pay, deliver, convey, surrender
28 or transfer forthwith or within such time as the Court directs to the
29 liquidator any money, property or books in his, her or its hands to
30 which the company is prima facie entitled.

1

2 **Division 4—Voluntary winding up generally**

3 **501 Distribution of property of company**

4 Subject to the provisions of this Act as to preferential payments,
5 the property of a company must, on its winding up, be applied in
6 satisfaction of its liabilities equally and, subject to that application,
7 must, unless the company's constitution otherwise provides, be
8 distributed among the members according to their rights and
9 interests in the company.

10 **502 Appointment of liquidator**

11 If from any cause there is no liquidator acting, the Court may
12 appoint a liquidator.

13 **503 Removal of liquidator**

14 The Court may, on cause shown, remove a liquidator and appoint
15 another liquidator.

16 **504 Review of liquidator's remuneration**

17 Any member or creditor, or the liquidator, may at any time before
18 the deregistration of the company apply to the Court to review the
19 amount of the remuneration of the liquidator, and the decision of
20 the Court is final and conclusive.

21 **505 Acts of liquidator valid etc.**

- 22 (1) The acts of a liquidator are valid notwithstanding any defects that
23 may afterwards be discovered in his or her appointment or
24 qualification.
- 25 (2) A conveyance, assignment, transfer, mortgage, charge or other
26 disposition of a company's property made by a liquidator is,
27 notwithstanding any defect or irregularity affecting the validity of
28 the winding up or the appointment of the liquidator, valid in favour

1 of any person taking such property in good faith and for value and
2 without actual knowledge of the defect or irregularity.

3 (3) A person making or permitting a disposition of property to a
4 liquidator is to be protected and indemnified in so doing
5 notwithstanding any defect or irregularity affecting the validity of
6 the winding up or the appointment of the liquidator that is not then
7 known to that person.

8 (4) For the purposes of this section, a disposition of property is taken
9 to include a payment of money.

10 **506 Powers and duties of liquidator**

11 (1) The liquidator may:

- 12 (b) exercise any of the powers that this Act confers on a
13 liquidator in a winding up in insolvency or by the Court; or
14 (c) exercise the power under section 478 of a liquidator
15 appointed by the Court to settle a list of contributors; or
16 (d) exercise the Court's powers under subsection 483(3) (except
17 paragraph 483(3)(b)) in relation to calls on contributories; or
18 (e) exercise the power of the Court of fixing a time within which
19 debts and claims must be proved; or
20 (f) convene a general meeting of the company for the purpose of
21 obtaining the sanction of the company by special resolution
22 in respect of any matter or for any other purpose he or she
23 thinks fit.

24 (1A) Subsections 477(2A) and (2B) apply in relation to the liquidator as
25 if:

- 26 (a) he or she were a liquidator in a winding up in insolvency or
27 by the Court; and
28 (b) in the case of a members' voluntary winding up—a reference
29 in those subsections to an approval were a reference to the
30 approval of a special resolution of the company.

31 (1B) The company must lodge a copy of a special resolution referred to
32 in paragraph (1A)(b) with ASIC within 14 days after the resolution
33 is passed.

- 1 (2) A list of contributories settled in accordance with paragraph (1)(c)
2 is prima facie evidence of the liability of the persons named in the
3 list to be contributories.
- 4 (3) The liquidator must pay the debts of the company and adjust the
5 rights of the contributories among themselves.
- 6 (4) When several liquidators are appointed, any power given by this
7 Act may be exercised by such one or more of them as is
8 determined at the time of their appointment, or in default of such
9 determination, by any number not less than 2.

10 **507 Power of liquidator to accept shares etc. as consideration for**
11 **sale of property of company**

- 12 (1) This section applies where it is proposed to transfer or sell to a
13 body corporate the whole or a part of the business or property of a
14 company.
- 15 (2) The liquidator of the company may, with the sanction of a special
16 resolution of the company conferring on the liquidator either a
17 general authority or an authority in respect of a particular
18 arrangement, enter into an arrangement under which, in
19 compensation or part compensation for the transfer or sale:
20 (a) the liquidator is to receive shares, debentures, policies or
21 other like interests in the body corporate for distribution
22 among the members of the company; or
23 (b) the members of the company may, instead of, or as well as,
24 receiving cash, shares, debentures, policies or other like
25 interests in the body corporate, participate in the profits of, or
26 receive any other benefit from, the body corporate.
- 27 (3) A transfer, sale or arrangement under this section is binding on the
28 members of the company.
- 29 (4) If a member of the company who did not vote in favour of a special
30 resolution expresses dissent from the resolution in writing
31 addressed to the liquidator and left at the office of the liquidator
32 within 7 days after the passing of the resolution, the member may
33 require the liquidator either to abstain from carrying the resolution

- 1 into effect or to purchase the member's interest at a price to be
2 determined by agreement or by arbitration under this section.
- 3 (5) If the liquidator elects to purchase the member's interest, the
4 purchase money must be paid before the company is deregistered
5 and be raised by the liquidator in such manner as is determined by
6 special resolution.
- 7 (6) A special resolution is not invalid for the purposes of this section
8 because it is passed before, or concurrently with, a resolution for
9 voluntary winding up or for appointing liquidators but, if an order
10 for winding up the company by the Court is made within 1 year
11 after the passing of the resolution, the resolution is not valid unless
12 sanctioned by the Court.
- 13 (7) For the purposes of an arbitration under this section, the agreed
14 arbitration law applies as if there were a submission for reference
15 to 2 arbitrators, one to be appointed by each party.
- 16 (7A) Parties to the arbitration may agree on the State or Territory in this
17 jurisdiction whose law is to govern the arbitration. The ***agreed***
18 ***arbitration law*** is the law of that State or Territory relating to
19 commercial arbitration.
- 20 (8) The appointment of an arbitrator may be made in writing signed
21 by:
22 (a) if there is only one liquidator—the liquidator; or
23 (b) if there is more than one liquidator—any 2 or more of the
24 liquidators.
- 25 (9) The Court may give any directions necessary for the initiation and
26 conduct of the arbitration and any such direction is binding on the
27 parties.
- 28 (10) In the case of a creditors' voluntary winding up, the powers of the
29 liquidator under this section must not be exercised except with the
30 approval of the Court or the committee of inspection.
- 31 (11) The company must lodge a copy of a special resolution referred to
32 in subsection (2) or (5) with ASIC within 14 days after the
33 resolution is passed.

1 **508 Annual meeting of creditors**

- 2 (1) If the winding up continues for more than 1 year, the liquidator
3 must:
4 (a) in the case of a members' voluntary winding up—convene a
5 general meeting of the company; or
6 (b) in the case of a creditors' voluntary winding up—convene a
7 general meeting of the company and a meeting of the
8 creditors;
9 within 3 months after the end of the first year from the
10 commencement of the winding up and the end of each succeeding
11 year, and must lay before the meeting or each meeting an account
12 of his or her acts and dealings and of the conduct of the winding up
13 during that first year or that succeeding year, as the case may be.
- 14 (2) The liquidator must cause the notices of the meeting of creditors to
15 be sent by post to the creditors simultaneously with the sending of
16 the notices of the meeting of the company.

17 **509 Final meeting and deregistration**

- 18 (1) As soon as the affairs of the company are fully wound up, the
19 liquidator must make up an account showing how the winding up
20 has been conducted and the property of the company has been
21 disposed of and, when the account is so made up, he or she must
22 convene a general meeting of the company, or, in the case of a
23 creditors' voluntary winding up, a meeting of the creditors and
24 members of the company, for the purpose of laying before it the
25 account and giving any explanation of the account.
- 26 (2) The meeting must be convened by an advertisement published in
27 the *Gazette* at least 1 month before the meeting specifying the date,
28 time, place and purpose of the meeting.
- 29 (3) The liquidator must, within 7 days after the meeting, lodge a return
30 of the holding of the meeting and of its date with a copy of the
31 account attached to the return.
- 32 (4) At a meeting of the company, 2 members constitute a quorum and,
33 at a meeting of the creditors and members of the company, 2

1 creditors and 2 members constitute a quorum and, if a quorum is
2 not present at the meeting, the liquidator must, in place of the
3 return mentioned in subsection (3), lodge a return (with account
4 attached) stating that the meeting was duly convened and that no
5 quorum was present and, upon such a return being lodged, the
6 provisions of that subsection as to the lodging of the return are
7 taken to have been complied with.

8 *ASIC must deregister at the end of 3 month period*

9 (5) ASIC must deregister the company at the end of the 3 month
10 period after the return was lodged.

11 *ASIC must deregister on a day specified by the Court*

12 (6) On application by the liquidator or any other interested party, the
13 Court may make an order that ASIC deregister the company on a
14 specified day. The Court must make the order before the end of the
15 3 month period after the return was lodged.

16 (7) The person on whose application an order of the Court under this
17 section is made must, within 14 days after the making of the order,
18 lodge an office copy of the order.

19 **510 Arrangement: when binding on creditors**

20 (1) An arrangement entered into between a company about to be, or in
21 the course of being, wound up and its creditors is, subject to
22 subsection (4):

- 23 (a) binding on the company if sanctioned by a special resolution;
24 and
25 (b) binding on the creditors if sanctioned by a resolution of the
26 creditors.

27 (1A) The company must lodge a copy of a special resolution referred to
28 in paragraph (1)(a) with ASIC within 14 days after the resolution is
29 passed.

30 (2) A creditor must be accounted a creditor for value for such sum as
31 upon an account fairly stated, after allowing the value of security

1 or liens held by the creditor and the amount of any debt or set-off
2 owing by the creditor to the company, appears to be the balance
3 due to the creditor.

4 (3) A dispute about the value of any such security or lien or the
5 amount of any such debt or set-off may be settled by the Court on
6 the application of the company, the liquidator or the creditor.

7 (4) A creditor or contributory may, within 3 weeks after the
8 completion of the arrangement, appeal to the Court in respect of
9 the arrangement, and the Court may confirm, set aside or modify
10 the arrangement and make such further order as it thinks just.

11 **511 Application to Court to have questions determined or powers**
12 **exercised**

13 (1) The liquidator, or any contributory or creditor, may apply to the
14 Court:

15 (a) to determine any question arising in the winding up of a
16 company; or

17 (b) to exercise all or any of the powers that the Court might
18 exercise if the company were being wound up by the Court.

19 (1A) APRA may apply to the Court under subsection (1) in relation to a
20 company that is a friendly society within the meaning of the *Life*
21 *Insurance Act 1995* and which may be wound up voluntarily under
22 subsection 180(2) of that Act.

23 (2) The Court, if satisfied that the determination of the question or the
24 exercise of power will be just and beneficial, may accede wholly or
25 partially to any such application on such terms and conditions as it
26 thinks fit or may make such other order on the application as it
27 thinks just.

28 **512 Costs**

29 All proper costs, charges and expenses of and incidental to the
30 winding up (including the remuneration of the liquidator) are
31 payable out of the property of the company in priority to all other
32 claims.

1

2 **Part 5.6—Winding up generally**

3 **Division 1—Preliminary**

4 **513 Application of Part**

5 Except so far as the contrary intention appears, the provisions of
6 this Act about winding up apply in relation to the winding up of a
7 company whether in insolvency, by the Court or voluntarily.

1

2 **Division 1A—When winding up taken to begin**

3 **513A Winding up ordered by the Court**

4 If the Court orders under section 233, 459A, 459B or 461 that a
5 company be wound up, the winding up is taken to have begun or
6 commenced:

- 7 (a) if, when the order was made, a winding up of the company
8 was already in progress—when the last-mentioned winding
9 up is taken because of this Division to have begun or
10 commenced; or
11 (b) if, immediately before the order was made, the company was
12 under administration—on the section 513C day in relation to
13 the administration; or
14 (c) if:
15 (i) when the order was made, a provisional liquidator of the
16 company was acting; and
17 (ii) immediately before the provisional liquidator was
18 appointed, the company was under administration;
19 on the section 513C day in relation to the administration; or
20 (d) if, immediately before the order was made, a deed of
21 company arrangement had been executed by the company
22 and had not yet terminated—on the section 513C day in
23 relation to the administration that ended when the deed was
24 executed; or
25 (e) otherwise—on the day when the order was made.

26 **513B Voluntary winding up**

27 Where a company resolves by special resolution that it be wound
28 up voluntarily, the winding up is taken to have begun or
29 commenced:

- 30 (a) if, when the resolution was passed, a winding up of the
31 company was already in progress—when the last-mentioned
32 winding up is taken because of this Division to have begun or
33 commenced; or

- 1 (b) if, immediately before the resolution was passed, the
2 company was under administration—on the section 513C day
3 in relation to the administration; or
4 (c) if, immediately before the resolution was passed, a deed of
5 company arrangement had been executed by the company but
6 had not yet terminated—on the section 513C day in relation
7 to the administration that ended when the deed was executed;
8 or
9 (d) if the resolution is taken to have been passed because, at a
10 meeting convened under section 445F, the company's
11 creditors:
12 (i) passed a resolution terminating a deed of company
13 arrangement executed by the company; and
14 (ii) also resolved under section 445E that the company be
15 wound up;
16 on the section 513C day in relation to the administration that
17 ended when the deed was executed;
18 (e) otherwise—on the day on which the resolution was passed.

19 **513C Section 513C day in relation to an administration under**
20 **Part 5.3A**

21 The section 513C day in relation to the administration of a
22 company is:

- 23 (a) if, when the administration began, a winding up of the
24 company was in progress—the day on which the winding up
25 is taken because of this Division to have begun; or
26 (b) otherwise—the day on which the administration began.

27 **513D Validity of proceedings in earlier winding up**

28 Where, at the time when:

- 29 (a) the Court orders under section 233, 459A, 459B or 461 that a
30 company be wound up; or

Clause 513D

1 (b) a company resolves by special resolution that it be wound up
2 voluntarily;
3 a winding up of the company is already in progress, all proceedings
4 in the last-mentioned winding up are taken to have been valid,
5 except so far as the Court otherwise orders because fraud or
6 mistake has been proved.

1

2 **Division 2—Contributories**

3 **514 Where Division applies**

- 4 (1) This Division applies where a company is wound up.
- 5 (2) This Division does not apply to the winding up of a no liability
6 company.

7 **515 General liability of contributory**

- 8 Subject to this Division, a present or past member is liable to
9 contribute to the company's property to an amount sufficient:
- 10 (a) to pay the company's debts and liabilities and the costs,
11 charges and expenses of the winding up; and
12 (b) to adjust the rights of the contributories among themselves.

13 **516 Company limited by shares**

14 Subject to sections 518 and 519, if the company is a company
15 limited by shares, a member need not contribute more than the
16 amount (if any) unpaid on the shares in respect of which the
17 member is liable as a present or past member.

18 **517 Company limited by guarantee**

19 Subject to sections 518 and 519, if the company is a company
20 limited by guarantee, a member need not contribute more than the
21 amount the member has undertaken to contribute to the company's
22 property if the company is wound up.

23 **518 Company limited both by shares and by guarantee**

24 Subject to section 519, if the company is a company limited both
25 by shares and by guarantee, neither of sections 516 and 517 applies
26 but the member need not contribute more than the aggregate of the
27 following:

- 1 (a) the amount (if any) unpaid on shares in respect of which the
2 member is liable as a present or past member;
3 (b) the amount that the member has undertaken to contribute to
4 the company's property if the company is wound up.

5 **519 Exceptions for former unlimited company**

6 Despite sections 516, 517 and 518, if the company is a limited
7 company and became a limited company by virtue of a change of
8 status, the amount that a member at the time of the change of
9 status, or a person who at that time was a past member, is liable to
10 contribute in respect of the company's debts and liabilities
11 contracted before that time is unlimited.

12 **520 Past member: later debts**

13 A past member need not contribute in respect of a debt or liability
14 of the company contracted after the past member ceased to be a
15 member.

16 **521 Person ceasing to be a member a year or more before winding
17 up**

18 Subject to section 523, a past member need not contribute if he, she
19 or it was a member at no time during the year ending on the day of
20 the commencement of the winding up.

21 **522 Present members to contribute first**

22 Subject to paragraph 523(b), a past member need not contribute
23 unless it appears to the Court that the existing members are unable
24 to satisfy the contributions they are liable to make under this Act.

25 **523 Past member of former unlimited company**

26 If an unlimited company changes to a limited company under
27 section 164, a past member who was a member at the time of the
28 change is liable:
29 (a) despite section 521; and

1 (b) if no person who was a member at that time is a member at
2 the commencement of the winding up—despite section 522;
3 to contribute in respect of the company’s debts and liabilities
4 contracted before that time.

5 **524 Past member of former limited company**

6 If a limited company changes to an unlimited company under
7 section 164, a person who, at the time when the company applied
8 for the change, was a past member and did not again become a
9 member after that time need not contribute more than they would
10 have been liable to contribute if the company had not changed
11 type.

12 **526 Liability on certain contracts**

13 Nothing in this Act invalidates a provision, in a policy of insurance
14 or other contract, whereby the liability of individual members on
15 the policy or contract is restricted or whereby the funds of the
16 company are alone made liable in respect of the policy or contract.

17 **527 Nature of contributory’s liability**

18 A contributory’s liability is of the nature of a specialty debt
19 according to the law of the Capital Territory accruing due from the
20 contributory when the contributory’s liability commenced but
21 payable at the times when calls are made for enforcing the liability.

22 **528 Death of contributory**

23 If a contributory dies, whether before or after being placed on the
24 list of contributories:

- 25 (a) his or her personal representatives are liable in due course of
26 administration to contribute to the company’s property in
27 discharge of his or her liability to contribute and are
28 contributories accordingly; and
29 (b) if his or her personal representatives default in paying any
30 money that they are ordered to pay—proceedings may be

1 taken for administering his or her estate and for compelling
2 payment, out of the assets of that estate, of the money due.

3 **529 Bankruptcy of contributory**

4 If a contributory becomes an insolvent under administration, or
5 assigns his or her estate for the benefit of his or her creditors,
6 whether before or after being placed on the list of contributories:

- 7 (a) his or her trustee is to represent him or her for the purposes
8 of the winding up and is to be a contributory accordingly;
9 and
10 (b) calls already made, and the estimated value of his or her
11 liability to future calls, may be proved against his or her
12 estate.

1

2 **Division 3—Liquidators**

3 **530A Officers to help liquidator**

4 (1) As soon as practicable after the Court orders that a company be
5 wound up or appoints a provisional liquidator of a company, or a
6 company resolves that it be wound up, each officer of the company
7 must:

8 (a) deliver to the liquidator appointed for the purposes of the
9 winding up, or to the provisional liquidator, as the case may
10 be, all books in the officer's possession that relate to the
11 company, other than books possession of which the officer is
12 entitled, as against the company and the liquidator or
13 provisional liquidator, to retain; and

14 (b) if the officer knows where other books relating to the
15 company are—tell the liquidator or provisional liquidator
16 where those books are.

17 (2) Where a company is being wound up, or a provisional liquidator of
18 a company is acting, an officer of the company must:

19 (a) attend on the liquidator or provisional liquidator at such
20 times; and

21 (b) give the liquidator or provisional liquidator such information
22 about the company's business, property, affairs and financial
23 circumstances; and

24 (c) attend such meetings of the company's creditors or members;
25 as the liquidator or provisional liquidator reasonably requires.

26 (3) An officer of a company that is being wound up must do whatever
27 the liquidator reasonably requires the officer to do to help in the
28 winding up.

29 (4) An officer of a company must do whatever a provisional liquidator
30 of the company reasonably requires the officer to do to help in the
31 performance or exercise of any of the provisional liquidator's
32 functions and powers.

- 1 (5) The liquidator or provisional liquidator of a company may require
2 an officer of the company:
3 (a) to tell the liquidator the officer's residential address and work
4 or business address; or
5 (b) to keep the liquidator informed of any change in either of
6 those addresses that happens during the winding up.
- 7 (6) A person must not, without reasonable excuse, fail to comply with
8 subsection (1), (2), (3) or (4), or with a requirement under
9 subsection (5).
- 10 (7) In this section:
11 *officer*, in relation to a company, means a person who is, or has
12 been but is no longer, an officer (as defined by section 82A) of the
13 company.
- 14 (8) However, a person is not an officer of a company for the purposes
15 of this section merely because he or she is or has been an employee
16 of the company.
- 17 (9) Nothing in this section limits the generality of anything else in it.

18 **530B Liquidator's rights to company's books**

- 19 (1) A person is not entitled, as against the liquidator of a company:
20 (a) to retain possession of books of the company; or
21 (b) to claim or enforce a lien on such books;
22 but such a lien is not otherwise prejudiced.
- 23 (2) Paragraph (1)(a) does not apply in relation to books of which a
24 secured creditor of the company is entitled to possession otherwise
25 than because of a lien, but the liquidator is entitled to inspect, and
26 make copies of, such books at any reasonable time.
- 27 (3) A person must not hinder or obstruct a liquidator of a company in
28 obtaining possession of books of the company, unless the person is
29 entitled, as against the company and the liquidator, to retain
30 possession of the books.

- 1 (4) The liquidator of a company may give to a person a written notice
2 requiring the person to deliver to the liquidator, as specified in the
3 notice, books so specified that are in the person's possession.
- 4 (5) A notice under subsection (4) must specify a period of at least 3
5 days as the period within which the notice must be complied with.
- 6 (6) A person must comply with a notice under subsection (4) except so
7 far as the person is entitled, as against the company and the
8 liquidator, to retain possession of the books.
- 9 (7) In this section:
- 10 *liquidator* includes a provisional liquidator.

11 **530C Warrant to search for, and seize, company's property or**
12 **books**

- 13 (1) The Court may issue a warrant under subsection (2) if:
- 14 (a) a company is being wound up or a provisional liquidator of a
15 company is acting; and
- 16 (b) on application by the liquidator or provisional liquidator, as
17 the case may be, or by ASIC, the Court is satisfied that a
18 person:
- 19 (i) has concealed or removed property of the company with
20 the result that the taking of the property into the custody
21 or control of the liquidator or provisional liquidator will
22 be prevented or delayed; or
- 23 (ii) has concealed, destroyed or removed books of the
24 company or is about to do so.
- 25 (2) The warrant may authorise a specified person, with such help as is
26 reasonably necessary:
- 27 (a) to search for and seize property or books of the company in
28 the possession of the person referred to in subsection (1); and
- 29 (b) to deliver, as specified in the warrant, property or books
30 seized under it.
- 31 (3) In order to seize property or books under the warrant, the specified
32 person may break open a building, room or receptacle where the

1 property is or the books are, or where the person reasonably
2 believes the property or books to be.

3 (4) A person who has custody of property or a book because of the
4 execution of the warrant must retain it until the Court makes an
5 order for its disposal.

6 **531 Books to be kept by liquidator**

7 A liquidator or provisional liquidator must keep proper books in
8 which he or she must cause to be made entries or minutes of
9 proceedings at meetings and of such other matters as are
10 prescribed, and any creditor or contributory may, unless the Court
11 otherwise orders, personally or by an agent inspect them.

12 **532 Disqualification of liquidator**

13 (1A) In this section:

14 *liquidator* includes a provisional liquidator.

15 (1) Subject to this section, a person must not consent to be appointed,
16 and must not act, as liquidator of a company unless he or she is:

17 (a) a registered liquidator; or

18 (b) registered as a liquidator of that company under subsection
19 1282(3).

20 (2) Subject to this section, a person must not, except with the leave of
21 the Court, seek to be appointed, or act, as liquidator of a company:

22 (a) if the person, or a body corporate in which the person has a
23 substantial holding, is indebted in an amount exceeding
24 \$5,000 to the company or a body corporate related to the
25 company; or

26 (b) if the person is, otherwise than in his or her capacity as
27 liquidator, a creditor of the company or of a related body
28 corporate in an amount exceeding \$5,000; or

29 (c) if:

- 1 (i) the person is an officer of the company (otherwise than
2 by reason of being a liquidator of the company or of a
3 related body corporate); or
4 (ii) the person is an officer of any body corporate that is a
5 mortgagee of property of the company; or
6 (iii) the person is an auditor of the company; or
7 (iv) the person is a partner or employee of an auditor of the
8 company; or
9 (v) the person is a partner, employer or employee of an
10 officer of the company; or
11 (vi) the person is a partner or employee of an employee of
12 an officer of the company.
- 13 (3) For the purposes of paragraph (2)(a), disregard a debt owed by a
14 natural person to a body corporate if:
15 (a) the body corporate is:
16 (i) an Australian ADI; or
17 (ii) a body corporate registered under the *Life Insurance Act*
18 *1995*; and
19 (b) the debt arose because of a loan that the body corporate or
20 entity made to the person in the ordinary course of its
21 ordinary business; and
22 (c) the person used the amount of the loan to pay the whole or
23 part of the purchase price of premises that the person uses as
24 their principal place of residence.
- 25 (4) Subsection (1) and paragraph (2)(c) do not apply to a members'
26 voluntary winding up of a proprietary company.
- 27 (5) Paragraph (2)(c) does not apply to a creditors' voluntary winding
28 up if, by a resolution of the creditors passed at a meeting of the
29 creditors of which 7 days notice has been given to every creditor
30 stating the purpose of the meeting, it is determined that that
31 paragraph does not so apply.
- 32 (6) For the purposes of subsection (2), a person is taken to be an
33 officer or auditor of a company if:

- 1 (a) the person is an officer or auditor of a related body corporate;
2 or
3 (b) except where ASIC, if it thinks fit in the circumstances of the
4 case, directs that this paragraph does not apply in relation to
5 the person—the person has, at any time within the
6 immediately preceding period of 2 years, been an officer,
7 auditor or promoter of the company or of a related body
8 corporate.
- 9 (7) A person must not consent to be appointed, and must not act, as
10 liquidator of a company if he or she is an insolvent under
11 administration.
- 12 (8) A person must not consent to be appointed, and must not act, as
13 liquidator of a company that is being wound up by order of the
14 Court unless he or she is an official liquidator.
- 15 (9) A person must not be appointed as liquidator of a company unless
16 the person has, before his or her appointment, consented in writing
17 to act as liquidator of the company.

18 **533 Reports by liquidator**

- 19 (1) If it appears to the liquidator of a company, in the course of a
20 winding up of the company, that:
- 21 (a) a past or present officer, or a member or contributory, of the
22 company may have been guilty of an offence under a law of
23 the Commonwealth or a State or Territory in relation to the
24 company; and
- 25 (b) a person who has taken part in the formation, promotion,
26 administration, management or winding up of the company:
- 27 (i) may have misapplied or retained, or may have become
28 liable or accountable for, any money or property of the
29 company; or
- 30 (ii) may have been guilty of any negligence, default, breach
31 of duty or breach of trust in relation to the company; or
- 32 (c) the company may be unable to pay its unsecured creditors
33 more than 50 cents in the dollar;
- 34 the liquidator must:

- 1 (d) as soon as practicable lodge a report with respect to the
2 matter and state in the report whether he or she proposes to
3 make an application for an examination or order under
4 section 597; and
5 (e) give ASIC such information, and give to it such access to and
6 facilities for inspecting and taking copies of any documents,
7 as ASIC requires.
- 8 (2) The liquidator may also, if he or she thinks fit, lodge further reports
9 specifying any other matter that, in his or her opinion, it is
10 desirable to bring to the notice of ASIC.
- 11 (3) If it appears to the Court, in the course of winding up a company:
12 (a) that a past or present officer, or a contributory or member, of
13 the company has been guilty of an offence under a law
14 referred to in paragraph (1)(a) in relation to the company; or
15 (b) that a person who has taken part in the formation, promotion,
16 administration, management or winding up of the company
17 has engaged in conduct referred to in paragraph (1)(b) in
18 relation to the company;
19 and that the liquidator has not lodged with ASIC a report with
20 respect to the matter, the Court may, on the application of a person
21 interested in the winding up, direct the liquidator so to lodge such a
22 report.

23 **534 Prosecution by liquidator of delinquent officers and members**

- 24 (1) Where:
25 (a) a report has been lodged under section 533; and
26 (b) it appears to ASIC that the matter is not one in respect of
27 which a prosecution ought to be begun;
28 it must inform the liquidator accordingly, and the liquidator may
29 begin a prosecution for any offence referred to in the report.
- 30 (2) ASIC may direct that the whole or a specified part of the costs and
31 expenses properly incurred by a liquidator in proceedings under
32 this section must be paid out of money of ASIC.

- 1 (3) Subject to a direction under subsection (2), to any charges on the
2 property of the company and to any debts to which this Act gives
3 priority, all such costs and expenses are payable out of that
4 property as part of the costs of the winding up.

5 **535 When liquidator has qualified privilege**

- 6 (1) A liquidator has qualified privilege in respect of a statement that he
7 or she makes, whether orally or in writing, in the course of his or
8 her duties as liquidator.

- 9 (2) In this section:

10 *liquidator* includes a provisional liquidator.

11 **536 Supervision of liquidators**

- 12 (1A) In this section:

13 *liquidator* includes a provisional liquidator.

- 14 (1) Where:

15 (a) it appears to the Court or to ASIC that a liquidator has not
16 faithfully performed or is not faithfully performing his or her
17 duties or has not observed or is not observing:

- 18 (i) a requirement of the Court; or
19 (ii) a requirement of this Act, of the regulations or of the
20 rules; or

21 (b) a complaint is made to the Court or to ASIC by any person
22 with respect to the conduct of a liquidator in connection with
23 the performance of his or her duties;

24 the Court or ASIC, as the case may be, may inquire into the matter
25 and, where the Court or ASIC so inquires, the Court may take such
26 action as it thinks fit.

- 27 (2) ASIC may report to the Court any matter that in its opinion is a
28 misfeasance, neglect or omission on the part of the liquidator and
29 the Court may order the liquidator to make good any loss that the
30 estate of the company has sustained thereby and may make such
31 other order or orders as it thinks fit.

- 1 (3) The Court may at any time require a liquidator to answer any
2 inquiry in relation to the winding up and may examine the
3 liquidator or any other person on oath concerning the winding up
4 and may direct an investigation to be made of the books of the
5 liquidator.

6 **537 Notice of appointment and address of liquidator**

- 7 (1A) In this section:

8 *liquidator* includes a provisional liquidator.

- 9 (1) A liquidator must, within 14 days after his or her appointment,
10 lodge notice in the prescribed form of his or her appointment and
11 of the address of his or her office and, in the event of any change in
12 the situation of his or her office, must, within 14 days after the
13 change, lodge notice in the prescribed form of the change.
- 14 (2) A liquidator must, within 14 days after his or her resignation or
15 removal from office, lodge notice of the resignation or removal in
16 the prescribed form.

17 **538 Regulations relating to money etc. received by liquidator**

- 18 (1A) In this section:

19 *liquidator* includes a provisional liquidator.

- 20 (1) The regulations may:
- 21 (a) require a liquidator to pay, into such bank and account, in
22 such manner and at such times as are prescribed, money
23 received by him or her; and
- 24 (b) prescribe the circumstances and manner in which money paid
25 into such an account is to be paid out; and
- 26 (c) require a liquidator of a company to deposit, in such bank, in
27 such manner and at such times as are prescribed, bills, notes
28 or other securities payable to the company or its liquidator;
29 and
- 30 (d) prescribe the circumstances and manner in which bills, notes
31 or other securities so deposited are to be delivered out; and

- 1 (e) make provision in relation to the giving by the Court of
2 directions with respect to the payment, deposit or custody of
3 money payable to or into the possession of a liquidator, or of
4 bills, notes or other securities so payable; and
5 (f) provide for:
6 (i) the payment by a liquidator of interest at such rate, on
7 such amount and in respect of such period as is
8 prescribed; and
9 (ii) disallowance of all or of such part as is prescribed of the
10 remuneration of a liquidator; and
11 (iii) the removal from office of a liquidator by the Court; and
12 (iv) the payment by a liquidator of any expenses occasioned
13 by reason of his or her default;
14 where a liquidator contravenes or fails to comply with
15 regulations made under this section.
- 16 (2) Regulations made under this section may apply generally or in
17 relation to a specified class of windings up.

18 **539 Liquidator's accounts**

- 19 (1A) In this section:
20 *liquidator* includes a provisional liquidator.
- 21 (1) A liquidator must, within 1 month after the end of the period of 6
22 months from the date of his or her appointment and of every
23 subsequent period of 6 months during which he or she acts as
24 liquidator and within 1 month after he or she ceases to act as
25 liquidator, lodge:
26 (a) an account in the prescribed form and verified by a statement
27 in writing showing:
28 (i) his or her receipts and his or her payments during each
29 such period or, where he or she ceases to act as
30 liquidator, during the period from the end of the period
31 to which the last preceding account related or from the
32 date of his or her appointment, as the case requires, up
33 to the date of his or her so ceasing to act; and

- 1 (ii) in the case of the second account lodged under this
2 subsection and all subsequent accounts—the aggregate
3 amount of receipts and payments during all preceding
4 periods since his or her appointment; and
5 (b) in the case of a liquidator other than a provisional
6 liquidator—a statement in the prescribed form relating to the
7 position in the winding up, verified by a statement in writing.
- 8 (2) ASIC may cause the account and, where a statement of the position
9 in the winding up has been lodged, that statement to be audited by
10 a registered company auditor, who must prepare a report on the
11 account and the statement (if any).
- 12 (3) For the purposes of the audit under subsection (2) the liquidator
13 must give the auditor with such books and information as the
14 auditor requires.
- 15 (4) Where ASIC causes an account, or an account and a statement, to
16 be audited under subsection (2):
17 (a) ASIC must give to the liquidator a copy of the report
18 prepared by the auditor; and
19 (b) subsection 1289(2) applies in relation to the report prepared
20 by the auditor as if it were a document required to be lodged.
- 21 (5) The liquidator must give notice that the account has been made up
22 to every creditor and contributory when next forwarding any
23 report, notice of meeting, notice of call or dividend.
- 24 (6) The costs of an audit under this section must be fixed by ASIC and
25 form part of the expenses of winding up.

26 **540 Liquidator to remedy defaults**

- 27 (1A) In this section:
28 *liquidator* includes a provisional liquidator.
- 29 (1) If any liquidator who has made any default in lodging or making
30 any application, return, account or other document, or in giving
31 any notice that he or she is by law required to lodge, make or give,
32 fails to make good the default within 14 days after the service on

- 1 him or her of a notice requiring him or her to do so, the Court may,
2 on the application of any contributory or creditor of the company
3 or ASIC, make an order directing the liquidator to make good the
4 default within such time as is specified in the order.
- 5 (2) Any order made under subsection (1) may provide that all costs of
6 and incidental to the application must be borne by the liquidator.
- 7 (3) Nothing in subsection (1) prejudices the operation of any law
8 imposing penalties on a liquidator in respect of any such default.

1

2 **Division 4—General**

3 **541 Notification that company is in liquidation**

4 A company that is being wound up must set out, in every public
5 document, and in every negotiable instrument, of the company,
6 after the name of the company where it first appears, the
7 expression *in liquidation*.

8 **542 Books of company**

- 9 (1) Where a company is being wound up, all books of the company
10 and of the liquidator that are relevant to affairs of the company at
11 or subsequent to the commencement of the winding up of the
12 company are, as between the contributories of the company, prima
13 facie evidence of the truth of all matters purporting to be recorded
14 in those books.
- 15 (2) If a company has been wound up, the liquidator must retain the
16 books referred to in subsection (1) for a period of 5 years from the
17 date of deregistration of the company and, subject to section 262A
18 of the *Income Tax Assessment Act 1936*, may, at the end of that
19 period, destroy them.
- 20 (3) Despite subsection (2) but subject to subsection (4), when a
21 company has been wound up, the books referred to in
22 subsection (1) may be destroyed within a period of 5 years after the
23 deregistration of the company:
- 24 (a) in the case of a winding up by the Court—in accordance with
25 the directions of the Court given pursuant to an application of
26 which at least 14 days notice has been given to ASIC; and
- 27 (b) in the case of a members' voluntary winding up—as the
28 company by resolution directs; and
- 29 (c) in the case of a creditors' voluntary winding up—as the
30 committee of inspection directs, or, if there is no such
31 committee, as the creditors of the company by resolution
32 direct.

- 1 (4) The liquidator is not entitled to destroy books as mentioned in
2 paragraph (3)(b) or (c) unless ASIC consents to the destruction of
3 those books.

4 **543 Investment of surplus funds on general account**

- 5 (1) Whenever the cash balance standing to the credit of a company that
6 is in the course of being wound up is in excess of the amount that,
7 in the opinion of the committee of inspection, or, if there is no
8 committee of inspection, of the liquidator, is required for the time
9 being to answer demands in respect of the property of the
10 company, the liquidator, if so directed in writing by the committee
11 of inspection, or, if there is not committee of inspection, the
12 liquidator himself or herself, may, unless the Court on application
13 by any creditor thinks fit to order otherwise and so orders, invest
14 the sum or any part of the sum:
15 (a) in any manner in which trustees are for the time being
16 authorised by law to invest trust funds; or
17 (b) on deposit with an eligible money market dealer; or
18 (c) on deposit at interest with any bank;
19 and any interest received in respect of that money so invested
20 forms part of the property of the company.
- 21 (2) Whenever any part of the money so invested is, in the opinion of
22 the committee of inspection, or, if there is no committee of
23 inspection, of the liquidator, required to answer any demands in
24 respect of the property of the company, the committee of
25 inspection may direct, or, if there is no committee of inspection,
26 the liquidator may arrange for, the sale or realisation of such part
27 of the securities as is necessary.

28 **544 Unclaimed money to be paid to ASIC**

- 29 (1) Where a liquidator of a company has in his or her hands or under
30 his or her control:
31 (a) any amount being a dividend or other money that has
32 remained unclaimed for more than 6 months after the day
33 when the dividend or other money became payable; or

- 1 (b) after making a final distribution, any unclaimed or
2 undistributed amount of money arising from the property of
3 the company;
4 he or she must forthwith pay that money to ASIC to be dealt with
5 under Part 9.7.
- 6 (1A) If a liquidator has, or has control of, the money of a company that
7 has no members, the liquidator must pay it to ASIC as soon as
8 practicable for it to be dealt with under Part 9.7.
- 9 (2) The Court may at any time, on the application of ASIC:
- 10 (a) order a liquidator of a company to submit to it an account,
11 verified by affidavit, of any unclaimed or undistributed
12 funds, dividends or other money in his or her hands or under
13 his or her control; and
14 (b) direct an audit of accounts submitted to it in accordance with
15 paragraph (a); and
16 (c) direct a liquidator of a company to pay any money referred to
17 in paragraph (a) to ASIC to be dealt with under Part 9.7.
- 18 (3) Where a liquidator of a company pays money to ASIC pursuant to
19 subsection (1) or (1A) or an order of the Court made under
20 paragraph (2)(c), the liquidator is entitled to a receipt for the
21 money so paid and the giving of that receipt discharges the
22 liquidator from any liability in respect of the money.
- 23 (4) For the purposes of this section the Court may exercise all the
24 powers conferred by this Act with respect to the discovery and
25 realisation of the property of a company and the provisions of this
26 Act with respect to the exercise of those powers apply, with such
27 adaptations as are prescribed, to proceedings under this section.
- 28 (5) The provisions of this section do not, except as expressly declared
29 in this Act, deprive a person of any other right or remedy to which
30 the person is entitled against the liquidator or another person.

1 **545 Expenses of winding up where property insufficient**

- 2 (1) Subject to this section, a liquidator is not liable to incur any
3 expense in relation to the winding up of a company unless there is
4 sufficient available property.
- 5 (2) The Court or ASIC may, on the application of a creditor or a
6 contributory, direct a liquidator to incur a particular expense on
7 condition that the creditor or contributory indemnifies the
8 liquidator in respect of the recovery of the amount expended and, if
9 the Court or ASIC so directs, gives such security to secure the
10 amount of the indemnity as the Court or ASIC thinks reasonable.
- 11 (3) Nothing in this section is taken to relieve a liquidator of any
12 obligation to lodge a document (including a report) with ASIC
13 under any provision of this Act by reason only that he or she would
14 be required to incur expense in order to perform that obligation.

15 **546 Resolutions passed at adjourned meetings of creditors and**
16 **contributories**

17 Subject to subsection 498(4), where a resolution is passed at an
18 adjourned meeting of any creditors or contributories of a company,
19 the resolution is, for all purposes, treated as having been passed on
20 the date on which it was in fact passed and not on any earlier date.

21 **547 Meetings to ascertain wishes of creditors or contributories**

- 22 (1) The Court may, as to all matters relating to the winding up of a
23 company, have regard to the wishes of the creditors or
24 contributories as proved to it by any sufficient evidence and may, if
25 it thinks fit for the purpose of ascertaining those wishes, direct
26 meetings of the creditors or contributories to be convened, held and
27 conducted in such manner as the Court directs, and may appoint a
28 person to act as chair of any such meeting and to report the result
29 of the meeting to the Court.
- 30 (2) In the case of creditors, regard is to be had to the value of each
31 creditor's debt.

- 1 (3) In the case of contributories, regard is to be had to the number of
2 votes conferred on each contributory by this Act or the company's
3 constitution.

1

2 **Division 5—Committees of inspection**

3 **548 Convening of meetings by liquidator for appointment of**
4 **committee of inspection**

- 5 (1) The liquidator of a company must, if so requested by a creditor or
6 contributory, convene separate meetings of the creditors and
7 contributories for the purpose of determining:
8 (a) whether a committee of inspection should be appointed; and
9 (b) where a committee of inspection is to be appointed:
10 (i) the numbers of members to represent the creditors and
11 the contributories, respectively; and
12 (ii) the persons who are to be members of the committee
13 representing creditors and contributories, respectively.
- 14 (2) If there is a difference between the determination of the meeting of
15 creditors and the determination of the meeting of contributories,
16 the Court may resolve the difference and make such order as it
17 thinks proper.
- 18 (3) A person is not eligible to be appointed a member of a committee
19 of inspection unless the person is:
20 (a) in the case of an appointment by creditors of the company:
21 (i) a creditor of the company; or
22 (ii) the attorney of a creditor of the company by virtue of a
23 general power of attorney given by the creditor; or
24 (iii) a person authorised in writing by a creditor of the
25 company to be a member of the committee of
26 inspection; or
27 (b) in the case of an appointment by the contributories of the
28 company:
29 (i) a contributory of the company; or
30 (ii) the attorney of a contributory of the company by virtue
31 of a general power of attorney given by the
32 contributory; or

- 1 (iii) a person authorised in writing by a contributory of the
2 company to be a member of the committee of
3 inspection.

4 **549 Proceedings of committee of inspection**

- 5 (1) A committee of inspection must meet at such times and places as
6 its members from time to time appoint.
- 7 (2) The liquidator or a member of the committee may convene a
8 meeting of the committee.
- 9 (3) A committee may act by a majority of its members present at a
10 meeting, but must not act unless a majority of its members are
11 present.

12 **550 Vacancies on committee of inspection**

- 13 (1) A member of a committee may resign by notice in writing signed
14 by the member and delivered to the liquidator.
- 15 (2) If a member of a committee:
16 (a) becomes an insolvent under administration; or
17 (b) is absent from 5 consecutive meetings of the committee
18 without the leave of those members who together with
19 himself or herself represent the creditors or contributories, as
20 the case may be;
21 his or her office becomes vacant.
- 22 (3) A member of the committee who represents creditors may be
23 removed by a resolution at a meeting of creditors of which 7 days'
24 notice has been given stating the object of the meeting, and a
25 member of the committee who represents contributories may be
26 removed by a resolution at a meeting of contributories of which
27 such notice has been given.
- 28 (4) A meeting referred to in subsection (3) may appoint a person to fill
29 a vacancy caused by the removal of a member of the committee.

- 1 (5) A vacancy in the committee may be filled by the appointment of a
2 person by a resolution at a meeting of the creditors or of the
3 contributories, as the case may be, of which 7 days' notice has
4 been given.
- 5 (6) A vacancy in the committee that is not filled as provided by
6 subsection (4) or (5) may be filled by the appointment of a person
7 by the committee and a person so appointed represents the
8 creditors, or the contributories, as the case may be.
- 9 (7) Notwithstanding a vacancy in the committee, the continuing
10 members of the committee may act provided they are not less than
11 2 in number.

12 **551 Member of committee not to accept extra benefit**

- 13 (1) A member of a committee of inspection must not, while acting as
14 such a member, except as provided by this Act or with the leave of
15 the Court:
- 16 (a) make an arrangement for receiving, or accept, from the
17 company or any other person, in connection with the winding
18 up, a gift, remuneration or pecuniary or other consideration
19 or benefit; or
- 20 (b) directly or indirectly derive any profit or advantage from a
21 transaction, sale or purchase for or on account of the
22 company or any gift, profit or advantage from a creditor; or
- 23 (c) directly or indirectly become the purchaser of any property of
24 the company.
- 25 (2) A transaction entered into in contravention of subsection (1) may
26 be set aside by the Court on the application of a creditor or member
27 of the company.

28 **552 Powers of Court where no committee of inspection**

29 Where there is no committee of inspection, the Court may, on the
30 application of the liquidator, do any thing and give any direction or
31 permission that is by this Part authorised or required to be done or
32 given by the committee.

1

2 **Division 6—Proof and ranking of claims**

3 **Subdivision A—Admission to proof of debts and claims**

4 **553 Debts or claims that are provable in winding up**

5 (1) Subject to this Division, in every winding up, all debts payable by,
6 and all claims against, the company (present or future, certain or
7 contingent, ascertained or sounding only in damages), being debts
8 or claims the circumstances giving rise to which occurred before
9 the relevant date, are admissible to proof against the company.

10 (1A) Even though the circumstances giving rise to a debt payable by the
11 company, or a claim against the company, occur on or after the
12 relevant date, the debt or claim is admissible to proof against the
13 company in the winding up if:

14 (a) the circumstances occur at a time when the company is under
15 a deed of company arrangement; and

16 (b) the company is under the deed immediately before the
17 resolution or court order that the company be wound up.

18 This subsection has effect subject to the other sections in this
19 Division.

20 Note 1: See Division 10 of Part 5.3A (sections 444A-444H) for the provisions
21 dealing with deeds of company arrangement.

22 Note 2: See paragraph 513A(d) for deeds that are followed immediately by
23 court ordered winding up. See paragraphs 513B(c) and (d) for deeds
24 that are followed immediately by voluntary winding up. Subsection
25 446A(2) and section 446B provide that companies are taken in certain
26 circumstances to have passed resolutions that they be wound up.

27 (1B) For the purpose of applying the other sections of this Division to a
28 debt or claim that is admissible to proof under subsection (1A), the
29 relevant date for the debt or claim is the date on which the deed
30 terminates.

31 (2) Where, after the relevant date, an order is made under section 91 of
32 the ASIC Act against a company that is being wound up, the
33 amount that, pursuant to the order, the company is liable to pay is
34 admissible to proof against the company.

1 **553A Member cannot prove debt unless contributions paid**

2 A debt owed by a company to a person in the person's capacity as
3 a member of the company, whether by way of dividends, profits or
4 otherwise, is not admissible to proof against the company unless
5 the person has paid to the company or the liquidator all amounts
6 that the person is liable to pay as a member of the company.

7 **553AA Selling shareholder cannot prove debt unless documents**
8 **given**

9 The selling shareholder in a share buy-back may claim in a
10 winding up of the company but is not entitled to a distribution of
11 money or property unless the shareholder has discharged the
12 shareholder's obligations to give documents in connection with the
13 buy-back.

14 Note: The selling shareholder's claim ranks after those of non-member
15 creditors and before those of other member creditors (see
16 section 563AA).

17 **553B Insolvent companies—penalties and fines not generally**
18 **provable**

- 19 (1) Subject to subsection (2), penalties or fines imposed by a court in
20 respect of an offence against a law are not admissible to proof
21 against an insolvent company.
- 22 (2) An amount payable under a pecuniary penalty order, or an
23 interstate pecuniary penalty order, within the meaning of the
24 *Proceeds of Crime Act 1987*, is admissible to proof against an
25 insolvent company.

26 **553C Insolvent companies—mutual credit and set-off**

- 27 (1) Subject to subsection (2), where there have been mutual credits,
28 mutual debts or other mutual dealings between an insolvent
29 company that is being wound up and a person who wants to have a
30 debt or claim admitted against the company:
- 31 (a) an account is to be taken of what is due from the one party to
32 the other in respect of those mutual dealings; and

- 1 (b) the sum due from the one party is to be set off against any
2 sum due from the other party; and
3 (c) only the balance of the account is admissible to proof against
4 the company, or is payable to the company, as the case may
5 be.
- 6 (2) A person is not entitled under this section to claim the benefit of a
7 set-off if, at the time of giving credit to the company, or at the time
8 of receiving credit from the company, the person had notice of the
9 fact that the company was insolvent.

10 **553D Debts or claims may be proved formally or informally**

- 11 (1) A debt or claim must be proved formally if the liquidator, in
12 accordance with the regulations, requires it to be proved formally.
- 13 (2) A debt or claim that is not required to be proved formally:
14 (a) may be proved formally; or
15 (b) may be proved in some other way, subject to compliance
16 with the requirements of the regulations (if any) relating to
17 the informal proof of debts and claims.
- 18 (3) A debt or claim is proved formally if it satisfies the requirements of
19 the regulations relating to the formal proof of debts and claims.

20 **553E Application of Bankruptcy Act to winding up of insolvent**
21 **company**

22 Subject to this Division and to section 279, in the winding up of an
23 insolvent company the same rules are to prevail and be observed
24 with regard to debts provable as are in force for the time being
25 under the *Bankruptcy Act 1966* in relation to the estates of
26 bankrupt persons (except the rules in sections 82 to 94 (inclusive)
27 and 96 of that Act), and all persons who in any such case would be
28 entitled to prove for and receive dividends out of the property of
29 the company may come in under the winding up and make such
30 claims against the company as they respectively are entitled to
31 because of this section.

1 **Subdivision B—Computation of debts and claims**

2 **554 General rule—compute amount as at relevant date**

3 (1) The amount of a debt or claim of a company (including a debt or
4 claim that is for or includes interest) is to be computed for the
5 purposes of the winding up as at the relevant date.

6 (2) Subsection (1) does not apply to an amount admissible to proof
7 under subsection 553(2).

8 **554A Determination of value of debts and claims of uncertain value**

9 (1) This section applies where, in the winding up of a company, the
10 liquidator admits a debt or claim that, as at the relevant date, did
11 not bear a certain value.

12 (2) The liquidator must:

13 (a) make an estimate of the value of the debt or claim as at the
14 relevant date; or

15 (b) refer the question of the value of the debt or claim to the
16 Court.

17 (3) A person who is aggrieved by the liquidator's estimate of the value
18 of the debt or claim may, in accordance with the regulations,
19 appeal to the Court against the liquidator's estimate.

20 (4) If:

21 (a) the liquidator refers the question of the value of the debt or
22 claim to the Court; or

23 (b) a person appeals to the Court against the liquidator's estimate
24 of the value of the debt or claim;

25 the Court must:

26 (c) make an estimate of the value of the debt or claim as at the
27 relevant date; or

28 (d) determine a method to be applied by the liquidator in
29 working out the value of the debt or claim as at the relevant
30 date.

- 1 (5) If the Court determines a method to be applied by the liquidator in
2 working out the value of the debt or claim, the liquidator must
3 work out the value of the debt or claim as at the relevant date in
4 accordance with that method.
- 5 (6) If:
- 6 (a) the Court has determined a method to be applied by the
7 liquidator in working out the value of the debt or claim as at
8 the relevant date; and
- 9 (b) a person is aggrieved by the way in which that method has
10 been applied by the liquidator in working out that value;
11 the person may, in accordance with the regulations, appeal to the
12 Court against the way in which the method was applied.
- 13 (7) If:
- 14 (a) a person appeals to the Court against the way in which the
15 liquidator, in working out the value of the debt or claim,
16 applied a method determined by the court; and
- 17 (b) the Court is satisfied that the liquidator did not correctly
18 apply that method;
19 the Court must work out the value of the debt or claim as at the
20 relevant date in accordance with that method.
- 21 (8) For the purposes of this Division, the amount of the debt or claim
22 that is admissible to proof is the value as estimated or worked out
23 under this section.

24 **554B Discounting of debts payable after relevant date**

25 The amount of a debt that is admissible to proof but that, as at the
26 relevant date, was not payable by the company until an ascertained
27 or ascertainable date (the *future date*) after the relevant date is the
28 amount payable on the future date reduced by the amount of the
29 discount worked out in accordance with the regulations.

1 **554C Conversion into Australian currency of foreign currency**
2 **debts or claims**

- 3 (1) This section applies if the amount of a debt or claim admissible to
4 proof against a company would, apart from this section, be an
5 amount of foreign currency.
- 6 (2) If the company and the creditor or claimant have, in an instrument
7 created before the relevant date, agreed on a method to be applied
8 for the purpose of converting the company's liability in respect of
9 the debt or claim into Australian currency, the amount of the debt
10 or claim that is admissible to proof is the equivalent in Australian
11 currency of the amount of foreign currency, worked out as at the
12 relevant date and in accordance with the agreed method.
- 13 (3) If subsection (2) does not apply, the amount of the debt or claim
14 that is admissible to proof is the equivalent in Australian currency
15 of the amount of foreign currency, worked out by reference to the
16 opening carded on demand airmail buying rate in relation to the
17 foreign currency available at the Commonwealth Bank of Australia
18 on the relevant date.

19 **Subdivision C—Special provisions relating to secured creditors**
20 **of insolvent companies**

21 **554D Application of Subdivision**

- 22 (1) This Subdivision applies in relation to the proof of a secured debt
23 in the winding up of an insolvent company.
- 24 (2) For the purposes of the application of this Subdivision in relation
25 to a secured debt of an insolvent company that is being wound up,
26 the amount of the debt is taken to be the amount of the debt as at
27 the relevant date (as worked out in accordance with Subdivision
28 B).

29 **554E Proof of debt by secured creditor**

- 30 (1) In the winding up of an insolvent company, a secured creditor is
31 not entitled to prove the whole or a part of the secured debt

- 1 otherwise than in accordance with this section and with any other
2 provisions of this Act or the regulations that are applicable to
3 proving the debt.
- 4 (2) The creditor's proof of debt must be in writing.
- 5 (3) If the creditor surrenders the security to the liquidator for the
6 benefit of creditors generally, the creditor may prove for the whole
7 of the amount of the secured debt.
- 8 (4) If the creditor realises the security, the creditor may prove for any
9 balance due after deducting the net amount realised, unless the
10 liquidator is not satisfied that the realisation has been effected in
11 good faith and in a proper manner.
- 12 (5) If the creditor has not realised or surrendered the security, the
13 creditor may:
- 14 (a) estimate its value; and
15 (b) prove for the balance due after deducting the value so
16 estimated.
- 17 (6) If subsection (5) applies, the proof of debt must include particulars
18 of the security and the creditor's estimate of its value.

19 **554F Redemption of security by liquidator**

- 20 (1) This section applies where a secured creditor's proof of debt is in
21 respect of the balance due after deducting the creditor's estimate of
22 the value of the security.
- 23 (2) The liquidator may, at any time, redeem the security on payment to
24 the creditor of the amount of the creditor's estimate of its value.
- 25 (3) If the liquidator is dissatisfied with the amount of the creditor's
26 estimate of the value of the security, the liquidator may require the
27 property comprised in the security to be offered for sale at such
28 times and on such terms and conditions as are agreed on by the
29 creditor and the liquidator or, in default of agreement, as the Court
30 determines.

- 1 (4) If the property is offered for sale by public auction, both the
2 creditor and the liquidator are entitled to bid for, and purchase, the
3 property.
- 4 (5) The creditor may at any time, by notice in writing, require the
5 liquidator to elect whether to exercise the power to redeem the
6 security or to require it to be sold and, if the liquidator does not,
7 within 3 months after receiving the notice, notify the creditor, in
8 writing, that the liquidator elects to exercise the power:
- 9 (a) the liquidator is not entitled to exercise it; and
10 (b) subject to subsection (6), any equity of redemption or other
11 interest in the property comprised in the security that is
12 vested in the company or the liquidator vests in the creditor;
13 and
14 (c) the amount of the creditor's debt is, for the purposes of this
15 Division, taken to be reduced by the amount of the creditor's
16 estimate of the value of the security.
- 17 (6) The vesting of an equity of redemption or other interest in property
18 because of paragraph (5)(b) is subject to compliance with any law
19 requiring the transmission of such interests in property to be
20 registered.

21 **554G Amendment of valuation**

- 22 (1) If a secured creditor's proof of debt is in respect of the balance due
23 after deducting the creditor's estimate of the value of the security,
24 the creditor may, at any time, apply to the liquidator or the Court
25 for permission to amend the proof of debt by altering the estimated
26 value.
- 27 (2) If the liquidator or the Court is satisfied:
- 28 (a) that the estimate of the value of the security was made in
29 good faith on a mistaken basis; or
30 (b) that the value of the security has changed since the estimate
31 was made;
- 32 the liquidator or the Court may permit the creditor to amend the
33 proof of debt accordingly.

- 1 (3) If the Court permits the creditor to amend the proof of debt, it may
2 do so on such terms as it thinks just and equitable.

3 **554H Repayment of excess**

- 4 (1) Where a creditor who has amended a proof of debt under
5 section 554G has received, in the winding up of the debtor
6 company, an amount in excess of the amount to which the creditor
7 would have been entitled under the amended proof of debt, the
8 creditor must, without delay, repay the amount of the excess to the
9 liquidator.
- 10 (2) Where a creditor who has so amended a proof of debt has received,
11 in the winding up of the debtor company, less than the amount to
12 which the creditor would have been entitled under the amended
13 proof of debt, the creditor is entitled to be paid, out of the money
14 remaining for distribution in the winding up, the amount of the
15 deficiency before any of that money is applied in the payment of
16 future distributions, but the creditor is not entitled to affect a
17 distribution made before the amendment of the proof of debt.

18 **554J Subsequent realisation of security**

19 Where:

- 20 (a) a secured creditor's proof of debt is in respect of the balance
21 due after deducting the creditor's estimate of the value of the
22 security; and
23 (b) subsequently:
24 (i) the creditor realises the security; or
25 (ii) the security is realised under section 554F;
26 the net amount realised is to be substituted for the estimated value
27 of the security and section 554H applies as if the proof of debt had
28 been amended accordingly under section 554G.

1 **Subdivision D—Priorities**

2 **555 Debts and claims proved to rank equally except as otherwise**
3 **provided**

4 Except as otherwise provided by this Act, all debts and claims
5 proved in a winding up rank equally and, if the property of the
6 company is insufficient to meet them in full, they must be paid
7 proportionately.

8 **556 Priority payments**

9 (1) Subject to this Division, in the winding up of a company the
10 following debts and claims must be paid in priority to all other
11 unsecured debts and claims:

12 (a) first, expenses (except deferred expenses) properly incurred
13 by a relevant authority in preserving, realising or getting in
14 property of the company, or in carrying on the company's
15 business;

16 (b) if the Court ordered the winding up—next, the costs in
17 respect of the application for the order (including the
18 applicant's taxed costs payable under section 466);

19 (c) next, the debts for which paragraph 443D(a) entitles an
20 administrator of the company to be indemnified (even if the
21 administration ended before the relevant date), except
22 expenses covered by paragraph (a) of this subsection and
23 deferred expenses;

24 (d) if the winding up began within 2 months after the end of a
25 period of official management of the company—next, debts
26 of the company properly incurred by an official manager in
27 carrying on the company's business during the period of
28 official management, except expenses covered by
29 paragraph (a) of this subsection and deferred expenses;

30 (da) if the Court ordered the winding up—next, costs and
31 expenses that are payable under subsection 475(8) out of the
32 company's property;

33 (db) next, costs that form part of the expenses of the winding up
34 because of subsection 539(6);

- 1 (dc) if the winding up began within 2 months after the end of a
2 period of official management of the company—next, the
3 remuneration, in respect of the period of official
4 management, of any auditor appointed in accordance with
5 Part 2M.4;
- 6 (dd) next, any other expenses (except deferred expenses) properly
7 incurred by a relevant authority;
- 8 (de) next, the deferred expenses;
- 9 (df) if a committee of inspection has been appointed for the
10 purposes of the winding up—next, expenses incurred by a
11 person as a member of the committee;
- 12 (e) subject to subsection (1A)—next, wages and superannuation
13 contributions payable by the company in respect of services
14 rendered to the company by employees before the relevant
15 date;
- 16 (f) next, amounts due in respect of injury compensation, being
17 compensation the liability for which arose before the relevant
18 date;
- 19 (g) subject to subsection (1B)—next, all amounts due:
20 (i) on or before the relevant date; and
21 (ii) because of an industrial instrument; and
22 (iii) to, or in respect of, employees of the company; and
23 (iv) in respect of leave of absence;
- 24 (h) subject to subsection (1C)—next, retrenchment payments
25 payable to employees of the company.
- 26 (1A) The amount or total paid under paragraph (1)(e) to, or in respect of,
27 an excluded employee of the company must be such that so much
28 (if any) of it as is attributable to non-priority days does not exceed
29 \$2,000.
- 30 (1B) The amount or total paid under paragraph (1)(g) to, or in respect of,
31 an excluded employee of the company must be such that so much
32 (if any) of it as is attributable to non-priority days does not exceed
33 \$1,500.

1 (1C) A payment under paragraph (1)(h) to an excluded employee of the
2 company must not include an amount attributable to non-priority
3 days.

4 (2) In this section:

5 **company** means a company that is being wound up.

6 **deferred expenses**, in relation to a company, means expenses
7 properly incurred by a relevant authority, in so far as they consist
8 of:

- 9 (a) remuneration, or fees for services, payable to the relevant
10 authority; or
11 (b) expenses incurred by the relevant authority in respect of the
12 supply of services to the relevant authority by:
13 (i) a partnership of which the relevant authority is a
14 member; or
15 (ii) an employee of the relevant authority; or
16 (iii) a member or employee of such a partnership; or
17 (c) expenses incurred by the relevant authority in respect of the
18 supply to the relevant authority of services that it is
19 reasonable to expect could have instead been supplied by:
20 (i) the relevant authority; or
21 (ii) a partnership of which the relevant authority is a
22 member; or
23 (iii) an employee of the relevant authority; or
24 (iv) a member or employee of such a partnership.

25 **employee**, in relation to a company, means a person:

- 26 (a) who has been or is an employee of the company, whether
27 remunerated by salary, wages, commission or otherwise; and
28 (b) whose employment by the company commenced before the
29 relevant date.

30 **excluded employee**, in relation to a company, means:

- 31 (a) an employee of the company who has been:
32 (i) at any time during the period of 12 months ending on
33 the relevant date; or

- 1 (ii) at any time since the relevant date;
2 or who is, a director of the company;
3 (b) an employee of the company who has been:
4 (i) at any time during the period of 12 months ending on
5 the relevant date; or
6 (ii) at any time since the relevant date;
7 or who is, the spouse of an employee of the kind referred to
8 in paragraph (a); or
9 (c) an employee of the company who is a relative (other than a
10 spouse) of an employee of the kind referred to in
11 paragraph (a).

12 ***non-priority day***, in relation to an excluded employee of a
13 company, means a day on which the employee was:

- 14 (a) if paragraph (a) of the definition of ***excluded employee***
15 applies—a director of the company; or
16 (b) if paragraph (b) of that definition applies—a spouse of an
17 employee of the kind referred to in paragraph (a) of that
18 definition; or
19 (c) if paragraph (c) of that definition applies—a relative (other
20 than a spouse) of an employee of the kind referred to in
21 paragraph (a) of that definition;
22 even if the day was more than 12 months before the relevant date.

23 ***official manager*** includes a deputy official manager.

24 ***relevant authority***, in relation to a company, means any of the
25 following:

- 26 (a) in any case—a liquidator or provisional liquidator of the
27 company;
28 (b) if the winding up began within 2 months after the end of a
29 period of official management of the company—an official
30 manager appointed for the purposes of the official
31 management;
32 (c) in any case—an administrator of the company, even if the
33 administration ended before the winding up began;

1 (d) in any case—an administrator of a deed of company
2 arrangement executed by the company, even if the deed
3 terminated before the winding up began.

4 **retrenchment payment**, in relation to an employee of a company,
5 means an amount payable by the company to the employee, by
6 virtue of an industrial instrument, in respect of the termination of
7 the employee's employment by the company, whether the amount
8 becomes payable before, on or after the relevant date.

9 **spouse** includes a de facto spouse.

10 **superannuation contribution**, in relation to a company, means a
11 contribution by the company to a fund for the purposes of making
12 provision for, or obtaining, superannuation benefits for an
13 employee of the company, or for dependants of such an employee.

14 **558 Debts due to employees**

15 (1) Where a contract of employment with a company being wound up
16 was subsisting immediately before the relevant date, the employee
17 under the contract is, whether or not he or she is a person referred
18 to in subsection (2), entitled to payment under section 556 as if his
19 or her services with the company had been terminated by the
20 company on the relevant date.

21 (2) Where, for the purposes of the winding up of a company, a
22 liquidator employs a person whose services with the company had
23 been terminated by reason of the winding up, that person is, for the
24 purpose of calculating any entitlement to payment for leave of
25 absence, or any entitlement to a retrenchment amount in respect of
26 employment, taken, while the liquidator employs him or her for
27 those purposes, to be employed by the company.

28 (3) Subject to subsection (4), where, after the relevant date, an amount
29 in respect of long service leave or extended leave, or a
30 retrenchment amount, becomes payable to a person referred to in
31 subsection (2) in respect of the employment so referred to, the
32 amount is a cost of the winding up.

- 1 (4) Where, at the relevant date, the length of qualifying service of a
2 person employed by a company that is being wound up is
3 insufficient to entitle him or her to any amount in respect of long
4 service leave or extended leave, or to any retrenchment amount in
5 respect of employment by the company, but, by the operation of
6 subsection (2) he or she becomes entitled to such an amount after
7 that date, that amount:
- 8 (a) is a cost of the winding up to the extent of an amount that
9 bears to that amount the same proportion as the length of his
10 or her qualifying service after that relevant date bears to the
11 total length of his or her qualifying service; and
- 12 (b) is, to the extent of the balance of that amount, taken, for the
13 purposes of section 556, to be an amount referred to in
14 paragraph 556(1)(g), or a retrenchment payment payable to
15 the person, as the case may be.
- 16 (5) In this section, *retrenchment amount*, in relation to employment of
17 a person, means an amount payable to the person, by virtue of an
18 industrial instrument, in respect of termination of the employment.

19 **559 Debts of a class to rank equally**

20 The debts of a class referred to in each of the paragraphs of
21 subsection 556(1) rank equally between themselves and must be
22 paid in full, unless the property of the company is insufficient to
23 meet them, in which case they must be paid proportionately.

24 **560 Advances for company to make priority payments in respect of**
25 **employees**

26 Where a payment has been made by a company on account of
27 wages or of superannuation contributions (within the meaning of
28 section 556), or in respect of leave of absence, or termination of
29 employment, under an industrial instrument, being a payment made
30 out of money advanced by a person for the purpose of making the
31 payment, the person by whom the money was advanced has, in the
32 winding up of the company, the same right of priority of payment
33 in respect of the money so advanced and paid, but not exceeding
34 the amount by which the sum in respect of which the person who

1 received the payment would have been entitled to priority in the
2 winding up has been diminished by reason of the payment, as the
3 person who received the payment would have had if the payment
4 had not been made.

5 **561 Priority of employees' claims over floating charges**

6 So far as the property of a company available for payment of
7 creditors other than secured creditors is insufficient to meet
8 payment of:

- 9 (a) any debt referred to in paragraph 556(1)(e), (g) or (h); and
10 (b) any amount that pursuant to subsection 558(3) or (4) is a cost
11 of the winding up, being an amount that, if it had been
12 payable on or before the relevant date, would have been a
13 debt referred to in paragraph 556(1)(e), (g) or (h); and
14 (c) any amount in respect of which a right of priority is given by
15 section 560;

16 payment of that debt or amount must be made in priority over the
17 claims of a chargee in relation to a floating charge created by the
18 company and may be made accordingly out of any property
19 comprised in or subject to that charge.

20 **562 Application of proceeds of contracts of insurance**

- 21 (1) Where a company is, under a contract of insurance (not being a
22 contract of reinsurance) entered into before the relevant date,
23 insured against liability to third parties, then, if such a liability is
24 incurred by the company (whether before or after the relevant date)
25 and an amount in respect of that liability has been or is received by
26 the company or the liquidator from the insurer, the amount must,
27 after deducting any expenses of or incidental to getting in that
28 amount, be paid by the liquidator to the third party in respect of
29 whom the liability was incurred to the extent necessary to
30 discharge that liability, or any part of that liability remaining
31 undischarged, in priority to all payments in respect of the debts
32 mentioned in section 556.

- 1 (2) If the liability of the insurer to the company is less than the liability
2 of the company to the third party, subsection (1) does not limit the
3 rights of the third party in respect of the balance.
- 4 (3) This section has effect notwithstanding any agreement to the
5 contrary.

6 **562A Application of proceeds of contracts of reinsurance**

- 7 (1) This section applies where:
8 (a) a company is insured, under a contract of reinsurance entered
9 into before the relevant date, against liability to pay amounts
10 in respect of a relevant contract of insurance or relevant
11 contracts of insurance; and
12 (b) an amount in respect of that liability has been or is received
13 by the company or the liquidator under the contract of
14 reinsurance.
- 15 (2) Subject to subsection (4), if the amount received, after deducting
16 expenses of or incidental to getting in that amount, equals or
17 exceeds the total of all the amounts that are payable by the
18 company under relevant contracts of insurance, the liquidator must,
19 out of the amount received and in priority to all payments in
20 respect of the debts mentioned in section 556, pay the amounts that
21 are so payable under those contracts of insurance.
- 22 (3) Subject to subsection (4), if subsection (2) does not apply, the
23 liquidator must, out of the amount received and in priority to all
24 payments in respect of the debts mentioned in section 556, pay to
25 each person to whom an amount is payable by the company under
26 a relevant contract of insurance an amount calculated in
27 accordance with the formula:

28
$$\frac{\text{Particular amount owed}}{\text{Total amount owed}} \times \text{Reinsurance payment}$$

29 where:

30 ***particular amount owed*** means the amount payable to the person
31 under the relevant contract of insurance.

1 **reinsurance payment** means the amount received under the
2 contract of reinsurance, less any expenses of or incidental to
3 getting in that amount.

4 **total amount owed** means the total of all the amounts payable by
5 the company under relevant contracts of insurance.

- 6 (4) The Court may, on application by a person to whom an amount is
7 payable under a relevant contract of insurance, make an order to
8 the effect that subsections (2) and (3) do not apply to the amount
9 received under the contract of reinsurance and that that amount
10 must, instead, be applied by the liquidator in the manner specified
11 in the order, being a manner that the Court considers just and
12 equitable in the circumstances.
- 13 (5) The matters that the Court may take into account in considering
14 whether to make an order under subsection (4) include, but are not
15 limited to:
- 16 (a) whether it is possible to identify particular relevant contracts
17 of insurance as being the contracts in respect of which the
18 contract of reinsurance was entered into; and
19 (b) whether it is possible to identify persons who can be said to
20 have paid extra in order to have particular relevant contracts
21 of insurance protected by reinsurance; and
22 (c) whether particular relevant contracts of insurance include
23 statements to the effect that the contracts are to be protected
24 by reinsurance; and
25 (d) whether a person to whom an amount is payable under a
26 relevant contract of insurance would be severely prejudiced if
27 subsections (2) and (3) applied to the amount received under
28 the contract of reinsurance.
- 29 (6) If receipt of a payment under this section only partially discharges
30 a liability of the company to a person, nothing in this section
31 affects the rights of the person in respect of the balance of the
32 liability.
- 33 (7) This section has effect despite any agreement to the contrary.
- 34 (8) In this section:
-

1 *relevant contract of insurance* means a contract of insurance
2 entered into by the company, as insurer, before the relevant date.

3 **563 Provisions relating to injury compensation**

- 4 (1) Notwithstanding anything in section 556, paragraph 556(1)(f) does
5 not apply in relation to the winding up of a company in any case
6 where:
7 (a) the company is being wound up voluntarily merely for the
8 purpose of reconstruction or of amalgamation with another
9 company and the right to the injury compensation has, on the
10 reconstruction or amalgamation, been preserved to the person
11 entitled to it; or
12 (b) the company has entered into a contract with an insurer in
13 respect of any liability for injury compensation.
- 14 (2) Where injury compensation is payable by way of periodical
15 payments, the amount of that compensation is, for the purposes of
16 paragraph 556(1)(f), taken to be the lump sum for which those
17 periodical payments could, if redeemable, be redeemed under the
18 law under which the periodical payments are made.

19 **563AA Seller under a buy-back agreement**

- 20 (1) The selling shareholder's claim under a buy-back agreement is
21 postponed until all debts owed to people otherwise than as
22 members of the company have been satisfied.
- 23 (2) The shareholder's claim is not a debt owed by the company to the
24 seller in the shareholder's capacity as a member of the company
25 for the purposes of section 563A.

26 **563A Member's debts to be postponed until other debts and claims
27 satisfied**

28 Payment of a debt owed by a company to a person in the person's
29 capacity as a member of the company, whether by way of
30 dividends, profits or otherwise, is to be postponed until all debts
31 owed to, or claims made by, persons otherwise than as members of
32 the company have been satisfied.

1 **563AAA Redemption of debentures**

2 *Priorities*

3 (1) Debentures of a company under a trust deed that are issued in place
4 of debentures under that deed that have been redeemed have the
5 priority that the redeemed debentures would have had if they had
6 never been redeemed.

7 *Deposit of debentures to secure advance*

8 (2) Debentures of a company are not to be taken to be redeemed
9 merely because:
10 (a) the debentures secure advances on current account or
11 otherwise; and
12 (b) the company's account ceases to be in debit while those
13 debentures remain available.

14 **Subdivision E—Miscellaneous**

15 **563B Interest on debts and claims from relevant date to date of**
16 **payment**

17 (1) If, in the winding up of a company, the liquidator pays an amount
18 in respect of an admitted debt or claim, there is also payable to the
19 debtor or claimant, as a debt payable in the winding up, interest, at
20 the prescribed rate, on the amount of the payment in respect of the
21 period starting on the relevant date and ending on the day on which
22 the payment is made.

23 (2) Subject to subsection (3), payment of the interest is to be
24 postponed until all other debts and claims in the winding up have
25 been satisfied, other than debts owed to members of the company
26 as members of the company (whether by way of dividends, profits
27 or otherwise).

28 (3) If the admitted debt or claim is a debt to which section 554B
29 applied, subsection (2) does not apply to postpone payment of so
30 much of the interest as is attributable to the period starting at the
31 relevant date and ending on the earlier of:

- 1 (a) the day on which the payment is made; and
2 (b) the future date, within the meaning of section 554B.

3 **563C Debt subordination**

4 (1) Nothing in this Division renders a debt subordination by a creditor
5 of a company unlawful or unenforceable, except so far as the debt
6 subordination would disadvantage any creditor of the company
7 who was not a party to, or otherwise concerned in, the debt
8 subordination.

9 (2) In this section:

10 *debt subordination* means an agreement or declaration by a
11 creditor of a company, however expressed, to the effect that, in
12 specified circumstances:

- 13 (a) a specified debt that the company owes the creditor; or
14 (b) a specified part of such a debt;

15 will not be repaid until other specified debts that the company
16 owes are repaid to a specified extent.

17 **564 Power of Court to make orders in favour of certain creditors**

18 Where in any winding up:

19 (a) property has been recovered under an indemnity for costs of
20 litigation given by certain creditors, or has been protected or
21 preserved by the payment of money or the giving of
22 indemnity by creditors; or

23 (b) expenses in relation to which a creditor has indemnified a
24 liquidator have been recovered;

25 the Court may make such orders, as it deems just with respect to
26 the distribution of that property and the amount of those expenses
27 so recovered with a view to giving those creditors an advantage
28 over others in consideration of the risk assumed by them.

1

2 **Division 7—Effect on certain transactions**

3 **565 Undue preference**

4 (1) A settlement, a conveyance or transfer of property, a charge on
5 property, a payment made, or an obligation incurred, before
6 23 June 1993, by a company that, if it had been made or incurred
7 by a natural person, would, in the event of his or her becoming a
8 bankrupt, be void as against the trustee in the bankruptcy, is, in the
9 event of the company being wound up, void as against the
10 liquidator.

11 (2) For the purposes of subsection (1), the date that corresponds with
12 the date of presentation of the petition in bankruptcy in the case of
13 a natural person is:

- 14 (a) if the company was under official management at any time
15 during the 6 months ending on the relation-back day—the
16 day on which the official management commenced; or
17 (b) otherwise—the relation-back day.

18 (3) For the purposes of this section, the date that corresponds with the
19 date on which a person becomes a bankrupt is the relation-back
20 day.

21 (4) Subject to Part 5.3A, a transfer or assignment by a company of all
22 its property to trustees for the benefit of all its creditors is void.

23 **566 Effect of floating charge**

24 A floating charge on the undertaking or property of the company
25 created before 23 June 1993 and within 6 months before the
26 relation-back day is, unless it is proved that the company
27 immediately after the creation of the charge was solvent, invalid
28 except to the amount of any money paid to the company at the time
29 of or subsequently to the creation of and in consideration for the
30 charge together with interest on that amount at the rate of 8% per
31 annum or at such other rate as is prescribed.

1 **567 Liquidator's right to recover in respect of certain transactions**

2 (1) Where any property, business or undertaking has been acquired by
3 a company for a cash consideration before 23 June 1993 and within
4 4 years before the relation-back day in relation to a winding up of
5 the company:

- 6 (a) from a promoter of the company or a spouse of such a
7 promoter, or from a relative of such a promoter or spouse; or
8 (b) from a person who was, at the time of the acquisition, a
9 director of the company, from a spouse of such a director, or
10 from a relative of such a person or spouse; or
11 (c) from a body corporate that was, at the time of the acquisition,
12 related to the company; or
13 (d) from a person who was, at the time of the acquisition, a
14 director of a body corporate that was related to the company,
15 from a spouse of such a person, or from a relative of such a
16 person or spouse;

17 the liquidator may recover from the person or body corporate from
18 which the property, business or undertaking was acquired any
19 amount by which the cash consideration for the acquisition
20 exceeded the value of the property, business or undertaking at the
21 time of its acquisition.

22 (2) Where any property, business or undertaking has been sold by a
23 company for a cash consideration before 23 June 1993 and within
24 4 years before the relation-back day in relation to a winding up of
25 the company:

- 26 (a) to a promoter of the company or a spouse of such a promoter,
27 or to a relative of such a promoter or spouse; or
28 (b) to a person who was, at the time of the sale, a director of the
29 company, to a spouse of such a director, or to a relative of
30 such a person or spouse; or
31 (c) to a body corporate that was, at the time of the sale, related to
32 the company; or

- 1 (d) to a person who was, at the time of the sale, a director of a
2 body corporate that was related to the company, to a spouse
3 of such a director, or to a relative of such a person or spouse;
4 the liquidator may recover from the person or body corporate to
5 which the property, business or undertaking was sold any amount
6 by which the value of the property, business or undertaking at the
7 time of the sale exceeded the cash consideration.
- 8 (3) For the purposes of this section, the value of the property, business
9 or undertaking includes the value of any goodwill, profits or gain
10 that might have been made from the property, business or
11 undertaking.
- 12 (4) In this section, *cash consideration* means any consideration
13 payable otherwise than by the issue of shares in the company.
- 14 (5) Where:
- 15 (a) a disposition of property is made by a company before
16 23 June 1993 and within 6 months before the relation-back
17 day in relation to a winding up of the company; and
18 (b) the disposition of property confers a preference upon a
19 creditor of the company; and
20 (c) the disposition of property has the effect of discharging an
21 officer of the company from a liability (whether under a
22 guarantee or otherwise and whether contingent or otherwise);
23 the liquidator:
- 24 (d) in a case to which paragraph (e) does not apply—may
25 recover from that officer an amount equal to the value of the
26 relevant property, as the case may be; or
27 (e) where the liquidator has recovered from the creditor in
28 respect of the disposition of the relevant property:
29 (i) an amount equal to part of the value of the relevant
30 property; or
31 (ii) part of the relevant property;
32 may recover from that officer an amount equal to the amount
33 by which the value of the relevant property exceeds the sum
34 of any amounts recovered as mentioned in subparagraph (i)

1 and the amount of the value of any property recovered as
2 mentioned in subparagraph (ii).

3 (6) Where:

4 (a) a liquidator recovers an amount of money from an officer of
5 a company in respect of a disposition of property to a creditor
6 as mentioned in subsection (5); and

7 (b) the liquidator subsequently recovers from that creditor an
8 amount equal to the whole or part of the value of the property
9 disposed of;

10 the officer may recover from the liquidator an amount equal to the
11 amount so recovered or the value of the property so recovered.

1

2 **Division 7A—Disclaimer of onerous property**

3 **568 Disclaimer by liquidator; application to Court by party to**
4 **contract**

5 (1) Subject to this section, a liquidator of a company may at any time,
6 on the company's behalf, by signed writing disclaim property of
7 the company that consists of:

8 (a) land burdened with onerous covenants; or

9 (b) shares; or

10 (c) property that is unsaleable or is not readily saleable; or

11 (d) property that may give rise to a liability to pay money or
12 some other onerous obligation; or

13 (e) property where it is reasonable to expect that the costs,
14 charges and expenses that would be incurred in realising the
15 property would exceed the proceeds of realising the property;
16 or

17 (f) a contract;

18 whether or not:

19 (g) except in the case of a contract—the liquidator has tried to
20 sell the property, has taken possession of it or exercised an
21 act of ownership in relation to it; or

22 (h) in the case of a contract—the company or the liquidator has
23 tried to assign, or has exercised rights in relation to, the
24 contract or any property to which it relates.

25 (1AA) This section does not apply to an agreement by the company to buy
26 back its own shares.

27 (1A) A liquidator cannot disclaim a contract (other than an unprofitable
28 contract or a lease of land) except with the leave of the Court.

29 (1B) On an application for leave under subsection (1A), the Court may:

30 (a) grant leave subject to such conditions; and

31 (b) make such orders in connection with matters arising under, or
32 relating to, the contract;

33 as the Court considers just and equitable.

- 1 (8) Where:
- 2 (a) an application in writing has been made to the liquidator by a
- 3 person interested in property requiring the liquidator to
- 4 decide whether he or she will disclaim the property; and
- 5 (b) the liquidator has, for the period of 28 days after the receipt
- 6 of the application, or for such extended period as is allowed
- 7 by the Court, declined or neglected to disclaim the property;
- 8 the liquidator is not entitled to disclaim the property under this
- 9 section and, in the case of a contract, he or she is taken to have
- 10 adopted it.
- 11 (9) The Court may, on the application of a person who is, as against
- 12 the company, entitled to the benefit or subject to the burden of a
- 13 contract made with the company, make an order:
- 14 (a) discharging the contract on such terms as to payment by or to
- 15 either party of damages for the non-performance of the
- 16 contract, or otherwise, as the Court thinks proper; or
- 17 (b) rescinding the contract on such terms as to restitution by or to
- 18 either party, or otherwise, as the Court thinks proper.
- 19 (10) Amounts payable pursuant to an order under subsection (9) may be
- 20 proved as a debt in the winding up.
- 21 (13) For the purpose of determining whether property of a company is
- 22 of a kind to which subsection (1) applies, the liquidator may, by
- 23 notice served on a person claiming to have an interest in the
- 24 property, require the person to give to the liquidator within such
- 25 period, not being less than 14 days, as is specified in the notice, a
- 26 statement of the interest claimed by the person and the person must
- 27 comply with the requirement.

28 **568A Liquidator must give notice of disclaimer**

- 29 (1) As soon as practicable after disclaiming property, a liquidator
- 30 must:
- 31 (a) lodge a written notice of the disclaimer; and
- 32 (b) give written notice of the disclaimer to each person who
- 33 appears to the liquidator to have, or to claim to have, an
- 34 interest in the property; and

- 1 (c) if the liquidator has reason to suspect that some person or
2 persons may have, or may claim to have, an interest or
3 interests in the property, but either does not know who, or
4 does not know where, the person is or the persons are—
5 comply with subsection (2); and
6 (d) if a law of the Commonwealth or of a State or Territory
7 requires the transfer or transmission of the property to be
8 registered—give written notice of the disclaimer to the
9 registrar or other person who has the function under that law
10 of registering the transfer or transmission of the property.
- 11 (2) If paragraph (1)(c) applies, the liquidator must cause notice of the
12 disclaimer to be published:
- 13 (a) if the property is situated in a State or Territory and a daily
14 newspaper circulates generally in that State or Territory—in
15 a daily newspaper that so circulates; and
16 (b) in each State and Territory in which:
17 (i) the company has carried on business during or after the
18 period of 6 months ending when the winding up began;
19 and
20 (ii) a daily newspaper circulates generally;
21 in a daily newspaper that circulates generally in that State or
22 Territory;
23 whether on the same or different days.

24 **568B Application to set aside disclaimer before it takes effect**

- 25 (1) A person who has, or claims to have, an interest in disclaimed
26 property may apply to the Court for an order setting aside the
27 disclaimer before it takes effect, but may only do so within 14 days
28 after:
29 (a) if the liquidator gives to the person notice of the disclaimer,
30 because of paragraph 568A(1)(b), before the end of 14 days
31 after the liquidator lodges such notice—the liquidator gives
32 such notice to the person; or
33 (b) if paragraph (a) does not apply but notice of the disclaimer is
34 published under subsection 568A(2) before the end of the 14

- 1 days referred to in that paragraph—the last such notice to be
2 so published is so published; or
3 (c) otherwise—the liquidator lodges notice of the disclaimer.
- 4 (2) On an application under subsection (1), the Court:
5 (a) may by order set aside the disclaimer; and
6 (b) if it does so—may make such further orders as it thinks
7 appropriate.
- 8 (3) However, the Court may set aside a disclaimer under this section
9 only if satisfied that the disclaimer would cause, to persons who
10 have, or claim to have, interests in the property, prejudice that is
11 grossly out of proportion to the prejudice that setting aside the
12 disclaimer would cause to the company's creditors.

13 **568C When disclaimer takes effect**

- 14 (1) A disclaimer takes effect if, and only if:
15 (a) in a case where only one application under section 568B for
16 an order setting aside the disclaimer, or each of 2 or more
17 such applications, is made within the period that that section
18 prescribes for making the application—the application, or
19 each of the applications, is unsuccessful; or
20 (b) no such application is so made.
- 21 (2) For the purposes of subsection (1), an application under
22 section 568B is successful if, and only if, the result of the
23 application, and all appeals (if any) arising out of the application,
24 being finally determined or otherwise disposed of is an order
25 setting aside the disclaimer (whether or not further orders are also
26 made).
- 27 (3) A disclaimer that takes effect because of subsection (1) is taken to
28 have taken effect on the day after:
29 (a) if:
30 (i) the liquidator gave to a person notice of the disclaimer
31 because of paragraph 568A(1)(b); or

- 1 (ii) notice of the disclaimer was published under subsection
2 568A(2);
3 before the end of 14 days after the liquidator lodged notice of
4 the disclaimer—the last day when the liquidator so gave such
5 notice or such notice was so published; or
6 (b) otherwise—the day when the liquidator lodged notice of the
7 disclaimer.

8 **568D Effect of disclaimer**

- 9 (1) A disclaimer is taken to have terminated, as from the day on which
10 it is taken because of subsection 568C(3) to take effect, the
11 company's rights, interests, liabilities and property in or in respect
12 of the disclaimer property, but does not affect any other person's
13 rights or liabilities except so far as necessary in order to release the
14 company and its property from liability.
- 15 (2) A person aggrieved by the operation of a disclaimer is taken to be a
16 creditor of the company to the extent of any loss suffered by the
17 person because of the disclaimer and may prove such a loss as a
18 debt in the winding up.

19 **568E Application to set aside disclaimer after it has taken effect**

- 20 (1) With the leave of the Court, a person who has, or claims to have,
21 an interest in disclaimed property may apply to the Court for an
22 order setting aside the disclaimer after it has taken effect.
- 23 (2) The Court may give leave only if it is satisfied that it is
24 unreasonable in all the circumstances to expect the person to have
25 applied for an order setting aside the disclaimer before it took
26 effect.
- 27 (3) The Court may give leave subject to conditions.
- 28 (4) On an application under subsection (1), the Court:
29 (a) may by order set aside the disclaimer; and
30 (b) if it does so—may make such further orders as it thinks
31 appropriate, including orders necessary to put the company,

1 the liquidator or anyone else in the same position, as nearly
2 as practicable, as if the disclaimer had never taken effect.

3 (5) However, the Court may set aside a disclaimer only if satisfied that
4 the disclaimer has caused, or would cause, to persons who have, or
5 claim to have, interests in the property, prejudice that is grossly out
6 of proportion to the prejudice that setting aside the disclaimer (and
7 making any further orders) would cause to:

- 8 (a) the company's creditors; and
9 (b) persons who have changed their position in reliance on the
10 disclaimer taking effect.

11 **568F Court may dispose of disclaimed property**

12 (1) The Court may order that disclaimed property vest in, or be
13 delivered to:

- 14 (a) a person entitled to the property; or
15 (b) a person in or to whom it seems to the Court appropriate that
16 the property be vested or delivered; or
17 (c) a person as trustee for a person of a kind referred to in
18 paragraph (a) or (b).

19 (2) The Court may make an order under subsection (1):

- 20 (a) on the application of a person who claims an interest in the
21 property, or is under a liability in respect of the property that
22 this Act has not discharged; and
23 (b) after hearing such persons as it thinks appropriate.

24 (3) Subject to subsection (4), where an order is made under
25 subsection (1) vesting property, the property vests immediately, for
26 the purposes of the order, without any conveyance, transfer or
27 assignment.

28 (4) Where:

- 29 (a) a law of the Commonwealth or of a State or Territory
30 requires the transfer of property vested by an order under
31 subsection (1) to be registered; and

- 1 (b) that law enables the order to be registered;
2 the property vests in equity because of the order but does not vest
3 at law until that law has been complied with.

1

2 **Division 7B—Effect on enforcement process against**
3 **company's property**

4 **569 Executions, attachments etc. before winding up**

5 (1) Where:

6 (a) a creditor has issued execution against property of a
7 company, or instituted proceedings to attach a debt due to a
8 company or to enforce a charge or a charging order against
9 property of a company, within 6 months immediately before
10 the commencement of the winding up; and

11 (b) the company commences to be wound up;

12 the creditor must pay to the liquidator an amount equal to the
13 amount (if any) received by the creditor as a result of the
14 execution, attachment or enforcement of the charge or the charging
15 order, less an amount in respect of the costs of the execution,
16 attachment or enforcement of the charge or the charging order,
17 being an amount agreed between the creditor and the liquidator or,
18 if no agreement is reached, an amount equal to the taxed cost of
19 that execution, attachment or enforcement.

20 (2) Where the creditor has paid to the liquidator an amount in
21 accordance with subsection (1), the creditor may prove in the
22 winding up for the creditor's debt as an unsecured creditor as if the
23 execution or attachment or the enforcement of the charge or the
24 charging order, as the case may be, had not taken place.

25 (3) Subject to subsections (4) and (5), where a creditor of a company
26 receives:

27 (a) notice in writing of an application to the Court for the
28 winding up of the company; or

29 (b) notice in writing of the convening of a meeting of the
30 company to consider a resolution that the company be wound
31 up voluntarily;

32 it is not competent for the creditor to take any action, or any further
33 action, as the case may be, to attach a debt due to the company or

- 1 to enforce a charge or a charging order against property of the
2 company.
- 3 (4) Subsection (3) does not affect the right of a creditor to take action
4 or further action if:
- 5 (a) in a case to which paragraph (3)(a) applies—the application
6 has been withdrawn or dismissed; or
- 7 (b) in a case to which paragraph (3)(b) applies—the meeting of
8 the company has refused to pass the resolution.
- 9 (5) Subsection (3) does not prevent a creditor from performing a
10 binding contract for the sale of property entered into before the
11 creditor received a notice referred to in that subsection.
- 12 (6) Notwithstanding anything contained in this Division, a person who
13 purchases property in good faith:
- 14 (a) under a sale by the sheriff in consequence of the issue of
15 execution against property of a company that, after the sale,
16 commences to be wound up; or
- 17 (b) under a sale in consequence of the enforcement by a creditor
18 of a charge or a charging order against property of a
19 company that, after the sale, commences to be wound up;
20 acquires a good title to it as against the liquidator and the company.
- 21 (7) In this section:
- 22 *charge* means a charge created by a law upon registration of a
23 judgment in a registry.
- 24 *charging order* means a charging order made by a court in respect
25 of a judgment.

26 **570 Duties of sheriff after receiving notice of application**

- 27 (1) Subject to this section, where a sheriff:
- 28 (a) receives notice in writing of an application to the Court for
29 the winding up of a company; or

- 1 (b) receives notice in writing of the convening of a meeting of a
2 company to consider a resolution that the company be wound
3 up voluntarily;
- 4 it is not competent for the sheriff to:
- 5 (c) take any action to sell property of the company pursuant to
6 any process of execution issued by or on behalf of a creditor;
7 or
- 8 (d) pay to the creditor by whom or on whose behalf the process
9 of execution was issued or to any person on the creditor's
10 behalf the proceeds of the sale of property of the company
11 that has been sold pursuant to such a process or any money
12 seized, or paid to avoid seizure or sale of property of the
13 company, under such a process.
- 14 (2) Subsection (1) does not affect the power of the sheriff to take any
15 action or make any payment if:
- 16 (a) in a case to which paragraph (1)(a) applies—the application
17 has been withdrawn or dismissed; or
- 18 (b) in a case to which paragraph (1)(b) applies—the meeting of
19 the company has refused to pass the resolution.
- 20 (3) Subject to this section, where the registrar or other appropriate
21 officer of a court to which proceeds of the sale of property of a
22 company or other money has been paid by a sheriff pursuant to a
23 process of execution issued by or on behalf of a creditor of the
24 company:
- 25 (a) receives notice in writing of an application to the Court for
26 the winding up of the company; or
- 27 (b) receives notice in writing of the convening of a meeting of
28 the company to consider a resolution that the company be
29 wound up voluntarily;
- 30 any of those proceeds or money not paid out of court must not be
31 paid to the creditor or to any person on behalf of the creditor.
- 32 (4) Subsection (3) does not prevent the making of a payment if:
- 33 (a) in a case to which paragraph (3)(a) applies—the application
34 has been withdrawn or dismissed; or

- 1 (b) in a case to which paragraph (3)(b) applies—the meeting of
2 the company has refused to pass the resolution.
- 3 (5) Where a company is being wound up, the liquidator may serve
4 notice in writing of that fact on a sheriff or the registrar or other
5 appropriate officer of a court.
- 6 (6) Upon such a notice being so served:
- 7 (a) the sheriff must deliver or pay to the liquidator:
- 8 (i) any property of the company in the sheriff's possession
9 under a process of execution issued by or on behalf of a
10 creditor; and
- 11 (ii) any proceeds of the sale of property of the company or
12 other money in the sheriff's possession, being proceeds
13 of the sale of property sold, whether before or after the
14 commencement of the winding up, pursuant to such a
15 process or money seized, or paid to avoid seizure or sale
16 of property of the company, whether before or after the
17 commencement of the winding up, under such a
18 process; or
- 19 (b) the registrar or other officer of the court must pay to the
20 liquidator any proceeds of the sale of property of the
21 company or other money in court, being proceeds of sale or
22 other money paid into court, whether before or after the
23 commencement of the winding up, by a sheriff pursuant to a
24 process of execution issued by or on behalf of a creditor;
25 as the case requires.
- 26 (7) Where:
- 27 (a) property is, or proceeds of the sale of property or other
28 money are, required by subsection (6) to be delivered or paid
29 to a liquidator; or
- 30 (b) a sheriff has, pursuant to subsection (1), refrained from
31 taking action to sell property of a company, being land, and
32 that company is being wound up under an order made on the
33 application referred to in that subsection;
- 34 the costs of the execution are a first charge on that property or on
35 those proceeds of sale or other money.

- 1 (8) For the purpose of giving effect to the charge referred to in
2 subsection (7), the sheriff, registrar or other officer may retain, on
3 behalf of the creditor entitled to the benefit of the charge, such
4 amount from the proceeds of sale or other money referred to in that
5 subsection as he or she thinks necessary for the purpose.
- 6 (9) The Court may, if in a particular case it considers it is proper to do
7 so:
- 8 (a) permit a sheriff to take action to sell property or make a
9 payment that the sheriff could not, by reason of
10 subsection (1), otherwise validly take; or
- 11 (b) permit the making of a payment the making of which would,
12 by reason of subsection (3), otherwise be prohibited.

1
2 **Division 9—Co-operation between Australian and foreign**
3 **courts in external administration matters**

4 **580 Definitions**

5 In this Division:

6 *external administration matter* means a matter relating to:

- 7 (a) winding up, under this Chapter, a company or a Part 5.7
8 body; or
9 (b) winding up, outside Australia, a body corporate or a Part 5.7
10 body; or
11 (c) the insolvency of a body corporate or of a Part 5.7 body.

12 *prescribed country* means:

- 13 (a) a country prescribed for the purposes of this definition; or
14 (b) a colony, overseas territory or protectorate of a country so
15 prescribed.

16 **581 Courts to act in aid of each other**

- 17 (1) All courts having jurisdiction in matters arising under this Act, the
18 Judges of those courts and the officers of, or under the control of,
19 those courts must severally act in aid of, and be auxiliary to, each
20 other in all external administration matters.
- 21 (2) In all external administration matters, the Court:
- 22 (a) must act in aid of, and be auxiliary to, the courts of:
- 23 (i) external Territories; and
24 (ii) States that are not in this jurisdiction; and
25 (iii) prescribed countries;
26 that have jurisdiction in external administration matters; and
- 27 (b) may act in aid of, and be auxiliary to, the courts of other
28 countries that have jurisdiction in external administration
29 matters.

Clause 581

- 1 (3) Where a letter of request from a court of an external Territory, or
2 of a country other than Australia, requesting aid in an external
3 administration matter is filed in the Court, the Court may exercise
4 such powers with respect to the matter as it could exercise if the
5 matter had arisen in its own jurisdiction.
- 6 (4) The Court may request a court of an external Territory, or of a
7 country other than Australia, that has jurisdiction in external
8 administration matters to act in aid of, and be auxiliary to, it in an
9 external administration matter.

1
2 **Part 5.7—Winding up bodies other than companies**
3

4 **582 Application of Part**

- 5 (1) This Part has effect in addition to, and not in derogation of,
6 sections 601CC and 601CL and any provisions contained in this
7 Act or any other law with respect to the winding up of bodies, and
8 the liquidator or Court may exercise any powers or do any act in
9 the case of Part 5.7 bodies that might be exercised or done by him,
10 her or it in the winding up of companies.
- 11 (2) Nothing in this Part affects the operation of the *Bankruptcy Act*
12 *1966*.
- 13 (3) A Part 5.7 body may be wound up under this Part notwithstanding
14 that it is being wound up or has been dissolved, deregistered or has
15 otherwise ceased to exist as a body corporate under or by virtue of
16 the laws of the place under which it was incorporated.

17 **583 Winding up Part 5.7 bodies**

18 Subject to this Part, a Part 5.7 body may be wound up under this
19 Chapter and this Chapter applies accordingly to a Part 5.7 body
20 with such adaptations as are necessary, including the following
21 adaptations:

- 22 (a) the principal place of business of a Part 5.7 body in this
23 jurisdiction is taken, for all the purposes of the winding up, to
24 be the registered office of the Part 5.7 body;
- 25 (b) a Part 5.7 body is not to be wound up voluntarily under this
26 Chapter;
- 27 (c) the circumstances in which a Part 5.7 body may be wound up
28 are as follows:
- 29 (i) if the Part 5.7 body is unable to pay its debts, has been
30 dissolved or deregistered, has ceased to carry on
31 business in this jurisdiction or has a place of business in
32 this jurisdiction only for the purpose of winding up its
33 affairs;

- 1 (ii) if the Court is of opinion that it is just and equitable that
2 the Part 5.7 body should be wound up;
3 (iii) if ASIC has stated in a report prepared under Division 1
4 of Part 3 of the ASIC Act that, in its opinion:
5 (A) the Part 5.7 body cannot pay its debts and
6 should be wound up; or
7 (B) it is in the interests of the public, of the
8 members, or of the creditors, that the Part 5.7
9 body should be wound up;
10 (d) if the Part 5.7 body is a registrable Australian body—the
11 winding up must deal only with the affairs of the body
12 outside its place of origin.

13 **585 Insolvency of Part 5.7 body**

14 For the purposes of this Part, a Part 5.7 body is taken to be unable
15 to pay its debts if:

- 16 (a) a creditor, by assignment or otherwise, to whom the Part 5.7
17 body is indebted in a sum exceeding the statutory minimum
18 then due has served on the Part 5.7 body, by leaving at its
19 principal place of business in this jurisdiction or by
20 delivering to the secretary or a director or executive officer of
21 the Part 5.7 body or by otherwise serving in such manner as
22 the Court approves or directs, a demand, signed by or on
23 behalf of the creditor, requiring the body to pay the sum so
24 due and the body has, for 3 weeks after the service of the
25 demand, failed to pay the sum or to secure or compound for
26 it to the satisfaction of the creditor; or
27 (b) an action or other proceeding has been instituted against any
28 member for any debt or demand due or claimed to be due
29 from the Part 5.7 body or from the member as such and,
30 notice in writing of the institution of the action or proceeding
31 having been served on the body by leaving it at its principal
32 place of business in this jurisdiction or by delivering it to the
33 secretary or a director or executive officer of the Part 5.7
34 body or by otherwise serving it in such manner as the Court
35 approves or directs, the Part 5.7 body has not, within 10 days
36 after service of the notice, paid, secured or compounded for

- 1 the debt or demand or procured the action or proceeding to
2 be stayed or indemnified the defendant to his, her or its
3 reasonable satisfaction against the action or proceeding and
4 against all costs, damages and expenses to be incurred by
5 him, her or it by reason of the action or proceeding; or
6 (c) execution or other process issued on a judgment, decree or
7 order obtained in a court (whether an Australian court or not)
8 in favour of a creditor against the Part 5.7 body or a member
9 of the Part 5.7 body as such, or a person authorised to be
10 sued as nominal defendant on behalf of the Part 5.7 body, is
11 returned unsatisfied; or
12 (d) it is otherwise proved to the satisfaction of the Court that the
13 Part 5.7 body is unable to pay its debts.

14 **586 Contributories in winding up of Part 5.7 body**

- 15 (1) On a Part 5.7 body being wound up, every person who:
16 (a) in any case—is liable to pay or contribute to the payment of:
17 (i) a debt or liability of the Part 5.7 body; or
18 (ii) any sum for the adjustment of the rights of the members
19 among themselves; or
20 (iii) the costs and expenses of winding up; or
21 (b) if the Part 5.7 body has been dissolved or deregistered in its
22 place of origin—was so liable immediately before the
23 dissolution or deregistration;
24 is a contributory and every contributory is liable to contribute to
25 the property of the Part 5.7 body all sums due from the
26 contributory in respect of any such liability.
- 27 (2) On the death or bankruptcy of a contributory, the provisions of this
28 Act with respect to the personal representatives of deceased
29 contributories or the assignees and trustees of bankrupt
30 contributories, as the case may be, apply.

31 **587 Power of Court to stay or restrain proceedings**

- 32 (1) The provisions of this Act with respect to staying and restraining
33 actions and other civil proceedings against a company at any time

1 after the filing of an application for winding up and before the
2 making of a winding up order extend, in the case of a Part 5.7 body
3 where the application to stay or restrain is by a creditor, to actions
4 and other civil proceedings against a contributory of the Part 5.7
5 body.

6 (2) Where an order has been made for winding up a Part 5.7 body, no
7 action or other civil proceeding is to be proceeded with or
8 commenced against a contributory of the Part 5.7 body in respect
9 of a debt of the Part 5.7 body except by leave of the Court and
10 subject to such terms as the Court imposes.

11 **588 Outstanding property of defunct registrable body**

12 (1) This section applies if, after the dissolution or deregistration of a
13 registrable body, outstanding property of the body remains:

- 14 (a) in this jurisdiction; and
15 (b) outside the body's place of origin.

16 (2) The estate and interest in the property, at law or in equity, of the
17 body or its liquidator at that time, together with all claims, rights
18 and remedies that the body or its liquidator then had in respect of
19 the property, vests by force of this section in:

- 20 (a) if the body was incorporated in Australia or an external
21 Territory—the person entitled to the property under the law
22 of the body's place of origin; or
23 (b) otherwise—ASIC.

24 (3) Where any claim, right or remedy of a liquidator may under this
25 Act be made, exercised or availed of only with the approval or
26 concurrence of the Court or some other person, ASIC may, for the
27 purposes of this section, make, exercise or avail itself of the claim,
28 right or remedy without such approval or concurrence.

29 (4) Section 601AE applies to property that vests in ASIC under this
30 section as if the property were vested in ASIC under subsection
31 601AD(2).

1

2 **Part 5.7B—Recovering property or compensation**
3 **for the benefit of creditors of insolvent**
4 **company**

5 **Division 1—Preliminary**

6 **588D Secured debt may become unsecured**

7 For the purposes of this Part, a secured debt becomes an unsecured
8 debt to the extent that the creditor proves for the debt as an
9 unsecured creditor.

10 **588E Presumptions to be made in recovery proceedings**

11 (1) In this section:

12 *recovery proceeding*, in relation to a company, means:

- 13 (a) an application under section 588FF by the company's
14 liquidator; or
15 (b) proceedings begun under subsection 588FH(2) by the
16 company's liquidator; or
17 (c) proceedings, in so far as they relate to the question whether a
18 charge created by the company is void to any extent, as
19 against the company's liquidator, because of subsection
20 588FJ(2); or
21 (d) proceedings begun under subsection 588FJ(6) by the
22 company's liquidator; or
23 (e) proceedings for a contravention of subsection 588G(2) in
24 relation to the incurring of a debt by the company (including
25 proceedings under section 588M in relation to the incurring
26 of the debt but not including proceedings for an offence); or
27 (f) proceedings under section 588W in relation to the incurring
28 of a debt by the company.

29 (2) Subsections (3) to (9), inclusive, have effect for the purposes of a
30 recovery proceeding in relation to a company.

- 1 (3) If:
- 2 (a) the company is being wound up; and
- 3 (b) it is proved, or because of subsection (4) or (8) it must be
- 4 presumed, that the company was insolvent at a particular
- 5 time during the 12 months ending on the relation-back day;
- 6 it must be presumed that the company was insolvent throughout the
- 7 period beginning at that time and ending on that day.
- 8 (4) Subject to subsections (5) to (7), if it is proved that the company:
- 9 (a) has failed to keep financial records in relation to a period as
- 10 required by subsection 286(1); or
- 11 (b) has failed to retain financial records in relation to a period for
- 12 the 7 years required by subsection 286(2);
- 13 the company is to be presumed to have been insolvent throughout
- 14 the period.
- 15 (5) Paragraph (4)(a) does not apply in relation to a contravention of
- 16 subsection 286(1) that is only minor or technical.
- 17 (6) Subsection (4) does not have effect, in so far as it would prejudice
- 18 a right or interest of a person for the company to be presumed
- 19 insolvent because of a contravention of subsection 286(2), if it is
- 20 proved that:
- 21 (a) the contravention was due solely to someone destroying,
- 22 concealing or removing financial records of the company;
- 23 and
- 24 (b) none of those financial records was destroyed, concealed or
- 25 removed by the first-mentioned person; and
- 26 (c) the person was not in any way, by act or omission, directly or
- 27 indirectly, knowingly or recklessly, concerned in, or party to,
- 28 destroying, concealing or removing any of those financial
- 29 records.
- 30 (7) If the recovery proceeding is an application under section 588FF,
- 31 subsection (4) of this section does not have effect for the purposes
- 32 of proving, for the purposes of the application, that an unfair
- 33 preference given by the company to a creditor of the company is an
- 34 insolvent transaction, unless it is proved, for the purposes of the

- 1 application, that a related entity of the company was a party to the
2 unfair preference.
- 3 (8) If, for the purposes of another recovery proceeding in relation to
4 the company, there has been proved:
- 5 (a) if the other proceeding is of the kind referred to in
6 paragraph (1)(a) of this section—a matter of the kind referred
7 to in a paragraph of section 588FC or of subsection
8 588FG(2); or
- 9 (b) if the other proceeding is of the kind referred to in
10 paragraph (1)(b) of this section—a matter of the kind referred
11 to in a paragraph of section 588FC or of subsection 588FG(2)
12 or 588FH(1), or a defence under subsection 588FH(3); or
- 13 (c) if the other proceeding is of the kind referred to in
14 paragraph (1)(c) or (d) of this section—a matter of the kind
15 referred to in subsection 588FJ(3); or
- 16 (d) if the other proceeding is of the kind referred to in
17 paragraph (1)(e) of this section—a matter of the kind referred
18 to in a paragraph of section 588G, or a defence under
19 section 588H; or
- 20 (e) if the other proceeding is of the kind referred to in
21 paragraph (1)(f) of this section—a matter of the kind referred
22 to in a paragraph of subsection 588V(1), or a defence under
23 section 588X;
- 24 it must be presumed that that matter was the case, or that the
25 matters constituting that defence were the case.
- 26 (9) A presumption for which this section provides operates except so
27 far as the contrary is proved for the purposes of the proceeding
28 concerned.

29 **588F Certain taxation liabilities taken to be debts**

- 30 (1) For the purposes of this Part, a company's liability under a
31 remittance provision to pay to the Commissioner of Taxation an
32 amount equal to a deduction made by the company, after 1 July
33 1993, from a payment:
- 34 (a) is taken to be a debt; and

- 1 (b) is taken to have been incurred when the deduction was made.
- 2 (2) In this section:
- 3 ***remittance provision*** means any of the following provisions of the
- 4 ***Income Tax Assessment Act 1936***:
- 5 (a) section 221F (except subsection 221F(12)) or section 221G
- 6 (except subsection 221G(4A));
- 7 (b) subsection 221YHDC(2);
- 8 (c) subsection 221YHZD(1) or (1A);
- 9 (d) subsection 221YN(1);
- 10 or any of the provisions of Subdivision 16-B in Schedule 1 to the
- 11 ***Taxation Administration Act 1953***.
- 12 (3) This section is not intended to limit the generality of a reference in
- 13 this Act to a debt or to incurring a debt.

1

2 **Division 2—Voidable transactions**

3 **588FA Unfair preferences**

- 4 (1) A transaction is an unfair preference given by a company to a
5 creditor of the company if, and only if:
6 (a) the company and the creditor are parties to the transaction
7 (even if someone else is also a party); and
8 (b) the transaction results in the creditor receiving from the
9 company, in respect of an unsecured debt that the company
10 owes to the creditor, more than the creditor would receive
11 from the company in respect of the debt if the transaction
12 were set aside and the creditor were to prove for the debt in a
13 winding up of the company;
14 even if the transaction is entered into, is given effect to, or is
15 required to be given effect to, because of an order of an Australian
16 court or a direction by an agency.
- 17 (2) For the purposes of subsection (1), a secured debt is taken to be
18 unsecured to the extent of so much of it (if any) as is not reflected
19 in the value of the security.
- 20 (3) Where:
21 (a) a transaction is, for commercial purposes, an integral part of
22 a continuing business relationship (for example, a running
23 account) between a company and a creditor of the company
24 (including such a relationship to which other persons are
25 parties); and
26 (b) in the course of the relationship, the level of the company's
27 net indebtedness to the creditor is increased and reduced
28 from time to time as the result of a series of transactions
29 forming part of the relationship;
30 then:
31 (c) subsection (1) applies in relation to all the transactions
32 forming part of the relationship as if they together constituted
33 a single transaction; and

Clause 588FB

- 1 (d) the transaction referred to in paragraph (a) may only be taken
2 to be an unfair preference given by the company to the
3 creditor if, because of subsection (1) as applying because of
4 paragraph (c) of this subsection, the single transaction
5 referred to in the last-mentioned paragraph is taken to be
6 such an unfair preference.

7 **588FB Uncommercial transactions**

- 8 (1) A transaction of a company is an uncommercial transaction of the
9 company if, and only if, it may be expected that a reasonable
10 person in the company's circumstances would not have entered
11 into the transaction, having regard to:
12 (a) the benefits (if any) to the company of entering into the
13 transaction; and
14 (b) the detriment to the company of entering into the transaction;
15 and
16 (c) the respective benefits to other parties to the transaction of
17 entering into it; and
18 (d) any other relevant matter.
- 19 (2) A transaction may be an uncommercial transaction of a company
20 because of subsection (1):
21 (a) whether or not a creditor of the company is a party to the
22 transaction; and
23 (b) even if the transaction is given effect to, or is required to be
24 given effect to, because of an order of an Australian court or
25 a direction by an agency.

26 **588FC Insolvent transactions**

- 27 A transaction of a company is an insolvent transaction of the
28 company if, and only if, it is an unfair preference given by the
29 company, or an uncommercial transaction of the company, and:
30 (a) any of the following happens at a time when the company is
31 insolvent:
32 (i) the transaction is entered into; or

- 1 (ii) an act is done, or an omission is made, for the purpose
2 of giving effect to the transaction; or
3 (b) the company becomes insolvent because of, or because of
4 matters including:
5 (i) entering into the transaction; or
6 (ii) a person doing an act, or making an omission, for the
7 purpose of giving effect to the transaction.

8 **588FD Unfair loans to a company**

- 9 (1) A loan to a company is unfair if, and only if:
10 (a) the interest on the loan was extortionate when the loan was
11 made, or has since become extortionate because of a
12 variation; or
13 (b) the charges in relation to the loan were extortionate when the
14 loan was made, or have since become extortionate because of
15 a variation;
16 even if the interest is, or the charges are, no longer extortionate.
- 17 (2) In determining:
18 (a) whether interest on a loan was or became extortionate at a
19 particular time as mentioned in paragraph (1)(a); or
20 (b) whether charges in relation to a loan were or became
21 extortionate at a particular time as mentioned in
22 paragraph (1)(b);
23 regard is to be had to the following matters as at that time:
24 (c) the risk to which the lender was exposed; and
25 (d) the value of any security in respect of the loan; and
26 (e) the term of the loan; and
27 (f) the schedule for payments of interest and charges and for
28 repayments of principal; and
29 (g) the amount of the loan; and
30 (h) any other relevant matter.

588FE Voidable transactions

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- (1) Where a company is being wound up, a transaction of the company that was entered into on or after 23 June 1993 may be voidable because of any one or more of the following subsections.
- (2) The transaction is voidable if:
 - (a) it is an insolvent transaction of the company; and
 - (b) it was entered into, or an act was done for the purpose of giving effect to it:
 - (i) during the 6 months ending on the relation-back day; or
 - (ii) after that day but on or before the day when the winding up began.
- (3) The transaction is voidable if:
 - (a) it is an insolvent transaction, and also an uncommercial transaction, of the company; and
 - (b) it was entered into, or an act was done for the purpose of giving effect to it, during the 2 years ending on the relation-back day.
- (4) The transaction is voidable if:
 - (a) it is an insolvent transaction of the company; and
 - (b) a related entity of the company is a party to it; and
 - (c) it was entered into, or an act was done for the purpose of giving effect to it, during the 4 years ending on the relation-back day.
- (5) The transaction is voidable if:
 - (a) it is an insolvent transaction of the company; and
 - (b) the company became a party to the transaction for the purpose, or for purposes including the purpose, of defeating, delaying, or interfering with, the rights of any or all of its creditors on a winding up of the company; and
 - (c) the transaction was entered into, or an act done was for the purpose of giving effect to the transaction, during the 10 years ending on the relation-back day.

- 1 (6) The transaction is voidable if it is an unfair loan to the company
2 made at any time on or before the day when the winding up began.
- 3 (7) A reference in this section to doing an act includes a reference to
4 making an omission.

5 **588FF Courts may make orders about voidable transactions**

- 6 (1) Where, on the application of a company's liquidator, a court is
7 satisfied that a transaction of the company is voidable because of
8 section 588FE, the court may make one or more of the following
9 orders:
- 10 (a) an order directing a person to pay to the company an amount
11 equal to some or all of the money that the company has paid
12 under the transaction;
- 13 (b) an order directing a person to transfer to the company
14 property that the company has transferred under the
15 transaction;
- 16 (c) an order requiring a person to pay to the company an amount
17 that, in the court's opinion, fairly represents some or all of
18 the benefits that the person has received because of the
19 transaction;
- 20 (d) an order requiring a person to transfer to the company
21 property that, in the court's opinion, fairly represents the
22 application of either or both of the following:
- 23 (i) money that the company has paid under the transaction;
- 24 (ii) proceeds of property that the company has transferred
25 under the transaction;
- 26 (e) an order releasing or discharging, wholly or partly, a debt
27 incurred, or a security or guarantee given, by the company
28 under or in connection with the transaction;
- 29 (f) if the transaction is an unfair loan and such a debt, security or
30 guarantee has been assigned—an order directing a person to
31 indemnify the company in respect of some or all of its
32 liability to the assignee;
- 33 (g) an order providing for the extent to which, and the terms on
34 which, a debt that arose under, or was released or discharged

Clause 588FG

- 1 to any extent by or under, the transaction may be proved in a
2 winding up of the company;
- 3 (h) an order declaring an agreement constituting, forming part of,
4 or relating to, the transaction, or specified provisions of such
5 an agreement, to have been void at and after the time when
6 the agreement was made, or at and after a specified later
7 time;
- 8 (i) an order varying such an agreement as specified in the order
9 and, if the Court thinks fit, declaring the agreement to have
10 had effect, as so varied, at and after the time when the
11 agreement was made, or at and after a specified later time;
- 12 (j) an order declaring such an agreement, or specified provisions
13 of such an agreement, to be unenforceable.
- 14 (2) Nothing in subsection (1) limits the generality of anything else in
15 it.
- 16 (3) An application under subsection (1) may only be made:
17 (a) within 3 years after the relation-back day; or
18 (b) within such longer period as the Court orders on an
19 application under this paragraph made by the liquidator
20 within those 3 years.

21 **588FG Transaction not voidable as against certain persons**

- 22 (1) A court is not to make under section 588FF an order materially
23 prejudicing a right or interest of a person other than a party to the
24 transaction if it is proved that:
- 25 (a) the person received no benefit because of the transaction; or
26 (b) in relation to each benefit that the person received because of
27 the transaction:
- 28 (i) the person received the benefit in good faith; and
29 (ii) at the time when the person received the benefit:
- 30 (A) the person had no reasonable grounds for
31 suspecting that the company was insolvent at
32 that time or would become insolvent as
33 mentioned in paragraph 588FC(b); and

- 1 (B) a reasonable person in the person's
2 circumstances would have had no such grounds
3 for so suspecting.
- 4 (2) A court is not to make under section 588FF an order materially
5 prejudicing a right or interest of a person if the transaction is not an
6 unfair loan to the company and it is proved that:
- 7 (a) the person became a party to the transaction in good faith;
8 and
9 (b) at the time when the person became such a party:
- 10 (i) the person had no reasonable grounds for suspecting
11 that the company was insolvent at that time or would
12 become insolvent as mentioned in paragraph 588FC(b);
13 and
14 (ii) a reasonable person in the person's circumstances
15 would have had no such grounds for so suspecting; and
16 (c) the person has provided valuable consideration under the
17 transaction or has changed his, her or its position in reliance
18 on the transaction.
- 19 (3) For the purposes of paragraph (2)(c), if an amount has been paid or
20 applied towards discharging to a particular extent a liability to pay
21 tax, the discharge is valuable consideration provided:
- 22 (a) by the person to whom the tax is payable; and
23 (b) under any transaction that consists of, or involves, the
24 payment or application.
- 25 (4) In subsection (3):
- 26 *tax* means tax (however described) payable under a law of the
27 Commonwealth or of a State or Territory, and includes, for
28 example, a levy, a charge, and municipal or other rates.
- 29 (5) For the purposes of paragraph (2)(c), if an amount has been paid or
30 applied towards discharging to a particular extent a liability to the
31 Commonwealth, or to the Commissioner of Taxation, that arose
32 under or because of an Act of which the Commissioner has the
33 general administration, the discharge is valuable consideration
34 provided by the Commonwealth, or by the Commissioner, as the

Clause 588FGA

1 case requires, under any transaction that consists of, or involves,
2 the payment or application.

3 (6) Subsections (3) and (5):

4 (a) are to avoid doubt and are not intended to limit the cases
5 where a person may be taken to have provided valuable
6 consideration under a transaction; and

7 (b) apply to an amount even if it was paid or applied before the
8 commencement of this Act.

9 **588FGA Directors to indemnify Commissioner of Taxation if certain**
10 **payments set aside**

11 (1) This section applies if the Court makes an order under
12 section 588FF against the Commissioner of Taxation because of
13 the payment of an amount in respect of a liability under any of the
14 following provisions of the *Income Tax Assessment Act 1936*:

15 (a) section 221F (except subsection 221F(12)), section 221G
16 (except subsection 221G(4A)) or section 221P;

17 (b) subsection 221YHDC(2);

18 (c) subsection 221YHZD(1) or (1A);

19 (d) subsection 221YN(1);

20 (e) section 222AHA;

21 or under a provision of Subdivision 16-B in Schedule 1 to the
22 *Taxation Administration Act 1953*.

23 (2) Each person who was a director of the company when the payment
24 was made is liable to indemnify the Commissioner in respect of
25 any loss or damage resulting from the order.

26 (3) An amount payable to the Commissioner under subsection (2):

27 (a) is a debt due to the Commonwealth and payable to the
28 Commissioner; and

29 (b) may be recovered in a court of competent jurisdiction by the
30 Commissioner, or a Deputy Commissioner of Taxation, suing
31 in his or her official name.

32 (4) The Court may, in the proceedings in which it made the order
33 against the Commissioner, order a person to pay to the

- 1 Commissioner an amount payable by the person under
2 subsection (2).
- 3 (5) A person who pays an amount under subsection (2) has the same
4 rights:
- 5 (a) whether by way of indemnity, subrogation, contribution or
6 otherwise; and
- 7 (b) against the company or anyone else;
- 8 as if the payment had been made under a guarantee:
- 9 (c) of the liability referred to in subsection (1); and
- 10 (d) under which the person and every other person who was a
11 director of the company as mentioned in subsection (2) were
12 jointly and severally liable as guarantors.

13 **588FGB Defences in proceedings under section 588FGA**

- 14 (1) This section has effect for the purposes of:
- 15 (a) proceedings to recover from a person an amount payable
16 under subsection 588FGA(2); and
- 17 (b) proceedings under subsection 588FGA(5) against a person of
18 the kind referred to in paragraph 588FGA(5)(d).
- 19 (2) The time when the payment referred to in subsection 588FGA(1)
20 was made is called *the payment time*.
- 21 (3) It is a defence if it is proved that, at the payment time, the person
22 had reasonable grounds to expect, and did expect, that the company
23 was solvent at that time and would remain solvent even if it made
24 the payment.
- 25 (4) Without limiting the generality of subsection (3), it is a defence if
26 it is proved that, at the payment time, the person:
- 27 (a) had reasonable grounds to believe, and did believe:
- 28 (i) that a competent and reliable person (*the other person*)
29 was responsible for providing to the first-mentioned
30 person adequate information about whether the
31 company was solvent; and
- 32 (ii) that the other person was fulfilling that responsibility;
33 and

- 1 (b) expected, on the basis of information provided to the
2 first-mentioned person by the other person, that the company
3 was solvent at that time and would remain solvent even if it
4 made the payment.
- 5 (5) It is a defence if it is proved that, because of illness or for some
6 other good reason, the person did not take part in the management
7 of the company at the payment time.
- 8 (6) It is a defence if it is proved that:
9 (a) the person took all reasonable steps to prevent the company
10 from making the payment; or
11 (b) there were no such steps the person could have taken.
- 12 (7) In determining whether a defence under subsection (6) has been
13 proved, the matters to which regard is to be had include, but are not
14 limited to:
15 (a) any action the person took with a view to appointing an
16 administrator of the company; and
17 (b) when that action was taken; and
18 (c) the results of that action.

19 **588FH Liquidator may recover from related entity benefit resulting**
20 **from insolvent transaction**

- 21 (1) This section applies where a company is being wound up and a
22 transaction of the company:
23 (a) is an insolvent transaction of the company; and
24 (b) is voidable under section 588FE; and
25 (c) has had the effect of discharging, to the extent of a particular
26 amount, a liability (whether under a guarantee or otherwise
27 and whether contingent or otherwise) of a related entity of
28 the company.
- 29 (2) The company's liquidator may recover from the related entity, as a
30 debt due to the company, an amount equal to the amount referred
31 to in paragraph (1)(c).

Clause 588FI

- 1 (3) In deciding what orders (if any) to make under section 588FF on an
2 application relating to the transaction, a court must take into
3 account any amount recovered under subsection (2) of this section.
- 4 (4) If the liquidator recovers an amount under subsection (2) from the
5 related entity, the related entity has the same rights:
6 (a) whether by way of indemnity, subrogation, contribution or
7 otherwise; and
8 (b) against the company or anyone else;
9 as if the related entity had paid the amount in discharging, to the
10 extent of that amount, the liability referred to in paragraph (1)(c).

11 **588FI Creditor who gives up benefit of unfair preference may prove**
12 **for preferred debt**

- 13 (1) This section applies where:
14 (a) a transaction is an unfair preference given by a company to a
15 creditor of the company after 23 June 1993; and
16 (b) at the request of the company's liquidator, because of an
17 order under section 588FF, or for any other reason, the
18 creditor has put the company in the same position as if the
19 transaction had not been entered into.
- 20 (2) A court must not make under section 588FF, on an application
21 relating to the transaction, an order prejudicing a right or interest of
22 the creditor.
- 23 (3) The creditor may prove in the winding up as if the transaction had
24 not been entered into.

25 **588FJ Floating charge created within 6 months before relation-back**
26 **day**

- 27 (1) This section applies if:
28 (a) a company is being wound up in insolvency; and
29 (b) the company created a floating charge on property of the
30 company at a particular time that is at or after 23 June 1993
31 and:
32 (i) during the 6 months ending on the relation-back day; or

- 1 (ii) after that day but on or before the day when the winding
2 up began.
- 3 (2) The charge is void, as against the company's liquidator, except so
4 far as it secures:
- 5 (a) an advance paid to the company, or at its direction, at or after
6 that time and as consideration for the charge; or
7 (b) interest on such an advance; or
8 (c) the amount of a liability under a guarantee or other obligation
9 undertaken at or after that time on behalf of, or for the benefit
10 of, the company; or
11 (d) an amount payable for property or services supplied to the
12 company at or after that time; or
13 (e) interest on an amount so payable.
- 14 (3) Subsection (2) does not apply if it is proved that the company was
15 solvent immediately after that time.
- 16 (4) Paragraphs (2)(a) and (b) do not apply in relation to an advance so
17 far as it was applied to discharge, directly or indirectly, an
18 unsecured debt, whether contingent or otherwise, that the company
19 owed to:
- 20 (a) the chargee; or
21 (b) if the chargee was a body corporate—a related entity of the
22 body.
- 23 (5) Paragraphs (2)(d) and (e) do not apply in relation to an amount
24 payable as mentioned in paragraph (2)(d) in so far as the amount
25 exceeds the market value of the property or services when supplied
26 to the company.

1 (6) If, during the 6 months ending on the relation-back day, or after
2 that day but on or before the day when the winding up began, a
3 debt secured by the charge was discharged, out of the company's
4 money or property, to the extent of a particular amount (in this
5 subsection called the ***realised amount***), the liquidator may, by
6 proceedings in a court of competent jurisdiction, recover from the
7 chargee, as a debt due to the company, the amount worked out in
8 accordance with the formula:

9 Unsecured amount – Realisation costs

10 where:

11 ***realisation costs*** means so much (if any) of the costs and expenses
12 of enforcing the charge as is attributable to realising the realised
13 amount.

14 ***unsecured amount*** means so much of the realised amount as does
15 not exceed so much of the debt as would, if the debt had not been
16 so discharged, have been unsecured, as against the liquidator,
17 because of subsection (2).

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Division 3—Director's duty to prevent insolvent trading

588G Director's duty to prevent insolvent trading by company

- (1) This section applies if:
- (a) a person is a director of a company at the time when the company incurs a debt; and
 - (b) the company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and
 - (c) at that time, there are reasonable grounds for suspecting that the company is insolvent, or would so become insolvent, as the case may be; and
 - (d) that time is at or after the commencement of this Act.

(1A) For the purposes of this section, if a company takes action set out in column 2 of the following table, it incurs a debt at the time set out in column 3.

When debts are incurred	[operative table]
Action of company	When debt is incurred
1 paying a dividend	when the dividend is paid or, if the company has a constitution that provides for the declaration of dividends, when the dividend is declared
2 making a reduction of share capital to which Division 1 of Part 2J.1 applies (other than a reduction that consists only of the cancellation of a share or shares for no consideration)	when the reduction takes effect
3 buying back shares (even if the consideration is not a sum certain in money)	when the buy-back agreement is entered into
4 redeeming redeemable preference shares that are redeemable at its option	when the company exercises the option

When debts are incurred	[operative table]
Action of company	When debt is incurred
5	issuing redeemable preference shares that are redeemable otherwise than at its option
6	financially assisting a person to acquire shares (or units of shares) in itself or a holding company
7	entering into an uncommercial transaction (within the meaning of section 588FB) other than one that a court orders, or a prescribed agency directs, the company to enter into

- 1 (2) By failing to prevent the company from incurring the debt, the
2 person contravenes this section if:
- 3 (a) the person is aware at that time that there are such grounds
4 for so suspecting; or
- 5 (b) a reasonable person in a like position in a company in the
6 company's circumstances would be so aware.
- 7 Note: This subsection is a civil penalty provision (see subsection 1317E(1)).
- 8 (3) A person commits an offence if:
- 9 (a) the person is a director of the company when it incurs a debt;
10 and
- 11 (b) the company is insolvent at that time, or becomes insolvent
12 by incurring that debt, or by incurring at that time debts
13 including that debt; and
- 14 (c) the person suspected at the time when the company incurred
15 the debt that the company was insolvent or would become
16 insolvent as a result of incurring that debt or other debts (as
17 in paragraph (1)(b)); and
- 18 (d) the person's failure to prevent the company incurring the
19 debt was dishonest.

- 1 (4) The provisions of Division 4 of this Part are additional to, and do
2 not derogate from, Part 9.4B as it applies in relation to a
3 contravention of this section.

4 **588H Defences**

- 5 (1) This section has effect for the purposes of proceedings for a
6 contravention of subsection 588G(2) in relation to the incurring of
7 a debt (including proceedings under section 588M in relation to the
8 incurring of the debt).
- 9 (2) It is a defence if it is proved that, at the time when the debt was
10 incurred, the person had reasonable grounds to expect, and did
11 expect, that the company was solvent at that time and would
12 remain solvent even if it incurred that debt and any other debts that
13 it incurred at that time.
- 14 (3) Without limiting the generality of subsection (2), it is a defence if
15 it is proved that, at the time when the debt was incurred, the
16 person:
- 17 (a) had reasonable grounds to believe, and did believe:
- 18 (i) that a competent and reliable person (the *other person*)
19 was responsible for providing to the first-mentioned
20 person adequate information about whether the
21 company was solvent; and
22 (ii) that the other person was fulfilling that responsibility;
23 and
- 24 (b) expected, on the basis of information provided to the
25 first-mentioned person by the other person, that the company
26 was solvent at that time and would remain solvent even if it
27 incurred that debt and any other debts that it incurred at that
28 time.
- 29 (4) If the person was a director of the company at the time when the
30 debt was incurred, it is a defence if it is proved that, because of
31 illness or for some other good reason, he or she did not take part at
32 that time in the management of the company.
- 33 (5) It is a defence if it is proved that the person took all reasonable
34 steps to prevent the company from incurring the debt.

- 1 (6) In determining whether a defence under subsection (5) has been
2 proved, the matters to which regard is to be had include, but are not
3 limited to:
- 4 (a) any action the person took with a view to appointing an
5 administrator of the company; and
6 (b) when that action was taken; and
7 (c) the results of that action.

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2 **Division 4—Director liable to compensate company**

2

3 **Subdivision A—Proceedings against director**

3

4 **588J On application for civil penalty order, Court may order**
5 **compensation**

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6 (1) Where, on an application for a civil penalty order against a person
7 in relation to a contravention of subsection 588G(2), the Court is
8 satisfied that:

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(a) the person committed the contravention in relation to the
incurring of a debt by a company; and

(b) the debt is wholly or partly unsecured; and

(c) the person to whom the debt is owed has suffered loss or
damage in relation to the debt because of the company's
insolvency;

the Court may (whether or not it makes a pecuniary penalty order
under section 1317G or an order under section 206C disqualifying
a person from managing corporations) order the first-mentioned
person to pay to the company compensation equal to the amount of
that loss or damage.

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(2) A company's liquidator may intervene in an application for a civil
penalty order against a person in relation to a contravention of
subsection 588G(2).

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(3) A company's liquidator who so intervenes is entitled to be heard:

(a) only if the Court is satisfied that the person committed the
contravention in relation to the incurring of a debt by that
company; and

(b) only on the question whether the Court should order the
person to pay compensation to the company.

29

588K Criminal court may order compensation

30

If:

Clause 588L

- 1 (a) a court finds a person guilty of an offence under subsection
2 588G(3) in relation to the incurring of a debt by a company;
3 and
4 (b) the court is satisfied that:
5 (i) the debt is wholly or partly unsecured; and
6 (ii) the person to whom the debt is owed has suffered loss
7 or damage in relation to the debt because of the
8 company's insolvency;
9 the court may (whether or not it imposes a penalty) order the
10 first-mentioned person to pay to the company compensation equal
11 to the amount of that loss or damage.

12 Note: Section 73A defines when a court is taken to find a person guilty of an
13 offence.

14 **588L Enforcement of order under section 588J or 588K**

15 An order to pay compensation that a court makes under
16 section 588J or 588K may be enforced as if it were a judgment of
17 the court.

18 **588M Recovery of compensation for loss resulting from insolvent**
19 **trading**

- 20 (1) This section applies where:
21 (a) a person (in this section called the *director*) has contravened
22 subsection 588G(2) or (3) in relation to the incurring of a
23 debt by a company; and
24 (b) the person (in this section called the *creditor*) to whom the
25 debt is owed has suffered loss or damage in relation to the
26 debt because of the company's insolvency; and
27 (c) the debt was wholly or partly unsecured when the loss or
28 damage was suffered; and
29 (d) the company is being wound up;
30 whether or not:
31 (e) the director has been convicted of an offence in relation to
32 the contravention; or

- 1 (f) a civil penalty order has been made against the director in
2 relation to the contravention.
- 3 (2) The company's liquidator may recover from the director, as a debt
4 due to the company, an amount equal to the amount of the loss or
5 damage.
- 6 (3) The creditor may, as provided in Subdivision B but not otherwise,
7 recover from the director, as a debt due to the creditor, an amount
8 equal to the amount of the loss or damage.
- 9 (4) Proceedings under this section may only be begun within 6 years
10 after the beginning of the winding up.

11 **588N Avoiding double recovery**

12 An amount recovered in proceedings under section 588M in
13 relation to the incurring of a debt by a company is to be taken into
14 account in working out the amount (if any) recoverable in:

- 15 (a) any other proceedings under that section in relation to the
16 incurring of the debt; and
17 (b) proceedings under section 596AC in relation to a
18 contravention of section 596AB that is linked to the incurring
19 of the debt.

20 **588P Effect of sections 588J, 588K and 588M**

21 Sections 588J, 588K and 588M:

- 22 (a) have effect in addition to, and not in derogation of, any rule
23 of law about the duty or liability of a person because of the
24 person's office or employment in relation to a company; and
25 (b) do not prevent proceedings from being instituted in respect of
26 a breach of such a duty or in respect of such a liability.

27 **588Q Certificates evidencing contravention**

28 For the purposes of this Part, a certificate that:

- 29 (a) purports to be signed by the Registrar or other proper officer
30 of an Australian court; and

- 1 (b) states:
- 2 (i) that that court has declared that a specified person has,
3 by failing to prevent a specified company from
4 incurring a specified debt, contravened subsection
5 588G(3) in relation to the company; or
- 6 (ii) that a specified person was convicted by that court for
7 an offence constituted by a contravention of
8 section 588G in relation to the incurring of a specified
9 debt by a specified company; or
- 10 (iii) that a specified person charged before that court with
11 such an offence was found in that court to have
12 committed the offence but that the court did not proceed
13 to convict the person of the offence;
- 14 is, unless it is proved that the declaration, conviction or finding
15 was set aside, quashed or reversed, conclusive evidence:
- 16 (c) that the declaration was made, that the person was convicted
17 of the offence, or that the person was so found, as the case
18 may be; and
- 19 (d) that the person committed the contravention.

20 **Subdivision B—Proceedings by creditor**

21 **588R Creditor may sue for compensation with liquidator's consent**

- 22 (1) A creditor of a company that is being wound up may, with the
23 written consent of the company's liquidator, begin proceedings
24 under section 588M in relation to the incurring by the company of
25 a debt that is owed to the creditor.
- 26 (2) Subsection (1) has effect despite section 588T, but subject to
27 section 588U.

28 **588S Creditor may give liquidator notice of intention to sue for** 29 **compensation**

30 After the end of 6 months beginning when a company begins to be
31 wound up, a creditor of the company may give to the company's
32 liquidator a written notice:

- 1 (a) stating that the creditor intends to begin proceedings under
2 section 588M in relation to the incurring by the company of a
3 specified debt that is owed to the creditor; and
4 (b) asking the liquidator to give to the creditor, within 3 months
5 after receiving the notice:
6 (i) a written consent to the creditor beginning the
7 proceedings; or
8 (ii) a written statement of the reasons why the liquidator
9 thinks that proceedings under section 588M in relation
10 to the incurring of that debt should not be begun.

11 **588T When creditor may sue for compensation without liquidator's**
12 **consent**

- 13 (1) This section applies where a notice is given under section 588S.
14 (2) The creditor may begin proceedings in a court under section 588M
15 in relation to the incurring by the company of the debt specified in
16 the notice if:
17 (a) as at the end of 3 months after the liquidator receives the
18 notice, he or she has not consented to the creditor beginning
19 such proceedings; and
20 (b) on an application made after those 3 months, the court has
21 given leave for the proceedings to begin.
22 (3) If:
23 (a) during those 3 months, the liquidator gives to the creditor a
24 written statement of the reasons why the liquidator thinks
25 that such proceedings should not be begun; and
26 (b) the creditor applies for leave under paragraph (2)(b);
27 then:
28 (c) the creditor must file the statement with the court when so
29 applying; and
30 (d) in determining the application, the court is to have regard to
31 the reasons set out in the statement.

1 **588U Events preventing creditor from suing**

- 2 (1) A creditor of a company that is being wound up cannot begin
3 proceedings under section 588M in relation to the incurring of a
4 debt by the company if:
- 5 (a) the company's liquidator has applied under section 588FF in
6 relation to the debt, or in relation to a transaction under
7 which the debt was incurred; or
 - 8 (b) the company's liquidator has begun proceedings under
9 section 588M in relation to the incurring of the debt; or
 - 10 (c) the company's liquidator has intervened in an application for
11 a civil penalty order against a person in relation to a
12 contravention of subsection 588G(2) in relation to the
13 incurring of the debt.
- 14 (2) Subsection (1) has effect despite sections 588R and 588T.

1
2 **Division 5—Liability of holding company for insolvent**
3 **trading by subsidiary**

4 **588V When holding company liable**

- 5 (1) A corporation contravenes this section if:
- 6 (a) the corporation is the holding company of a company at the
7 time when the company incurs a debt; and
- 8 (b) the company is insolvent at that time, or becomes insolvent
9 by incurring that debt, or by incurring at that time debts
10 including that debt; and
- 11 (c) at that time, there are reasonable grounds for suspecting that
12 the company is insolvent, or would so become insolvent, as
13 the case may be; and
- 14 (d) one or both of the following subparagraphs applies:
- 15 (i) the corporation, or one or more of its directors, is or are
16 aware at that time that there are such grounds for so
17 suspecting;
- 18 (ii) having regard to the nature and extent of the
19 corporation's control over the company's affairs and to
20 any other relevant circumstances, it is reasonable to
21 expect that:
- 22 (A) a holding company in the corporation's
23 circumstances would be so aware; or
- 24 (B) one or more of such a holding company's
25 directors would be so aware; and
- 26 (e) that time is at or after the commencement of this Act.
- 27 (2) A corporation that contravenes this section is not guilty of an
28 offence.

29 **588W Recovery of compensation for loss resulting from insolvent**
30 **trading**

- 31 (1) Where:

Clause 588X

- 1 (a) a corporation has contravened section 588V in relation to the
2 incurring of a debt by a company; and
3 (b) the person to whom the debt is owed has suffered loss or
4 damage in relation to the debt because of the company's
5 insolvency; and
6 (c) the debt was wholly or partly unsecured when the loss or
7 damage was suffered; and
8 (d) the company is being wound up;
9 the company's liquidator may recover from the corporation, as a
10 debt due to the company, an amount equal to the amount of the loss
11 or damage.
- 12 (2) Proceedings under this section may only be begun within 6 years
13 after the beginning of the winding up.

14 **588X Defences**

- 15 (1) This section has effect for the purposes of proceedings under
16 section 588W.
- 17 (2) It is a defence if it is proved that, at the time when the debt was
18 incurred, the corporation, and each relevant director (if any), had
19 reasonable grounds to expect, and did expect, that the company
20 was solvent at that time and would remain solvent even if it
21 incurred that debt and any other debts that it incurred at that time.
- 22 (3) Without limiting the generality of subsection (2), it is a defence if
23 it is proved that, at the time when the debt was incurred, the
24 corporation, and each relevant director (if any):
25 (a) had reasonable grounds to believe, and did believe:
26 (i) that a competent and reliable person was responsible for
27 providing to the corporation adequate information about
28 whether the company was solvent; and
29 (ii) that the person was fulfilling that responsibility; and
30 (b) expected, on the basis of the information provided to the
31 corporation by the person, that the company was solvent at
32 that time and would remain solvent even if it incurred that
33 debt and any other debts that it incurred at that time.

Clause 588X

- 1 (4) If it is proved that, because of illness or for some other good
2 reason, a particular relevant director did not take part in the
3 management of the corporation at the time when the company
4 incurred the debt, the fact that the director was aware as mentioned
5 in subparagraph 588V(1)(d)(i) is to be disregarded.
- 6 (5) It is a defence if it is proved that the corporation took all
7 reasonable steps to prevent the company from incurring the debt.
- 8 (6) In subsections (2), (3) and (4):
- 9 ***relevant director*** means a director of the corporation who was
10 aware as mentioned in subparagraph 588V(1)(d)(i).

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2 **Division 6—Application of compensation under Division 4**
3 **or 5**

4 **588Y Application of amount paid as compensation**

5 (1) An amount paid to a company under section 588J, 588K, 588M or
6 588W is not available to pay a secured debt of the company unless
7 all the company's unsecured debts have been paid in full.

8 (2) Where:

- 9 (a) under section 588J or 588K, or in proceedings under
10 section 588M or 588W, a court orders a person to pay to the
11 company compensation, or an amount, equal to the amount
12 of loss or damage suffered by a person in relation to a debt
13 because of the company's insolvency; and
14 (b) the court is satisfied that, at the time when the company
15 incurred the debt, the person who suffered the loss or damage
16 knew that the company was insolvent at that time or would
17 become insolvent by incurring the debt, or by incurring at
18 that time debts including the debt, as the case requires;

19 the court may order that the compensation or amount paid to the
20 company is not available to pay that debt unless all the company's
21 unsecured debts (other than debts to which orders under this
22 subsection relate) have been paid in full.

23 (3) Subsection (2) does not apply in relation to proceedings under
24 section 588M in relation to the incurring of a debt by a company if
25 the proceedings are begun by a creditor of the company (as
26 provided for in Subdivision B of Division 4).

27 (4) Subsection (2) does not apply in relation to a liability that is taken
28 to be a debt because of section 588F.

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**Division 7—Person managing a corporation while
disqualified may become liable for corporation's
debts**

588Z Court may make order imposing liability

Where:

- (a) a company is being wound up; and
- (b) on or after 23 June 1993 and within 4 years before the
relation-back day, a person contravened section 206A by
managing the company;

the Court may, on the application of the company's liquidator,
order that the person is personally liable for so much of the
company's debts and liabilities as does not exceed an amount
specified in the order.

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Part 5.8—Offences

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589 Interpretation and application

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(1) Sections 590 to 593 (inclusive) apply to a company:

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(a) that has been wound up or is in the course of being wound up; or

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(b) that has been in the course of being wound up, where the winding up has been stayed or terminated by an order under section 482; or

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(ba) of which a provisional liquidator has been appointed; or

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(c) that is or has been under administration; or

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(ca) that has executed a deed of company arrangement, even if the deed has since terminated; or

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(d) affairs of which are or have been under investigation; or

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(e) in respect of property of which a receiver, or a receiver and manager, has at any time been appointed, whether by the Court or under a power contained in an instrument, whether or not the appointment has been terminated; or

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(f) that has ceased to carry on business or is unable to pay its debts; or

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(g) that has entered into a compromise or arrangement with its creditors.

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(2) For the purposes of this Part, affairs of a company are or have been under investigation if, and only if:

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(a) ASIC is investigating, or has at any time investigated, under Division 1 of Part 3 of the ASIC Act:

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(i) matters being, or connected with, affairs of the company; or

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(ii) matters including such matters; or

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(b) affairs of the company have at any time been under investigation under:

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(i) Part VII of the *Companies Act 1981*; or

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- 1 (ii) the provisions of a previous law of a State or Territory
2 that correspond to that Part.
- 3 (3) For the purposes of this Part, a company is taken to have ceased to
4 carry on business only if:
- 5 (a) ASIC has published in the *Gazette* a notice of the proposed
6 deregistration of the company under subsection 601AA(4) or
7 601AB(3); and
- 8 (b) if the notice was published under subsection 601AA(4) or
9 under subsection 601AB(3) because of a decision under
10 subsection 601AB(1)—2 months have passed since the
11 notice was published and ASIC has not been informed that
12 the company is carrying on business.
- 13 (4) For the purposes of this Part, a company is taken to be unable to
14 pay its debts if, and only if, execution or other process issued on a
15 judgment, decree or order of a court (whether or not an Australian
16 court) in favour of a creditor of the company is returned unsatisfied
17 in whole or in part.
- 18 (5) In this Part:
- 19 ***appropriate officer*** means:
- 20 (a) in relation to a company that has been, has been being or is
21 being wound up—the liquidator; and
- 22 (aa) in relation to a company of which a provisional liquidator has
23 been appointed—the provisional liquidator; and
- 24 (b) in relation to a company that is or has been under
25 administration—the administrator; and
- 26 (ba) in relation to a company that has executed a deed of company
27 arrangement—the deed’s administrator; and
- 28 (c) in relation to a company affairs of which are or have been
29 under investigation—ASIC or the NCSC, as the case
30 requires; and
- 31 (d) in relation to a company in respect of property of which a
32 receiver, or a receiver and manager, has been appointed—the
33 receiver or the receiver and manager; and

- 1 (e) in relation to a company that has ceased to carry on business
2 or is unable to pay its debts—ASIC or the NCSC, as the case
3 requires; and
4 (f) in relation to a company that has entered into a compromise
5 or arrangement with its creditors—the person appointed by
6 the Court to administer the compromise or arrangement.

7 *relevant day* means the day on which:

- 8 (a) in relation to a company that has been wound up, has been in
9 the course of being wound up, or is being wound up:
10 (i) if, because of Division 1A of Part 5.6, the winding up is
11 taken to have begun on the day when an order that the
12 company be wound up was made—the application for
13 the order was filed; or
14 (ii) otherwise—the winding up is taken because of
15 Division 1A of Part 5.6 to have begun;
16 (aa) in relation to a company of which a provisional liquidator has
17 been appointed—the provisional liquidator was appointed;
18 (b) in relation to a company that is or has been under
19 administration—the administration began;
20 (ba) in relation to a company that has executed a deed of company
21 arrangement—the deed was executed;
22 (c) in relation to a company affairs of which are or have been
23 under investigation:
24 (i) if paragraph (2)(a) applies—the investigation began; or
25 (ii) if paragraph (2)(b) applies—a direction was given to the
26 NCSC to arrange for the investigation;
27 (d) in relation to a company in respect of property of which a
28 receiver, or a receiver and manager, has been appointed—the
29 receiver, or the receiver and manager, was appointed;
30 (e) in relation to a company that is unable to pay its debts—the
31 execution or other process was returned unsatisfied in whole
32 or in part;
33 (f) in relation to a company that has ceased to carry on
34 business—a notice was first published in relation to the
35 company under subsection 601AA(4) or 601AB(3);

- 1 (g) in relation to a company that has entered into a compromise
2 or arrangement with its creditors—the compromise or
3 arrangement was approved by the Court.
- 4 (6) This Part applies in relation to a company that was first
5 incorporated other than under this Act:
- 6 (a) as if, in this Part (other than section 595) as so applying:
- 7 (i) a reference to the company included a reference to the
8 company as it existed at a time before its registration
9 day (including a time before the commencement of this
10 Act); and
- 11 (iii) a reference, in relation to a provision of this Act, to
12 ASIC included a reference to the NCSC (if relevant);
13 and
- 14 (b) with such other modifications as the circumstances require.

15 **590 Offences by officers of certain companies**

- 16 (1) A person who, being a past or present officer of a company to
17 which this section applies:
- 18 (a) does not, so far as the person is capable of doing so, disclose
19 to the appropriate officer all the property of the company,
20 and how and to whom and for what consideration and when
21 any part of the property of the company was disposed of
22 within 10 years next before the relevant day, except such part
23 as has been disposed of in the ordinary course of the business
24 of the company; or
- 25 (b) does not deliver up to, or in accordance with the directions
26 of, the appropriate officer:
- 27 (i) all the property of the company in the person's
28 possession; or
- 29 (ii) all books in the person's possession belonging to the
30 company (except books of which the person is entitled,
31 as against the company and the appropriate officer, to
32 retain possession);
- 33 (c) has, within 10 years next before the relevant day or at a time
34 on or after that day:

- 1 (i) fraudulently concealed or removed any part of the
2 property of the company to the value of \$100 or more;
3 or
4 (ii) concealed any debt due to or by the company; or
5 (iii) fraudulently parted with, altered or made any omission
6 in, or been privy to fraudulent parting with, altering or
7 making any omission in, any book affecting or relating
8 to affairs of the company; or
9 (iv) by any false representation or other fraud, obtained on
10 credit, for or on behalf of the company, any property
11 that the company has not subsequently paid for; or
12 (v) fraudulently pawned, pledged or disposed of, otherwise
13 than in the ordinary course of the business of the
14 company, property of the company that has been
15 obtained on credit and has not been paid for;
16 (d) fraudulently makes any material omission in any statement or
17 report relating to affairs of the company; or
18 (e) knowing or believing that a false debt has been proved by a
19 person, fails for a period of one month to inform the
20 appropriate officer of his or her knowledge or belief; or
21 (f) prevents the production to the appropriate officer of any book
22 affecting or relating to affairs of the company; or
23 (g) has, within 10 years next before the relevant day or at a time
24 on or after that day, attempted to account for any part of the
25 property of the company by making entries in the books of
26 the company showing fictitious transactions, losses or
27 expenses; or
28 (h) has, within 10 years next before the relevant day or at a time
29 on or after that day, been guilty of any false representation or
30 other fraud for the purpose of obtaining the consent of the
31 creditors of the company or any of them to an agreement
32 with reference to affairs of the company or to the winding up;
33 contravenes this subsection.
- 34 (5) Where a person pawns, pledges or disposes of any property in
35 circumstances that amount to a contravention by virtue of
36 subparagraph (1)(c)(v), a person who takes in pawn or pledge or

1 otherwise receives the property knowing it to be pawned, pledged
2 or disposed of in those circumstances contravenes this subsection.

3 (6) A person who takes in pawn or pledge or otherwise receives
4 property in circumstances mentioned in subsection (5) and with the
5 knowledge mentioned in that subsection is taken to hold the
6 property as trustee for the company concerned and is liable to
7 account to the company for the property.

8 (7) Where, in proceedings under subsection (6), it is necessary to
9 establish that a person has taken property in pawn or pledge, or
10 otherwise received property:

11 (a) in circumstances mentioned in subsection (5); and

12 (b) with the knowledge mentioned in that subsection;

13 the matter referred to in paragraph (b) of this subsection may be
14 established on the balance of probabilities.

15 **592 Incurring of certain debts; fraudulent conduct**

16 (1) Where:

17 (a) a company has incurred a debt before 23 June 1993; and

18 (b) immediately before the time when the debt was incurred:

19 (i) there were reasonable grounds to expect that the
20 company will not be able to pay all its debts as and
21 when they become due; or

22 (ii) there were reasonable grounds to expect that, if the
23 company incurs the debt, it will not be able to pay all its
24 debts as and when they become due; and

25 (c) the company was, at the time when the debt was incurred, or
26 becomes at a later time, a company to which this section
27 applies;

28 any person who was a director of the company, or took part in the
29 management of the company, at the time when the debt was
30 incurred contravenes this subsection and the company and that
31 person or, if there are 2 or more such persons, those persons are
32 jointly and severally liable for the payment of the debt.

- 1 (2) In any proceedings against a person under subsection (1), it is a
2 defence if it is proved:
- 3 (a) that the debt was incurred without the person's express or
4 implied authority or consent; or
- 5 (b) that at the time when the debt was incurred, the person did
6 not have reasonable cause to expect:
- 7 (i) that the company would not be able to pay all its debts
8 as and when they became due; or
- 9 (ii) that, if the company incurred that debt, it would not be
10 able to pay all its debts as and when they became due.
- 11 (3) Proceedings may be brought under subsection (1) for the recovery
12 of a debt whether or not the person against whom the proceedings
13 are brought, or any other person, has been convicted of an offence
14 under subsection (1) in respect of the incurring of that debt.
- 15 (4) In proceedings brought under subsection (1) for the recovery of a
16 debt, the liability of a person under that subsection in respect of the
17 debt may be established on the balance of probabilities.
- 18 (5) Where subsection (1) renders a person or persons liable to pay a
19 debt incurred by a company, the payment by that person or either
20 or any of those persons of the whole or any part of that debt does
21 not render the company liable to the person concerned in respect of
22 the amount so paid.
- 23 (6) Where:
- 24 (a) a company has done an act (including the making of a
25 contract or the entering into of a transaction) with intent to
26 defraud creditors of the company or of any other person or
27 for any other fraudulent purpose; and
- 28 (b) the company was at the time when it does the act, or becomes
29 at a later time, a company to which this section applies;
30 any person who was knowingly concerned in the doing of the act
31 with that intent or for that purpose contravenes this subsection.
- 32 (7) A certificate issued by the proper officer of an Australian court
33 stating that a person specified in the certificate:

- 1 (a) was convicted of an offence under subsection (1) in relation
2 to a debt specified in the certificate incurred by a company so
3 specified; or
4 (b) was convicted of an offence under subsection (6) in relation
5 to a company specified in the certificate;
6 is, in any proceedings, prima facie evidence of the matters stated in
7 the certificate.
- 8 (8) A document purporting to be a certificate issued under
9 subsection (7) is, unless the contrary is established, taken to be
10 such a certificate and to have been duly issued.

11 **593 Powers of Court**

- 12 (1) Where a person has been convicted of an offence under subsection
13 592(1) in respect of the incurring of a debt, the Court, on the
14 application of ASIC or the person to whom the debt is payable,
15 may, if it thinks it proper to do so, declare that the first-mentioned
16 person is personally responsible without any limitation of liability
17 for the payment to the person to whom the debt is payable of an
18 amount equal to the whole of the debt or such part of it as the
19 Court thinks proper.
- 20 (2) Where a person has been convicted of an offence under subsection
21 592(6), the Court, on the application of ASIC or of a prescribed
22 person, may, if it thinks it proper to do so, declare that the
23 first-mentioned person is personally responsible without any
24 limitation of liability for the payment to the company of the
25 amount required to satisfy so much of the debts of the company as
26 the Court thinks proper.
- 27 (3) In relation to a company in respect of which a conviction referred
28 to in subsection (2) relates:
29 (a) the appropriate officer; and
30 (b) a creditor or contributory of the company authorised by
31 ASIC to make an application under that subsection; and

- 1 (c) if the company was a company to which section 592 applied
2 by reason of paragraph 589(1)(c)—a member of the
3 company;
4 are prescribed persons for the purposes of that subsection.
- 5 (4) Where the Court makes a declaration under subsection (1) in
6 relation to a person, it may give such further directions as it thinks
7 proper for the purpose of giving effect to that declaration.
- 8 (5) In particular, the Court may order that the liability of the person
9 under the declaration is a charge:
- 10 (a) on a debt or obligation due from the company to the person;
11 or
12 (b) on a right or interest under a charge on any property of the
13 company held by or vested in the person or a person on the
14 person's behalf, or a person claiming as assignee from or
15 through the person liable or a person acting on the person's
16 behalf.
- 17 (6) The Court may, from time to time, make such further order as it
18 thinks proper for the purpose of enforcing a charge imposed under
19 subsection (5).
- 20 (7) For the purpose of subsection (5), *assignee* includes a person to
21 whom or in whose favour, by the directions of the person liable,
22 the debt, obligation or charge was created, issued or transferred or
23 the interest created, but does not include an assignee for valuable
24 consideration, not including consideration by way of marriage,
25 given in good faith and without actual knowledge of any of the
26 matters upon which the conviction or declaration was made.
- 27 (8) On the hearing of an application under subsection (1) or (2), the
28 appropriate officer or other applicant may give evidence or call
29 witnesses.

30 **594 Certain rights not affected**

31 Except as provided by subsection 592(4) nothing in subsection
32 592(1) or 593(1) or (2) affects any rights of a person to indemnity,
33 subrogation or contribution.

1 **595 Inducement to be appointed liquidator etc. of company**

2 A person must not give, or agree or offer to give, to a member or
3 creditor of a company any valuable consideration with a view to
4 securing the person's own appointment or nomination, or to
5 securing or preventing the appointment or nomination of some
6 other person, as:

- 7 (a) a liquidator or provisional liquidator of the company; or
8 (b) an administrator of the company; or
9 (c) an administrator of a deed of company arrangement
10 executed, or to be executed, by the company; or
11 (d) a receiver, or a receiver and manager, of property of the
12 company; or
13 (e) a trustee or other person to administer a compromise or
14 arrangement made between the company and any other
15 person or persons.

16 **596 Frauds by officers**

17 A person who, while an officer of a company:

- 18 (a) by false pretences or by means of any other fraud, induces a
19 person to give credit to the company or to a related body
20 corporate; or
21 (b) with intent to defraud the company or a related body
22 corporate, or members or creditors of the company or of a
23 related body corporate, makes or purports to make, or causes
24 to be made or to be purported to be made, any gift or transfer
25 of, or charge on, or causes or connives at the levying of any
26 execution against, property of the company or of a related
27 body corporate; or
28 (c) with intent to defraud the company or a related body
29 corporate, or members or creditors of the company or of a
30 related body corporate, conceals or removes any part of the
31 property of the company or of a related body corporate after,
32 or within 2 months before, the date of any unsatisfied
33 judgment or order for payment of money obtained against the
34 company or a related body corporate;

35 contravenes this section.

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Part 5.8A—Employee entitlements

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596AA Object and coverage of Part

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Object

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- (1) The object of this Part is to protect the entitlements of a company's employees from agreements and transactions that are entered into with the intention of defeating the recovery of those entitlements.

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Employee entitlements

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- (2) The *entitlements* of an employee of a company that are protected under this Part are:

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- (a) wages payable by the company for services rendered to the company by the employee; and

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- (b) superannuation contributions (that is, contributions by the company to a fund for the purposes of making provision for, or obtaining, superannuation benefits for the employee, or for dependants of the employee) payable by the company in respect of services rendered to the company by the employee; and

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- (c) amounts due in respect of injury compensation in relation to the employee; and

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- (d) amounts due under an industrial instrument in respect of the employee's leave of absence; and

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- (e) retrenchment payments for the employee (that is, amounts payable by the company to the employee, under an industrial instrument, in respect of the termination of the employee's employment by the company).

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An entitlement of an employee need not be owed to the employee. It might, for example, be an amount owed to the employee's dependants or a superannuation contribution payable to a fund in respect of services rendered by the employee.

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- 1 (3) The entitlements of an excluded employee (within the meaning of
2 section 556) are protected under this Part only to the extent to
3 which they have priority under paragraph 556(1)(e), (f), (g) or (h).

4 *Employees*

- 5 (4) For the purposes of this Part, a person is an *employee* of a company
6 if the person is, or has been, an employee of the company (whether
7 remunerated by salary, wages, commission or otherwise).
- 8 (5) If an entitlement of an employee of a company is owed to a person
9 other than the employee, this Part applies to the entitlement as if a
10 reference to the *employee* included a reference to the person to
11 whom the entitlement is owed.

12 **596AB Entering into agreements or transactions to avoid employee**
13 **entitlements**

- 14 (1) A person must not enter into a relevant agreement or a transaction
15 with the intention of, or with intentions that include the intention
16 of:
- 17 (a) preventing the recovery of the entitlements of employees of a
18 company; or
- 19 (b) significantly reducing the amount of the entitlements of
20 employees of a company that can be recovered.
- 21 (2) Subsection (1) applies even if:
- 22 (a) the company is not a party to the agreement or transaction; or
23 (b) the agreement or transaction is approved by a court.
- 24 (3) A reference in this section to a *relevant agreement or a*
25 *transaction* includes a reference to:
- 26 (a) a relevant agreement and a transaction; and
27 (b) a series or combination of:
- 28 (i) relevant agreements or transactions; or
29 (ii) relevant agreements; or
30 (iii) transactions.

- 1 (4) If a person contravenes this section by incurring a debt (within the
2 meaning of section 588G), the incurring of the debt and the
3 contravention are *linked* for the purposes of this Act.

4 **596AC Person who contravenes section 596AB liable to compensate**
5 **for loss**

- 6 (1) A person is liable to pay compensation under subsection (2) or (3)
7 if:
8 (a) the person contravenes section 596AB in relation to the
9 entitlements of employees of a company; and
10 (b) the company is being wound up; and
11 (c) the employees suffer loss or damage because of:
12 (i) the contravention; or
13 (ii) action taken to give effect to an agreement or
14 transaction involved in the contravention.

15 The person is liable whether or not the person has been convicted
16 of an offence in relation to the contravention.

- 17 (2) The company's liquidator may recover from the person an amount
18 equal to the loss or damage as a debt due to the company.

19 Note: Because employee entitlements are priority payments under
20 paragraphs 556(1)(e) to (h), employees have priority to any
21 compensation recovered by the liquidator in proceedings brought
22 under this section.

- 23 (3) If an employee of the company has suffered loss or damage
24 because of:

- 25 (a) the contravention; or
26 (b) action taken to give effect to an agreement or transaction
27 involved in the contravention;

28 the employee may, as provided in section 596AF to 596AI (but not
29 otherwise), recover from the person, as a debt due to the employee,
30 an amount equal to the amount of the loss or damage. Any amount
31 recovered by the employee under this subsection is to be taken into
32 account in working out the amount for which the employee may
33 prove in the liquidation of the company.

- 1 (4) Proceedings under this section may only be begun within 6 years
2 after the beginning of the winding up.

3 **596AD Avoiding double recovery**

4 An amount recovered in proceedings under section 596AC in
5 relation to a contravention of section 596AB is to be taken into
6 account in working out the amount (if any) recoverable in:

- 7 (a) any other proceedings under that section in relation to the
8 contravention; and
9 (b) proceedings under section 588M in relation to the incurring
10 of a debt that is linked to the contravention.

11 **596AE Effect of section 596AC**

12 Section 596AC:

- 13 (a) has effect in addition to, and not in derogation of, any rule of
14 law about the duty or liability of a person because of the
15 person's office or employment in relation to a company; and
16 (b) does not prevent proceedings from being instituted in respect
17 of a breach of such a duty or in respect of such a liability.

18 **596AF Employee may sue for compensation with liquidator's**
19 **consent**

- 20 (1) If a company is being wound up, an employee of the company
21 may, with the written consent of the company's liquidator, begin
22 proceedings under section 596AC in relation to a contravention of
23 section 596AB in relation to an entitlement of the employee.
24 (2) Subsection (1) has effect despite section 596AH, but subject to
25 section 596AI.

26 **596AG Employee may give liquidator notice of intention to sue for**
27 **compensation**

28 An employee of a company that is being wound up may give the
29 company's liquidator a written notice:

Clause 596AH

- 1 (a) stating that the employee intends to begin proceedings under
2 section 596AC in relation to a contravention of
3 section 596AB in relation to an entitlement of the employee;
4 and
5 (b) specifying the contravention of section 596AB and the
6 entitlement to which the proposed proceedings relate; and
7 (c) asking the liquidator to give the employee, within 3 months
8 after receiving the notice:
9 (i) a written consent to the employee beginning the
10 proceedings; or
11 (ii) a written statement of the reasons why the liquidator
12 thinks that proceedings under section 596AC in relation
13 to the contravention should not be begun.
14 The notice may be given only after the end of 6 months beginning
15 when the company begins to be wound up.

16 **596AH When employee may sue for compensation without**
17 **liquidator's consent**

- 18 (1) This section applies if an employee of a company gives a notice
19 under section 596AG in relation to a contravention of
20 section 569AB and to an entitlement.
21 (2) The employee may begin proceedings in a court under
22 section 596AC in relation to the contravention and the entitlement
23 if:
24 (a) as at the end of 3 months after the liquidator receives the
25 notice, he or she has not consented to the employee
26 beginning such proceedings; and
27 (b) on an application made after those 3 months, the court has
28 given leave for the proceedings to begin.
29 (3) If:
30 (a) during those 3 months, the liquidator gives to the employee a
31 written statement of the reasons why the liquidator thinks
32 that such proceedings should not be begun; and
33 (b) the employee applies for leave under paragraph (2)(b);
34 then:

- 1 (c) the employee must file the statement with the court when so
2 applying; and
3 (d) in determining the application, the court is to have regard to
4 the reasons set out in the statement.

5 **596AI Events preventing employee from suing**

- 6 (1) An employee of a company that is being wound up cannot begin
7 proceedings under section 596AC in relation to a contravention in
8 relation to an entitlement of the employee if:
9 (a) the company's liquidator has applied under section 588FF in
10 relation to a transaction that constituted, or was part of, the
11 contravention; or
12 (b) the company's liquidator has begun proceedings under
13 section 596AC in relation to the contravention; or
14 (c) the company's liquidator has begun proceedings under
15 section 588M in relation to the incurring of the debt that is
16 linked to the contravention; or
17 (d) the company's liquidator has intervened in an application for
18 a civil penalty order against a person in relation to a
19 contravention of section 588G in relation to the incurring of
20 the debt that is linked to the contravention.
- 21 (2) Subsection (1) has effect despite sections 596AF and 596AH.

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2 **Part 5.9—Miscellaneous**

3 **Division 1—Examining a person about a corporation**

4 **596A Mandatory examination**

5 The Court is to summon a person for examination about a
6 corporation's examinable affairs if:

- 7 (a) an eligible applicant applies for the summons; and
8 (b) the Court is satisfied that the person is an examinable officer
9 of the corporation or was such an officer during or after the 2
10 years ending:
11 (i) if the corporation is under administration—on the
12 section 513C day in relation to the administration; or
13 (ii) if the corporation has executed a deed of company
14 arrangement that has not yet terminated—on the
15 section 513C day in relation to the administration that
16 ended when the deed was executed; or
17 (iii) if the corporation is being, or has been, wound up—
18 when the winding up began; or
19 (iv) otherwise—when the application is made.

20 **596B Discretionary examination**

- 21 (1) The Court may summon a person for examination about a
22 corporation's examinable affairs if:
23 (a) an eligible applicant applies for the summons; and
24 (b) the Court is satisfied that the person:
25 (i) has taken part or been concerned in examinable affairs
26 of the corporation and has been, or may have been,
27 guilty of misconduct in relation to the corporation; or
28 (ii) may be able to give information about examinable
29 affairs of the corporation.
- 30 (2) This section has effect subject to section 596A.

1 **596C Affidavit in support of application under section 596B**

- 2 (1) A person who applies under section 596B must file an affidavit
3 that supports the application and complies with the rules.
- 4 (2) The affidavit is not available for inspection except so far as the
5 Court orders.

6 **596D Content of summons**

- 7 (1) A summons to a person under section 596A or 596B is to require
8 the person to attend before the Court:
9 (a) at a specified place and at a specified time on a specified day,
10 being a place, time and day that are reasonable in the
11 circumstances; and
12 (b) to be examined on oath about the corporation's examinable
13 affairs.
- 14 (2) A summons to a person under section 596A or 596B may require
15 the person to produce at the examination specified books that:
16 (a) are in the person's possession; and
17 (b) relate to the corporation or to any of its examinable affairs.
- 18 (3) A summons under section 596A is to require under subsection (2)
19 of this section the production of such of the books requested in the
20 application for the summons as the summons may so require.

21 **596E Notice of examination**

- 22 If the Court summons a person for examination, the person who
23 applied for the summons must give written notice of the
24 examination to:
25 (a) as many of the corporation's creditors as reasonably
26 practicable; and
27 (b) each eligible applicant in relation to the corporation, except:
28 (i) the person who applied for the examination; and
29 (ii) if a person authorised by ASIC applied for the
30 examination—ASIC; and

- 1 (iii) a person who is such an eligible applicant only because
2 the person is authorised by ASIC.

3 **596F Court may give directions about examination**

- 4 (1) Subject to section 597, the Court may at any time give one or more
5 of the following:
6 (a) a direction about the matters to be inquired into at an
7 examination;
8 (b) a direction about the procedure to be followed at an
9 examination;
10 (c) a direction about who may be present at an examination
11 while it is being held in private;
12 (d) a direction that a person be excluded from an examination,
13 even while it is being held in public;
14 (e) a direction about access to records of the examination;
15 (f) a direction prohibiting publication or communication of
16 information about the examination (including questions
17 asked, and answers given, at the examination);
18 (g) a direction that a document that relates to the examination
19 and was created at the examination be destroyed.
- 20 (2) The Court may give a direction under paragraph (1)(e), (f) or (g) in
21 relation to all or part of an examination even if the examination, or
22 that part, was held in public.
- 23 (3) A person must not contravene a direction under subsection (1).

24 **597 Conduct of examination**

- 25 (4) An examination is to be held in public except to such extent (if
26 any) as the Court considers that, by reason of special
27 circumstances, it is desirable to hold the examination in private.
- 28 (5A) Any of the following may take part in an examination:
29 (a) ASIC;

- 1 (b) any other eligible applicant in relation to the corporation;
2 and for that purpose may be represented by a lawyer or by an agent
3 authorised in writing for the purpose.
- 4 (5B) The Court may put, or allow to be put, to a person being examined
5 such questions about the corporation or any of its examinable
6 affairs as the Court thinks appropriate.
- 7 (6) A person who is summoned under section 596A or 596B to attend
8 before the Court must not, without reasonable excuse:
9 (a) fail to attend as required by the summons; or
10 (b) fail to attend from day to day until the conclusion of the
11 examination.
- 12 (7) A person who attends before the Court for examination must not:
13 (a) without reasonable excuse, refuse or fail to take an oath or
14 make an affirmation; or
15 (b) without reasonable excuse, refuse or fail to answer a question
16 that the Court directs him or her to answer; or
17 (c) make a statement that is false or misleading in a material
18 particular; or
19 (d) without reasonable excuse, refuse or fail to produce books
20 that the summons requires him or her to produce.
- 21 (9) The Court may direct a person to produce, at an examination of
22 that or any other person, books that are in the first-mentioned
23 person's possession and are relevant to matters to which the
24 examination relates or will relate.
- 25 (9A) A person may comply with a direction under subsection (9) by
26 causing the books to be produced at the examination.
- 27 (10) Where the Court so directs a person to produce any books and the
28 person has a lien on the books, the production of the books does
29 not prejudice the lien.
- 30 (10A) A person must not, without reasonable excuse, refuse or fail to
31 comply with a direction under subsection (9).

- 1 (12) A person is not excused from answering a question put to the
2 person at an examination on the ground that the answer might tend
3 to incriminate the person or make the person liable to a penalty.
- 4 (12A) Where:
- 5 (a) before answering a question put to a person (other than a
6 body corporate) at an examination, the person claims that the
7 answer might tend to incriminate the person or make the
8 person liable to a penalty; and
- 9 (b) the answer might in fact tend to incriminate the person or
10 make the person so liable;
- 11 the answer is not admissible in evidence against the person in:
- 12 (c) a criminal proceeding; or
13 (d) a proceeding for the imposition of a penalty;
- 14 other than a proceeding under this section, or any other proceeding
15 in respect of the falsity of the answer.
- 16 (13) The Court may order the questions put to a person and the answers
17 given by him or her at an examination to be recorded in writing
18 and may require him or her to sign that written record.
- 19 (14) Subject to subsection (12A), any written record of an examination
20 so signed by a person, or any transcript of an examination of a
21 person that is authenticated as provided by the rules, may be used
22 in evidence in any legal proceedings against the person.
- 23 (14A) A written record made under subsection (13):
- 24 (a) is to be open for inspection, without fee, by:
- 25 (i) the person who applied for the examination; or
26 (ii) an officer of the corporation; or
27 (iii) a creditor of the corporation; and
- 28 (b) is to be open for inspection by anyone else on paying the
29 prescribed fee.
- 30 (15) An examination under this Division may, if the Court so directs
31 and subject to the rules, be held before such other court as is
32 specified by the Court and the powers of the Court under this
33 Division may be exercised by that other court.

- 1 (16) A person ordered to attend before the Court or another court for
2 examination under this Division may, at his or her own expense,
3 employ a solicitor, or a solicitor and counsel, and the solicitor or
4 counsel, as the case may be, may put to the person such questions
5 as the Court, or the other court, as the case may be, considers just
6 for the purpose of enabling the person to explain or qualify any
7 answers or evidence given by the person.
- 8 (17) The Court or another court before which an examination under this
9 Division takes place may, if it thinks fit, adjourn the examination
10 from time to time.

11 **597A When Court is to require affidavit about corporation's**
12 **examinable affairs**

- 13 (1) The Court is to require a person to file an affidavit about a
14 corporation's examinable affairs if:
15 (a) an eligible applicant applies for the requirement to be made;
16 and
17 (b) the Court is satisfied that the person is an examinable officer
18 of the corporation or was such an officer during or after the 2
19 years ending:
20 (i) if the corporation is under administration—on the
21 section 513C day in relation to the administration; or
22 (ii) if the corporation has executed a deed of company
23 arrangement that has not yet terminated—on the
24 section 513C day in relation to the administration that
25 ended when the deed was executed; or
26 (iii) if the corporation is being, or has been, wound up—
27 when the winding up began; or
28 (iv) otherwise—when the application is made;
29 even if the person has been summoned under section 596A or
30 596B for examination about those affairs.
- 31 (2) The requirement is to:
32 (a) specify such of the information requested in the application
33 as relates to examinable affairs of the corporation; and
34 (b) require the affidavit to set out the specified information; and

- 1 (c) require the affidavit to be filed on or before a specified day
2 that is reasonable in the circumstances.
- 3 (3) A person must not, without reasonable excuse, refuse or fail to
4 comply with a requirement made of the person under
5 subsection (1).
- 6 (4) The Court may excuse a person from answering a question at an
7 examination about a corporation's examinable affairs if the person
8 has already filed an affidavit under this section about that
9 corporation's examinable affairs that sets out information that
10 answers the question.

11 **597B Costs of unnecessary examination or affidavit**

- 12 Where the Court is satisfied that a summons to a person under
13 section 596A or 596B, or a requirement made of a person under
14 section 597A, was obtained without reasonable cause, the Court
15 may order some or all of the costs incurred by the person because
16 of the summons or requirement to be paid by:
- 17 (a) in any case—the applicant for the summons or requirement;
18 or
- 19 (b) in the case of a summons—any person who took part in the
20 examination.

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2 **Division 2—Orders against a person in relation to a**
3 **corporation**

4 **598 Order against person concerned with corporation**

5 (2) Subject to subsection (3), where, on application by an eligible
6 applicant, the Court is satisfied that:

- 7 (a) a person is guilty of fraud, negligence, default, breach of trust
8 or breach of duty in relation to a corporation; and
9 (b) the corporation has suffered, or is likely to suffer, loss or
10 damage as a result of the fraud, negligence, default, breach of
11 trust or breach of duty;

12 the Court may make such order or orders as it thinks appropriate
13 against or in relation to the person (including either or both of the
14 orders specified in subsection (4)) and may so make an order
15 against or in relation to a person even though the person may have
16 committed an offence in respect of the matter to which the order
17 relates.

18 (3) The Court must not make an order against a person under
19 subsection (2) unless the Court has given the person the
20 opportunity:

- 21 (a) to give evidence; and
22 (b) to call witnesses to give evidence; and
23 (c) to bring other evidence in relation to the matters to which the
24 application relates; and
25 (d) to employ, at the person's own expense, a solicitor, or a
26 solicitor and counsel, to put to the person, or to any other
27 witness, such questions as the Court considers just for the
28 purpose of enabling the person to explain or qualify any
29 answers or evidence given by the person.

30 (4) The orders that may be made under subsection (2) against a person
31 include:

- 32 (a) an order directing the person to pay money or transfer
33 property to the corporation; and

- 1 (b) an order directing the person to pay to the corporation the
2 amount of the loss or damage.
- 3 (5) Nothing in this section prevents any person from instituting any
4 other proceedings in relation to matters in respect of which an
5 application may be made under this section.

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Division 3—Provisions applying to various kinds of external administration

600A Powers of Court where outcome of voting at creditors’ meeting determined by related entity

- (1) Subsection (2) applies where, on the application of a creditor of a company or Part 5.1 body, the Court is satisfied:
 - (a) that a proposed resolution has been voted on at:
 - (i) in the case of a company—a meeting of creditors of the company held:
 - (A) under Part 5.3A or a deed of company arrangement executed by the company; or
 - (B) in connection with winding up the company; or
 - (ii) in the case of a Part 5.1 body—a meeting of creditors, or of a class of creditors, of the body held under Part 5.1; and
 - (b) that, if the vote or votes that a particular related creditor, or particular related creditors, of the company or body cast on the proposed resolution had been disregarded for the purposes of determining whether or not the proposed resolution was passed, the proposed resolution:
 - (i) if it was in fact passed—would not have been passed; or
 - (ii) if in fact it was not passed—would have been passed; or the question would have had to be decided on a casting vote; and
 - (c) that the passing of the proposed resolution, or the failure to pass it, as the case requires:
 - (i) is contrary to the interests of the creditors as a whole or of that class of creditors as a whole, as the case may be; or
 - (ii) has prejudiced, or is reasonably likely to prejudice, the interests of the creditors who voted against the proposed resolution, or for it, as the case may be, to an extent that is unreasonable having regard to:

- 1 (A) the benefits resulting to the related creditor, or
2 to some or all of the related creditors, from the
3 resolution, or from the failure to pass the
4 proposed resolution, as the case may be; and
5 (B) the nature of the relationship between the
6 related creditor and the company or body, or of
7 the respective relationships between the related
8 creditors and the company or body; and
9 (C) any other relevant matter.
- 10 (2) The Court may make one or more of the following:
- 11 (a) if the proposed resolution was passed—an order setting aside
12 the resolution;
- 13 (b) an order that the proposed resolution be considered and voted
14 on at a meeting of the creditors of the company or body, or of
15 that class of creditors, as the case may be, convened and held
16 as specified in the order;
- 17 (c) an order directing that the related creditor is not, or such of
18 the related creditors as the order specifies are not, entitled to
19 vote on:
- 20 (i) the proposed resolution; or
21 (ii) a resolution to amend or vary the proposed resolution;
- 22 (d) such other orders as the Court thinks necessary.
- 23 (3) In this section:
- 24 *related creditor*, in relation to a company or Part 5.1 body, in
25 relation to a vote, means a person who, when the vote was cast,
26 was a related entity, and a creditor, of the company or body.

27 **600B Review by Court of resolution of creditors passed on casting**
28 **vote of person presiding at meeting**

- 29 (1) This section applies if, because the person presiding at the meeting
30 exercises a casting vote, a resolution is passed at a meeting of
31 creditors of a company held:
- 32 (a) under Part 5.3A or a deed of company arrangement executed
33 by the company; or

- 1 (b) in connection with winding up the company.
- 2 (2) A person may apply to the Court for an order setting aside or
3 varying the resolution, but only if:
- 4 (a) the person voted against the resolution in some capacity
5 (even if the person voted for the resolution in another
6 capacity); or
- 7 (b) a person voted against the resolution on the first-mentioned
8 person's behalf.
- 9 (3) On an application, the Court may:
- 10 (a) by order set aside or vary the resolution; and
11 (b) if it does so—make such further orders, and give such
12 directions, as it thinks necessary.
- 13 (4) On and after the making of an order varying the resolution, the
14 resolution has effect as varied by the order.

15 **600C Court's powers where proposed resolution of creditors lost as**
16 **casting vote of person presiding at meeting**

- 17 (1) This section applies if, because the person presiding at the meeting
18 exercises a casting vote, or refuses or fails to exercise such a vote,
19 a proposed resolution is not passed at a meeting of creditors of a
20 company held:
- 21 (a) under Part 5.3A or a deed of company arrangement executed
22 by the company; or
- 23 (b) in connection with winding up the company.
- 24 (2) A person may apply to the Court for an order under subsection (3),
25 but only if:
- 26 (a) the person voted for the proposed resolution in some capacity
27 (even if the person voted against the proposed resolution in
28 another capacity); or
- 29 (b) a person voted for the proposed resolution on the
30 first-mentioned person's behalf.
- 31 (3) On an application, the Court may:

- 1 (a) order that the proposed resolution is taken to have been
2 passed at the meeting; and
3 (b) if it does so—make such further orders, and give such
4 directions, as it thinks necessary.
- 5 (4) If an order is made under paragraph (3)(a), the proposed resolution:
6 (a) is taken for all purposes (other than those of subsection (1))
7 to have been passed at the meeting; and
8 (b) is taken to have taken effect:
9 (i) if the order specifies a time when the proposed
10 resolution is taken to have taken effect—at that time,
11 even if it is earlier than the making of the order; or
12 (ii) otherwise—on the making of the order.

13 **600D Interim order on application under section 600A, 600B or**
14 **600C**

- 15 (1) Where:
16 (a) an application under subsection 600A(1), 600B(2) or
17 600C(2) has not yet been determined; and
18 (b) the Court is of the opinion that it is desirable to do so;
19 the Court may make such interim orders as it thinks appropriate.
- 20 (2) An interim order must be expressed to apply until the application is
21 determined, but may be varied or discharged.

22 **600E Order under section 600A or 600B does not affect act already**
23 **done pursuant to resolution**

24 An act done pursuant to a resolution as in force before the making
25 under section 600A or 600B of an order setting aside or varying the
26 resolution is as valid and binding on and after the making of the
27 order as if the order had not been made.

28 **600F Limitation on right of suppliers of essential services to insist on**
29 **payment as condition of supply**

- 30 (1) If:

- 1 (a) a relevant authority of an eligible company requests, or
2 authorises someone else to request, a person or authority (*the*
3 *supplier*) to supply an essential service to the company in
4 Australia; and
5 (b) the company owes an amount to the supplier in respect of the
6 supply of the essential service before the effective day;
7 the supplier must not:
8 (c) refuse to comply with the request for the reason only that the
9 amount is owing; or
10 (d) make it a condition of the supply of the essential service
11 pursuant to the request that the amount is to be paid.

12 (2) In this section:

13 *effective day*, in relation to a relevant authority of an eligible
14 company, means the day when the relevant authority became a
15 relevant authority of the company, even if that day began before
16 this Act commenced.

17 *eligible company* means a company:

- 18 (a) that is being wound up; or
19 (b) a provisional liquidator of which is acting; or
20 (c) that is under administration; or
21 (d) that has executed a deed of company arrangement that has
22 not yet terminated; or
23 (e) a receiver, or receiver and manager, of property of which is
24 acting.

25 *essential service* means:

- 26 (a) electricity; or
27 (b) gas; or
28 (c) water; or
29 (d) a carriage service (within the meaning of the
30 *Telecommunications Act 1997*).

31 *relevant authority*, in relation to an eligible company, means:

- 32 (a) the liquidator; or
33 (b) the provisional liquidator; or

- 1 (c) the administrator of the company; or
- 2 (d) the administrator of the deed of company arrangement; or
- 3 (e) the receiver, or receiver and manager;
- 4 as the case requires.

1
2 **Chapter 5A—Deregistration, and transfer of**
3 **registration, of companies**

4 **Part 5A.1—Deregistration**
5

6 **601AA Deregistration—voluntary**

7 *Who may apply for deregistration*

8 (1) An application to deregister a company may be lodged with ASIC
9 by:

- 10 (a) the company; or
11 (b) a director or member of the company; or
12 (c) a liquidator of the company.

13 If the company lodges the application, it must nominate a person to
14 be given notice of the deregistration.

15 *Circumstances in which application can be made*

- 16 (2) A person may apply only if:
17 (a) all the members of the company agree to the deregistration;
18 and
19 (b) the company is not carrying on business; and
20 (c) the company's assets are worth less than \$1,000; and
21 (d) the company has paid all fees and penalties payable under
22 this Act; and
23 (e) the company has no outstanding liabilities; and
24 (f) the company is not a party to any legal proceedings.

25 *ASIC may ask for information about officers*

- 26 (3) The applicant must give ASIC any information that ASIC requests
27 about the current and former officers of the company.

1 *Deregistration procedure*

2 (4) If ASIC is not aware of any failure to comply with subsections (1)
3 to (3), it must give notice of the proposed deregistration:

- 4 (a) on ASIC database; and
5 (b) in the *Gazette*.

6 When 2 months have passed since the *Gazette* notice, ASIC may
7 deregister the company.

8 (5) ASIC must give notice of the deregistration to:

- 9 (a) the applicant; or
10 (b) the person nominated in the application to be given the
11 notice.

12 **601AB Deregistration—ASIC initiated**

13 *Circumstances in which the ASIC may deregister*

14 (1) ASIC may decide to deregister a company if:

- 15 (a) the company's annual return is at least 6 months late; and
16 (b) the company has not lodged any other documents under this
17 Act in the last 18 months; and
18 (c) ASIC has no reason to believe that the company is carrying
19 on business.

20 (2) ASIC may also decide to deregister a company if the company is
21 being wound up and ASIC has reason to believe that:

- 22 (a) the liquidator is no longer acting; or
23 (b) the company's affairs have been fully wound up and a return
24 that the liquidator should have lodged is at least 6 months
25 late; or
26 (c) the company's affairs have been fully wound up under
27 Part 5.4 and the company has no property or not enough
28 property to cover the costs of obtaining a Court order for the
29 company's deregistration.

1 *Deregistration procedure*

- 2 (3) If ASIC decides to deregister a company under this section, it must
3 give notice of the proposed deregistration:
4 (a) to the company; and
5 (b) to the company's liquidator (if any); and
6 (c) to the company's directors; and
7 (d) on ASIC database; and
8 (e) in the *Gazette*.
9 When 2 months have passed since the *Gazette* notice, ASIC may
10 deregister the company.
- 11 (4) ASIC does not have to give a person notice under subsection (3) if
12 ASIC does not have the necessary information about the person's
13 identity or address.
- 14 (5) ASIC must give notice of the deregistration to everyone who was
15 notified of the proposed deregistration under paragraph (3)(b) or
16 (c).

17 **601AC Deregistration—following amalgamation or winding up**

- 18 (1) ASIC must deregister a company if the Court orders the
19 deregistration of the company under:
20 (a) paragraph 413(1)(d) (reconstruction and amalgamation of
21 Part 5.1 bodies); or
22 (b) paragraph 481(5)(b) (release of liquidator); or
23 (c) subsection 509(6) (liquidator's return following winding up).
- 24 (2) ASIC must deregister a company if:
25 (a) 3 months have passed since the company's liquidator lodged
26 a return under section 509; and
27 (b) no order under subsection 509(6) has been made during that
28 period.

1 **601AD Effect of deregistration**

2 *Company ceases to exist*

- 3 (1) A company ceases to exist on deregistration.

4 Note: Despite the deregistration, officers of the company may still be liable
5 for things done before the company was deregistered.

6 *Company's property vests in ASIC*

- 7 (2) On deregistration, all the company's property vests in ASIC. If
8 company property is vested in a liquidator immediately before
9 deregistration, that property vests in ASIC. This subsection extends
10 to property situated outside this jurisdiction.

- 11 (3) Under subsection (2), ASIC takes only the same property rights
12 that the company itself held. If the company held particular
13 property subject to a security or other interest or claim, ASIC takes
14 the property subject to that interest or claim.

15 Note: See also subsection 601AE(3)—which deals with liabilities that a law
16 imposes on the property (particularly liabilities such as rates, taxes
17 and other charges).

- 18 (4) ASIC has all the powers of an owner over property vested in it
19 under subsection (2).

20 Note: Section 601AF confers additional powers on ASIC to fulfil
21 outstanding obligations of the deregistered company.

22 *Company books to be kept by former directors*

- 23 (5) The directors of the company immediately before deregistration
24 must keep the company's books for 3 years after the deregistration.
25 This does not apply to books that a liquidator has to keep under
26 subsection 542(2).

27 **601AE What ASIC does with the property**

- 28 (1) If property vested in ASIC under subsection 601AD(2) was held by
29 the company on trust, ASIC may:
30 (a) continue to act as trustee; or
31 (b) apply to a court for the appointment of a new trustee.

Clause 601AE

1 Note: Under paragraph (a), ASIC may be able to transfer the property to a
2 new trustee chosen in accordance with the trust instrument.

- 3 (2) If the company did not hold the property on trust, ASIC may:
4 (a) dispose of or deal with the property as it sees fit; and
5 (b) apply any money it receives to:
6 (i) defray expenses incurred by ASIC in exercising its
7 powers in relation to the company under this Chapter;
8 and
9 (ii) make payments authorised by subsection (3).
10 ASIC must deal with the rest (if any) under Part 9.7.

11 *Obligations attaching to property*

- 12 (3) The property remains subject to all liabilities imposed on the
13 property under a law and does not have the benefit of any
14 exemption that the property might otherwise have because it is
15 vested in ASIC. These liabilities include a liability that:
16 (a) is a charge or claim on the property; and
17 (b) arises under a law that imposes rates, taxes or other charges.
- 18 (4) ASIC's obligation under subsection (3) is limited to satisfying the
19 liabilities out of the company's property to the extent that the
20 property is properly available to satisfy those liabilities.

21 *Accounts*

- 22 (5) ASIC must keep:
23 (a) a record of property that it knows is vested in it under this
24 Chapter; and
25 (b) a record of its dealings with that property; and
26 (c) accounts of all money received from those dealings; and
27 (d) all accounts, vouchers, receipts and papers relating to the
28 property and that money.

1 **601AF ASIC's power to fulfil outstanding obligations of**
2 **deregistered company**

3 ASIC may do an act on behalf of the company or its liquidator if
4 ASIC is satisfied that the company or liquidator would be bound to
5 do the act if the company still existed.

6 Note: This power is a general one and is not limited to acts in relation to
7 property vested in ASIC under subsection 601AD(2). ASIC has all the
8 powers that automatically flow from the vesting of property in ASIC
9 under that subsection (see subsection 601AD(4)) and may exercise
10 *those* powers whether or not the company was bound to do so.

11 **601AG Claims against insurers of deregistered company**

12 A person may recover from the insurer of a company that is
13 deregistered an amount that was payable to the company under the
14 insurance contract if:

- 15 (a) the company had a liability to the person; and
16 (b) the insurance contract covered that liability immediately
17 before deregistration.

18 **601AH Reinstatement**

19 *Reinstatement by ASIC*

- 20 (1) ASIC may reinstate the registration of a company if ASIC is
21 satisfied that the company should not have been deregistered.

22 *Reinstatement by Court*

- 23 (2) The Court may make an order that ASIC reinstate the registration
24 of a company if:
25 (a) an application for reinstatement is made to the Court by:
26 (i) a person aggrieved by the deregistration; or
27 (ii) a former liquidator of the company; and
28 (b) the Court is satisfied that it is just that the company's
29 registration be reinstated.
- 30 (3) If the Court makes an order under subsection (2), it may:

- 1 (a) validate anything done between the deregistration of the
2 company and its reinstatement; and
3 (b) make any other order it considers appropriate.

4 Note: For example, the Court may direct ASIC to transfer to another person
5 property vested in ASIC under subsection 601AD(2).

6 *ASIC to give notice of reinstatement*

- 7 (4) ASIC must give notice of a reinstatement in the *Gazette*. If ASIC
8 exercises its power under subsection (1) in response to an
9 application by a person, ASIC must also give notice of the
10 reinstatement to the applicant.

11 *Effect of reinstatement*

- 12 (5) If a company is reinstated, the company is taken to have continued
13 in existence as if it had not been deregistered. A person who was a
14 director of the company immediately before deregistration
15 becomes a director again as from the time when ASIC or the Court
16 reinstates the company. Any property of the company that is still
17 vested in ASIC reverts in the company. If the company held
18 particular property subject to a security or other interest or claim,
19 the company takes the property subject to that interest or claim.

1
2 **Part 5A.2—Transfer of registration**
3

4 **601AI Transferring registration**

5 A company may transfer its registration to registration under a law
6 of a State or Territory by:

- 7 (a) passing a special resolution resolving to transfer its
8 registration to registration under that law; and
9 (b) complying with sections 601AJ and 601AK.

10 The company may transfer its registration only if the State or
11 Territory is the one in which it is taken to be registered.

12 Note 1: Section 119A tells you which State or Territory the company is taken
13 to be registered in.

14 Note 2: In order to be registered under the State or Territory law, the company
15 may need to amend its constitution, or adopt a new one, and the
16 provisions of this Act (including the class rights provisions in
17 Part 2F.2) will apply to the amendment or adoption.

18 **601AJ Applying to transfer registration**

- 19 (1) To transfer its registration, a company must lodge an application
20 with ASIC together with:
21 (a) a copy of the special resolution that resolves to change the
22 company's registration to a registration under the law of the
23 State or Territory; and
24 (b) a statement signed by the directors of the company that in
25 their opinion the company's creditors are not likely to be
26 materially prejudiced by the change and sets out their reasons
27 for that opinion.
28 (2) The application must be in the prescribed form.

29 **601AK ASIC makes transfer of registration declaration**

30 ASIC may make a transfer of registration declaration in relation to
31 the company under this section if ASIC is satisfied that:

- 32 (a) the application complies with section 601AJ; and

- 1 (b) the company's creditors are not likely to be materially
2 prejudiced by the transfer of the company's registration; and
3 (c) the law of the State or Territory concerned adequately
4 provides for:
5 (i) the continuation of the company's legal personality after
6 the transfer; and
7 (ii) the preservation of any rights or claims against the
8 company (other than the right of a member as a
9 member) that accrued while the company was registered
10 under this Act.

11 **601AL ASIC to deregister company**

- 12 (1) ASIC must deregister the company if:
13 (a) ASIC makes a transfer of registration declaration in relation
14 to the company; and
15 (b) the company is registered under the law of the State or
16 Territory.

17 Note: Despite the deregistration, officers of the company may still be liable
18 for things done before the company was deregistered.

- 19 (2) Sections 601AD, 601AE, 601AF and 601AG do not apply to the
20 deregistration of a company under this section.

1
2 **Chapter 5B—Bodies corporate registered as**
3 **companies, and registrable bodies**

4 **Part 5B.1—Registering a body corporate as a**
5 **company**

6 **Division 1—Registration**

7 **601BA Bodies corporate may be registered as certain types of**
8 **companies**

9 (1) A body corporate that is not a company or corporation sole may be
10 registered under this Act as a company of one of the following
11 types:

- 12 (a) a proprietary company limited by shares;
13 (b) an unlimited proprietary company with share capital;
14 (c) a public company limited by shares;
15 (d) a company limited by guarantee;
16 (e) an unlimited public company with share capital;
17 (f) a no liability company.

18 (2) A body corporate may be registered as a no liability company only
19 if:

- 20 (a) the body has a share capital; and
21 (b) the body's constitution states that its sole objects are mining
22 purposes; and
23 (c) under the constitution the body has no contractual right to
24 recover calls made on its shares from a member who fails to
25 pay them.

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

27 **601BB Bodies registered as proprietary companies**

28 (1) The body must have no more than 50 non-employee shareholders if
29 it is to be registered as a proprietary company under this Part.

- 1 (2) In applying subsection (1):
2 (a) count joint holders of a particular parcel of shares as
3 1 person; and
4 (b) an employee shareholder is:
5 (i) a shareholder who is an employee of the body or of a
6 subsidiary of the body; or
7 (ii) a shareholder who was an employee of the body, or of a
8 subsidiary of the body, when they became a
9 shareholder.

10 **601BC Applying for registration under this Part**

- 11 (1) To register the body as a company under this Part, a person must
12 lodge an application with ASIC.

13 Note 1: For the types of companies that can be registered under this Part, see
14 section 601BA.

15 Note 2: A name may be reserved for a company to be registered under this
16 Part before the application is lodged (see Part 2B.6).

- 17 (2) The application must state the following:
18 (a) the type of company that the body is proposed to be
19 registered as under this Act;
20 (b) the name of the body;
21 (c) if the body is a registered body—its ARBN;
22 (d) the proposed name under which the body is to be registered
23 (unless the ACN is to be used);
24 (e) the name and address of each member of the body;
25 (f) the present given and family name, all former given and
26 family names and the date and place of birth of each person
27 who consents in writing to become a director;
28 (g) the present given and family name, all former given and
29 family names and the date and place of birth of each person
30 who consents in writing to become a company secretary;
31 (h) the address of each person who consents in writing to
32 become a director or company secretary;
33 (i) the address of the body's proposed registered office;

- 1 (j) for a body proposed to be registered as a public company—
2 the proposed opening hours of its registered office (if they
3 are not the standard opening hours);
- 4 (k) the address of the body’s proposed principal place of
5 business (if it is not the address of the proposed registered
6 office);
- 7 (l) for a body proposed to be registered as a company limited by
8 shares or an unlimited company—the following:
- 9 (i) the number and class of shares each member already
10 holds or has agreed, in writing, to take up;
- 11 (ii) the amount each member has already paid or agreed, in
12 writing, to pay for each share;
- 13 (iii) the amount unpaid on each share;
- 14 (m) for a body proposed to be registered as a public company, if
15 shares have been issued for non-cash consideration—the
16 prescribed particulars about the issue of the shares, unless the
17 shares were issued under a written contract and a copy of the
18 contract is lodged with the application;
- 19 (n) for a body proposed to be registered as a company limited by
20 guarantee—the amount of the guarantee that each member
21 has agreed to in writing;
- 22 (o) the State or Territory in this jurisdiction in which the
23 company is to be taken to be registered.
- 24 Note 1: Paragraph (h)—the address that must be stated is usually the
25 residential address, although an alternative address can sometimes be
26 stated instead (see section 205D).
- 27 Note 2: Paragraph (i)—if the body when it is registered under this Part is not
28 to be the occupier of premises at the address of its registered office,
29 the application must state that the occupier has consented to the
30 address being specified in the application and has not withdrawn that
31 consent (see section 100).
- 32 (3) If the body is proposed to be registered as a public company, the
33 application must be accompanied by a copy of each document
34 (including an agreement or consent) or resolution that is necessary
35 to ascertain the rights attached to issued or unissued shares of the
36 body.
- 37 (4) The application must be in the prescribed form.

1 (5) An applicant must have the consents and agreements referred to in
2 subsection (2) when the application is lodged. After the body is
3 registered as a company, the applicant must give the consents and
4 agreements to the company. The company must keep the consents
5 and agreements.

6 (6) The following documents must be lodged with the application:
7 (a) a certified copy of a current certificate of the body's
8 incorporation in its place of origin, or of a document that has
9 a similar effect;
10 (b) a certified printed copy of the body's constitution (if any);
11 (c) for a body that is not a registered body—the documents
12 required by subsection 263(3) in relation to existing charges
13 on the property of the body;
14 (d) any other documents that are prescribed;
15 (e) any other documents that ASIC requires by written notice
16 given to the body.

17 A document need not be lodged if ASIC already has the document
18 and agrees not to require its lodgment.

19 Note: Subsection 263(3) requires documents relating to charges on the
20 property of the body to be lodged with the application.

21 (7) The application must be accompanied by evidence that:
22 (a) the body is not an externally-administered body corporate;
23 and
24 (b) no application to wind up the body has been made to a court
25 (in Australia or elsewhere) that has not been dealt with; and
26 (c) no application to approve a compromise or arrangement
27 between the body and another person has been made to a
28 court (in Australia or elsewhere) that has not been dealt with.

29 (8) The application must be accompanied by evidence that under the
30 law of the body's place of origin:
31 (a) the body's type is the same or substantially the same as the
32 proposed type specified in the application; and
33 (b) if the members of the body have limited liability—the body's
34 constitution defines how and to what extent that liability is
35 limited; and

- 1 (d) the transfer of the body's incorporation is authorised; and
2 (e) the body has complied with the requirements (if any) of that
3 law for the transfer of its incorporation; and
4 (f) if those requirements do not include consent to the transfer
5 by the members of the body—the members:
6 (i) have consented to the transfer by a resolution that has
7 been passed at a meeting by at least 75% of the votes
8 cast by members entitled to vote on the resolution; and
9 (ii) were given at least 21 days notice of the meeting and
10 the proposed resolution.

- 11 (9) The evidence lodged in accordance with subsections (7) and (8)
12 must be satisfactory proof to ASIC of the matters referred to in
13 those subsections.

14 Note: Section 1304 requires documents that are not in English to be
15 translated into English.

16 **601BD ASIC gives body ACN, registers as company and issues**
17 **certificate**

18 *Registration*

- 19 (1) If an application is lodged under section 601BC, ASIC may:
20 (a) give the body an ACN; and
21 (b) register the body as a company of the proposed type specified
22 in the application; and
23 (c) issue a certificate that states:
24 (i) the company's name; and
25 (ii) the company's ACN; and
26 (iii) the company's type; and
27 (iv) that the company is registered as a company under this
28 Act; and
29 (v) the State or Territory in which the company is taken to
30 be registered; and
31 (vi) the date of registration.

32 Note: For the evidentiary value of a certificate of registration, see subsection
33 1274(7A).

1 *ASIC must keep record of registration*

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

5 **601BE Registered office**

6 The address specified in the application as the body's proposed
7 registered office becomes the address of its registered office as a
8 company on registration.

9 **601BF Name**

10 A company registered under this Part has a name on registration
11 that is:

- 12 (a) an available name; or
13 (b) the expression "Australian Company Number" followed by
14 the company's ACN.

15 The name must also include the words required by subsection
16 148(2) or 148(3).

17 **601BG Constitution**

18 (1) The constitution on registration (if any) of a company registered
19 under this Part is the constitution lodged with the application.

20 (2) If any text in a constitution lodged with the application is not in
21 English, the English translation of that text lodged with the
22 application for registration is taken to be the relevant text in the
23 constitution on registration.

24 **601BH Modifications of constitution**

25 (1) A company registered under this Part must modify its constitution
26 within 3 months after registration to give effect to this Part.

27 (2) If the constitution specifies amounts of money expressed in foreign
28 currency, the company must:

- 29 (a) fix a single rate of conversion by resolution; and

- 1 (b) modify its constitution by special resolution to convert those
2 amounts into Australian currency using that rate.
3 The modification must be made within 3 months after registration.
- 4 (3) An amendment of a company's constitution under this section does
5 not affect the number and class of shares held by each member.

6 **601BJ ASIC may direct company to apply for Court approval for**
7 **modifications of constitution**

- 8 (1) ASIC may give the company a written direction to apply to the
9 Court within a specified period for an order approving the modified
10 constitution.
- 11 (2) The Court may make an order:
12 (a) declaring that the company has complied with
13 section 601BH; or
14 (b) declaring that the company will comply with section 601BH
15 if it makes further modifications of its constitution as
16 specified in the order.
- 17 (3) The company must lodge a copy of the order with ASIC within 14
18 days after the order is made.

19 **601BK Establishing registers and minute books**

- 20 (1) A company registered under this Part must, within 14 days after
21 registration:
22 (a) set up the registers required by sections 168 and 271; and
23 (b) include in those registers the information that is required to
24 be included in those registers and that is available to the
25 company on registration; and
26 (c) set up the minute books required by section 251A.
- 27 (2) During the 14 days the company need not comply with a person's
28 request to inspect or obtain a copy of:
29 (a) information in a register; or
30 (b) a minute of a general meeting.

1 However, the period within which the company must comply with
2 the request begins at the end of the 14 days.

3 **601BL Registration of registered bodies**

4 (1) If a registered body becomes registered as a company under this
5 Part, it ceases to be a registered body. ASIC must remove the
6 body's name from the appropriate register kept for the purposes of
7 Division 1 or 2 of Part 5B.2.

8 (2) ASIC may keep any of the documents relating to the company that
9 were lodged because the company used to be a registered body.

1

2 **Division 2—Operation of this Act**

3 **601BM Effect of registration under this Part**

- 4 (1) Registration under this Part does not:
- 5 (a) create a new legal entity; or
- 6 (b) affect the body's existing property, rights or obligations
7 (except as against the members of the body in their capacity
8 as members); or
- 9 (c) render defective any legal proceedings by or against the body
10 or its members.
- 11 (2) This Part and sections 263, 266 and 276 set out special provisions
12 for companies registered under this Part.

13 **601BN Liability of members on winding up**

14 A person who stopped being a member of the body before it was
15 registered as a company under this Part is to be treated as a past
16 member of the company in applying Division 2 of Part 5.6 to a
17 winding up of the company. However, the person's liability to
18 contribute to the company's property is further limited by this
19 section to an amount sufficient for the following:

- 20 (a) payment of debts and liabilities contracted by the company
21 before the day on which the company was registered under
22 this Part;
- 23 (b) payment of the costs, charges and expenses of winding up the
24 company, so far as those costs, charges and expenses relate to
25 those debts and liabilities;
- 26 (c) the adjustment of the rights between the contributories, so far
27 as the adjustment relates to those debts and liabilities.

28 **601BP Bearer shares**

- 29 (1) A bearer of a bearer share in a company registered under this Part
30 may surrender the share to the company. The company must:
- 31 (a) cancel the share; and

- 1 (b) include the bearer's name in the company's register of
2 members.
- 3 (2) The company is liable to compensate anyone who suffers a loss
4 because the company includes the bearer's name in the company's
5 register of members despite the fact that:
6 (a) the share was not surrendered to the company; or
7 (b) the company failed to cancel the share.
- 8 (3) Subject to this section, the constitution of a company registered
9 under this Part may provide that the bearer of a bearer share in the
10 company is taken to be a member of the company for all purposes
11 or for specified purposes.
- 12 Note: A body must not issue bearer shares after it is registered as a company
13 under this Part (see paragraph 254F(a)).

14 **601BQ References in pre-registration contracts and other**
15 **documents to par value in existing contracts and**
16 **documents**

- 17 (1) This section applies in relation to a company registered under this
18 Part for the purpose of interpreting and applying after registration:
19 (a) a contract entered into before the registration; or
20 (b) a trust deed or other document executed before the
21 registration.
- 22 (2) A reference to the par value of a share is taken to be a reference to
23 the par value of the share immediately before the registration, or
24 the par value that the share would have had if it had been issued
25 then.
- 26 (3) A reference to a right to a return of capital on a share is taken to be
27 a reference to a right to a return of capital of a value equal to the
28 amount paid before the registration in respect of the share's par
29 value, or the par value that the share would have had if it had been
30 issued then.
- 31 (4) A reference to the aggregate par value of the company's issued
32 share capital is taken to be a reference to that aggregate as it
33 existed immediately before the registration.

1 **601BR First AGM**

2 Despite subsection 250N(1), a public company registered under
3 this Part must hold its first AGM after registration in the calendar
4 year of its registration.

5 **601BS Modification by regulations**

6 The regulations may modify the operation of this Part in relation to
7 a company registered under this Part.

1

2 **Part 5B.2—Registrable bodies**

3 **Division 1—Registrable Australian bodies**

4 **601CA When a registrable Australian body may carry on business**
5 **in this jurisdiction and outside its place of origin**

6 A registrable Australian body must not carry on business in a State
7 or Territory in this jurisdiction unless:

- 8 (a) that State or Territory is its place of origin; or
9 (b) it has its head office or principal place of business in that
10 State or Territory; or
11 (c) it is registered under this Division; or
12 (d) it has applied to be so registered and the application has not
13 been dealt with.

14 **601CB Application for registration**

15 Subject to this Part, where a registrable Australian body lodges an
16 application for registration under this Division that is in the
17 prescribed form and is accompanied by:

- 18 (a) a certified copy of a current certificate of its incorporation or
19 registration in its place of origin, or a document of similar
20 effect; and
21 (b) a certified copy of its constitution; and
22 (c) a list of its directors containing personal details of those
23 directors that are equivalent to the personal details of
24 directors referred to in subsection 242(2); and
25 (d) in relation to each existing charge on property of the body
26 that would be a registrable charge within the meaning of
27 Chapter 2K if the body were a registered Australian body, the
28 documents that subsection 263(3) requires to be lodged; and
29 (e) notice of the address of:
30 (i) if it has in its place of origin a registered office for the
31 purposes of a law (other than this Act) there in force—
32 that office; or

- 1 (ii) otherwise—its principal place of business in its place of
2 origin; and
3 (f) notice of the address of its registered office under
4 section 601CT;
5 ASIC must:
6 (g) grant the application and register the body under this
7 Division by entering the body's name in a register kept for
8 the purposes of this Division; and
9 (h) allot to the body an ARBN distinct from the ARBN or ACN
10 of each body corporate (other than the body) already
11 registered as a company or registered body under this Act.

12 **601CC Cessation of business etc.**

- 13 (1) Within 7 days after ceasing to carry on business interstate, a
14 registered Australian body must lodge written notice that it has so
15 ceased.
- 16 (1A) For the purposes of this section, a body *carries on business*
17 *interstate* if, and only if, the body carries on business at a place
18 that is in this jurisdiction and outside the body's place of origin.
- 19 (2) Where ASIC has reasonable cause to believe that a registered
20 Australian body does not carry on business interstate, ASIC may
21 send to the body in the prescribed manner a letter to that effect and
22 stating that, if no answer showing cause to the contrary is received
23 within one month from the date of the letter, a notice will be
24 published in the *Gazette* with a view to striking the body's name
25 off the register.
- 26 (3) Unless ASIC receives, within one month after the date of the letter,
27 an answer to the effect that the body is still carrying on business
28 interstate, it may publish in the *Gazette*, and send to the body in the
29 prescribed manner, a notice that, at the end of 3 months after the
30 date of the notice, the body's name will, unless cause to the
31 contrary is shown, be struck off the register.
- 32 (4) At the end of the period specified in a notice sent under
33 subsection (3), ASIC may, unless cause to the contrary has been

- 1 shown, strike the body's name off the register and must publish in
2 the *Gazette* notice of the striking off.
- 3 (5) Nothing in subsection (4) affects the power of the Court to wind up
4 a body whose name has been struck off the register.
- 5 (6) Where a body's name is struck off the register under
6 subsection (4), the body ceases to be registered under this Division.
- 7 (7) If ASIC is satisfied that a body's name was struck off the register
8 as a result of an error on ASIC's part, ASIC may restore the body's
9 name to the register, and thereupon the body's name is taken never
10 to have been struck off and the body is taken never to have ceased
11 to be registered under this Division.
- 12 (8) A person who is aggrieved by a body's name having been struck
13 off the register may, within 15 years after the striking off, apply to
14 the Court for the body's name to be restored to the register.
- 15 (9) If, on an application under subsection (8), the Court is satisfied
16 that:
- 17 (a) at the time of the striking off, the body was carrying on
18 business interstate; or
- 19 (b) it is otherwise just for the body's name to be restored to the
20 register;
- 21 the Court may, by order:
- 22 (c) direct the body's name to be restored to the register; and
23 (d) give such directions, and make such provisions, as it thinks
24 just for placing the body and all other persons in the same
25 position, as nearly as practicable, as if the body's name had
26 never been struck off.
- 27 (10) On the lodging of an office copy of an order under subsection (9),
28 the body's name is taken never to have been struck off.
- 29 (11) Where a body's name is restored to the register under
30 subsection (7) or (9), ASIC must cause notice of that fact to be
31 published in the *Gazette*.

- 1 (12) Where a body ceases to be registered under this Division, an
2 obligation to lodge a document that this Act imposes on the body
3 by virtue of the doing of an act or thing, or the occurrence of an
4 event, at or before the time when the body so ceased, being an
5 obligation not discharged at or before that time, continues to apply
6 in relation to the body even if the period prescribed for lodging the
7 document has not ended at or before that time.
- 8 (13) Where a registered Australian body commences to be wound up, or
9 is dissolved or deregistered, in its place of origin, the Court must,
10 on application by the person who is the liquidator for the body's
11 place of origin, or by ASIC, appoint a liquidator of the body.
- 12 (14) A liquidator of a registered Australian body who is appointed by
13 the Court:
- 14 (a) must, before any distribution of the body's property is made,
15 by advertisement in a daily newspaper circulating generally
16 in each State or Territory where the body carried on business
17 at any time during the 6 years before the liquidation, invite
18 all creditors to make their claims against the body within a
19 reasonable time before the distribution; and
- 20 (b) must not, without obtaining an order of the Court, pay out a
21 creditor of the body to the exclusion of another creditor of
22 the body; and
- 23 (c) must, unless the Court otherwise orders, recover and realise
24 the property of the body that is located:
- 25 (i) in this jurisdiction; and
26 (ii) outside the body's place of origin;
27 and must pay the net amount so recovered and realised to the
28 liquidator of the body for its place of origin.
- 29 (15) If a registered Australian body has been wound up so far as its
30 property located:
- 31 (a) in this jurisdiction; and
32 (b) outside its place of origin;
- 33 is concerned and there is no liquidator for its place of origin, the
34 liquidator may apply to the Court for directions about the disposal
35 of the net amount recovered under subsection (14).

1

2 **Division 2—Foreign companies**

3 **601CD When a foreign company may carry on business in this**
4 **jurisdiction**

- 5 (1) A foreign company must not carry on business in this jurisdiction
6 unless:
- 7 (a) it is registered under this Division; or
 - 8 (b) it has applied to be so registered and the application has not
9 been dealt with.
- 10 (2) For the purposes of this Division, a foreign company carries on
11 business in this jurisdiction if it:
- 12 (a) offers debentures in this jurisdiction; or
 - 13 (b) is a guarantor body for debentures offered in this jurisdiction;
14 and Part 2L.1 applies to the debentures.

15 **601CE Application for registration**

- 16 Subject to this Part, where a foreign company lodges an application
17 for registration under this Division that is in the prescribed form
18 and is accompanied by:
- 19 (a) a certified copy of a current certificate of its incorporation or
20 registration in its place of origin, or a document of similar
21 effect; and
 - 22 (b) a certified copy of its constitution; and
 - 23 (c) a list of its directors containing personal details of those
24 directors that are equivalent to the personal details of
25 directors referred to in subsection 205B(3); and
 - 26 (d) if that list includes directors who are:
 - 27 (i) resident in Australia; and
 - 28 (ii) members of a local board of directors;
- 29 a memorandum that is duly executed by or on behalf of the
30 foreign company and states the powers of those directors;
31 and

- 1 (e) in relation to each existing charge on property of the foreign
2 company that would be a registrable charge within the
3 meaning of Chapter 2K if the foreign company were a
4 registered foreign company, the documents that subsection
5 263(3) requires to be lodged; and
6 (f) notice of the address of:
7 (i) if it has in its place of origin a registered office for the
8 purposes of a law there in force—that office; or
9 (ii) otherwise—its principal place of business in its place of
10 origin; and
11 (g) notice of the address of its registered office under
12 section 601CT;
13 ASIC must:
14 (h) grant the application and register the foreign company under
15 this Division by entering the foreign company's name in a
16 register kept for the purposes of this Division; and
17 (j) allot to the foreign company an ARBN distinct from the
18 ARBN or ACN of each body corporate (other than the
19 foreign company) already registered as a company or
20 registered body under this Act.

21 **601CF Appointment of local agent**

- 22 (1) A foreign company may at any time appoint a person as a local
23 agent.
24 (2) ASIC must not register a foreign company under this Division
25 unless the foreign company has at least one local agent in relation
26 to whom the foreign company has complied with section 601CG.
27 (3) Where:
28 (a) because a person ceased on a particular day to be a local
29 agent of the foreign company, a registered foreign company
30 has no local agent; and
31 (b) the foreign company carries on business, or has a place of
32 business, in this jurisdiction;
33 the foreign company must, within 21 days after that day, appoint a
34 person as a local agent.

1 **601CG Local agent: how appointed**

- 2 (1) A foreign company that lodges a memorandum of appointment, or
3 a power of attorney, that is duly executed by or on behalf of the
4 foreign company and states the name and address of a person who
5 is:
6 (a) a natural person or a company; and
7 (b) resident in this jurisdiction; and
8 (c) authorised to accept on the foreign company's behalf service
9 of process and notices;
10 is taken to appoint that person as a local agent.
- 11 (2) Where a memorandum of appointment, or a power of attorney,
12 lodged under subsection (1) is executed on the foreign company's
13 behalf, the foreign company must, unless it has already done so,
14 lodge a copy, verified in writing in the prescribed form to be a true
15 copy, of the document authorising the execution.
- 16 (3) A copy lodged under subsection (2) is taken for all purposes to be
17 the original of the document.
- 18 (4) A foreign company that appoints a local agent must lodge a written
19 statement that is in the prescribed form and is made by the local
20 agent.
- 21 (5) A person whom a foreign company appoints as a local agent is a
22 local agent of the foreign company until the person:
23 (a) ceases by virtue of section 601CH to be such a local agent; or
24 (b) dies or ceases to exist.

25 **601CH Local agent: how removed**

- 26 (1) Where a person is a local agent of a foreign company, the foreign
27 company or the person may lodge a written notice stating that the
28 person's appointment as a local agent has terminated, or will
29 terminate, on a specified day.
- 30 (2) Where a notice is lodged under subsection (1), the person ceases to
31 be a local agent of the foreign company at the end of:
32 (a) the period of 21 days beginning on the day of lodgment; or

- 1 (b) the day specified in the notice;
2 whichever is the later.

3 **601CJ Liability of local agent**

4 A local agent of a registered foreign company:

- 5 (a) is answerable for the doing of all acts, matters and things that
6 the foreign company is required by or under this Act to do;
7 and
8 (b) is personally liable to a penalty imposed on the foreign
9 company for a contravention of this Act if the court or
10 tribunal hearing the matter is satisfied that the local agent
11 should be so liable.

12 **601CK Balance-sheets and other documents**

- 13 (1) Subject to this section, a registered foreign company must, at least
14 once in every calendar year and at intervals of not more than 15
15 months, lodge a copy of its balance-sheet made up to the end of its
16 last financial year, a copy of its cash flow statement for its last
17 financial year and a copy of its profit and loss statement for its last
18 financial year, in such form and containing such particulars and
19 including copies of such documents as the company is required to
20 prepare by the law for the time being applicable to that company in
21 its place of origin, together with a statement in writing in the
22 prescribed form verifying that the copies are true copies of the
23 documents so required.
- 24 (2) ASIC may extend the period within which subsection (1) requires a
25 balance-sheet, profit and loss statement, cash flow statement or
26 other document to be lodged.
- 27 (3) ASIC may, if it is of the opinion that the balance-sheet, the profit
28 and loss statement and the other documents referred to in
29 subsection (1) do not sufficiently disclose the company's financial
30 position:
31 (a) require the company to lodge a balance-sheet; or
32 (b) require the company to lodge an audited balance-sheet; or
33 (ba) require the company to lodge a cash flow statement; or

- 1 (bb) require the company to lodge an audited cash flow statement;
2 or
3 (c) require the company to lodge a profit and loss statement; or
4 (d) require the company to lodge an audited profit and loss
5 statement;
6 within such period, in such form, containing such particulars and
7 including such documents as ASIC by notice in writing to the
8 company requires, but this subsection does not authorise ASIC to
9 require a balance-sheet or a profit and loss statement to contain any
10 particulars or include any documents that would not be required to
11 be given if the company were a public company within the
12 meaning of this Act.
- 13 (4) The registered foreign company must comply with the
14 requirements set out in the notice.
- 15 (5) Where a registered foreign company is not required by the law of
16 the place of its incorporation or formation to prepare a
17 balance-sheet, the company must prepare and lodge a
18 balance-sheet, or, if ASIC so requires, an audited balance-sheet,
19 within such period, in such form and containing such particulars
20 and including such documents as the company would have been
21 required to prepare if the company were a public company
22 incorporated under this Act.
- 23 (5A) If a registered foreign company is not required by the law of the
24 place of its incorporation or formation to prepare a cash flow
25 statement, the company must prepare and lodge a cash flow
26 statement, or, if ASIC so requires, an audited cash flow statement,
27 within the period, in the form, containing the particulars and
28 including the documents that the company would have been
29 required to prepare if the company were a public company
30 registered under this Act.
- 31 (6) Where a registered foreign company is not required by the law of
32 its place of origin to prepare a profit and loss statement, the
33 company must prepare and lodge a profit and loss statement or, if
34 ASIC so requires, an audited profit and loss statement, within such
35 period, in such form, containing such particulars and including
36 such documents as the company would have been required to

1 prepare if the company were a public company incorporated under
2 this Act.

3 (7) ASIC may, by *Gazette* notice, declare that this section does not
4 apply to specified foreign companies.

5 (8) Subsections (1) to (6), inclusive, do not apply in relation to a
6 foreign company in relation to which a notice is in force under
7 subsection (7).

8 (9) A registered foreign company in relation to which a notice is in
9 force under subsection (7) must, at least once in every calendar
10 year, lodge with ASIC a return in the prescribed form made up to
11 the date of its annual general meeting.

12 (10) The return must be lodged within 1 month after the date to which it
13 is made up, or within such further period as ASIC, in special
14 circumstances, allows.

15 **601CL Cessation of business etc.**

16 (1) Within 7 days after ceasing to carry on business in this jurisdiction,
17 a registered foreign company must lodge written notice that it has
18 so ceased.

19 (2) Where ASIC receives notice from a local agent of a registered
20 foreign company that the foreign company has been dissolved or
21 deregistered, ASIC must remove the foreign company's name from
22 the register.

23 (3) Where ASIC has reasonable cause to believe that a registered
24 foreign company does not carry on business in this jurisdiction,
25 ASIC may send to the foreign company in the prescribed manner a
26 letter to that effect and stating that, if no answer showing cause to
27 the contrary is received within one month from the date of the
28 letter, a notice will be published in the *Gazette* with a view to
29 striking the foreign company's name off the register.

30 (4) Unless ASIC receives, within one month after the date of the letter,
31 an answer to the effect that the foreign company is still carrying on
32 business in this jurisdiction, it may publish in the *Gazette*, and send

- 1 to the foreign company in the prescribed manner, a notice that, at
2 the end of 3 months after the date of the notice, the foreign
3 company's name will, unless cause to the contrary is shown, be
4 struck off the register.
- 5 (5) At the end of the period specified in a notice sent under
6 subsection (4), ASIC may, unless cause to the contrary has been
7 shown, strike the foreign company's name off the register and must
8 publish in the *Gazette* notice of the striking off.
- 9 (6) Nothing in subsection (5) affects the power of the Court to wind up
10 a foreign company whose name has been struck off the register.
- 11 (7) Where a foreign company's name is struck off the register under
12 subsection (5), the foreign company ceases to be registered under
13 this Division.
- 14 (8) If ASIC is satisfied that a foreign company's name was struck off
15 the register as a result of an error on ASIC's part, ASIC may
16 restore the foreign company's name to the register, and thereupon
17 the foreign company's name is taken never to have been struck off
18 and the foreign company is taken never to have ceased to be
19 registered under this Division.
- 20 (9) A person who is aggrieved by a foreign company's name having
21 been struck off the register may, within 15 years after the striking
22 off, apply to the Court for the foreign company's name to be
23 restored to the register.
- 24 (10) If, on an application under subsection (9), the Court is satisfied
25 that:
- 26 (a) at the time of the striking off, the foreign company was
27 carrying on business in this jurisdiction; or
28 (b) it is otherwise just for the foreign company's name to be
29 restored to the register;
- 30 the Court may, by order:
- 31 (c) direct the foreign company's name to be restored to the
32 register; and
33 (d) give such directions, and make such provision, as it thinks
34 just for placing the foreign company and all other persons in

- 1 the same position, as nearly as practicable, as if the foreign
2 company's name had never been struck off.
- 3 (11) On the lodging of an office copy of an order under subsection (10),
4 the foreign company's name is taken never to have been struck off.
- 5 (12) Where a foreign company's name is restored to the register under
6 subsection (8) or (10), ASIC must cause notice of that fact to be
7 published in the *Gazette*.
- 8 (13) Where a foreign company ceases to be registered under this
9 Division, an obligation to lodge a document that this Act imposes
10 on the foreign company by virtue of the doing of an act or thing, or
11 the occurrence of an event, at or before the time when the foreign
12 company so ceased, being an obligation not discharged at or before
13 that time, continues to apply in relation to the foreign company
14 even if the period prescribed for lodging the document has not
15 ended at or before that time.
- 16 (14) Where a registered foreign company commences to be wound up,
17 or is dissolved or deregistered, in its place of origin:
18 (a) each person who, on the day when the winding up
19 proceedings began, was a local agent of the foreign company
20 must, within the period of 1 month after that day or within
21 that period as extended by ASIC in special circumstances,
22 lodge or cause to be lodged notice of that fact and, when a
23 liquidator is appointed, notice of the appointment; and
24 (b) the Court must, on application by the person who is the
25 liquidator for the foreign company's place of origin, or by
26 ASIC, appoint a liquidator of the foreign company.
- 27 (15) A liquidator of a registered foreign company who is appointed by
28 the Court:
29 (a) must, before any distribution of the foreign company's
30 property is made, by advertisement in a daily newspaper
31 circulating generally in each State or Territory where the
32 foreign company carried on business at any time during the 6
33 years before the liquidation, invite all creditors to make their
34 claims against the foreign company within a reasonable time
35 before the distribution; and

- 1 (b) must not, without obtaining an order of the Court, pay out a
2 creditor of the foreign company to the exclusion of another
3 creditor of the foreign company; and
4 (c) must, unless the Court otherwise orders, recover and realise
5 the property of the foreign company in this jurisdiction and
6 must pay the net amount so recovered and realised to the
7 liquidator of the foreign company for its place of origin.
- 8 (16) Where a registered foreign company has been wound up so far as
9 its property in this jurisdiction is concerned and there is no
10 liquidator for its place of origin, the liquidator may apply to the
11 Court for directions about the disposal of the net amount recovered
12 under subsection (15).

13 **601CM Register of members of foreign company**

- 14 (1) A registered foreign company that has a share capital may cause a
15 branch register of members to be kept in this jurisdiction.
- 16 (2) If a member of a registered foreign company is resident in this
17 jurisdiction and requests the foreign company in writing to register
18 in a branch register kept under subsection (1) shares held by the
19 member, then:
20 (a) if the foreign company already keeps a register under
21 subsection (1)—the foreign company must register in that
22 register the shares held by the member; or
23 (b) otherwise—the foreign company must, within 1 month after
24 receiving the request:
25 (i) keep at its registered office or at some other place in this
26 jurisdiction a branch register of members; and
27 (ii) register in that register the shares held by the member.
- 28 (3) Subsection (2) does not apply in relation to a foreign company
29 whose constitution prohibits any invitation to the public to
30 subscribe for, and any offer to the public to accept subscriptions
31 for, shares in the foreign company.
- 32 (4) Subject to this section, a registered foreign company may
33 discontinue a register kept under subsection (1) and must, if it does

1 so, transfer all entries in that register to a register of members kept
2 outside Australia.

3 (5) If shares held by a member of a registered foreign company who is
4 resident in this jurisdiction are registered in a register kept by the
5 foreign company under subsection (1), the foreign company must
6 not discontinue that register without that member's written
7 consent.

8 **601CN Register kept under section 601CM**

9 (1) This section has effect where a registered foreign company keeps a
10 register under section 601CM.

11 (2) The foreign company must keep the register in the same manner as
12 this Act requires a company to keep its register of members.

13 (3) Subject to subsection (2), the foreign company must register a
14 transaction in the register in the same way, and at the same charge,
15 as it would have registered the transaction in the register of
16 members that the foreign company keeps in its place of origin.

17 (4) A transfer of shares in the foreign company that is lodged at the
18 foreign company's registered office, or at the place where the
19 register is kept, is binding on the foreign company.

20 (5) The Court has the same powers in relation to correction of the
21 register as it has in relation to correction of a company's register of
22 members.

23 (6) The register is taken to be part of the foreign company's register of
24 members.

25 (7) At the written request of a member who holds shares registered in
26 the register, the foreign company must remove the shares from the
27 register and register them in such other register as is specified in
28 the request.

29 (8) The register is prima facie evidence of matters that this Act
30 requires or authorises to be entered in the register.

1 **601CP Notifying ASIC about register kept under section 601CM**

2 Within 14 days after:

- 3 (a) beginning to keep a register under section 601CM; or
4 (b) changing the place where a register is so kept; or
5 (c) discontinuing a register under section 601CM;

6 a registered foreign company must lodge a written notice of that
7 fact specifying, if paragraph (a) or (b) applies, the address or new
8 address, as the case may be, where the register is kept.

9 **601CQ Effect of right to acquire shares compulsorily**

10 Where:

- 11 (a) a law of the place of origin of a foreign company that
12 corresponds to section 414, 661A or 664A entitles a person
13 to give notice to another person that the first-mentioned
14 person wishes to acquire shares in the foreign company that
15 the other person holds; and
16 (b) some or all of those shares are registered in a register kept
17 under section 601CM;

18 sections 601CM, 601CN and 601CP cease to apply in relation to
19 the foreign company until the first-mentioned person acquires, or
20 ceases to be entitled to acquire, the shares so registered.

21 **601CR Index of members and inspection of registers**

22 Subsection 169(2) and sections 173, 174 and 177 apply in relation
23 to a register kept under section 601CM.

24 **601CS Certificate as to shareholding**

25 A certificate under the seal of a foreign company specifying shares
26 held by a member of that company and registered in a register kept
27 under section 601CM is prima facie evidence of the title of the
28 member to the shares and of the fact that the shares are registered
29 in the register.

1

2 **Division 3—Bodies registered under this Part**

3 **601CT Registered office**

- 4 (1) A registered body must have a registered office in this jurisdiction
5 to which all communications and notices may be addressed and
6 that must be open:
7 (a) if the body has:
8 (i) lodged a notice under subsection (2); or
9 (ii) lodged a notice under subsection (2) and a notice or
10 notices under subsection (4);
11 for such hours (being not fewer than 3) between 9 am and 5
12 pm on each business day as are specified in that notice, or in
13 the later or last of those notices, as the case may be; or
14 (b) otherwise—each business day from at least 10 am to 12 noon
15 and from at least 2 pm to 4 pm;
16 and at which a representative of the body is present at all times
17 when the office is open.
- 18 (2) A registered body may lodge written notice of the hours (being not
19 fewer than 3) between 9 am and 5 pm on each business day during
20 which the body's registered office is open.
- 21 (3) Within 7 days after a change in the situation of its registered office,
22 a registered body must lodge a written notice of the change and of
23 the new address of that office.
- 24 (4) A registered body that has lodged a notice under subsection (2)
25 must, within 7 days after a change in the hours during which its
26 registered office is open, lodge a notice, in the prescribed form, of
27 the change.

28 **601CU Certificate of registration**

- 29 (1) On registering a body corporate under Division 1 or 2 or
30 registering under section 601DH or 601DJ a change in a registered
31 body's name, ASIC must issue to the body a certificate, under

1 ASIC's common seal and in the prescribed form, of the body's
2 registration under that Division.

3 (2) A certificate under subsection (1) is prima facie evidence of the
4 matters stated in it.

5 **601CV Notice of certain changes**

- 6 (1) A registered body must, within 1 month after a change in:
7 (b) its constitution or any other document lodged in relation to
8 the body; or
9 (c) its directors; or
10 (d) if the body is a foreign company;
11 (i) the powers of any directors who are resident in
12 Australia and members of an Australian board of
13 directors of the foreign company; or
14 (ii) a local agent or local agents; or
15 (iii) the name or address of a local agent; or
16 (e) the situation of:
17 (i) if it has in its place of origin a registered office for the
18 purposes of a law (other than this Act) there in force—
19 that office; or
20 (ii) otherwise—its principal place of business in its place of
21 origin;

22 lodge a written notice of particulars of the change, together with
23 such documents (if any) as the regulations require.

24 (2) ASIC may in special circumstances extend the period within which
25 subsection (1) requires a notice or document to be lodged.

26 **601CW Body's name etc. must be displayed at office and place of**
27 **business**

28 (1) Subject to subsection (2), this section applies to a registrable body.

29 (2) If the registrable body is a registrable Australian body, this section
30 does not apply to a place at which the body carries on business if
31 the place is in the body's place of origin.

- 1 (9) Unless the body is an Australian ADI, it must paint or affix and
2 keep painted or affixed, in a conspicuous position and in letters
3 easily legible, on the outside of every office and place (including
4 its registered office) that is in this jurisdiction, at which its business
5 is carried on and that is open and accessible to the public:
6 (a) its name and the name of its place of origin; and
7 (b) if the liability of its members is limited and the last word of
8 its name is neither the word “Limited” nor the abbreviation
9 “Ltd.”—notice of the fact that the liability of its members is
10 limited; and
11 (c) in the case of its registered office—the expression
12 “Registered Office”.
- 13 (10) If the body is an Australian ADI, it must paint or affix its name,
14 and must keep its name painted or affixed, in a conspicuous
15 position and in letters easily legible, on the outside of every office
16 or place (including its registered office) that is in this jurisdiction,
17 at which its business is carried on and that is open and accessible to
18 the public.

19 **601CX Service of documents on registered body**

- 20 (1) A document may be served on a registered body:
21 (a) by leaving it at, or by sending it by post to, the registered
22 office of the body; or
23 (b) in the case of a registered foreign company—by leaving it at,
24 or by sending it by post to, the address of a local agent of the
25 foreign company, being:
26 (i) in a case to which subparagraph (ii) does not apply—an
27 address notice of which has been lodged under
28 subsection 601CG(1); or
29 (ii) if a notice or notices of a change or alteration in that
30 address has or have been lodged under subsection
31 601CV(1)—the address shown in that last-mentioned
32 notice or the later or latest of those last-mentioned
33 notices.

- 1 (2) For the purposes of subsection (1), the situation of the registered
2 office of a registered body:
- 3 (a) in a case to which neither paragraph (b) nor paragraph (c)
4 applies—is taken to be the place notice of the address of
5 which has been lodged under paragraph 601CB(e) or
6 601CE(g); or
- 7 (b) if only one notice of a change in the situation of the
8 registered office has been lodged with ASIC under
9 subsection 601CT(3)—is, on and from:
- 10 (i) the day that is 7 days after the day on which the notice
11 was lodged; or
- 12 (ii) the day that is specified in the notice as the day from
13 which the change is to take effect;
- 14 whichever is later, taken to be the place the address of which
15 is specified in the notice; or
- 16 (c) if 2 or more notices of a change in the situation of the
17 registered office have been lodged under subsection
18 601CT(3)—is, on and from:
- 19 (i) the day that is 7 days after the day on which the later or
20 latest of those notices was lodged; or
- 21 (ii) the day that is specified in the later or latest of those
22 notices as the day from which the change is to take
23 effect;
- 24 whichever is later, taken to be the place the address of which
25 is specified in the relevant notice;
- 26 and is so taken to be that place irrespective of whether the address
27 of a different place is shown as the address of the registered office
28 of the registered body in a return or other document (not being a
29 notice under subsection 601CT(3)) lodged after the notice referred
30 to in paragraph (a) or (b), or the later or latest of the notices
31 referred to in paragraph (c), was lodged.
- 32 (3) Without limiting the operation of subsection (1), if 2 or more
33 directors of a registered body reside in Australia or an external
34 Territory, a document may be served on the body by delivering a
35 copy of the document personally to each of 2 of those directors.

- 1 (3A) Without limiting the operation of subsection (1), a document may
2 be served on a registered body that is registered as a proprietary
3 company and has only one director by delivering a copy personally
4 to that director.
- 5 (4) Where a liquidator of a registered body has been appointed, a
6 document may be served on the body by leaving it at, or by
7 sending it by post to, the last address of the office of the liquidator
8 notice of which has been lodged.
- 9 (5) Nothing in this section affects the power of the Court to authorise a
10 document to be served on a registered body in a manner not
11 provided for by this section.
- 12 (6) Subject to subsection 8(4), subsection 8(3) applies in relation to a
13 reference in this section.

14 **601CY Power to hold land**

15 A registered body has power to hold land in this jurisdiction.

1

2 **Division 4—Register of debenture holders for**
3 **non-companies**

3

4 **601CZA Certain documents are debentures**

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6

7

8

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

9

10 **601CZB Register of debenture holders to be maintained by**
11 **non-companies**

10

11

12

- (1) A body that is not a company must set up and maintain a register of debenture holders if it issues debentures covered by Chapter 2L.

13

14

Note 1: Companies have to keep a register of debenture holders under sections 168 and 171.

15

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

16

17

- (2) The register must contain the following information about each debenture holder:

18

19

- (a) their name and address;
(b) the amount of the debentures held.

20

21

- (3) A body's failure to comply with this section in relation to a debenture does not affect the debenture itself.

22

23 **601CZC Location of register**

23

24

25

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- (1) The register must be kept at:
(a) the body's registered office; or
(b) the body's principal place of business in this jurisdiction; or
(c) a place in this jurisdiction (whether of the body or of someone else) where the work involved in maintaining the register is done; or
(d) another place approved by ASIC.

- 1 (2) The body must lodge with ASIC a notice of the address at which
2 the register is kept within 7 days after the register is:
3 (a) established at an office that is neither the body's registered
4 office nor at its principal place of business; or
5 (b) moved from one office to another.
6 Notice is not required for moving the register between the
7 registered office and an office at the principal place of business.

8 **601CZD Application of sections 173 to 177**

9 Sections 173 to 177 apply to a register kept under this Division as
10 if it were kept under Chapter 2C.

11 Note: Sections 173 to 177 deal with rights to inspect the register and get
12 copies, the obligations of agents who maintain the register, correction
13 of the register, the evidential value of the register and the use of
14 information on the register.

1
2 **Part 5B.3—Names of registrable Australian bodies**
3 **and foreign companies**
4

5 **601DA Reserving a name**

- 6 (1) A person may lodge an application in the prescribed form with
7 ASIC to reserve a name for a registrable Australian body or a
8 foreign company. If the name is available, ASIC must reserve it.

9 Note: For available names, see section 601DC.

- 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 **601DB Acceptable abbreviations**

- 17 (1) The abbreviations set out in the following table may be used:
18 (a) instead of words that this Act requires to be part of a
19 registrable Australian body's or foreign company's name or
20 to be included in a document; and
21 (b) instead of words that are part of a registrable Australian
22 body's or foreign company's name; and
23 (c) with or without full stops.
24

Acceptable abbreviations		[operative table]
Word	Abbreviation	
1 Company	Co or Coy	
2 Proprietary	Pty	
3 Limited	Ltd	
4 Australian	Aust	
5 Number	No	

Acceptable abbreviations		[operative table]
Word	Abbreviation	
6 and	&	
7 Australian Registered Body Number	ARBN	
8 Registered	Regd	

- 1 (2) If a registrable Australian body's or foreign company's name
2 includes any of these abbreviations, the word corresponding to the
3 abbreviation may be used instead.

4 **601DC When a name is available**

5 *Name is available unless identical or unacceptable*

- 6 (1) A name is available to a registrable Australian body or a foreign
7 company unless the name is:
8 (a) identical (under rules set out in the regulations) to a name
9 that is reserved or registered under this Act for another body;
10 or
11 (b) identical (under rules set out in the regulations) to a name
12 that is included on the national business names register in
13 respect of another individual or body who is not the person
14 applying to have the name; or
15 (c) unacceptable for registration under the regulations.

16 *Minister may consent to a name being available*

- 17 (2) The Minister may consent in writing to a name being available to a
18 registrable Australian body or foreign company even if the name
19 is:
20 (a) identical to a name that is reserved or registered under this
21 Act for another body; or
22 (b) unacceptable for registration under the regulations.
- 23 (3) The Minister's consent may be given subject to conditions.

24 Note: If the body or company breaches a condition, ASIC may direct it to
25 change its name under section 601DJ.

- 1 (4) The regulations may specify that a particular unacceptable name is
2 available to a registrable Australian body or foreign company if:
3 (a) a specified public authority, or an instrumentality or agency
4 of the Crown in right of the Commonwealth, a State or an
5 internal Territory has consented to the body or company
6 using or assuming the name; or
7 (b) the body or company is otherwise permitted to use or assume
8 the name by or under a specified provision of an Act of the
9 Commonwealth, a State or an internal Territory.

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

12 Note: If the consent is withdrawn, the body or company ceases to be
13 permitted or it breaches a condition, ASIC may direct it to change its
14 name under section 601DJ.

15 **601DD Registered Australian bodies and registered foreign**
16 **companies can carry on business with some names only**

- 17 (1) A registered Australian body or registered foreign company must
18 not carry on business under a name in this jurisdiction unless
19 subsection (2) or (3) authorises the body or company to use the
20 name.
21 (2) The body or company may use the name if the company or body is
22 registered under that name under Part 5B.2.
23 (3) A registered Australian body may use a name in the State or
24 Territory that is its place of origin if the use of that name is
25 authorised by a law of that State or Territory that deals with
26 business names.

27 **601DE Using a name and ARBN**

28 *Requirements for bodies that are not Australian ADIs*

- 29 (1) Subject to sections 601DF and 601DG, a registered Australian
30 body or registered foreign company must set out the following on
31 all its public documents and negotiable instruments published or
32 signed in this jurisdiction:

- 1 (a) its name;
2 (b) the expression “Australian Registered Body Number”
3 followed by its ARBN;
4 (c) its place of origin;
5 (d) if the liability of its members is limited and this is not
6 apparent from its name—notice of the limited liability of its
7 members.

8 Paragraphs (c) and (d) do not apply to an Australian ADI.

9 *Where information to be set out*

- 10 (2) Subject to sections 601DF and 601DG, the information required by
11 paragraph (1)(b) must be set out with the company’s or body’s
12 name, or 1 of the references to its name in the document or
13 instrument. If the name appears on 2 or more pages of the
14 document or instrument, this must be done on the first of those
15 pages.

16 **601DF Exception to requirement to have ARBN on receipts**

17 A registered Australian body or a registered foreign company does
18 not have to set out the expression “Australian Registered Body
19 Number” followed by its ARBN on a receipt (for example, a cash
20 register receipt) that sets out information recorded in the machine
21 that produced the receipt.

22 **601DG Regulations may exempt from requirement to set out**
23 **information on documents**

24 The regulations may exempt a specified registered Australian body
25 or registered foreign company, or a class of those bodies or
26 companies, from the requirement in paragraphs 601DE(1)(b), (c)
27 and (d) to set out information on its public documents and
28 negotiable instruments. The exemption may relate to specified
29 documents or instruments, or a class of documents or instruments.

1 **601DH Notice of name change must be given to ASIC**

2 (1) A registered Australian body or a registered foreign company must
3 give ASIC written notice of a change to its name within 14 days
4 after the date the change occurred.

5 (2) If the proposed name is available, ASIC must alter the details of
6 the body's or foreign company's registration to reflect the change.
7 For the purposes of this Act (other than subsection (1)), the change
8 of name takes effect when ASIC alters the details of the body's or
9 foreign company's registration.

10 Note 1: For the reservation of names, see section 601DA.

11 Note 2: For available names, see section 601DC.

12 Note 3: ASIC must issue a new certificate reflecting the name change (see
13 section 601CU).

14 **601DJ ASIC's power to direct a registered name be changed**

15 (1) ASIC may direct a registered Australian body or registered foreign
16 company in writing to change the name under which the body or
17 company is registered within 2 months if:

18 (a) the name should not have been registered; or

19 (b) the body or company has breached a condition under
20 subsection 601DC(3) on the availability of the name; or

21 (c) a consent given under subsection 601DC(4) to use or assume
22 the name has been withdrawn; or

23 (d) the body or company has breached a condition on a consent
24 given under subsection 601DC(4); or

25 (e) the body or company ceases to be permitted to use or assume
26 the name (as referred to in paragraph 601DC(4)(b)).

27 (2) The body or company must comply with the direction within 2
28 months after being given it by doing everything necessary to
29 change its name for the purposes of this Act under section 601DH.

30 (3) If the body or company does not comply with subsection (2), ASIC
31 may change the body's or company's name to a name that includes
32 its ARBN by altering the details of the body's or company's
33 registration to reflect the change.

Clause 601DJ

- 1 (4) For the purposes of this Act, a change of name under
2 subsection (3) takes effect when ASIC alters the details of the
3 body's or foreign company's registration.

4 Note: ASIC must issue a new certificate reflecting the name change (see
5 section 601CU).

1
2 **Chapter 5C—Managed investment schemes**

3 **Part 5C.1—Registration of managed investment**
4 **schemes**
5

6 **601EA Applying for registration**

- 7 (1) To register a managed investment scheme, a person must lodge an
8 application with ASIC.
- 9 (2) The application must state:
- 10 (a) the name, and the address of the registered office, of the
11 proposed responsible entity; and
- 12 (b) the name and address of a person who has consented to be
13 the auditor of the compliance plan.
- 14 (3) The applicant must have the consent referred to in paragraph (2)(b)
15 when the application is lodged. After the scheme is registered, the
16 applicant must give the consent to the responsible entity. The
17 responsible entity must keep the consent.
- 18 (4) The following must be lodged with the application:
- 19 (a) a copy of the scheme's constitution;
- 20 (b) a copy of the scheme's compliance plan;
- 21 (c) a statement signed by the directors of the proposed
22 responsible entity that:
- 23 (i) the scheme's constitution complies with
24 sections 601GA and 601GB; and
- 25 (ii) the scheme's compliance plan complies with
26 section 601HA.

27 Note: Section 601HC requires that the copy of the compliance plan be
28 signed by the directors of the responsible entity.

29 **601EB Registration of managed investment scheme**

- 30 (1) ASIC must register the scheme within 14 days of lodgment of the
31 application, unless it appears to ASIC that:

- 1 (c) the application does not comply with section 601EA; or
2 (d) the proposed responsible entity does not meet the
3 requirements of section 601FA; or
4 (e) the scheme's constitution does not meet the requirements of
5 sections 601GA and 601GB; or
6 (f) the scheme's compliance plan does not meet the
7 requirements of section 601HA; or
8 (g) the copy of the compliance plan lodged with the application
9 is not signed as required by section 601HC; or
10 (h) arrangements are not in place that will satisfy the
11 requirements of section 601HG in relation to audit of
12 compliance with the plan.
- 13 (2) If ASIC registers the scheme, ASIC must give it an ARSN.
- 14 (3) ASIC must keep a record of the registration of the scheme.
- 15 (4) For the purpose of determining whether subsection (1) is satisfied
16 in relation to the scheme:
- 17 (a) references in Parts 5C.3, 5C.4 and 5C.5 to a registered
18 scheme are taken to include a reference to the scheme; and
19 (b) references in those Parts to the responsible entity of a
20 registered scheme are taken to include a reference to the
21 proposed responsible entity of the scheme.

22 **601EC All documents etc. lodged with ASIC to bear ARSN**

23 After a managed investment scheme is registered, the scheme's
24 ARSN must appear on all documents relating to the scheme that
25 are lodged with ASIC.

26 **601ED When a managed investment scheme must be registered**

- 27 (1) Subject to subsection (2), a managed investment scheme must be
28 registered under section 601EB if:
- 29 (a) it has more than 20 members; or
30 (b) it was promoted by a person, or an associate of a person, who
31 was, when the scheme was promoted, in the business of
32 promoting managed investment schemes; or

- 1 (c) a determination under subsection (3) is in force in relation to
2 the scheme and the total number of members of all of the
3 schemes to which the determination relates exceeds 20.
- 4 (2) A managed investment scheme does not have to be registered if all
5 the issues of interests in the scheme that have been made did not
6 need disclosure to investors under Part 6D.2 (see sections 706 and
7 708) when they were made.
- 8 (3) ASIC may, in writing, determine that a number of managed
9 investment schemes are closely related and that each of them has to
10 be registered at any time when the total number of members of all
11 of the schemes exceeds 20. ASIC must give written notice of the
12 determination to the operator of each of the schemes.
- 13 (4) For the purpose of this section, when working out how many
14 members a scheme has:
- 15 (a) joint holders of an interest in the scheme count as a single
16 member; and
- 17 (b) an interest in the scheme held on trust for a beneficiary is
18 taken to be held by the beneficiary (rather than the trustee) if:
- 19 (i) the beneficiary is presently entitled to a share of the
20 trust estate or of the income of the trust estate; or
- 21 (ii) the beneficiary is, individually or together with other
22 beneficiaries, in a position to control the trustee.
- 23 (5) A person must not operate in this jurisdiction a managed
24 investment scheme that this section requires to be registered under
25 section 601EB unless the scheme is so registered.
- 26 (6) For the purpose of subsection (5), a person is not operating a
27 scheme merely because:
- 28 (a) they are acting as an agent or employee of another person; or
29 (b) they are taking steps to wind up the scheme or remedy a
30 defect that led to the scheme being deregistered.
- 31 (7) A person who would otherwise contravene subsection (5) because
32 an interest in a scheme is held in trust for 2 or more beneficiaries
33 (see paragraph (4)(b)) does not contravene that subsection if they

1 prove that they did not know, and had no reason to suspect, that the
2 interest was held in that way.

3 **601EE Unregistered schemes may be wound up**

- 4 (1) If a person operates a managed investment scheme in
5 contravention of subsection 601ED(5), the following may apply to
6 the Court to have the scheme wound up:
7 (a) ASIC;
8 (b) the person operating the scheme;
9 (c) a member of the scheme.
- 10 (2) The Court may make any orders it considers appropriate for the
11 winding up of the scheme.

1

2 **Part 5C.2—The responsible entity**

3 **Division 1—Responsibilities and powers**

4 **601FA Responsible entity to be public company and hold dealers**
5 **licence**

6 The responsible entity of a registered scheme must be a public
7 company that holds a dealers licence authorising it to operate a
8 managed investment scheme.

9 **601FB Responsible entity to operate scheme**

10 (1) The responsible entity of a registered scheme is to operate the
11 scheme and perform the functions conferred on it by the scheme's
12 constitution and this Act.

13 (2) The responsible entity has power to appoint an agent, or otherwise
14 engage a person, to do anything that it is authorised to do in
15 connection with the scheme. For the purpose of determining
16 whether:

17 (a) there is a liability to the members; or

18 (b) the responsible entity has properly performed its duties for
19 the purposes of subsection 601GA(2);

20 the responsible entity is taken to have done (or failed to do)
21 anything that the agent or person has done (or failed to do) because
22 of the appointment or engagement, even if they were acting
23 fraudulently or outside the scope of their authority or engagement.

24 Note: A scheme's constitution may provide for the responsible entity to
25 be indemnified for liabilities—see subsection 601GA(2).

26 (3) An agent appointed, or a person otherwise engaged, by:

27 (a) the agent or person referred to in subsection (2); or

28 (b) a person who is taken under this subsection to be an agent of
29 the responsible entity;

30 to do anything that the responsible entity is authorised to do in
31 connection with the scheme is taken to be an agent appointed by

1 the responsible entity to do that thing for the purposes of
2 subsection (2).

3 (4) If:

- 4 (a) an agent holds scheme property on behalf of the responsible
5 entity; and
6 (b) the agent is liable to indemnify the responsible entity against
7 any loss or damage that:
8 (i) the responsible entity suffers as a result of a wrongful or
9 negligent act or omission of the agent; and
10 (ii) relates to a failure by the responsible entity to perform
11 its duties in relation to the scheme;
12 any amount recovered under the indemnity forms part of the
13 scheme property.

14 **601FC Duties of responsible entity**

- 15 (1) In exercising its powers and carrying out its duties, the responsible
16 entity of a registered scheme must:
17 (a) act honestly; and
18 (b) exercise the degree of care and diligence that a reasonable
19 person would exercise if they were in the responsible entity's
20 position; and
21 (c) act in the best interests of the members and, if there is a
22 conflict between the members' interests and its own interests,
23 give priority to the members' interests; and
24 (d) treat the members who hold interests of the same class
25 equally and members who hold interests of different classes
26 fairly; and
27 (e) not make use of information acquired through being the
28 responsible entity in order to:
29 (i) gain an improper advantage for itself or another person;
30 or
31 (ii) cause detriment to the members of the scheme; and
32 (f) ensure that the scheme's constitution meets the requirements
33 of sections 601GA and 601GB; and

- 1 (g) ensure that the scheme's compliance plan meets the
2 requirements of section 601HA; and
3 (h) comply with the scheme's compliance plan; and
4 (i) ensure that scheme property is:
5 (i) clearly identified as scheme property; and
6 (ii) held separately from property of the responsible entity
7 and property of any other scheme; and
8 (j) ensure that the scheme property is valued at regular intervals
9 appropriate to the nature of the property; and
10 (k) ensure that all payments out of the scheme property are made
11 in accordance with the scheme's constitution and this Act;
12 and
13 (l) report to ASIC any breach of this Act that:
14 (i) relates to the scheme; and
15 (ii) has had, or is likely to have, a materially adverse effect
16 on the interests of members;
17 as soon as practicable after it becomes aware of the breach;
18 and
19 (m) carry out or comply with any other duty, not inconsistent
20 with this Act, that is conferred on the responsible entity by
21 the scheme's constitution.

22 Note: Subsection (1) is a civil penalty provision as defined by
23 section 1317DA and Part 9.4B provides for civil and criminal
24 consequences of contravening it.

- 25 (2) The responsible entity holds scheme property on trust for scheme
26 members.

27 Note: Under subsection 601FB(2), the responsible entity may appoint an
28 agent to hold scheme property separately from other property.

- 29 (3) A duty of the responsible entity under subsection (1) or (2)
30 overrides any conflicting duty an officer or employee of the
31 responsible entity has under Part 2D.1.

1 *Investment of scheme property in other managed investment*
2 *schemes*

- 3 (4) The responsible entity may only invest scheme property, or keep
4 scheme property invested, in another managed investment scheme
5 if that other scheme is registered under this Chapter.

6 **601FD Duties of officers of responsible entity**

- 7 (1) An officer of the responsible entity of a registered scheme must:
8 (a) act honestly; and
9 (b) exercise the degree of care and diligence that a reasonable
10 person would exercise if they were in the officer's position;
11 and
12 (c) act in the best interests of the members and, if there is a
13 conflict between the members' interests and the interests of
14 the responsible entity, give priority to the members' interests;
15 and
16 (d) not make use of information acquired through being an
17 officer of the responsible entity in order to:
18 (i) gain an improper advantage for the officer or another
19 person; or
20 (ii) cause detriment to the members of the scheme; and
21 (e) not make improper use of their position as an officer to gain,
22 directly or indirectly, an advantage for themselves or for any
23 other person or to cause detriment to the members of the
24 scheme; and
25 (f) take all steps that a reasonable person would take, if they
26 were in the officer's position, to ensure that the responsible
27 entity complies with:
28 (i) this Act; and
29 (ii) any conditions imposed on the responsible entity's
30 dealers licence; and
31 (iii) the scheme's constitution; and
32 (iv) the scheme's compliance plan.

33 Note: Subsection (1) is a civil penalty provision as defined in
34 section 1317DA and Part 9.4B provides for civil and criminal
35 consequences of contravening it.

- 1 (2) A duty of an officer of the responsible entity under subsection (1)
2 overrides any conflicting duty the officer has under Part 2D.1.

3 **601FE Duties of employees of responsible entity**

- 4 (1) An employee of the responsible entity of a registered scheme must
5 not:
6 (a) make use of information acquired through being an employee
7 of the responsible entity in order to:
8 (i) gain an improper advantage for the employee or another
9 person; or
10 (ii) cause detriment to members of the scheme; or
11 (b) make improper use of their position as an employee to gain,
12 directly or indirectly, an advantage for themselves or for any
13 other person or to cause detriment to the members of the
14 scheme.

15 Note: Subsection (1) is a civil penalty provision as defined in
16 section 1317DA and Part 9.4B provides for civil and criminal
17 consequences of contravening it.

- 18 (2) A duty of an employee of the responsible entity under
19 subsection (1) overrides any conflicting duty the employee has
20 under Part 2D.1.

21 **601FF Surveillance checks by ASIC**

- 22 (1) ASIC may, from time to time, check whether the responsible entity
23 of a registered scheme is complying with the scheme's constitution
24 and compliance plan and with this Act.

25 Note: For this purpose ASIC may exercise the powers set out in
26 Division 3 of Part 3 of the ASIC Act.

- 27 (2) The responsible entity and its officers must take all reasonable
28 steps to assist ASIC in carrying out a check under subsection (1).

29 **601FG Acquisition of interest in scheme by responsible entity**

30 The responsible entity of a registered scheme may acquire and hold
31 an interest in the scheme, but it must only do so:

- 1 (a) for not less than the consideration that would be payable if
2 the interest were acquired by another person; and
3 (b) subject to terms and conditions that would not disadvantage
4 other members.

5 Note 1: If the responsible entity holds an interest in the scheme, it does so
6 subject to section 253E (certain members cannot vote or be
7 counted).

8 Note 2: This section is a civil penalty provision as defined in
9 section 1317DA and Part 9.4B provides for civil and criminal
10 consequences of contravening it.

11 **601FH Liquidator etc. of responsible entity entitled to exercise**
12 **indemnity rights**

13 If the company that is a registered scheme's responsible entity is
14 being wound up, is under administration or has executed a deed of
15 company arrangement that has not terminated:

- 16 (a) a provision of the scheme's constitution, or of another
17 instrument, is void against the liquidator, or the administrator
18 of the company or the deed, if it purports to deny the
19 company a right to be indemnified out of the scheme
20 property that the company would have had if it were not
21 being wound up, were not under administration, or had not
22 executed a deed of company arrangement; and
23 (b) a right of the company to be indemnified out of the scheme
24 property may only be exercised by the liquidator or the
25 administrator of the company or the deed.

1

2 **Division 2—Changing the responsible entity**

3 **601FJ Changes only take effect when ASIC alters record of**
4 **registration**

- 5 (1) Despite anything in this Division, the company named in ASIC's
6 record of registration as the responsible entity or temporary
7 responsible entity of a registered scheme remains the scheme's
8 responsible entity until the record is altered to name another
9 company as the scheme's responsible entity or temporary
10 responsible entity.
- 11 (2) A purported change of the scheme's responsible entity is
12 ineffective unless it is in accordance with this Division.

13 **601FK Requirements of section 601FA must be met**

14 A company cannot be chosen or appointed as the responsible entity
15 or temporary responsible entity of a registered scheme unless it
16 meets the requirements of section 601FA.

17 **601FL Retirement of responsible entity**

- 18 (1) If the responsible entity of a registered scheme wants to retire, it
19 must call a members' meeting to explain its reason for wanting to
20 retire and to enable the members to vote on a resolution to choose a
21 company to be the new responsible entity. The resolution must be
22 an extraordinary resolution if the scheme is not listed.
- 23 (2) If the members choose a company to be the new responsible entity
24 and that company has consented, in writing, to becoming the
25 scheme's responsible entity:
- 26 (a) as soon as practicable and in any event within 2 business
27 days after the resolution is passed, the current responsible
28 entity must lodge a notice with ASIC asking it to alter the
29 record of the scheme's registration to name the chosen
30 company as the scheme's responsible entity; and

- 1 (b) if the current responsible entity does not lodge the notice
2 required by paragraph (a), the company chosen by the
3 members to be the new responsible entity may lodge that
4 notice; and
5 (c) ASIC must comply with the notice when it is lodged.
- 6 (3) If the members do not choose a company to be the new responsible
7 entity, or the company they choose does not consent to becoming
8 the scheme's responsible entity, the current responsible entity may
9 apply to the Court for appointment of a temporary responsible
10 entity under section 601FP.
- 11 (4) A person must not lodge a notice under subsection (2) unless the
12 consent referred to in that subsection has been given before the
13 notice is lodged.

14 **601FM Removal of responsible entity by members**

- 15 (1) If members of a registered scheme want to remove the responsible
16 entity, they may take action under Division 1 of Part 2G.4 for the
17 calling of a members' meeting to consider and vote on a resolution
18 that the current responsible entity should be removed and a
19 resolution choosing a company to be the new responsible entity.
20 The resolutions must be extraordinary resolutions if the scheme is
21 not listed.
- 22 (2) If the members vote to remove the responsible entity and, at the
23 same meeting, choose a company to be the new responsible entity
24 that consents, in writing, to becoming the scheme's responsible
25 entity:
- 26 (a) as soon as practicable and in any event within 2 business
27 days after the resolution is passed, the current responsible
28 entity must lodge a notice with ASIC asking it to alter the
29 record of the scheme's registration to name the chosen
30 company as the scheme's responsible entity; and
- 31 (b) if the current responsible entity does not lodge the notice
32 required by paragraph (a), the company chosen by the
33 members to be the new responsible entity may lodge that
34 notice; and

1 (c) ASIC must comply with the notice when it is lodged.

2 (3) A person must not lodge a notice under subsection (2) unless the
3 consent referred to in that subsection has been given before the
4 notice is lodged.

5 Note: If the members vote to remove the responsible entity but do not, at
6 the same meeting, choose a company to be the new responsible
7 entity, or the company they choose does not consent to becoming
8 the scheme's responsible entity, the scheme must be wound up
9 (see section 601NE).

10 **601FN ASIC or scheme member may apply to Court for**
11 **appointment of temporary responsible entity**

12 ASIC or a member of the registered scheme may apply to the Court
13 for the appointment of a temporary responsible entity of the
14 scheme under section 601FP if the scheme does not have a
15 responsible entity that meets the requirements of section 601FA.

16 **601FP Appointment of temporary responsible entity by Court**

17 (1) On application under section 601FL or 601FN, the Court may, by
18 order, appoint a company as the temporary responsible entity of a
19 registered scheme if the Court is satisfied that the appointment is in
20 the interest of the members.

21 (2) The Court may make any further orders that it considers necessary.

22 (3) If the application was made by the current responsible entity, it
23 must, as soon as practicable after the Court's order appointing the
24 temporary responsible entity, lodge a notice with ASIC informing
25 ASIC of the appointment made by the Court.

26 (4) As soon as practicable after the appointment, ASIC must alter the
27 record of the scheme's registration to name the appointed company
28 as the scheme's temporary responsible entity.

1 **601FQ Temporary responsible entity to take steps for appointment**
2 **of new responsible entity**

- 3 (1) The temporary responsible entity of a registered scheme must call a
4 members' meeting for the purpose of the members, by resolution,
5 choosing a company to be the new responsible entity. The
6 resolution must be an extraordinary resolution if the scheme is not
7 listed. The temporary responsible entity must call the meeting as
8 soon as practicable and, in any event, within 3 months of becoming
9 the temporary responsible entity.
- 10 (2) Within that 3 months, the temporary responsible entity may call
11 further members' meetings for the purpose of choosing a company
12 to be the new responsible entity. Before the end of the 3 months, it
13 may apply to the Court for an extension of that period. If the Court
14 grants the extension, the temporary responsible entity may, within
15 the extended period, call further members' meetings for the
16 purpose of choosing a company to be the new responsible entity.
- 17 (3) Provided it still meets the requirements in section 601FA, nothing
18 prevents the company that is the temporary responsible entity from
19 being chosen as the new responsible entity.
- 20 (4) If the members choose a company to be the new responsible entity
21 and that company has consented, in writing, to becoming the
22 scheme's responsible entity, the temporary responsible entity must,
23 as soon as practicable, lodge a notice with ASIC asking it to alter
24 the record of the scheme's registration to name the chosen
25 company as the scheme's responsible entity. ASIC must comply
26 with the notice when it is lodged.
- 27 (5) The temporary responsible entity must apply to the Court for an
28 order directing it to wind up the scheme, and the Court may make
29 the order, if:
- 30 (a) no meeting is called within the 3 months or extended period
31 for the purpose of choosing a new company to be the
32 responsible entity; or
- 33 (b) the meeting or meetings called within that period for that
34 purpose have not resulted in the members choosing a

- 1 company to be the new responsible entity that consents to
2 becoming the scheme's responsible entity.
3 ASIC or a member of the scheme may apply for the order if the
4 temporary responsible entity does not do so.
- 5 (6) The temporary responsible entity must not lodge a notice under
6 subsection (4) unless the consent referred to in that subsection has
7 been given before the notice is lodged.

1

2 **Division 3—Consequences of change of responsible entity**

3 **601FR Former responsible entity to hand over books and provide**
4 **reasonable assistance**

5 If the responsible entity of a registered scheme changes, the former
6 responsible entity must:

- 7 (a) as soon as practicable give the new responsible entity any
8 books in the former responsible entity's possession or control
9 that this Act requires to be kept in relation to the scheme; and
10 (b) give other reasonable assistance to the new responsible entity
11 to facilitate the change of responsible entity.

12 **601FS Rights, obligations and liabilities of former responsible entity**

13 (1) If the responsible entity of a registered scheme changes, the rights,
14 obligations and liabilities of the former responsible entity in
15 relation to the scheme become rights, obligations and liabilities of
16 the new responsible entity.

- 17 (2) Despite subsection (1), the following rights and liabilities remain
18 rights and liabilities of the former responsible entity:
- 19 (a) any right of the former responsible entity to be paid fees for
20 the performance of its functions before it ceased to be the
21 responsible entity; and
22 (b) any right of the former responsible entity to be indemnified
23 for expenses it incurred before it ceased to be the responsible
24 entity; and
25 (c) any right, obligation or liability that the former responsible
26 entity had as a member of the scheme; and
27 (d) any liability for which the former responsible entity could not
28 have been indemnified out of the scheme property if it had
29 remained the scheme's responsible entity.

1 **601FT Effect of change of responsible entity on documents etc. to**
2 **which former responsible entity is party**

3 (1) If the responsible entity of a registered scheme changes, a
4 document:

5 (a) to which the former responsible entity is a party, in which a
6 reference is made to the former responsible entity, or under
7 which the former responsible entity has acquired or incurred
8 a right, obligation or liability, or might have acquired or
9 incurred a right, obligation or liability if it had remained the
10 responsible entity; and

11 (b) that is capable of having effect after the change;

12 has effect as if the new responsible entity (and not the former
13 responsible entity) were a party to it, were referred to in it or had or
14 might have acquired or incurred the right, obligation or liability
15 under it.

16 (2) Subsection (1) does not apply to a right, obligation or liability that
17 remains a right, obligation or liability of the former responsible
18 entity because of subsection 601FS(2).

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Part 5C.3—The constitution

3

4

601GA Contents of the constitution

5

- (1) The constitution of a registered scheme must make adequate provision for:

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(a) the consideration that is to be paid to acquire an interest in the scheme; and

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(b) the powers of the responsible entity in relation to making investments of, or otherwise dealing with, scheme property; and

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12

(c) the method by which complaints made by members in relation to the scheme are to be dealt with; and

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14

(d) winding up the scheme.

15

- (2) If the responsible entity is to have any rights to be paid fees out of scheme property, or to be indemnified out of scheme property for liabilities or expenses incurred in relation to the performance of its duties, those rights:

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18

(a) must be specified in the scheme's constitution; and

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(b) must be available only in relation to the proper performance of those duties;

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22

and any other agreement or arrangement has no effect to the extent that it purports to confer such a right.

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24

- (3) If the responsible entity is to have any powers to borrow or raise money for the purposes of the scheme:

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(a) those powers must be specified in the scheme's constitution; and

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(b) any other agreement or arrangement has no effect to the extent that it purports to confer such a power.

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- (4) If members are to have a right to withdraw from the scheme, the scheme's constitution must:

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(a) specify the right; and

Clause 601GB

- 1 (b) if the right may be exercised while the scheme is liquid (as
2 defined in section 601KA)—set out adequate procedures for
3 making and dealing with withdrawal requests; and
4 (c) if the right may be exercised while the scheme is not liquid
5 (as defined in section 601KA)—provide for the right to be
6 exercised in accordance with Part 5C.6 and set out any other
7 adequate procedures (consistent with that Part) that are to
8 apply to making and dealing with withdrawal requests.
9 The right to withdraw, and any provisions in the constitution
10 setting out procedures for making and dealing with withdrawal
11 requests, must be fair to all members.

12 **601GB Constitution must be legally enforceable**

13 The constitution of a registered scheme must be contained in a
14 document that is legally enforceable as between the members and
15 the responsible entity.

16 **601GC Changing the constitution**

- 17 (1) The constitution of a registered scheme may be modified, or
18 repealed and replaced with a new constitution:
19 (a) by special resolution of the members of the scheme; or
20 (b) by the responsible entity if the responsible entity reasonably
21 considers the change will not adversely affect members'
22 rights.
- 23 (2) The responsible entity must lodge with ASIC a copy of the
24 modification or the new constitution. The modification, or repeal
25 and replacement, cannot take effect until the copy has been lodged.
- 26 (3) The responsible entity must lodge with ASIC a consolidated copy
27 of the scheme's constitution if ASIC directs it to do so.
- 28 (4) The responsible entity must send a copy of the scheme's
29 constitution to a member of the scheme within 7 days if the
30 member:
31 (a) asks the responsible entity, in writing, for the copy; and

Clause 601GC

- 1 (b) pays any fee (up to the prescribed amount) required by the
2 responsible entity.

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Part 5C.4—The compliance plan

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601HA Contents of the compliance plan

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(1) The compliance plan of a registered scheme must set out adequate measures that the responsible entity is to apply in operating the scheme to ensure compliance with this Act and the scheme's constitution, including the arrangements for:

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(a) ensuring that all scheme property is clearly identified as scheme property and held separately from property of the responsible entity and property of any other scheme (see paragraph 601FC(1)(i)); and

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(b) if the scheme is required to have a compliance committee (see section 601JA)—ensuring that the compliance committee functions properly, including adequate arrangements relating to:

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17

(i) the membership of the committee; and

18

(ii) how often committee meetings are to be held; and

19

(iii) the committee's reports and recommendations to the responsible entity; and

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21

(iv) the committee's access to the scheme's accounting records and to the auditor of the scheme's financial statements; and

22

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24

(v) the committee's access to information that is relevant to the responsible entity's compliance with this Act; and

25

26

(c) ensuring that the scheme property is valued at regular intervals appropriate to the nature of the property; and

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(d) ensuring that compliance with the plan is audited as required by section 601HG; and

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(e) ensuring adequate records of the scheme's operations are kept; and

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32

(f) any other matter prescribed by the regulations.

33

(2) If:

Clause 601HB

- 1 (a) a registration application is made as a result of a resolution
2 passed under subparagraph 1457(1)(a)(i); and
3 (b) the resolution included a direction under subsection
4 1457(1A);
5 the compliance plan lodged with the application must provide for
6 scheme property to be held by a person other than the responsible
7 entity, or a person that is not related to the responsible entity, as the
8 responsible entity's agent.

9 **601HB Compliance plan may incorporate provisions from another**
10 **scheme's plan**

- 11 (1) The responsible entity of a registered scheme may lodge with
12 ASIC a compliance plan for the scheme that is expressed to
13 incorporate specified provisions, as in force at a specified time, of
14 a compliance plan of another registered scheme of which it is also
15 the responsible entity.
16 (2) The specified provisions, as in force at the specified time, are taken
17 to be included in the plan.

18 **601HC Directors must sign lodged copy of compliance plan**

19 The copy of a scheme's compliance plan that is lodged with ASIC
20 must be signed by all the directors of the responsible entity.

21 **601HD ASIC may require further information about compliance**
22 **plan**

23 ASIC may direct the responsible entity of a registered scheme to
24 give it information about the arrangements contained in the
25 compliance plan. The direction is to be given by notice in writing
26 to the responsible entity.

1 **601HE Changing the compliance plan**

2 *Responsible entity's powers*

- 3 (1) The responsible entity of a registered scheme may modify the
4 scheme's compliance plan or repeal it and replace it with a new
5 compliance plan.

6 *ASIC may require modifications*

- 7 (2) ASIC may direct the responsible entity of a registered scheme to
8 modify the scheme's compliance plan, as set out in the direction, to
9 ensure that the plan is consistent with section 601HA. The
10 direction is to be given by notice in writing to the responsible
11 entity.

12 *Lodgment of modification or new plan*

- 13 (3) The responsible entity must lodge with ASIC a copy of a
14 modification of the scheme's compliance plan or of a new
15 compliance plan within 14 days after the modification is made or
16 the old plan is repealed. The copy must be signed by all the
17 directors of the responsible entity.

18 **601HF ASIC may require consolidation of compliance plan to be**
19 **lodged**

- 20 (1) ASIC may direct the responsible entity of a registered scheme to
21 lodge a consolidated copy of the scheme's compliance plan.
- 22 (2) The consolidation must set out:
23 (a) the plan as modified to the time of lodgment; and
24 (b) if required by ASIC's direction—the full text of provisions
25 taken to be included in the plan by subsection 601HB(2).

26 **601HG Audit of compliance plan**

- 27 (1) The responsible entity of a registered scheme must ensure that at
28 all times a registered company auditor is engaged to audit
29 compliance with the scheme's compliance plan in accordance with

- 1 this section. This auditor is referred to as the *auditor of the*
2 *compliance plan*.
- 3 (2) A person is not eligible to act as the auditor of the compliance plan
4 if the person is:
- 5 (a) an associate of the responsible entity; or
6 (b) an agent holding scheme property on behalf of the
7 responsible entity or an associate of an agent of that kind; or
8 (c) the auditor of the responsible entity's financial statements.
- 9 The auditor of the compliance plan and the auditor of the
10 responsible entity's financial statements may, however, work for
11 the same firm of auditors.
- 12 (3) Within 3 months after the end of a financial year of the scheme, the
13 auditor of the compliance plan must:
- 14 (a) examine the scheme's compliance plan; and
15 (b) carry out:
- 16 (i) if the scheme has only had one responsible entity during
17 the financial year—an audit of the responsible entity's
18 compliance with the compliance plan during the
19 financial year; or
20 (ii) if the scheme has had more than one responsible entity
21 during the financial year—an audit of each responsible
22 entity's compliance with the compliance plan during
23 that part of the financial year when it was the scheme's
24 responsible entity; and
- 25 (c) give to the scheme's current responsible entity a report that
26 states whether, in the auditor's opinion:
- 27 (i) the responsible entity, or each responsible entity,
28 complied with the scheme's compliance plan during the
29 financial year or that part of the financial year when it
30 was the scheme's responsible entity; and
31 (ii) the plan continues to meet the requirements of this Part.
- 32 (4) The auditor of the compliance plan must, as soon as possible,
33 notify ASIC in writing if the auditor:
- 34 (a) has reasonable grounds to suspect that a contravention of this
35 Act has occurred; and

Clause 601HH

- 1 (b) believes that the contravention has not been or will not be
2 adequately dealt with by commenting on it in the auditor's
3 report under subsection (3) or bringing it to the attention of
4 the responsible entity.
- 5 (5) The auditor of the compliance plan:
6 (a) has a right of access at all reasonable times to the books of
7 the scheme; and
8 (b) may require an officer of the responsible entity to give the
9 auditor information and explanations for the purposes of the
10 audit.
- 11 (6) An officer of the responsible entity must:
12 (a) allow the auditor of the compliance plan to have access to the
13 books of the scheme; and
14 (b) give the auditor information or an explanation required under
15 subsection (5); and
16 (c) otherwise assist the conduct of the audit.
- 17 (7) The responsible entity must lodge the auditor's report under
18 subsection (3) with ASIC at the same time as the financial
19 statements and reports in respect of the scheme are to be lodged
20 with ASIC (see sections 292 and 321).
- 21 (8) The auditor of the compliance plan has qualified privilege in
22 respect of:
23 (a) a statement made in a report under subsection (3); or
24 (b) a notification to ASIC under subsection (4).
- 25 (9) This section does not prevent the responsible entity from arranging
26 for the auditor of the compliance plan to carry out audits in
27 addition to those required by this section.

28 **601HH Removal and resignation of auditors**

29 *Removal of auditor by responsible entity*

- 30 (1) The responsible entity:

- 1 (a) must remove the auditor of the compliance plan if the auditor
2 becomes ineligible under subsection 601HG(2) to act as
3 auditor of the compliance plan; and
4 (b) may, with ASIC's consent, remove the auditor of the
5 compliance plan.

6 *Resignation of auditor*

- 7 (2) The auditor of the compliance plan may resign by written notice to
8 the responsible entity if:
9 (a) the auditor:
10 (i) applies to ASIC in writing for its consent to the
11 resignation; and
12 (ii) gives the responsible entity written notice of the
13 application at or about the same time as applying to
14 ASIC; and
15 (b) ASIC consents to the resignation.
- 16 (3) As soon as practicable after receiving the application, ASIC must
17 notify the auditor and the responsible entity whether it consents to
18 the resignation.
- 19 (4) A statement by the auditor in the application or in answer to an
20 inquiry by ASIC relating to the reasons for the application:
21 (a) is not admissible in evidence in any civil or criminal
22 proceedings against the auditor (other than proceedings for a
23 contravention of section 1308); and
24 (b) may not be made the ground of a prosecution (other than a
25 prosecution for a contravention of section 1308), action or
26 suit against the auditor.
27 A certificate by ASIC that the statement was made in the
28 application, or in answer to an inquiry by ASIC, is conclusive
29 evidence that the statement was so made.
- 30 (5) The auditor's resignation takes effect on the later of:
31 (a) the day (if any) specified in the notice of resignation; or
32 (b) the day ASIC consents to the resignation; or
33 (c) the day (if any) fixed by ASIC for the purpose.

1 **601HI Action on change of auditor of compliance plan**

2 If the auditor of the compliance plan of a registered scheme
3 changes, the responsible entity must, as soon as practicable after
4 the change and in writing, ask ASIC to alter the record of the
5 scheme's registration to show the name of the new auditor as the
6 auditor of the scheme's compliance plan. ASIC must comply with
7 the request if the change complies with this Act.

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2

Part 5C.5—The compliance committee

3

4

601JA When is a compliance committee required?

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(1) The responsible entity of a registered scheme must establish a compliance committee if less than half of the directors of the responsible entity are external directors.

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(2) A director of the responsible entity is an external director if they:

9

(a) are not, and have not been in the previous 2 years, an employee of the responsible entity or a related body corporate; and

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(b) are not, and have not been in the previous 2 years, an executive officer of a related body corporate; and

13

14

(c) are not, and have not been in the previous 2 years, substantially involved in business dealings, or in a professional capacity, with the responsible entity or a related body corporate; and

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16

17

(d) are not a member of a partnership that is, or has been in the previous 2 years, substantially involved in business dealings, or in a professional capacity, with the responsible entity or a related body corporate; and

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21

(e) do not have a material interest in the responsible entity or a related body corporate; and

22

23

24

(f) are not a relative or de facto spouse of a person who has a material interest in the responsible entity or a related body corporate.

25

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(3) The responsible entity must establish the compliance committee within 14 days after it is required to do so by subsection (1) or within any longer period that ASIC has agreed to in writing.

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(4) In agreeing to a longer period under subsection (3), ASIC may impose conditions to be complied with and the responsible entity must comply with them.

31

32

1 **601JB Membership of compliance committee**

- 2 (1) A scheme's compliance committee must have at least 3 members,
3 and a majority of them must be external members.
- 4 (2) A member of the compliance committee is an external member if
5 they:
- 6 (a) are not, and have not been in the previous 2 years, a
7 non-external director, an executive officer or an employee of
8 the responsible entity or a related body corporate; and
 - 9 (b) are not, and have not been in the previous 2 years,
10 substantially involved in business dealings, or in a
11 professional capacity, with the responsible entity or a related
12 body corporate; and
 - 13 (c) are not a member of a partnership that is, or has been in the
14 previous 2 years, substantially involved in business dealings,
15 or in a professional capacity, with the responsible entity or a
16 related body corporate; and
 - 17 (d) do not have a material interest in the responsible entity or a
18 related body corporate; and
 - 19 (e) are not a relative or de facto spouse of a person who has a
20 material interest in the responsible entity or a related body
21 corporate.
- 22 (3) For the purposes of paragraph (2)(a), a person who is a director of
23 a related body corporate, but not of the responsible entity itself, is
24 an external director of the related body corporate if they would
25 have been an external director of the responsible entity under
26 subsection 601JA(2) had they been a director of the responsible
27 entity.
- 28 (4) A person who is, or has been, either:
- 29 (a) an external director of the responsible entity; or
 - 30 (b) a member of a compliance committee for the scheme or
31 another registered managed investment scheme operated by
32 the responsible entity;
- 33 is not, merely because of that directorship or membership, taken to
34 be, or to have been, substantially involved in business dealings, or
35 in a professional capacity, with the responsible entity.

Clause 601JC

- 1 (5) If the membership of the scheme's compliance committee ceases to
2 satisfy subsection (1), the responsible entity must make
3 appointments to the committee to satisfy that subsection within 14
4 days or within any longer period that ASIC has agreed to in
5 writing.
- 6 (6) In agreeing to a longer period under subsection (5), ASIC may
7 impose conditions to be complied with and the responsible entity
8 must comply with them.

9 **601JC Functions of compliance committee**

- 10 (1) The functions of a scheme's compliance committee are:
11 (a) to monitor to what extent the responsible entity complies
12 with the scheme's compliance plan and to report on its
13 findings to the responsible entity; and
14 (b) to report to the responsible entity:
15 (i) any breach of this Act involving the scheme; or
16 (ii) any breach of the provisions included in the scheme's
17 constitution in accordance with section 601GA;
18 of which the committee becomes aware or that it suspects;
19 and
20 (c) to report to ASIC if the committee is of the view that the
21 responsible entity has not taken, or does not propose to take,
22 appropriate action to deal with a matter reported under
23 paragraph (b); and
24 (d) to assess at regular intervals whether the compliance plan is
25 adequate, to report to the responsible entity on the assessment
26 and to make recommendations to the responsible entity about
27 any changes that it considers should be made to the plan.
- 28 (2) In carrying out its functions, the compliance committee may
29 commission independent legal, accounting or other professional
30 advice or assistance, at the reasonable expense of the responsible
31 entity.

32 **601JD Duties of members**

- 33 (1) A member of a scheme's compliance committee must:

Clause 601JE

- 1 (a) act honestly; and
2 (b) exercise the degree of care and diligence that a reasonable
3 person would exercise if they were in the member's position;
4 and
5 (c) not make use of information acquired through being a
6 member of the committee in order to:
7 (i) gain an improper advantage for the member or another
8 person; or
9 (ii) cause detriment to the members of the scheme; and
10 (d) not make improper use of their position as a member of the
11 committee to gain, directly or indirectly, an advantage for
12 themselves or for any other person or to cause detriment to
13 the members of the scheme.

14 Note: Subsection (1) is a civil penalty provision as defined in
15 section 1317DA and Part 9.4B provides for civil and criminal
16 consequences of contravening it.

- 17 (2) A member of the compliance committee is to take all reasonable
18 steps to assist ASIC in carrying out a check under subsection
19 601FF(1).

20 **601JE Compliance committee members have qualified privilege in**
21 **certain cases**

22 A member of a scheme's compliance committee has qualified
23 privilege in respect of a statement concerning the operation of the
24 scheme made by or on behalf of the committee, or a member of the
25 committee, to the responsible entity or to ASIC.

26 **601JF When can responsible entity indemnify compliance**
27 **committee members?**

- 28 (1) A scheme's responsible entity or a related body corporate must not:
29 (a) indemnify a person who is or has been a member of the
30 scheme's compliance committee against a liability incurred
31 by the person as a member; or
32 (b) exempt the person from such a liability.

- 1 (2) A provision of the scheme's constitution or a body corporate's
2 constitution is void in so far as it provides for the responsible entity
3 or a related body corporate to do something that subsection (1)
4 prohibits.
- 5 (3) Subsection (1) does not prevent a person from being indemnified
6 against a liability to another person (other than the responsible
7 entity or a related body corporate) unless the liability arises out of
8 conduct involving a lack of good faith.
- 9 (4) Subsection (1) does not prevent a person from being indemnified
10 against a liability for costs and expenses incurred by them:
11 (a) in defending proceedings, whether civil or criminal, in which
12 judgment is given in favour of them or in which they are
13 acquitted; or
14 (b) in connection with an application, in relation to such
15 proceedings, in which the Court grants relief to them under
16 this Act.
- 17 (5) In this section:
18 *indemnify* includes indemnify indirectly through one or more
19 interposed entities.

20 **601JG When can responsible entity pay insurance premiums for**
21 **compliance committee members?**

- 22 (1) A scheme's responsible entity or a related body corporate must not
23 pay, or agree to pay, a premium in respect of a contract insuring a
24 person who is or has been a member of the scheme's compliance
25 committee against a liability:
26 (a) incurred by the person as a member; and
27 (b) arising out of conduct involving a wilful breach of a duty
28 referred to in section 601JD.
- 29 (2) If subsection (1) is contravened, the contract is void in so far as it
30 insures the person against the liability.

Clause 601JH

1 (3) Subsections (1) and (2) do not apply to a liability for costs and
2 expenses incurred by a person in defending proceedings, whether
3 civil or criminal and whatever their outcome.

4 (4) In this section:

5 *pay* includes pay indirectly through one or more interposed entities.

6 **601JH Proceedings of compliance committee**

7 (1) Subject to the requirements of the compliance plan, a scheme's
8 compliance committee may regulate its proceedings as it thinks
9 appropriate.

10 (2) The committee must keep:

11 (a) minutes of its meetings; and

12 (b) records of its reports and recommendations.

13 (3) A committee meeting may be held using any technology agreed to
14 by all the members.

15 **601JJ Disclosure of interests**

16 (1) A member of a scheme's compliance committee must disclose to
17 the committee a direct or indirect pecuniary interest that they have
18 in a matter being considered, or about to be considered, by the
19 committee if their interest could conflict with the proper
20 performance of their duties in relation to the consideration of the
21 matter.

22 (2) A disclosure under subsection (1) must occur at the first meeting of
23 the committee after the relevant facts have come to the member's
24 knowledge and must be recorded in the minutes of the meeting.

1

2 **Part 5C.6—Members' rights to withdraw from a**
3 **scheme**

4

5 **601KA Members' rights to withdraw**

6

Withdrawal from schemes that are liquid

7

- (1) The constitution of a registered scheme may make provision for members to withdraw from the scheme, wholly or partly, at any time while the scheme is liquid (see subsection 601GA(4)).

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Withdrawal from schemes that are not liquid

11

- (2) The constitution of a registered scheme may make provision for members to withdraw from the scheme, wholly or partly, in accordance with this Part while the scheme is not liquid (see subsection 601GA(4)).

12

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Restrictions on withdrawal from schemes

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- (3) The responsible entity must not allow a member to withdraw from the scheme:

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(a) if the scheme is liquid—otherwise than in accordance with the scheme's constitution; or

(b) if the scheme is not liquid—otherwise than in accordance with the scheme's constitution and sections 601KB to 601KE.

23

Liquid schemes

24

- (4) A registered scheme is liquid if liquid assets account for at least 80% of the value of scheme property.

25

26

Liquid assets

27

- (5) The following are liquid assets unless it is proved that the responsible entity cannot reasonably expect to realise them within

28

- 1 the period specified in the constitution for satisfying withdrawal
2 requests while the scheme is liquid:
- 3 (a) money in an account or on deposit with a bank;
 - 4 (b) bank accepted bills;
 - 5 (c) marketable securities (as defined in section 9);
 - 6 (d) property of a prescribed kind.
- 7 (6) Any other property is a liquid asset if the responsible entity
8 reasonably expects that the property can be realised for its market
9 value within the period specified in the constitution for satisfying
10 withdrawal requests while the scheme is liquid.

11 **601KB Non-liquid schemes—offers**

- 12 (1) The responsible entity of a registered scheme that is not liquid may
13 offer members an opportunity to withdraw, wholly or partly, from
14 the scheme to the extent that particular assets are available and able
15 to be converted to money in time to satisfy withdrawal requests
16 that members may make in response to the offer.
- 17 (2) The withdrawal offer must be in writing and be made:
- 18 (a) if the constitution specifies procedures for making the
19 offer—in accordance with those procedures; or
 - 20 (b) otherwise—by giving a copy of the offer to all members of
21 the scheme or to all members of a particular class.
- 22 (3) The withdrawal offer must specify:
- 23 (a) the period during which the offer will remain open (this
24 period must last for at least 21 days after the offer is made);
25 and
 - 26 (b) the assets that will be used to satisfy withdrawal requests;
27 and
 - 28 (c) the amount of money that is expected to be available when
29 those assets are converted to money; and
 - 30 (d) the method for dealing with withdrawal requests if the money
31 available is insufficient to satisfy all requests.
- 32 The method specified under paragraph (d) must comply with
33 section 601KD.

- 1 (4) For joint members, a copy of the withdrawal offer need only be
2 given to the joint member named first in the register of members.
- 3 (5) As soon as practicable after making the withdrawal offer, the
4 responsible entity must lodge a copy of the offer with ASIC.

5 **601KC Non-liquid schemes—only one withdrawal offer to be open**
6 **at any time**

7 Only one withdrawal offer may be open at any time in relation to a
8 particular interest in a registered scheme that is not liquid.

9 **601KD Non-liquid schemes—how payments are to be made**

10 The responsible entity of a registered scheme that is not liquid
11 must ensure that withdrawal requests made in response to a
12 withdrawal offer are satisfied within 21 days after the offer closes.
13 No request made under the withdrawal offer may be satisfied while
14 the offer is still open. If an insufficient amount of money is
15 available from the assets specified in the offer to satisfy all
16 requests, the requests are to be satisfied proportionately in
17 accordance with the formula:

18
$$\text{Amount of money available} \times \frac{\text{Amount member requested to withdraw}}{\text{Total of all amounts members request to withdraw}}$$

19 **601KE Non-liquid schemes—responsible entity may cancel**
20 **withdrawal offer**

- 21 (1) The responsible entity of a registered scheme that is not liquid:
22 (a) may cancel a withdrawal offer before it closes if the offer
23 contains a material error; or
24 (b) must cancel a withdrawal offer before it closes if it is in the
25 best interests of members to do so.
- 26 (2) The cancellation must be made:

Clause 601KE

- 1 (a) if the constitution specifies procedures for cancelling the
2 withdrawal offer—in accordance with those procedures; or
3 (b) otherwise—by notice in writing to the members to whom the
4 withdrawal offer was made.
- 5 (3) The responsible entity must lodge written notice of the cancellation
6 with ASIC.

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Part 5C.7—Related party transactions

3

4

601LA Chapter 2E applies with modifications

5

Chapter 2E applies to a registered scheme with the modifications set out in sections 601LB to 601LE and as if:

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(a) references to a public company were instead references to the responsible entity of the scheme; and

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9

(b) references to a benefit being given to or received by a related party of a public company were instead references to a benefit being given to or received by the responsible entity or a related party; and

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(c) references to a resolution of a public company were instead references to a resolution of the members of the scheme; and

14

15

(d) references to a general meeting were instead references to a members' meeting of the scheme; and

16

17

(e) references to members of a public company were instead references to members of the scheme; and

18

19

(f) references to the company's best interests were instead references to the best interests of the scheme's members.

20

21

601LB Replacement section 207

22

Chapter 2E applies as if section 207 were replaced by the following section:

23

24

207 Purpose

25

The rules in this Chapter, as they apply to a registered scheme, are designed to protect the interests of the scheme's members as a whole, by requiring member approval for giving financial benefits to the responsible entity or its related parties that come out of scheme property or that could endanger those interests.

26

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1 **601LC Replacement section 208**

2 Chapter 2E applies as if section 208 were replaced by the
3 following section:

4 **208 Need for member approval for financial benefit**

5 (1) If all the following conditions are satisfied in relation to a financial
6 benefit:

7 (a) the benefit is given by:

8 (i) the responsible entity of a registered scheme; or

9 (ii) an entity that the responsible entity controls; or

10 (iii) an agent of, or person engaged by, the responsible entity

11 (b) the benefit either:

12 (i) is given out of the scheme property; or

13 (ii) could endanger the scheme property

14 (c) the benefit is given to:

15 (i) the person or a related party; or

16 (ii) another person referred to in paragraph (a) or a related
17 party of that person;

18 then, for the person referred to in paragraph (a) to give the benefit,
19 either:

20 (d) the person referred to in paragraph (a) must:

21 (i) obtain the approval of the scheme's members in the way
22 set out in sections 217 to 227; and

23 (ii) give the benefit within 15 months after the approval; or

24 (e) the giving of the benefit must fall within an exception set out
25 in sections 210 to 216.

26 Note: Section 228 defines *related party*, section 191 defines *entity*,
27 section 191 defines *control* and section 229 affects the meaning of
28 *giving a financial benefit*.

29 (2) If:

30 (a) the giving of the benefit is required by a contract; and

31 (b) the making of the contract was approved in accordance with
32 subparagraph (1)(d)(i) as a financial benefit given to the
33 entity or related party; and

Clause 601LD

- 1 (c) the contract was made:
2 (i) within 15 months after that approval; or
3 (ii) before that approval, if the contract was conditional on
4 the approval being obtained;
5 member approval for the giving of the benefit is taken to have been
6 given and the benefit need not be given within the 15 months.
- 7 (3) Subsection (1) does not prevent the responsible entity from paying
8 itself fees, and exercising rights to an indemnity, as provided for in
9 the scheme's constitution under subsection 601GA(2).

10 **601LD Omission of sections 213, 214 and 224**

11 Chapter 2E applies as if sections 213, 214 and 224 were omitted.

12 Note: Instead of section 224, the rule in section 253E will apply.

13 **601LE Modification of section 225**

14 Chapter 2E applies as if subsection 225(1) were amended by
15 omitting "subsection 224(1)" and substituting "section 253E".

1

2 **Part 5C.8—Effect of contraventions (civil liability**
3 **and voidable contracts)**
4

5 **601MA Civil liability of responsible entity to members**

6 (1) A member of a registered scheme who suffers loss or damage
7 because of conduct of the scheme's responsible entity that
8 contravenes a provision of this Chapter may recover the amount of
9 the loss or damage by action against the responsible entity whether
10 or not the responsible entity has been convicted of an offence, or
11 has had a civil penalty order made against it, in respect of the
12 contravention.

13 (2) An action under subsection (1) must be begun within 6 years after
14 the cause of action arises.

15 (3) This section does not affect any liability that a person has under
16 other provisions of this Act or under other laws.

17 **601MB Voidable contracts where subscription offers and invitations**
18 **contravene this Act**

19 (1) If:

20 (a) a managed investment scheme is being operated in
21 contravention of subsection 601ED(5) and a person (the
22 *offeror*) offers an interest in the scheme for subscription, or
23 issues an invitation to subscribe for an interest in the scheme;
24 or

25 (b) a person (the *offeror*), in contravention of Chapter 6D, offers
26 an interest in a registered scheme for subscription, or issues
27 an invitation to subscribe for an interest in a registered
28 scheme;

29 a contract entered into by a person (other than the offeror) to
30 subscribe for the interest as a result of the person accepting the
31 offer, or of the acceptance of an offer made by the person in
32 response to the invitation, is voidable at the option of that person
33 by notice in writing to the offeror.

- 1 (2) If the person gives a notice under subsection (1), the obligations of
2 the parties to the contract are suspended:
3 (a) during the period of 21 days after the notice is given; and
4 (b) during the period beginning when an application is made
5 under subsection (4) in relation to the notice and ending
6 when the application, and any appeals arising out of it, have
7 been finally determined or otherwise disposed of.
- 8 (3) Subject to subsection (6), the notice takes effect to void the
9 contract:
10 (a) at the end of 21 days after the notice is given; or
11 (b) if, within that 21 days, the offeror applies under
12 subsection (4)—at the end of the period when the obligations
13 of the parties are suspended under paragraph (2)(b).
- 14 (4) Within 21 days after the notice is given, the offeror may apply to
15 the Court for an order declaring the notice to have had no effect.
- 16 (5) The Court may extend the period within which the offeror may
17 apply under subsection (4), even if the notice has taken effect.
- 18 (6) On application under subsection (4), the Court may declare the
19 notice to have had no effect if it is satisfied that, in all the
20 circumstances, it is just and equitable to make the declaration.

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2

Part 5C.9—Winding up

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4

601NA Winding up required by scheme's constitution

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The constitution of a registered scheme may provide that the scheme is to be wound up:

6

7

(a) at a specified time; or

8

(b) in specified circumstances or on the happening of a specified event;

9

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but a provision of the constitution that purports to provide that the scheme is to be wound up if a particular company ceases to be its responsible entity is of no effect (including for the purposes of paragraph 601NE(1)(a)).

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601NB Winding up at direction of members

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If members of a registered scheme want the scheme to be wound up, they may take action under Division 1 of Part 2G.4 for the calling of a members' meeting to consider and vote on an extraordinary resolution directing the responsible entity to wind up the scheme.

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601NC Winding up if scheme's purpose accomplished or cannot be accomplished

21

22

(1) If the responsible entity of a registered scheme considers that the purpose of the scheme:

23

24

(a) has been accomplished; or

25

(b) cannot be accomplished;

26

it may, in accordance with this section, take steps to wind up the scheme.

27

28

(2) The responsible entity must give to the members of the scheme and to ASIC a notice in writing:

29

Clause 601ND

- 1 (a) explaining the proposal to wind up the scheme, including
2 explaining how the scheme's purpose has been accomplished
3 or why that purpose cannot be accomplished; and
4 (b) informing the members of their rights to take action under
5 Division 1 of Part 2G.4 for the calling of a members' meeting
6 to consider the proposed winding up of the scheme and to
7 vote on any extraordinary resolution members propose about
8 the winding up of the scheme; and
9 (c) informing the members that the responsible entity is
10 permitted to wind up the scheme unless a meeting is called to
11 consider the proposed winding up of the scheme within 28
12 days of the responsible entity giving the notice to the
13 members.
- 14 (3) If no meeting is called within that 28 days to consider the proposed
15 winding up, the responsible entity may wind up the scheme.

16 **601ND Winding up ordered by Court**

- 17 (1) The Court may, by order, direct the responsible entity of a
18 registered scheme to wind up the scheme if:
19 (a) the Court thinks it is just and equitable to make the order; or
20 (b) within 3 months before the application for the order was
21 made, execution or other process was issued on a judgment,
22 decree or order obtained in a court (whether an Australian
23 court or not) in favour of a creditor of, and against, the
24 responsible entity in its capacity as the scheme's responsible
25 entity and the execution or process has been returned
26 unsatisfied.
- 27 (2) An order based on paragraph (1)(a) may be made on the
28 application of:
29 (a) the responsible entity; or
30 (b) a director of the responsible entity; or
31 (c) a member of the scheme; or
32 (d) ASIC.
- 33 (3) An order based on paragraph (1)(b) may be made on the
34 application of a creditor.

1 **601NE The winding up of the scheme**

- 2 (1) The responsible entity of a registered scheme must ensure that the
3 scheme is wound up in accordance with its constitution and any
4 orders under subsection 601NF(2) if:
- 5 (a) the scheme's constitution provides that the scheme is to be
6 wound up at a specified time, in specified circumstances or
7 on the happening of a specified event and that time is
8 reached, those circumstances occur or that event occurs; or
 - 9 (b) the members pass an extraordinary resolution directing the
10 responsible entity to wind up the scheme; or
 - 11 (c) the Court makes an order directing the responsible entity to
12 wind up the scheme; or
 - 13 (d) the members pass a resolution removing the responsible
14 entity but do not, at the same meeting, pass a resolution
15 choosing a company to be the new responsible entity that
16 consents to becoming the scheme's responsible entity.

17 Note: For the Court's power to order winding up, see subsection
18 601FQ(5) and section 601ND.

- 19 (2) The responsible entity of a registered scheme may wind up the
20 scheme in accordance with its constitution and any orders under
21 subsection 601NF(2) if the responsible entity is permitted by
22 subsection 601NC(3) to wind up the scheme.
- 23 (3) Interests must not be issued in a registered scheme at a time after
24 the responsible entity has become obliged to ensure the scheme is
25 wound up, or after the scheme has started to be wound up.

26 **601NF Other orders about winding up**

- 27 (1) The Court may, by order, appoint a person to take responsibility
28 for ensuring a registered scheme is wound up in accordance with
29 its constitution and any orders under subsection (2) if the Court
30 thinks it necessary to do so (including for the reason that the
31 responsible entity has ceased to exist or is not properly discharging
32 its obligations in relation to the winding up).

Clause 601NG

- 1 (2) The Court may, by order, give directions about how a registered
2 scheme is to be wound up if the Court thinks it necessary to do so
3 (including for the reason that the provisions in the scheme's
4 constitution are inadequate or impracticable).
- 5 (3) An order under subsection (1) or (2) may be made on the
6 application of:
- 7 (a) the responsible entity; or
8 (b) a director of the responsible entity; or
9 (c) a member of the scheme; or
10 (d) ASIC.

11 **601NG Unclaimed money to be paid to ASIC**

12 If, on completion of the winding up of a registered scheme, the
13 person who has been winding up the scheme has in their
14 possession or under their control any unclaimed or undistributed
15 money or other property that was part of the scheme property, the
16 person must, as soon as practicable, pay the money or transfer the
17 property to ASIC to be dealt with under Part 9.7.

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2 **Part 5C.10—Deregistration**

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4 **601PA Deregistration—voluntary**

5 *Responsible entity may apply for deregistration*

- 6 (1) The responsible entity of a registered scheme may lodge an
7 application for deregistration of the scheme with ASIC.
- 8 (2) The responsible entity may only apply if:
- 9 (a) the scheme:
- 10 (i) has 20 or less members (calculated in accordance with
11 subsection 601ED(4)) and all the members agree that
12 the scheme should be deregistered; and
- 13 (ii) is not required to be registered by paragraph
14 601ED(1)(b) or (c); or
- 15 (b) because of subsection 601ED(2) (exemption based on
16 Chapter 6D not applying), the scheme is not required to be
17 registered and all the members agree that the scheme should
18 be deregistered; or
- 19 (c) the scheme is not a managed investment scheme.
- 20 (3) If ASIC is satisfied that the application complies with
21 subsections (1) and (2), it must give notice of the proposed
22 deregistration:
- 23 (a) on the national database; and
24 (b) in the *Gazette*.
- 25 When 2 months have passed since the *Gazette* notice, ASIC may
26 deregister the scheme.
- 27 (4) ASIC must give notice of the deregistration to the applicant.

28 **601PB Deregistration by ASIC**

- 29 (1) ASIC may decide to deregister a registered scheme if:

Clause 601PB

- 1 (a) the scheme does not have a responsible entity that meets the
2 requirements of section 601FA; or
3 (b) the scheme does not have a constitution that meets the
4 requirements of sections 601GA and 601GB; or
5 (c) the scheme does not have a compliance plan that meets the
6 requirements of section 601HA; or
7 (d) the scheme's property is not being:
8 (i) clearly identified as the scheme's property; and
9 (ii) held separately from property of the responsible entity
10 and property of any other scheme;
11 in accordance with the scheme's compliance plan; or
12 (e) the following conditions are satisfied:
13 (i) the annual return for the scheme is at least 6 months
14 late; and
15 (ii) no other documents have been lodged by or on behalf of
16 the scheme in the last 18 months; and
17 (iii) ASIC has no reason to believe that the scheme is being
18 operated; or
19 (f) the scheme has been wound up.

20 *Deregistration procedure*

- 21 (2) If ASIC decides to deregister a scheme under this section, it must
22 give notice of the proposed deregistration:
23 (a) to the scheme's responsible entity; and
24 (b) to any other person who is winding up the scheme; and
25 (c) on the national database; and
26 (d) in the *Gazette*.
27 If the notice is given under paragraph (1)(a), (b), (c) or (d), the
28 notice must specify the period at the end of which ASIC proposes
29 to deregister the scheme.
- 30 (3) ASIC may deregister the scheme:
31 (a) if paragraph (1)(a), (b), (c) or (d) applies—at the end of the
32 period set out in the *Gazette* notice; or
33 (b) if paragraph (1)(e) or (f) applies—when 2 months have
34 passed since the *Gazette* notice.

- 1 (4) ASIC does not have to give a person notice under subsection (2) if
2 ASIC does not have the necessary information about the person's
3 address.
- 4 (5) ASIC must give notice of the deregistration to everyone who was
5 notified of the proposed deregistration under paragraph (2)(a) or
6 (b).

7 **601PC Reinstatement**

- 8 (1) ASIC may reinstate the registration of a managed investment
9 scheme if ASIC is satisfied that the scheme should not have been
10 deregistered or if the defect that led to the scheme being
11 deregistered has been remedied.
- 12 (2) The Court may make an order that ASIC reinstate the registration
13 of a managed investment scheme if:
14 (a) an application for reinstatement is made to the Court by:
15 (i) a person aggrieved by the deregistration; or
16 (ii) a person who was winding up the scheme; and
17 (b) the Court is satisfied that it is just that the scheme's
18 registration be reinstated.
- 19 (3) The Court may give any directions it thinks just for putting the
20 scheme and other people in the same position, as far as possible, as
21 if the scheme had not been deregistered.

22 *ASIC to give notice of reinstatement*

- 23 (4) ASIC must give notice of a reinstatement in the *Gazette*. If ASIC
24 exercises its power under subsection (1) in response to an
25 application by a person, ASIC must also give notice of the
26 reinstatement to the applicant.

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Part 5C.11—Exemptions and modifications

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601QA ASIC’s power to make exemption and modification orders

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(1) ASIC may:

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(a) exempt a person from a provision of this Chapter; or

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(b) declare that this Chapter applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.

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Without limiting this, ASIC may declare that this Chapter applies to a person as if section 601HA included a requirement for scheme property to be held by a person other than the responsible entity as the responsible entity’s agent.

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(2) The exemption or declaration may:

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(a) apply to all or specified provisions of this Chapter; and

16

(b) apply to all persons, specified persons, or a specified class of persons; and

17

18

(c) relate to all securities, specified securities or a specified class of securities; and

19

20

(d) relate to any other matter generally or as specified.

21

(3) An exemption may apply unconditionally or subject to specified

22

conditions. A person to whom a condition specified in an

23

exemption applies must comply with the condition. The Court may

24

order the person to comply with the condition in a specified way.

25

Only ASIC may apply to the Court for the order.

26

(4) The exemption or declaration must be in writing and ASIC must

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publish notice of it in the *Gazette*.

28

(5) For the purposes of this section, the *provisions of this Chapter*

29

include:

30

(a) regulations made for the purposes of this Chapter; and

31

(b) definitions in this Act or the regulations as they apply to

32

references in:

- 1 (i) this Chapter; or
2 (ii) regulations made for the purposes of this Chapter; and
3 (c) the old Division 11 of Part 11.2 transitionals.

4 **601QB Modification by regulations**

5 The regulations may modify the operation of this Chapter or any
6 other provisions of this Act relating to securities in relation to:

- 7 (a) a managed investment scheme; or
8 (b) all managed investment schemes of a specified class.

Chapter 6—Takeovers

602 Purposes of Chapter

The purposes of this Chapter are to ensure that:

(a) the acquisition of control over:

- (i) the voting shares in a listed company, or an unlisted company with more than 50 members; or
- (ii) the voting shares in a listed body; or
- (iii) the voting interests in a listed managed investment scheme;

takes place in an efficient, competitive and informed market; and

(b) the holders of the shares or interests, and the directors of the company or body or the responsible entity for the scheme:

- (i) know the identity of any person who proposes to acquire a substantial interest in the company, body or scheme; and
- (ii) have a reasonable time to consider the proposal; and
- (iii) are given enough information to enable them to assess the merits of the proposal; and

(c) as far as practicable, the holders of the relevant class of voting shares or interests all have a reasonable and equal opportunity to participate in any benefits accruing to the holders through any proposal under which a person would acquire a substantial interest in the company, body or scheme; and

(d) an appropriate procedure is followed as a preliminary to compulsory acquisition of voting shares or interests or any other kind of securities under Part 6A.1.

Note 1: To achieve the objectives referred to in paragraphs (a), (b) and (c), the prohibition in section 606 and the exceptions to it refer to interests in “voting shares”. To achieve the objective in paragraph (d), the provisions that deal with the takeover procedure refer more broadly to interests in “securities”.

Note 2: Subsection 92(3) defines *securities* for the purposes of this Chapter.

603 Chapter extends to some listed bodies that are not companies

This Chapter applies to the acquisition of relevant interests in the securities of listed bodies that are not companies but are incorporated or formed in Australia in the same way as it applies to the acquisition of relevant interests in the securities of companies.

Note: Section 9 defines *company* and *listed*.

604 Chapter extends to listed managed investment schemes

- (1) This Chapter applies to the acquisition of relevant interests in the interests in a registered scheme that is also listed as if:
- (a) the scheme were a listed company; and
 - (b) interests in the scheme were shares in the company; and
 - (c) voting interests in the scheme were voting shares in the company; and
 - (d) a meeting of the members of the scheme were a general meeting of the company; and
 - (e) the obligations and powers that are imposed or conferred on the company were imposed or conferred on the responsible entity; and
 - (f) the directors of the responsible entity were the directors of the company; and
 - (g) the appointment of a responsible entity for the scheme were the election of a director of the company; and
 - (h) the scheme's constitution were the company's constitution.

Note 1: Paragraph (g): See subsection 610(2).

Note 2: Section 9 defines *voting interest* in a managed investment scheme.

- (2) The regulations may modify the operation of this Chapter as it applies in relation to the acquisition of interests in listed managed investment schemes.

605 Classes of securities

- (1) Takeover bids are made for securities within a particular class. Similarly, compulsory acquisition and buy-out rights operate on securities within a particular class.

- 1 (2) For the purposes of this Chapter and Chapters 6A and 6C,
2 securities are not taken to be different classes merely because:
3 (a) some of the securities are fully-paid and others are
4 partly-paid; or
5 (b) different amounts are paid up or remain unpaid on the
6 securities.

1
2 **Part 6.1—Prohibited acquisitions of relevant**
3 **interests in voting shares**
4

5 **606 Prohibition on certain acquisitions of relevant interests in voting**
6 **shares**

7 *Acquisition of relevant interests in voting shares through*
8 *transaction entered into by or on behalf of person acquiring*
9 *relevant interest*

- 10 (1) A person must not acquire a relevant interest in issued voting
11 shares in a company if:
12 (a) the company is:
13 (i) a listed company; or
14 (ii) an unlisted company with more than 50 members; and
15 (b) the person acquiring the interest does so through a
16 transaction in relation to securities entered into by or on
17 behalf of the person; and
18 (c) because of the transaction, that person's or someone else's
19 voting power in the company increases:
20 (i) from 20% or below to more than 20%; or
21 (ii) from a starting point that is above 20% and below 90%.

22 However, the person may acquire the relevant interest under one of
23 the exceptions set out in section 611 without contravening this
24 subsection.

25 Note 1: Section 9 defines *company* as meaning a company registered under
26 this Act.

27 Note 2: Section 607 deals with the effect of a contravention of this section on
28 transactions. Sections 608 and 609 deal with the meaning of *relevant*
29 *interest*. Section 610 deals with the calculation of a person's voting
30 power in a company.

31 Note 3: If the acquisition of relevant interests in an unlisted company with 50
32 or fewer members leads to the acquisition of a relevant interest in
33 another company that is an unlisted company with more than 50
34 members, or a listed company, the acquisition is caught by this section
35 because of its effect on that other company.

1 *Acquisition of legal or equitable interest giving rise to relevant*
2 *interest for someone else*

3 (2) A person must not acquire a legal or equitable interest in securities
4 of a body corporate if, because of the acquisition:

5 (a) another person acquires a relevant interest in issued voting
6 shares in a company that is:

7 (i) a listed company; or

8 (ii) an unlisted company with more than 50 members; and

9 (b) someone's voting power in the company increases:

10 (i) from 20% or below to more than 20%; or

11 (ii) from a starting point that is above 20% and below 90%.

12 However, if the acquisition of the relevant interest is covered by
13 one of the exceptions set out in section 611, the person may
14 acquire the legal or equitable interest without contravening this
15 subsection.

16 *50 member threshold*

17 (3) In determining whether the company has more than 50 members
18 for the purposes of subsection (1) or (2), count joint holders of a
19 particular parcel of shares as 1 person.

20 *Offers and invitations*

21 (4) A person must not:

22 (a) make an offer, or cause an offer to be made on their behalf, if
23 the person would contravene subsection (1) or (2) if the offer
24 were accepted; or

25 (b) issue an invitation, or cause an invitation to be issued on their
26 behalf, if the person would contravene subsection (1) or (2)
27 if:

28 (i) an offer were made in response to the invitation; and

29 (ii) the offer were accepted.

1 *Defences*

2 (5) It is a defence to the prosecution of a person for contravening
3 subsection (1), (2) or (4) if the person proves that they contravened
4 the subsection:

- 5 (a) because of inadvertence or mistake; or
6 (b) because the person was not aware of a relevant fact or
7 occurrence.

8 In determining whether the defence is available, disregard the
9 person's ignorance of, or a mistake on the person's part
10 concerning, a matter of law.

11 *Extended meaning of acquiring relevant interests—conversions*
12 *and increases in voting rights*

13 (6) A person is taken for the purposes of subsection (1) or (2) to
14 acquire a relevant interest in voting shares in a company if:

- 15 (a) securities in which the person already had a relevant interest
16 become voting shares in the company; or
17 (b) there is an increase in the number of votes that may be cast
18 on a poll attached to voting shares that the person already had
19 a relevant interest in.

20 The acquisition occurs when the securities become voting shares or
21 the number of votes increases.

22 Note: Some examples of cases to which this subsection applies are:

- 23 • A person exercises a right to convert a non-voting preference
24 share into an ordinary share that carries votes.
25 • A person pays up partly-paid shares with limited votes and
26 this leads to an increase in the number of votes attached to the
27 shares.

28 **607 Effect on transactions**

29 A transaction is not invalid merely because it involves a
30 contravention of section 606.

1 **608 Relevant interests in securities**

2 *Basic rule—relevant interest is holding, or controlling voting or*
3 *disposal of, securities*

- 4 (1) A person has a relevant interest in securities if they:
5 (a) are the holder of the securities; or
6 (b) have power to exercise, or control the exercise of, a right to
7 vote attached to the securities; or
8 (c) have power to dispose of, or control the exercise of a power
9 to dispose of, the securities.

10 It does not matter how remote the relevant interest is or how it
11 arises. If 2 or more people can jointly exercise one of these powers,
12 each of them is taken to have that power.

13 *Extension to control exercisable through a trust, agreement or*
14 *practice*

- 15 (2) In this section, power or control includes:
16 (a) power or control that is indirect; and
17 (b) power or control that is, or can be, exercised as a result of, by
18 means of or by the revocation or breach of:
19 (i) a trust; or
20 (ii) an agreement; or
21 (iii) a practice; or
22 (iv) any combination of them;
23 whether or not they are enforceable; and
24 (c) power or control that is, or can be made, subject to restraint
25 or restriction.

26 It does not matter whether the power or control is express or
27 implied, formal or informal, exercisable alone or jointly with
28 someone else. It does not matter that the power or control cannot
29 be related to a particular security.

30 *Extension to relevant interests held through bodies corporate*

- 31 (3) A person has the relevant interests in any securities that any of the
32 following has:

1 (a) a body corporate, or managed investment scheme, in which
2 the person's voting power is above 20%;

3 (b) a body corporate, or managed investment scheme, that the
4 person controls.

5 Paragraph (a) does not apply to a relevant interest that the body
6 corporate or scheme itself has in the securities merely because of
7 the operation of that paragraph in relation to another body
8 corporate or managed investment scheme.

9 (4) For the purposes of paragraph (3)(b), a person controls a body
10 corporate if the person has the capacity to determine the outcome
11 of decisions about the body corporate's financial and operating
12 policies.

13 (5) In determining whether a person has this capacity:

14 (a) the practical influence the person can exert (rather than the
15 rights they can enforce) is the issue to be addressed; and

16 (b) any practice or pattern of behaviour affecting the body
17 corporate's financial or operating policies is to be taken into
18 account (even if it involves a breach of an agreement or a
19 breach of trust).

20 (6) The person does not control the body corporate merely because the
21 person and an entity that is not an associate jointly have the
22 capacity to determine the outcome of decisions about the body
23 corporate's financial and operating policies.

24 (7) A person is not taken to control a body corporate merely because
25 of a capacity they have if they are under a legal obligation to
26 exercise that capacity for the benefit of:

27 (a) if the person is an individual—someone else; or

28 (b) if the person is a body corporate—someone other than its
29 members.

30 *Extension to control in anticipation of performance of agreements*
31 *etc.*

32 (8) If at a particular time all the following conditions are satisfied:

33 (a) a person has a relevant interest in issued securities;

- 1 (b) the person (whether before or after acquiring the relevant
2 interest):
3 (i) has entered or enters into an agreement with another
4 person with respect to the securities; or
5 (ii) has given or gives another person an enforceable right,
6 or has been or is given an enforceable right by another
7 person, in relation to the securities (whether the right is
8 enforceable presently or in the future and whether or not
9 on the fulfilment of a condition); or
10 (iii) has granted or grants an option to, or has been or is
11 granted an option by, another person with respect to the
12 securities;
13 (c) the other person would have a relevant interest in the
14 securities if the agreement were performed, the right
15 enforced or the option exercised;
16 the other person is taken to already have a relevant interest in the
17 securities.

18 Note: Subsections 609(6) and (7) deal with specific situations in which the
19 agreement will not give rise to a relevant interest.

20 *Body corporate may have relevant interest in its own securities*

- 21 (9) This section may result in a body corporate having a relevant
22 interest in its own securities.

23 **609 Situations not giving rise to relevant interests**

24 *Money lending and financial accommodation*

- 25 (1) A person does not have a relevant interest in securities merely
26 because of a mortgage, charge or other security taken for the
27 purpose of a transaction entered into by the person if:
28 (a) the mortgage, charge or security is taken or acquired in the
29 ordinary course of the person's business of providing
30 financial services and on ordinary commercial terms; and
31 (b) the person whose property is subject to the mortgage, charge
32 or security is not an associate of the person.

33 Note: Sections 11 to 17 define *associate*.

1 *Nominees and other trustees*

- 2 (2) A person who would otherwise have a relevant interest in securities
3 as a bare trustee does not have a relevant interest in the securities if
4 a beneficiary under the trust has a relevant interest in the securities
5 because of a presently enforceable and unconditional right of the
6 kind referred to in subsection 608(8).

7 Note: This subsection will often apply to a person who holds securities as a
8 nominee.

9 *Holding of securities by securities dealer*

- 10 (3) A securities dealer does not have a relevant interest in securities
11 merely because they hold securities on behalf of someone else in
12 the ordinary course of their securities business.

13 *Shares covered by buy-backs*

- 14 (4) A person does not have a relevant interest in a company's shares if
15 the relevant interest would arise merely because the company has
16 entered into an agreement to buy back the shares.

17 *Proxies*

- 18 (5) A person does not have a relevant interest in securities merely
19 because the person has been appointed to vote as a proxy or
20 representative at a meeting of members, or of a class of members,
21 of the company, body or managed investment scheme if:
22 (a) the appointment is for one meeting only; and
23 (b) neither the person nor any associate gives valuable
24 consideration for the appointment.

25 *Exchange traded options and futures contracts*

- 26 (6) A person does not have a relevant interest in securities merely
27 because of:
28 (a) an exchange traded option over the securities; or
29 (b) a right to acquire the securities given by a futures contract.
30 This subsection stops applying to the relevant interest when the
31 obligation to make or take delivery of the securities arises.

1 Note: Without this subsection, subsection 608(8) would create a relevant
2 interest from the option or contract.

3 *Conditional agreements*

- 4 (7) A person does not have a relevant interest in securities merely
5 because of an agreement if the agreement:
6 (a) is conditional on:
7 (i) a resolution under item 7 in the table in section 611
8 being passed; or
9 (ii) ASIC exempting the acquisition under the agreement
10 from the provisions of this Chapter under section 655A;
11 and
12 (b) does not confer any control over, or power to substantially
13 influence, the exercise of a voting right attached to the
14 securities; and
15 (c) does not restrict disposal of the securities for more than 3
16 months from the date when the agreement is entered into.

17 The person acquires a relevant interest in the securities when the
18 condition referred to in paragraph (a) is satisfied.

19 *Pre-emptive rights*

- 20 (8) A member of a company, body or managed investment scheme
21 does not have a relevant interest in securities of the company, body
22 or scheme merely because the company's, body's or scheme's
23 constitution gives members pre-emptive rights on the transfer of
24 the securities if all members have pre-emptive rights on the same
25 terms.

26 *Director of body corporate holding securities*

- 27 (9) A person does not have a relevant interest in securities merely
28 because:
29 (a) the person is a director of a body corporate; and
30 (b) the body corporate has a relevant interest in those securities.

1 *Prescribed exclusions*

- 2 (10) A person does not have a relevant interest in securities in the
3 circumstances specified in the regulations. The regulations may
4 provide that interests in securities are not relevant interests subject
5 to specified conditions.

6 **610 Voting power in a body corporate**

7 *Person's voting power in a body corporate*

- 8 (1) A person's **voting power** in a body corporate is:

9
$$\frac{\text{Person's and associates' votes}}{\text{Total votes in body corporate}} \times 100$$

10 where:

11 **person's and associates' votes** is the total number of votes attached
12 to all the voting shares in the body corporate (if any) that the
13 person or an associate has a relevant interest in.

14 **total votes in body corporate** is the total number of votes attached
15 to all voting shares in the body corporate.

16 Note: Even if a person's relevant interest in voting shares is based on control
17 over disposal of the shares (rather than control over voting rights
18 attached to the shares), their voting power in the body corporate is
19 calculated on the basis of the number of votes attached to those shares.

20 *Counting votes*

- 21 (2) For the purposes of this section, the number of votes attached to a
22 voting share in a body corporate is the maximum number of votes
23 that can be cast in respect of the share on a poll:
24 (a) if the election of directors is determined by the casting of
25 votes attached to voting shares—on the election of a director
26 of the body corporate; or
27 (b) if the election of directors is not determined by the casting of
28 votes attached to voting shares—on the adoption of a
29 constitution for the body corporate or the amendment of the
30 body corporate's constitution.

1 Note: The Corporations and Securities Panel may decide that the setting or
2 varying of voting rights in a way that affects control of a body
3 corporate is unacceptable circumstances under section 657A.

- 4 (3) If:
- 5 (a) a transaction in relation to, or an acquisition of an interest in,
6 securities occurs; and
- 7 (b) before the transaction or acquisition, a person did not have a
8 relevant interest in particular voting shares but an associate
9 of the person did have a relevant interest in those shares; and
- 10 (c) because of the transaction or acquisition, the person acquires
11 a relevant interest in those shares;

12 then, for the purposes of applying section 606 to the transaction or
13 acquisition, the person's voting power is taken to have increased
14 because of the transaction or acquisition from what it would have
15 been before the transaction or acquisition if the votes attached to
16 those shares were disregarded to what it was after the transaction
17 or acquisition (taking the votes attached to those shares into
18 account).

- 19 (4) Disregard the operation of section 613 in working out a person's
20 voting power in a body corporate.

1
2 **Part 6.2—Exceptions to the prohibition**
3

4 **611 Exceptions to the prohibition**

5 The following table sets out:

- 6 (a) acquisitions of relevant interests in a company's voting
7 shares that are exempt from the prohibition in subsection
8 606(1); and
9 (b) acquisitions of relevant interests in a company's voting
10 shares resulting from acquisitions of legal or equitable
11 interests in securities of a body corporate that are exempt
12 from the prohibition in subsection 606(2).

13 Note: Some of the items in the table cover only activities in relation to the
14 company itself (items 7, 8, 12 and 13) while the other items cover
15 acquisitions in that company that may occur through activities in
16 relation to other companies.
17

Acquisitions that are exempt	[operative]
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Takeover bids

Acceptance of takeover offer

- 1 An acquisition that results from the acceptance of an offer under a takeover bid.

See also section 612.

On-market purchase during bid period

- 2 An acquisition in relation to bid class securities that results from an on-market transaction if:
- (a) the acquisition is by or on behalf of the bidder under a takeover bid; and
 - (b) the acquisition occurs during the bid period; and
 - (c) the bid is for all the voting shares in the bid class; and
 - (d) the bid is:
 - (i) unconditional; or
 - (ii) conditional only on the happening of an event referred to in subsection 652C(1) or (2).

See also sections 612 and 613.

Acquisitions that are exempt	[operative]
<i>On-market purchase of convertible securities during bid period</i>	
3	An acquisition of bid class securities that results directly from the exercise of rights attached to convertible securities if: (a) the acquisition is by or on behalf of the bidder under a takeover bid; and (b) the bidder acquired a relevant interest in the convertible securities through an on-market transaction during the bid period; and (c) the bid is for all the voting shares in the bid class; and (d) the bid is: (i) unconditional; or (ii) conditional only on the happening of an event referred to in subsection 652C(1) or (2).
See sections 612 and 613.	
<i>Acceptance of scrip offered as takeover consideration</i>	
4	An acquisition that results from the acceptance of: (a) an offer under a takeover bid if the voting shares are included in the consideration for offers under the bid; or (b) an offer that results in an acquisition to which item 5 applies.
See also section 612.	
Nature of acquirer	
6	An acquisition that results from the exercise by a person of a power, or appointment as a receiver, or receiver and manager, under a mortgage, charge or other security if: (a) the person's ordinary business includes providing financial services; and (b) the person took or acquired the security in the ordinary course of their business of providing financial services and on ordinary commercial terms.

Acquisitions that are exempt

[operative]

Approval by resolution of target

- 7 An acquisition approved previously by a resolution passed at a general meeting of the company in which the acquisition is made, if:
- (a) no votes are cast in favour of the resolution by:
 - (i) the person proposing to make the acquisition and their associates; or
 - (ii) the persons (if any) from whom the acquisition is to be made and their associates; and
 - (b) the members of the company were given all information known to the person proposing to make the acquisition or their associates, or known to the company, that was material to the decision on how to vote on the resolution, including:
 - (i) the identity of the person proposing to make the acquisition and their associates; and
 - (ii) the maximum extent of the increase in that person's voting power in the company that would result from the acquisition; and
 - (iii) the voting power that person would have as a result of the acquisition; and
 - (iv) the maximum extent of the increase in the voting power of each of that person's associates that would result from the acquisition; and
 - (v) the voting power that each of that person's associates would have as a result of the acquisition.

Target newly formed

- 8 An acquisition that results from an issue of securities of the company in which the acquisition is made if the company has not started to carry on any business and has not borrowed any money.

Manner of acquisition

3% creep in 6 months

- 9 An acquisition by a person if:
- (a) throughout the 6 months before the acquisition that person, or any other person, has had voting power in the company of at least 19%; and
 - (b) as a result of the acquisition, none of the persons referred to in paragraph (a) would have voting power in the company more than 3 percentage points higher than they had 6 months before the acquisition.
-

Acquisitions that are exempt

[operative]

Rights issues

- 10 An acquisition that results from an issue of securities that satisfies all of the following conditions:
- (a) a company offers to issue securities in a particular class;
 - (b) offers are made to every person who holds securities in that class to issue them with the percentage of the securities to be issued that is the same as the percentage of the securities in that class that they hold before the issue;
 - (c) all of those persons have a reasonable opportunity to accept the offers made to them;
 - (d) agreements to issue are not entered into until a specified time for acceptances of offers has closed;
 - (e) the terms of all the offers are the same.

This extends to an acquisition by a person as underwriter to the issue or sub-underwriter.

See section 615.

Dividend reinvestment etc.

- 11 An acquisition that results from an issue of:
- (a) shares in a company to existing holders of shares in the company under a dividend reinvestment plan or bonus share plan; or
 - (b) interests in a managed investment scheme to existing holders of interests in the scheme under a distribution reinvestment plan or switching facility;

if the plan or facility is available to all members.

Disregard any unavailability to foreign holders in determining whether the plan or facility is available to all members.

Initial public offering (IPO) fundraising

- 12 An acquisition that results from an issue under a disclosure document of securities in the company in which the acquisition is made if:
- (a) the issue is to a promoter; and
 - (b) the disclosure document is the first issued by the company; and
 - (c) the disclosure document disclosed the effect that the acquisition would have on the promoter's voting power in the company.
-

Acquisitions that are exempt	[operative]
<i>Underwriting of fundraising</i>	
13	An acquisition that results from an issue under a disclosure document of securities in the company in which the acquisition is made if: (a) the issue is to a person as underwriter to the issue or sub-underwriter; and (b) the disclosure document disclosed the effect that the acquisition would have on the person's voting power in the company.
<i>Acquisition through listed company</i>	
14	An acquisition that results from another acquisition of relevant interests in voting shares in a body corporate included in the official list of: (a) a stock exchange; or (b) a foreign body conducting a stock market that is a body approved in writing by ASIC for the purposes of this item.
<i>Wills etc.</i>	
15	An acquisition through a will or through operation of law.
<i>Forfeiture of shares</i>	
16	An acquisition that results from an auction of forfeited shares conducted on-market.
Compromise, arrangement, liquidation or buy-back	
<i>Part 5.1 compromise or arrangement</i>	
17	An acquisition that results from a compromise or arrangement approved by the Court under Part 5.1.
<i>Section 507 arrangement</i>	
18	An acquisition that results from an arrangement entered into by a liquidator under section 507.
<i>Buy-back</i>	
19	An acquisition that results from a buy-back authorised by section 257A.
Regulations	
20	An acquisition made in a manner or in circumstances prescribed by the regulations. The circumstances may include acquisitions of relevant interests in voting shares in a specified body or class of bodies.

1 **612 Effect of non-compliance with takeover rules for exceptions 1 to**
2 **4**

3 The exceptions in items 1 to 4 of the table in section 611 do not
4 apply to a takeover bid if the bid is carried out in contravention of:

- 5 (a) section 618 (full or proportionate bid); or
6 (b) section 619 (offers to be the same); or
7 (c) subsection 621(3) (minimum price); or
8 (d) subsection 624(1) (minimum offer period); or
9 (e) sections 625 to 630 (conditional offers); or
10 (f) items 2, 3 and 6 in the table in subsection 633(1) (procedural
11 steps for off-market bid); or
12 (g) items 3, 4 and 6 in the table in section 635 (procedural steps
13 for market bid).

14 **613 Bidder not to exercise voting rights if failure to send bids for**
15 **off-market acquisition—exception 2 or 3**

16 If the exception in item 2 or 3 of the table in section 611 applies to
17 an acquisition on-market during a takeover bid, the bidder is not
18 entitled to exercise the voting rights attached to the shares if:

- 19 (a) the bid is an off-market bid; and
20 (b) the bidder fails to send offers under the bid within 28 days
21 after giving the bidder's statement to the target.

22 **615 Treatment of foreign holders under equal access issue—**
23 **exception 10**

24 The exception in item 10 of the table in section 611 applies even
25 though the conditions set out in the item are not satisfied in respect
26 of foreign holders of the company's securities if, under the terms of
27 the offers:

- 28 (a) the company must appoint a nominee for foreign holders of
29 the company's securities who is approved by ASIC; and
30 (b) the company must transfer to the nominee:
31 (i) the securities that would otherwise be issued to the
32 foreign holders who accept the offer; or

Clause 615

- 1 (ii) the right to acquire those securities; and
2 (c) the nominee must sell the securities, or those rights, and
3 distribute to each of those foreign holders their proportion of
4 the proceeds of the sale net of expenses.

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Part 6.3—The different types of takeover bid

616 Off-market bids and market bids

- (1) There are 2 kinds of takeover bid:
- (a) an off-market bid (for quoted or unquoted securities); or
 - (b) a market bid (only available for quoted securities).

Note: Although the prohibition in section 606 is against acquiring relevant interests in voting shares, a takeover bid may be made for any securities (for example, as a preliminary to compulsorily acquiring securities in that class under Part 6A.1).

- (2) The following table shows where to find the provisions dealing with the main features of the offers that may be made under off-market bids and market bids and the procedures to be followed:

Takeover bids		[signpost table]	
Feature	Off-market bid	Market bid	
1 people to whom offers made	617(1)-(2)	617(3)	
2 securities covered	618(1)-(2)	618(3)	
3 consideration offered for the securities	621(1), (3)-(5) and 651A	621(2), (3)-(5)	
4 escalation agreements and collateral benefits not allowed	622 and 623	622 and 623	
5 offer period	624(1)-(2) and 650C	624(1)-(2) and 649C	
6 conditional offers	625(2)-(3) and 626-630	625(1)	
7 procedure to be followed in making bid	632 and 633	634 and 635	
8 acceptances	650E and 653A-653B	-	

1

2 **Part 6.4—Formulating the takeover offer**

3 **Division 1—General**

4 **617 Securities covered by the bid**

5 *Off-market bid*

- 6 (1) An off-market bid must relate to securities:
7 (a) in a class of securities (the *bid class*); and
8 (b) that exist or will exist as at the date set by the bidder under
9 subsection 633(2).

10 Note: Subsection 92(3) defines *securities* for the purposes of this Chapter.

- 11 (2) If other securities exist or will exist at that date that:
12 (a) will convert, or may be converted, to securities in the bid
13 class; or
14 (b) confer rights to be issued securities in the bid class;
15 the bid may extend to securities that come to be in the bid class
16 during the offer period due to a conversion or exercise of the
17 rights.

18 Note: The bidder's statement must say if the bid is extended in this way (see
19 paragraph 636(1)(j)).

20 *Market bid*

- 21 (3) A market bid must relate to securities:
22 (a) in a class of quoted securities (the *bid class*); and
23 (b) that exist or will exist at any time during the offer period.

24 **618 Offers must be for all or a proportion of securities in the bid**
25 **class**

26 *Off-market bid*

- 27 (1) An offer for securities under an off-market bid must be an offer to
28 buy:

- 1 (a) all the securities in the bid class; or
2 (b) a specified proportion of the securities in the bid class.
3 The proportion specified under paragraph (b) must be the same for
4 all holders of securities in the bid class.

5 *Off-market bid—non-marketable parcels*

- 6 (2) If accepting an offer under an off-market bid for quoted securities
7 would leave a person with a parcel of the securities that is less than
8 a marketable parcel (within the meaning of the rules of the relevant
9 securities exchange), the offer extends to that parcel.

10 *Market bid*

- 11 (3) An offer for securities under a market bid must be an offer to buy
12 all the securities in the bid class.

13 **619 General terms of the offer**

14 *Off-market bid*

- 15 (1) All the offers made under an off-market bid must be the same.

16 Note: The offers may include alternative forms of consideration (see
17 section 621).

- 18 (2) In applying subsection (1), disregard the following:

- 19 (a) any differences in the offers attributable to the fact that the
20 number of securities that may be acquired under each offer is
21 limited by the number of securities held by the holder;
22 (b) any differences in the offers attributable to the fact that the
23 offers relate to securities having different accrued dividend or
24 distribution entitlements;
25 (c) any differences in the offers attributable to the fact that the
26 offers relate to securities on which different amounts are paid
27 up or remain unpaid;
28 (d) any differences in the offers attributable to the fact that the
29 bidder may issue or transfer only whole numbers of securities
30 as consideration for the acquisition;

- 1 (e) any additional cash amount offered to holders instead of the
2 fraction of a security that they would otherwise be offered.

3 *Foreign holders*

- 4 (3) If the consideration for the bid includes an offer of securities, the
5 securities do not need to be offered to foreign holders of the
6 target's securities if under the terms of the bid:
7 (a) the bidder must appoint a nominee for foreign holders of the
8 target's securities who is approved by ASIC; and
9 (b) the bidder must transfer to the nominee:
10 (i) the securities that would otherwise be transferred to the
11 foreign holders who accept the bid for that
12 consideration; or
13 (ii) the right to acquire those securities; and
14 (c) the nominee must sell the securities, or those rights, and
15 distribute to each of those foreign holders their proportion of
16 the proceeds of the sale net of expenses.

17 **620 Off-market bid (offer formalities)**

- 18 (1) Each offer under an off-market bid must:
19 (a) be in writing; and
20 (b) have the same date; and
21 (c) provide that, unless withdrawn, it will remain open until the
22 end of the offer period (see section 624); and
23 (d) state how, and when, the bidder is to satisfy their obligations.
- 24 (2) Each offer must provide that the bidder is to pay or provide the
25 consideration for the offer:
26 (a) if the bidder is given the necessary transfer documents with
27 the acceptance—by the end of whichever of the following
28 periods ends earlier:
29 (i) 1 month after the offer is accepted or, if the offer is
30 subject to a defeating condition, within 1 month after
31 the takeover contract becomes unconditional
32 (ii) 21 days after the end of the offer period; or

- 1 (b) if the bidder is given the necessary transfer documents after
2 the acceptance and before the end of the bid period—within 1
3 month after the bidder is given the necessary transfer
4 documents; or
5 (c) if the bidder is given the necessary transfer documents after
6 the acceptance and after the end of the bid period—within 21
7 days after the bidder is given the necessary transfer
8 documents.

9 Note: Subsection 630(1) requires an offer that is subject to a defeating
10 condition to specify a date for declaring whether the condition has
11 been fulfilled or not.

- 12 (3) The offer may provide that the bidder may avoid the takeover
13 contract if the bidder is not given the necessary transfer documents
14 within 1 month after the end of the offer period.

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2 **Division 2—Consideration for the offer**

3 **621 Consideration offered**

4 *Off-market bid—general*

- 5 (1) A bidder making an off-market bid for securities may offer any
6 form of consideration for the securities, including:
7 (a) a cash sum; or
8 (b) securities (including shares, debentures, interests in a
9 managed investment scheme or options); or
10 (c) a combination of a cash sum and securities.

11 Note: Sections 650B and 651A deal with variations of the consideration
12 offered under the bid.

13 *Market bid—cash only*

- 14 (2) As the offers under a market bid for securities are made through
15 the stock market of a securities exchange, the bidder must offer to
16 acquire the securities for a cash sum only for each security.

17 Note: Section 649B deals with variations of the consideration offered under
18 the bid.

19 *All bids—minimum consideration if bidder purchased securities in*
20 *the 4 months before the bid*

- 21 (3) The consideration offered for securities in the bid class under a
22 takeover bid must equal or exceed the maximum consideration that
23 the bidder or an associate provided, or agreed to provide, for a
24 security in the bid class under any purchase or agreement during
25 the 4 months before the date of the bid.
- 26 (4) For the purposes of subsection (3), the consideration offered or
27 provided for a security is:
28 (a) if the consideration offered or provided is a cash sum only—
29 the amount of that cash sum; or
30 (b) if the consideration offered or provided does not include a
31 cash sum—the value of that consideration; or

1 (c) if the consideration offered or provided is a cash sum and
2 other consideration—the sum of the amount of the cash sum
3 and the value of the other consideration.

4 The value of consideration that is not a cash sum is to be
5 ascertained as at the time the relevant offer, purchase or agreement
6 is made.

7 (5) If:

8 (a) a person agrees to buy a security in a company; and

9 (b) the agreement provides that the price payable for the security
10 is a price specified in the agreement but may be varied in
11 accordance with the terms of the agreement;

12 any variation in price under the agreement is to be disregarded in
13 working out, for the purposes of subsection (3), the price agreed to
14 be paid for the security under the agreement.

15 **622 Escalation agreements**

16 *Benefits linked to bids and proposed bids not allowed*

17 (1) A person who makes or proposes to make a takeover bid for
18 securities, or their associate, contravenes this section if:

19 (a) a person acquires a relevant interest in securities in the bid
20 class within the 6 months before the bid is made or proposed;
21 and

22 (b) at any time whatever, the bidder, proposed bidder or
23 associate gives or agrees to give a benefit to, or receives or
24 agrees to receive a benefit from:

25 (i) a person who had a relevant interest in any of the
26 paragraph (a) securities immediately before the
27 acquisition; or

28 (ii) an associate of a person who had a relevant interest in
29 any of those securities at that time; and

30 (c) the benefit is attributable to the acquisition or matters that
31 include the acquisition; and

32 (d) the amount or value of the benefit is, or is to be, determined
33 by reference to or to matters that include either of the
34 following:

- 1 (i) the amount or value of the consideration for the
2 securities under the bid or proposed bid;
3 (ii) the amount or value of the consideration for which the
4 bidder or proposed bidder acquires, offers or proposes
5 to offer to acquire, securities in the bid class during the
6 offer period (whether or not under the bid) or under
7 Chapter 6A.

8 *Contravening agreements void*

- 9 (2) An agreement is void to the extent that it purports to provide for:
10 (a) a person to give a benefit to a person; or
11 (b) a person to receive a benefit from a person;
12 in contravention of subsection (1).

13 **623 Collateral benefits not allowed**

- 14 (1) A bidder, or an associate, must not, during the offer period for a
15 takeover bid, give, offer to give or agree to give a benefit to a
16 person if:
17 (a) the benefit is likely to induce the person or an associate to:
18 (i) accept an offer under the bid; or
19 (ii) dispose of securities in the bid class; and
20 (b) the benefit is not offered to all holders of securities in the bid
21 class under the bid.
- 22 (2) For the purpose of this section, a person does not receive a benefit
23 that is not offered under a takeover bid merely because the person
24 sells bid class securities on-market and the takeover bid is an
25 off-market bid or a conditional bid.
- 26 (3) This section does not prohibit:
27 (a) the variation of a takeover offer as provided by
28 sections 649A to 650D; or
29 (b) an acquisition of securities through an on-market transaction;
30 or
31 (c) simultaneous takeover bids for different classes of securities
32 in the target.

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2 **Division 3—The offer period**

3 **624 Offer period**

4 *Offer period set in offer*

5 (1) The offers under a takeover bid must remain open for the period
6 stated in the offer. The period must:

- 7 (a) start on the date the first offer under the bid is made; and
8 (b) last for at least 1 month, and not more than 12 months.

9 However, the offer may be withdrawn during that period under
10 section 652B.

11 Note: Sections 649C (market bids) and 650C (off-market bids) deal with
12 variation of the offer period.

13 *Automatic extension of offer period if bidder reaches 50% or*
14 *consideration increased in last week*

15 (2) If, within the last 7 days of the offer period:

- 16 (a) for an off-market bid—the offers under the bid are varied to
17 improve the consideration offered; or
18 (b) in any case—the bidder's voting power in the target increases
19 to more than 50%;

20 the offer period is extended so that it ends 14 days after the event
21 referred to in paragraph (a) or (b). The bidder must give the target
22 and everyone who has not accepted an offer under the bid written
23 notice that the extension has occurred within 3 days after that
24 event.

25 Note: The consideration for a market bid cannot be increased in the last 5
26 trading days of the offer period (see section 649B).

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2 **Division 4—Conditional offers**

3 **625 Conditional offers—general**

4 *Market bids*

5 (1) Offers under a market bid must be unconditional.

6 *Off-market bids may generally be conditional*

7 (2) Offers under an off-market bid may be subject to conditions that
8 are not prohibited by sections 626 to 629.

9 (3) If:

10 (a) the consideration offered is or includes securities; and

11 (b) the offer or the bidder's statement states or implies that the
12 securities are to be quoted on a stock market of a securities
13 exchange (whether in Australia or elsewhere);

14 the following rules apply:

15 (c) the offer is subject to a condition that:

16 (i) an application for admission to quotation will be made
17 within 7 days after the start of the bid period; and

18 (ii) permission for admission to quotation will be granted no
19 later than 7 days after the end of the bid period;

20 (d) the offer may not be freed from this condition.

21 Note: Section 1325A provides that a Court may make a remedial order if the
22 condition is not satisfied.

23 **626 Maximum acceptance conditions in off-market bids**

24 *Maximum acceptance conditions not allowed*

25 (1) Offers under an off-market bid must not be subject to a maximum
26 acceptance condition. A maximum acceptance condition is one that
27 provides that the offers will terminate, or the maximum
28 consideration offered under the bid will be reduced, if one or more
29 of the following occur:

- 1 (a) the number of securities for which the bidder receives
2 acceptances reaches or exceeds a particular number; or
3 (b) the bidder's voting power in the company reaches or exceeds
4 a particular percentage; or
5 (c) the percentage of securities the bidder has relevant interests
6 in reaches or exceeds a particular percentage of securities in
7 that class.
- 8 (2) For the purposes of subsection (1), it does not matter:
9 (a) how the condition is expressed; or
10 (b) how a particular number or percentage was, or is to be,
11 determined; or
12 (c) whether or not a particular number or percentage is specified
13 in the condition and, if it is so specified, how it is expressed.
- 14 (3) For the purposes of subsection (1), an offer under an off-market bid
15 terminates if:
16 (a) the offer lapses, is withdrawn or otherwise ceases to have
17 effect; or
18 (b) a binding takeover contract will not result from an
19 acceptance of the offer; or
20 (c) an obligation of the bidder will not arise under the takeover
21 contract; or
22 (d) the takeover contract is rescinded; or
23 (e) the bidder is entitled to rescind the takeover contract; or
24 (f) the bidder is relieved of an obligation arising under the
25 takeover contract.

26 **627 Discriminatory conditions not allowed for off-market bids**

27 Offers under an off-market bid must not be subject to a condition
28 that allows the bidder to acquire, or may result in the bidder
29 acquiring, securities from some but not all of the people who
30 accept the offers. It does not matter how the condition is expressed.

1 **628 Conditions requiring payments to officers of target not allowed**
2 **in off-market bids**

3 An offer to a person under an off-market bid must not be made
4 subject to a condition that requires the person to approve or
5 consent to a payment or other benefit to an officer of the target or a
6 related body corporate:

- 7 (a) as compensation for loss of; or
8 (b) as consideration in connection with retirement from;
9 any office or employment in connection with the management of
10 the target or of a related body corporate. A purported requirement
11 of this kind is void.

12 **629 Conditions turning on bidder's or associate's opinion not**
13 **allowed in off-market bids**

- 14 (1) Offers under an off-market bid must not be subject to a defeating
15 condition if the fulfilment of the condition depends on:
16 (a) the bidder's, or an associate's, opinion, belief or other state
17 of mind; or
18 (b) the happening of an event that is within the sole control of, or
19 is a direct result of action by, any of the following:
20 (i) the bidder (acting alone or together with an associate or
21 associates);
22 (ii) an associate (acting alone or together with the bidder or
23 another associate or associates of the bidder).

24 A purported condition of this kind is void.

25 Note: Section 9 defines *defeating condition*. Sections 630, 650F and 650G
26 deal with defeating conditions.

- 27 (2) For the purposes of paragraph (1)(b):
28 (a) the target; and
29 (b) a subsidiary of the target;
30 are taken not to be associates of the bidder if they would otherwise
31 be an associate merely because they are a related body corporate.

32 Note: Paragraph 11(b) makes related bodies corporate associates of each
33 other.

1 **630 Defeating conditions**

2 *Off-market bid may include defeating conditions*

- 3 (1) Offers under an off-market bid may be made subject to a defeating
4 condition only if the offers specify a date (not more than 14 days
5 and not less than 7 days before the end of the offer period) for
6 giving a notice on the status of the condition.
- 7 (2) If the offer period is extended by a period:
- 8 (a) the date for giving the notice is taken to be postponed for the
9 same period; and
- 10 (b) as soon as practicable after the extension, the bidder must
11 give a notice that states:
- 12 (i) the new date for giving the notice of the status of the
13 condition; and
- 14 (ii) whether the offers have been freed from the condition
15 and whether, so far as the bidder knows, the condition
16 has been fulfilled on the date the notice under this
17 subsection is given.

18 *Bidder to give notice of status of defeating condition near end of*
19 *offer period*

- 20 (3) On the date determined under subsection (1) or (2), the bidder must
21 give a notice that states:
- 22 (a) whether the offers are free of the condition; and
- 23 (b) whether, so far as the bidder knows, the condition was
24 fulfilled on the date the notice is given; and
- 25 (c) the bidder's voting power in the target.

26 The bidder must comply with this subsection whether or not the
27 bidder has given a notice under subsection (4) or 650F(1).

28 Note: The offers may be freed of the condition by a declaration by the
29 bidder under subsection 650F(1).

30 *Bidder to give notice if defeating condition fulfilled*

- 31 (4) If the condition is fulfilled (so that the offers become free of the
32 condition) during the bid period but before the date for publishing

1 the notice on the status of the condition, the bidder must publish as
2 soon as practicable a notice that states that the condition has been
3 fulfilled.

- 4 (5) A notice under this section is given by:
- 5 (a) giving the notice to the target; and
 - 6 (b) for quoted bid class securities—giving the notice to the
7 relevant securities exchange; and
 - 8 (c) for unquoted bid class securities—lodging the notice with
9 ASIC.

1

2 **Part 6.5—The takeover procedure**

3 **Division 1—The overall procedure**

4 **631 Proposing or announcing a bid**

5 *Bid must proceed within 2 months after proposal*

- 6 (1) If a person publicly proposes to make a takeover bid for securities
7 in a company, either alone or with other persons, the person
8 contravenes this subsection unless they make offers for the
9 securities under a takeover bid within 2 months after the proposal.
10 The terms and conditions of the bid must be the same as or not
11 substantially less favourable than those in the public proposal.

12 Note: The Court has power under section 1325B to order a person to
13 proceed with a bid.

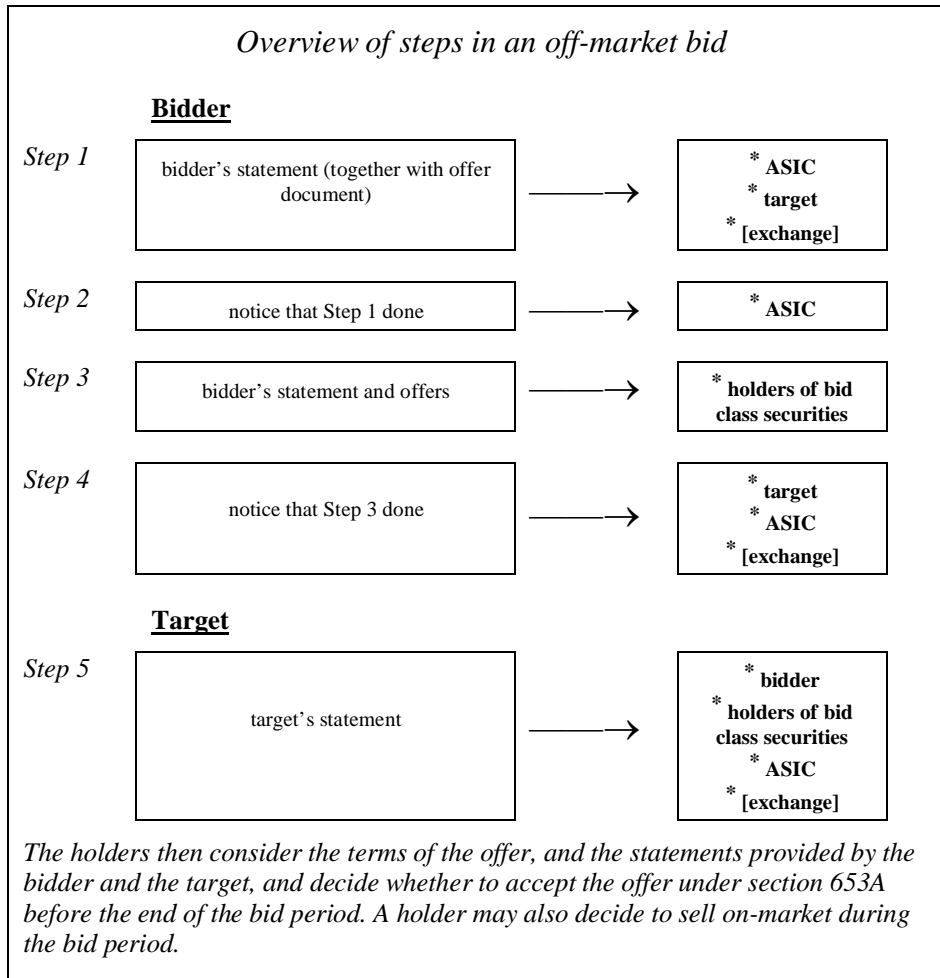
14 *Proposals if takeover bid not intended*

- 15 (2) A person must not publicly propose, either alone or with other
16 persons, to make a takeover bid if:
17 (a) the person knows the proposed bid will not be made, or is
18 reckless as to whether the proposed bid is made; or
19 (b) the person is reckless as to whether they will be able to
20 perform their obligations relating to the takeover bid if a
21 substantial proportion of the offers under the bid are
22 accepted.
- 23 (3) Section 1314 (continuing offences) and subsection 1324(2)
24 (injunctions) do not apply in relation to a failure to make a
25 takeover bid in accordance with a public proposal under
26 subsection (1).

27 Note: For liability and defences for contraventions of this section, see
28 sections 670E and 670F.

1 **632 Overview of steps in an off-market bid**

2 The following diagram gives an overview of the steps involved in
 3 an off-market bid.
 4



5 **633 Detailed steps in an off-market bid**

6 (1) The following table provides for the steps that a bidder must take
 7 to make an effective off-market bid and the steps that a target must
 8 take when an off-market bid is made.

1

Steps in off-market bid		[operative table]
Steps	Timing and relevant provisions	
1	The bidder must prepare: <ul style="list-style-type: none"> • a bidder's statement; and • if the bidder's statement does not set out all the terms of the offer— an offer document that sets out the other terms of the offer. 	<i>See section 636 for content of statement.</i>
2	The bidder must lodge a copy of the bidder's statement and offer document with ASIC.	
3	The bidder must send a copy of the bidder's statement and offer document to the target.	To be done on the day the bidder's statement is lodged or within 21 days afterwards
4	The bidder must lodge with ASIC a notice stating that the bidder's statement and offer document have been sent to the target.	To be done on the day the bidder's statement is sent to the target
5	The bidder must send a copy of the bidder's statement and offer document to each securities exchange that has a stock market on which the target's securities are quoted.	To be done on the day the bidder's statement is sent to the target <i>See also subsection (5).</i>

Steps in off-market bid		[operative table]
Steps	Timing and relevant provisions	
6	<p>The bidder must send the bidder's statement and offers to each person (other than the bidder) who holds:</p> <ul style="list-style-type: none"> • securities in the bid class; or • if the bid extends to securities that come to be in the bid class due to the conversion of or exercise of rights attached to other securities (see subsection 617(2))—the other securities; <p>as at the date set by the bidder under subsection (2).</p> <p>The offers must be made on the terms set out in the bidder's statement and the offer document lodged with ASIC under item 2.</p>	<p>To be done:</p> <ul style="list-style-type: none"> • within a 3 day period; and • within 14-28 days after the bidder's statement is sent to the target <p>The directors of the target may agree that the offers and accompanying documents be sent earlier.</p> <p><i>See also subsections (5) and (6). Item 2 of the table in section 611 covers offers made by the bidder on-market during the period between the lodgment of the bidder's statement and the making of the offers under the bid. Sections 648B and 648C provide for the manner in which documents may be sent to holders.</i></p>
7	<p>The bidder must send a notice to the target that the bidder's statement and offers have been sent as required by item 6.</p> <p>The notice must state the date of the offers.</p>	<p>To be done on the day all offers have been sent as required by item 6</p> <p><i>See subsection 620(1) on date of offer.</i></p>
8	<p>The bidder must send a notice that offers have been sent as required by item 6 to each securities exchange that has a stock market on which the target's securities are quoted.</p>	<p>To be done on the day all offers have been sent as required by item 6</p>
9	<p>The bidder must lodge with ASIC a notice that offers have been sent as required by item 6.</p>	<p>To be done on the day all offers have been sent as required by item 6</p>
10	<p>The target must prepare a target's statement.</p>	<p><i>See section 638 for content of statement.</i></p>

Steps in off-market bid		[operative table]
	Steps	Timing and relevant provisions
11	The target must send the target's statement (and any accompanying report) to the bidder.	To be done no later than 15 days after the target receives a notice that all offers have been sent as required by item 6
12	<p>The target must send a copy of the target's statement (and any accompanying report) to each person who holds:</p> <ul style="list-style-type: none"> • securities in the bid class; or • if the bid extends to securities that come to be in the bid class due to the conversion of or exercise of rights attached to other securities (see subsection 617(2))—the other securities; <p>as at the date set by the bidder under subsection (2).</p>	<p>To be done:</p> <ul style="list-style-type: none"> • no earlier than the day on which the target sends the target's statement to the bidder; and • no later than 15 days after the target receives a notice that all offers have been sent as required by item 6 <p><i>Sections 648B and 648C provide for the manner in which documents may be sent to holders.</i></p>
13	The target must lodge a copy of the target's statement (and any accompanying report) with ASIC.	<p>To be done on the day the target's statement is sent to the bidder</p> <p><i>See also subsection (7).</i></p>
14	The target must send a copy of the target's statement (and any accompanying report) to each securities exchange that has a stock market on which the target's securities are quoted.	<p>To be done on the day the target's statement is sent to the bidder</p> <p><i>See also subsection (7).</i></p>

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Date for determining holders of securities

- (2) The people to whom information is to be sent under items 6 and 12 of the table in subsection (1) are the holders of the securities referred to in those items as at the date set by the bidder in:
- (a) the bidder's statement; or
 - (b) a separate written notice given to the target on or before the date set by the bidder.

Note: The bidder may set the date when the bidder asks the target for a list of members under section 641.

- 1 (3) The date set by the bidder must be:
2 (a) on or after the date on which the bidder gives the bidder's
3 statement, or the separate written notice, to the target; and
4 (b) on or before the date on which the first offers under the bid
5 are made to holders of the securities.
- 6 (4) As soon as practicable after setting the day, the bidder must give
7 notice of it by:
8 (a) if the securities in the bid class are quoted—giving the notice
9 to the relevant securities exchange; or
10 (b) otherwise—lodging the notice with ASIC.

11 *Information to be sent with bidder's statement*

- 12 (5) A bidder's statement required to be sent under item 5 or 6 in the
13 table in subsection (1) must be sent together with any other
14 information sent by the bidder to the target with the statement.

15 *Information to be sent with notices that offers have been sent*

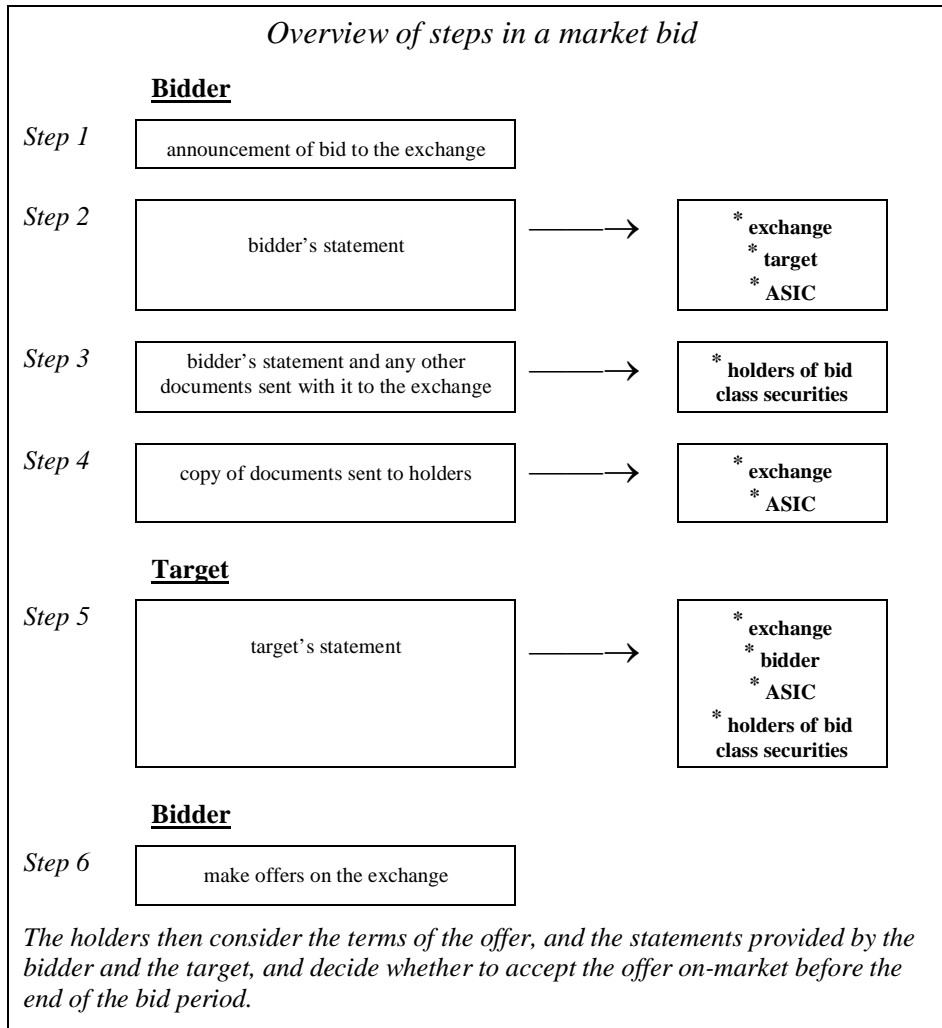
- 16 (6) If the bidder sends the people to whom the bidder's statement is
17 sent under item 6 of the table in subsection (1) additional
18 information together with the bidder's statement and the offer, the
19 bidder must also include that information in any notice under
20 item 7, 8 or 9 of the table.

21 *Information to be sent with target's statement*

- 22 (7) If the target sends the people to whom the target's statement is sent
23 under item 12 of the table in subsection (1) additional information
24 together with the target's statement, the target must also include
25 that information in any notice under item 13 or 14 of the table.

26 **634 Overview of steps in a market bid**

- 27 The following diagram gives an overview of the steps involved in a
28 market bid.
29



1 **635 Detailed steps in a market bid**

2 The following table provides for the steps that a bidder must take
 3 to make an effective market bid and the steps that a target must
 4 take when a market bid is made.

5

Steps in market bid		[operative]
Steps	Timing and relevant provisions	
1	The bidder must prepare a bidder's statement.	<i>See section 636 for content of statement</i>
2	The bidder must have the bid announced to the relevant securities exchange.	
3	The bidder must send a copy of the bidder's statement to the relevant securities exchange.	To be done on the day the announcement is made
4	The bidder must send to the target: <ul style="list-style-type: none"> • a copy of the bidder's statement; and • a copy of any other document that was sent with the bidder's statement to the relevant securities exchange. 	To be done on the day the announcement is made
5	The bidder must lodge with ASIC: <ul style="list-style-type: none"> • a copy of the bidder's statement; and • a copy of any other document that was sent with the bidder's statement to the relevant securities exchange. 	To be done on the day the announcement is made
6	The bidder must send to each holder of bid class securities (other than the bidder): <ul style="list-style-type: none"> • a copy of the bidder's statement; and • a copy of any other document that was sent with the bidder's statement to the relevant securities exchange. 	Within 14 days after the announcement is made <i>Sections 648B and 648C provide for the manner in which documents may be sent to holders.</i>
7	The bidder must lodge with ASIC a copy of every other document sent to holders of bid class securities with the bidder's statement.	To be done no later than the day copies of the bidder's statement have been sent to all holders of bid class securities

Steps in market bid		[operative]
Steps	Timing and relevant provisions	
8	The bidder must give the relevant securities exchange a copy of every other document sent to holders of bid class securities with the bidder's statement.	To be done no later than the day copies of the bidder's statement have been sent to all holders of bid class securities
9	The target must prepare a target's statement.	<i>See section 638 for content of statement</i>
10	The target must send a copy of the target's statement to the relevant securities exchange.	Within 14 days after the announcement is made
11	The target must send to the bidder: <ul style="list-style-type: none"> • a copy of the target's statement; and • a copy of any other document that was sent with the target's statement to the relevant securities exchange. 	To be done on the day the target sends a copy of the target's statement to the securities exchange
12	The target must lodge with ASIC: <ul style="list-style-type: none"> • a copy of the target's statement; and • a copy of any other document that was sent with the target's statement to the relevant securities exchange. 	To be done on the day the target sends a copy of the target's statement to the securities exchange
13	The target must send each holder of bid class securities: <ul style="list-style-type: none"> • a copy of the target's statement; and • a copy of any other document that was sent with the target's statement to the relevant securities exchange. 	Within 14 days after the announcement is made <i>Sections 648B and 648C provide for the manner in which documents may be sent to holders.</i>

Steps in market bid		[operative]
Steps	Timing and relevant provisions	
14	The bidder must make offers for the securities under the bid through the relevant securities exchange.	To be done on the next day after the end of the 14 day period referred to in item 13. If the bidder does not make the offers at that time, the bidder contravenes this section. <i>Item 2 of the table in section 611 covers offers made by the bidder on market during the 14 day period between the announcement and the making of the offers under the bid</i>

1

2 **Division 2—The bidder's statement**

3 **636 Bidder's statement content**

- 4 (1) A bidder's statement must include the following:
- 5 (a) the identity of the bidder;
- 6 (b) the date of the statement;
- 7 (c) if the target is a company or body—details of the bidder's
- 8 intentions regarding:
- 9 (i) the continuation of the business of the target; and
- 10 (ii) any major changes to be made to the business of the
- 11 target, including any redeployment of the fixed assets of
- 12 the target; and
- 13 (iii) the future employment of the present employees of the
- 14 target;
- 15 (d) if the target is a managed investment scheme—details of the
- 16 bidder's intentions regarding:
- 17 (i) the continued operation of the scheme; and
- 18 (ii) any major changes to be made to the operation of the
- 19 scheme, including any redeployment of scheme
- 20 property; and
- 21 (iii) any plans to remove the current responsible entity and
- 22 appoint a new responsible entity;
- 23 (e) for an off-market bid—a statement that the bidder's
- 24 statement has been lodged with ASIC but that ASIC takes no
- 25 responsibility for the content of the statement;
- 26 (f) in relation to the cash consideration (if any) offered under the
- 27 bid—details of:
- 28 (i) the cash amounts (if any) held by the bidder for
- 29 payment of the consideration; and
- 30 (ii) the identity of any other person who is to provide,
- 31 directly or indirectly, cash consideration from that
- 32 person's own funds; and
- 33 (iii) any arrangements under which cash will be provided by
- 34 a person referred to in subparagraph (ii);

- 1 (g) if any securities are offered as consideration under the bid
2 and the bidder is:
3 (i) the body that has issued or will issue the securities; or
4 (ii) a person who controls that body;
5 all material that would be required for a prospectus for an
6 offer of those securities by the bidder under section 710 to
7 713;
- 8 (h) if the bidder or an associate provided, or agreed to provide,
9 consideration for a security in the bid class under a purchase
10 or agreement during the 4 months before the date of the
11 bid—the following information about the consideration:
12 (i) to the extent to which the consideration is a cash sum—
13 the amount per security of the cash sum;
14 (ii) to the extent to which the consideration is quoted
15 securities—the market price per security of those
16 securities;
17 (iii) to the extent to which the consideration is neither a cash
18 sum nor a quoted security—the value per security of
19 that consideration;
- 20 (i) if, during the period of 4 months before the date of the bid,
21 the bidder or an associate gave, or offered to give or agreed
22 to give a benefit to another person and the benefit was likely
23 to induce the other person, or an associate, to:
24 (i) accept an offer under the bid; or
25 (ii) dispose of securities in the bid class;
26 and the benefit is not offered to all holders of securities in the
27 bid class under the bid—details of the benefit;
- 28 (j) if the bid is to extend to securities that come to be in the bid
29 class during the offer period due to the conversion of or
30 exercise of rights attached to other securities (see subsection
31 617(2))—a statement to that effect;
- 32 (k) for an off-market bid—the following details in relation to
33 each class of securities in the target:
34 (i) the total number of securities in the class;
35 (ii) the number of securities in the class that the bidder had
36 a relevant interest in immediately before the first offer is

- 1 sent (expressed as a number of securities or as a
2 percentage of the total number of securities in the class);
3 (l) for an off-market bid—the bidder's voting power in the
4 company;
5 (m) any other information that:
6 (i) is material to the making of the decision by a holder of
7 bid class securities whether to accept an offer under the
8 bid; and
9 (ii) is known to the bidder; and
10 (iii) does not relate to the value of securities offered as
11 consideration under the bid.

12 The information that the bidder must disclose under
13 subparagraph (k)(i) and paragraph (l) must be only as up-to-date as
14 it is reasonable to expect in the circumstances. The bidder does not
15 have to disclose information under paragraph (m) if it would be
16 unreasonable to require the bidder to do so because the information
17 had previously been disclosed to the holders of bid class securities.

18 Note: Paragraph (b)—See subsection 637(2) for the date of the statement.

19 *Expert's report on non-cash consideration provided for bid class*
20 *securities in last 4 months*

- 21 (2) If the bidder's statement includes details of the value per share of
22 consideration under subparagraph (1)(h)(iii), the statement must
23 include, or be accompanied by, a report by an expert that states
24 whether, in the expert's opinion, the value stated is fair and
25 reasonable and gives the reasons for forming that opinion.

26 Note: Subsections 648A(2) and (3) provide for the independence of the
27 expert and disclosure of any association between the bidder and the
28 expert or the target and the expert. A contravention of one of those
29 subsections results in the bidder's statement not complying with this
30 subsection.

31 *Consent of person to whom statement attributed*

- 32 (3) The bidder's statement may only include, or be accompanied by, a
33 statement by a person, or a statement said in the bidder's statement
34 to be based on a statement by a person, if:

- 1 (a) the person has consented to the statement being included in
2 the bidder's statement, or accompanying it, in the form and
3 context in which it is included; and
4 (b) the bidder's statement states that the person has given this
5 consent; and
6 (c) the person has not withdrawn this consent before the bidder's
7 statement is lodged with ASIC.
- 8 (4) The bidder must keep the consent.

9 **637 Bidder's statement formalities**

10 *Approval*

- 11 (1) The copy of the bidder's statement that is lodged with ASIC must
12 be approved by:
13 (a) for a bidder that is a body corporate:
14 (i) if the consideration offered under the bid is a cash sum
15 only—a resolution passed by the directors of the bidder;
16 or
17 (ii) otherwise—a unanimous resolution passed by all the
18 directors of the bidder; or
19 (b) for a bidder who is an individual—the bidder.
- 20 (2) The bidder's statement must be dated. The date is the date on
21 which it is lodged with ASIC.

1

2 **Division 3—The target's response**

3 **638 Target's statement content**

4 *General requirement*

- 5 (1) A target's statement must include all the information that holders
6 of bid class securities and their professional advisers would
7 reasonably require to make an informed assessment whether to
8 accept the offer under the bid. The statement must contain this
9 information:
- 10 (a) only to the extent to which it is reasonable for investors and
11 their professional advisers to expect to find the information
12 in the statement; and
- 13 (b) only if the information is known to any of the directors of the
14 target.
- 15 (2) In deciding what information should be included under
16 subsection (1), have regard to:
- 17 (a) the nature of the bid class securities; and
18 (b) if the bid class securities are interests in a managed
19 investment scheme—the nature of the scheme; and
20 (c) the matters that the holders of bid class securities may
21 reasonably be expected to know; and
22 (d) the fact that certain matters may reasonably be expected to be
23 known to their professional advisers; and
24 (e) the time available to the target to prepare the statement.

25 *Director's recommendations*

- 26 (3) A target's statement must contain a statement by each director of
27 the target:
- 28 (a) recommending that offers under the bid be accepted or not
29 accepted, and giving reasons for the recommendation; or
30 (b) giving reasons why a recommendation is not made.
- 31 (4) The statement under subsection (3) must be made by:

- 1 (a) if the target is under administration—the liquidator or
2 administrator; or
3 (b) if the target has executed a deed of company arrangement
4 that has not yet terminated—the deed's administrator.

5 *Consent of person to whom statement attributed*

- 6 (5) The target's statement may only include, or be accompanied by, a
7 statement by a person, or a statement said in the target's statement
8 to be based on a statement by a person, if:
9 (a) the person has consented to the statement being included in
10 the target's statement, or accompanying it, in the form and
11 context in which it is included; and
12 (b) the target's statement states that the person has given this
13 consent; and
14 (c) the person has not withdrawn this consent before the target's
15 statement is lodged with ASIC.
16 (6) The target must keep the consent.

17 **639 Target's statement formalities**

18 *Approval*

- 19 (1) The copy of the target's statement that is lodged with ASIC must
20 be approved by:
21 (a) if paragraphs (b) and (c) do not apply—a resolution passed
22 by the directors of the target; or
23 (b) for a target that is under administration—the liquidator or
24 administrator; or
25 (c) for a target that has executed a deed of company arrangement
26 that has not yet terminated—the deed's administrator.

27 *Date*

- 28 (2) The target's statement must be dated. The date is the date on which
29 it is lodged with ASIC.

1 **640 Expert's report to accompany target's statement if bidder**
2 **connected with target**

3 (1) If:

- 4 (a) the bidder's voting power in the target is 30% or more; or
5 (b) for a bidder who is, or includes, an individual—the bidder is
6 a director of the target; or
7 (c) for a bidder who is, or includes, a body corporate—a director
8 of the bidder is a director of the target;

9 a target's statement given in accordance with section 638 must
10 include, or be accompanied by, a report by an expert that states
11 whether, in the expert's opinion, the takeover offers are fair and
12 reasonable and gives the reasons for forming that opinion.

13 Note: Subsections 648A(2) and (3) provide for the independence of the
14 expert and disclosure of any association between the target and the
15 expert or the bidder and the expert. A contravention of one of those
16 subsections results in the target's statement not complying with this
17 subsection.

18 (2) In determining whether the bidder's voting power in the target is
19 30% or more, calculate the bidder's voting power at the time the
20 bidder's statement is sent to the target.

21 **641 Target must inform bidder about securities holdings**

22 *Requirement to inform bidder and information that must be given*

23 (1) If the bidder has given a bidder's statement to the target and
24 requested the target to give the bidder information in accordance
25 with this section, the target must inform the bidder of:

- 26 (a) the name and address of each person who, at a time specified
27 by the bidder under subsection (2), held securities:
28 (i) in the bid class; or
29 (ii) convertible into securities in the bid class; and
30 (b) the type, and number of each type, of those securities held by
31 the person at the specified time.

32 However, the target does not need to give information to the bidder
33 about a person or their holding of securities unless the target knows
34 the person's name.

1 *Time at which target's information must be correct*

- 2 (2) The bidder's request must specify a day as at which the
3 information must be correct. The day must be one that occurs after
4 the day on which the bidder makes the request unless the target
5 agrees to it being the day on which the bidder makes the request.

6 *Form in which target must provide information*

- 7 (3) The target must give the information to the bidder:
8 (a) in the form that the bidder requests; or
9 (b) if the target is unable to comply with the request—in writing.
- 10 (4) If the target must give the information to the bidder in electronic
11 form, the information must be readable but the information need
12 not be formatted for the bidder's preferred operating system.

13 *Fee for provision of information*

- 14 (5) The target may require the bidder to pay an amount, not exceeding
15 the prescribed amount, for the provision of the information to the
16 bidder.

17 *Time by which target must provide information*

- 18 (6) The target must give the information to the bidder no later than the
19 latest of the following times:
20 (a) the end of the second day after the day on which the bidder
21 requested the information; or
22 (b) the end of the next day after the day as at which the
23 information must be correct; or
24 (c) the time when the target receives the amount mentioned in
25 subsection (5).

26 **642 Expenses of directors of target companies**

- 27 (1) If the target is a company or body, the directors of the target have a
28 right to recover from the target any expenses they reasonably incur
29 in the interest of members of the target and in relation to the

- 1 takeover bid. The directors have this right regardless of anything
2 contained in the target's constitution (if any).
- 3 (2) If the target is a managed investment scheme, the responsible
4 entity for the scheme has a right to recover from scheme property
5 any expenses it reasonably incurs in the interest of members of the
6 scheme and in relation to the takeover bid. The responsible entity
7 has this right regardless of anything contained in the scheme's
8 constitution.

